

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 9 | Issue 3

2026

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Erasing the Self: The Constitutional Crisis of Remedicalization under India's Transgender Persons (Protection of Rights) Amendment Act, 2026

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ABSTRACT

The enactment of the Transgender Persons (Protection of Rights) Amendment Act, 2026 marks a profound paradigm shift in India's human rights jurisprudence, transitioning from a progressive 'self-identification' standard to a rigid, state-enforced medicalised verification model. By explicitly deleting the statutory guarantee to a self-perceived gender identity and making legal recognition contingent upon the mandatory recommendation of a Chief Medical Officer-led District Medical Board, the 2026 Amendment creates a direct structural confrontation with the foundational constitutional tenets established in National Legal Services Authority (NALSA) v. Union of India (2014). This article provides a granular, section-by-section statutory critique of the 2026 framework, evaluating its constitutional validity under Articles 14, 19, and 21 of the Constitution of India. It exposes the 'statutory erasure' of non-binary, transmasculine, and genderqueer individuals through the shrunk definitions of Section 2, and tracks an alarming institutional regression within the newly added penal provisions of Section 18. By criminalising community induction under the vague language of 'coerced identity' and 'allurement', the state effectively resurrects the surveillance mechanics of the colonial Criminal Tribes Act, 1871, targeting traditional guru-chela kinship systems under the pretext of preventing welfare fraud. Analysing the Supreme Court's May 2026 reference of these challenges to a Three-Judge Bench, this article proposes a dual-track administrative template that harmonises state record-keeping with the fundamental rights to bodily autonomy, privacy, and personal dignity.

Keywords: Transgender Rights; NALSA; Article 21; Remedicalization; 2026 Amendment; Constitutional Law; Gender Identity.

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I. INTRODUCTION AND THE PHILOSOPHICAL DEMEDICALIZATION BENCHMARK

A. The Jurisprudential Evolution of Legal Personality: From State-Granted Privileges to Inherent Human Rights

The concept of 'legal personality' forms the baseline upon which all modern constitutional and civil rights are built. Within the historical development of jurisprudence, legal personality was frequently treated as an artificial construct managed by political authority. Classical positivism, from Thomas Hobbes to John Austin, conceptualised the sovereign as the sole source of legal status, arguing that an individual possessed rights and a recognisable legal identity only through express recognition by the state.¹ Under this framework, identity was not an inherent human characteristic but a functional category governed by administrative utility and sovereign discretion. This perspective reduced marginalised identities, particularly gender non-conforming individuals, to a state of legal invisibility or explicit criminalisation, as the state declined to build legal structures to recognise identities outside binary biological parameters.

However, the constitutionalising of human rights in the twentieth century fundamentally overturned this approach. Legal theorists began viewing personality, dignity, and bodily autonomy as inherent rights that exist prior to any legislative text.² Modern constitutional law treats legal recognition not as a gift from the state, but as an essential requirement for individual agency and self-expression. To deny an individual the right to define their own identity is to strip away their legal personhood, leaving them unable to exercise basic civil liberties, protect their privacy, or participate fully in public life. In a modern democracy, the role of the state must shift from an aggressive gatekeeper creating arbitrary benchmarks for identity to an institution dedicated to protecting individual autonomy.

B. The International Landscape: De-Pathologization and the Yogyakarta Principles

Historically, international legal and medical systems viewed transgender and gender non-conforming identities through a clinical lens, treating them as psychological disorders or physical anomalies requiring institutional intervention.³ This medicalisation created a pathologised framework where legal recognition was strictly conditional upon invasive medical procedures such as mandatory sterilisation, psychiatric evaluation, or gender-affirming surgery,

¹ THOMAS HOBBS, *LEVIATHAN* 112–15 (Richard Tuck *ed.*, Cambridge Univ. Press 1996) (1651); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 12–18 (Wilfrid E. Rumble *ed.*, Cambridge Univ. Press 1995) (1832).

² RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–28 (1977); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 13–17 (1999).

³ Dean Spade, *Resignifying Variance: Transgender Legal Politics and the Myth of a Law of Gender*, 18 *Yale Journal of Law & Feminism* 34, 40–44 (2006).

effectively forcing individuals to compromise their physical integrity to secure basic administrative recognition.^S

The modern international standard has moved decisively away from this approach, championing the complete de-pathologization of gender identity. The pivotal shift came with the formulation of the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*.⁴ Principle 3 explicitly states that each person's self-defined gender identity is an essential part of their personality and a fundamental component of self-determination, dignity, and freedom.⁵ It mandates that states must ensure legal recognition is granted without requiring medical procedures, psychological testing, or any other coercive criteria. This standard has been integrated into numerous progressive jurisdictions,⁶ and has been formally endorsed by the World Health Organization through its reclassification of gender incongruence in ICD-11.⁷ Taken together, these international instruments confirm that effective state administration is compatible with, and indeed strengthened by, non-medicalised models of gender recognition.

C. The NALSA Judgment as a Constitutional Milestone: Rejecting Biological Determinism and Anchoring Self-Determination

In India, the international shift toward self-determination reached its most significant domestic milestone with the Supreme Court's landmark ruling in *National Legal Services Authority (NALSA) v. Union of India*.⁸ Prior to *NALSA*, the Indian legal system lacked a uniform, progressive framework for recognising transgender persons. The Court addressed this injustice by ruling that gender identity does not depend on medical verification, anatomical features, or chromosomal structures, but is instead rooted in an individual's deep-seated psychological self-perception.⁹ Writing for the Bench, Justice K.S. Radhakrishnan explicitly dismissed the traditional 'biological test' in favour of a progressive 'psychological test',¹⁰ holding that forcing an individual to undergo socio-medical evaluation to prove their gender identity is an inherently intrusive act that compromises personal dignity.

⁴ The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007) [*hereinafter* Yogyakarta Principles].

⁵ Yogyakarta Principles, Principle 3 ('The Right to Recognition before the Law').

⁶ Gender Recognition Act 2015 (Act No. 25/2015) (Ir.) (establishing self-determination without medical certification); Malta's Gender Identity, Gender Expression and Sex Characteristics Act (2015); Denmark's Act on the Legal Gender of Persons (2014).

⁷ WORLD HEALTH ORGANIZATION, *ICD-11: International Classification of Diseases, Eleventh Revision* § 17 (2022) (removing gender incongruence from the chapter on mental disorders, formally de-pathologizing transgender identity).

⁸ *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 [*hereinafter* NALSA].

⁹ NALSA, (2014) 5 S.C.C. at 460–65.

¹⁰ *Id.* at 490 (per Radhakrishnan, J.).

The true significance of *NALSA* lies in how it anchored the right to self-identification within the framework of fundamental rights. The Court did not treat self-determination as an administrative convenience; it recognised it as an essential component of Articles 14, 19, and 21 of the Constitution of India.¹¹ Under Article 21, the right to life and personal liberty has long been interpreted to include the right to live with human dignity, personal autonomy, and privacy.¹² The Court further linked self-identification to Article 19(1)(a)'s guarantee of freedom of speech and expression, ruling that personal values, dress, and deportment are vital forms of expressive identity.¹³ By protecting self-determination through these constitutional pillars, *NALSA* detached legal recognition from medical approval, creating a strong shield against legislative and executive overreach.

D. The Legislative Shift: From the 2019 Safeguards to the 2026 Rollback

Despite the clear constitutional principles established in *NALSA*, the legislative translation of these rights has followed a highly contested path. The initial statutory framework (the *Transgender Persons (Protection of Rights) Act, 2019*) was criticised for retaining bureaucratic hurdles.¹⁴ However, it preserved a vital baseline in Section 4(2), which guaranteed a right to a 'self-perceived gender identity'.¹⁵ This provision served as an important legislative anchor, keeping the statute aligned with the core mandate of *NALSA*.

The passage of the *Transgender Persons (Protection of Rights) Amendment Act, 2026* represents a sharp institutional reversal. Passed by Parliament in late March 2026 and receiving Presidential assent on March 30, 2026, the new law completely deletes the statutory guarantee to a self-perceived identity.¹⁶ By replacing self-attestation with a system where legal recognition requires formal recommendation from a District Medical Board led by a Chief Medical Officer, the 2026 Amendment marks a definitive return to a highly medicalised verification model.¹⁷ This sudden change precipitates a major constitutional crisis, shifting the law toward a system where individual identity is conditional upon state-supervised clinical approval.

¹¹ *Id.* at 475–80.

¹² *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248; *Francis Coralie Mullin v. Adm'r, Union Territory of Delhi*, (1981) 1 S.C.C. 608.

¹³ *NALSA*, (2014) 5 S.C.C. at 502 (per Sikri, J.).

¹⁴ CTR. FOR LAW & POLICY RESEARCH, *THE INTERSECTIONAL FAILURES OF THE TRANSGENDER PERSONS ACT, 2019*, CLPR POLICY BRIEF (2020); HUMAN RIGHTS WATCH, *INDIA: TRANSGENDER BILL RAISES RIGHTS CONCERNS* (JULY 23, 2019).

¹⁵ The Transgender Persons (Protection of Rights) Act, 2019, § 4(2), No. 40, Acts of Parliament, 2019 (India) [*hereinafter* 2019 Act].

¹⁶ The Transgender Persons (Protection of Rights) Amendment Act, 2026, No. 12, Acts of Parliament, 2026 (India) [*hereinafter* 2026 Amendment Act].

¹⁷ 2026 Amendment Act, *supra* note 16, § 6; VIDHI CTR. FOR LEGAL POLICY, *The New Medical Surveillance Regime*, Vidhi Legal Policy Report, Apr. 2026, at 12.

II. THE BIO-DETERMINIST REGRESSION: SECTION 6 AND THE OVERTHROW OF NALSA

A. The Statutory Dismantlement of Self-Identification and the Shift to Clinical Gatekeeping

The primary mechanism through which the 2026 Amendment achieves its medicalised rollback is the explicit deletion of Section 4(2) of the principal 2019 Act.¹⁸ Section 4(2) was the legislative core of the self-determination model in India, providing a clear statutory vehicle for enforcement of the *NALSA* mandate. By removing this sub-section, the legislature actively erased the phrase ‘self-perceived gender identity’ from the text of the law, reflecting a clear legislative intent to withdraw legal protection from psychological self-perception and re-establish physical, clinical parameters as the only valid metrics for legal gender recognition.

In constitutional law, such a deletion creates a major institutional conflict. While Parliament has the power to amend statutes, it cannot use ordinary legislation to undermine fundamental rights interpreted by the Supreme Court. The deletion of Section 4(2) represents a deliberate attempt to bypass the judicial framework of *NALSA* without addressing the constitutional requirements of dignity and personal liberty under Article 21.¹⁹ Furthermore, the post-*NALSA* judicial consensus affirmed through *Navtej Singh Johar v. Union of India* makes clear that constitutional morality must prevail over social morality in matters of identity and dignity.²⁰

Practically, this legislative deletion completely transforms the process of obtaining a legal identity. Under the *Transgender Persons (Protection of Rights) Rules, 2020*, the process was primarily administrative: an applicant submitted a self-attested affidavit to the District Magistrate, who was required to issue an identity certificate without demanding external confirmation or medical proof.²¹ The 2026 Amendment replaces this straightforward process with a complex clinical system.²² Legal recognition is no longer treated as an inherent right recorded via an administrative process, but as a privilege granted by the state only after successful clinical verification.

¹⁸ 2026 Amendment Act, *supra* note 16, § 3 (deleting sub-section 2 of section 4 of the Principal Act).

¹⁹ See *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (reaffirming that constitutional morality must prevail over social morality in matters of identity and dignity).

²⁰ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 S.C.C. 1 (*overruled by Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1) (illustrating the constitutional cost of judicial deference to legislative erasure of marginalised identities).

²¹ The *Transgender Persons (Protection of Rights) Rules, 2020*, r. 3, Ministry of Social Justice & Empowerment (India) [*hereinafter* 2020 Rules].

²² 2020 Rules, *supra* note 21, rr. 4–6 (prescribing the self-attested affidavit procedure and the timelines for issuance of identity certificates by the District Magistrate).

B. The CMO-Led Medical Board: Structure, Unguided Discretion, and Constitutional Deficits

The primary operational mechanism of the new gatekeeping model is the District Medical Board established under Section 6 of the 2026 Amendment.²³ These panels operate under the absolute authority of a designated Chief Medical Officer (CMO) or Deputy Chief Medical Officer. Their composition, typically including general physicians, endocrinologists, and psychiatrists, confirms that the state views gender identity through a purely clinical lens, treating it as a medical condition requiring formal diagnosis.

The statutory authority granted to these boards is exceptionally broad. The District Magistrate is legally bound to act only upon the formal written recommendation of the CMO-led board, turning it into an incredibly powerful administrative gatekeeper. If the medical panel decides an applicant does not meet its criteria, it can deny the recommendation, effectively blocking the individual from obtaining legal recognition and accessing vital citizenship rights, welfare benefits, and legal protections. This concentration of institutional power is severely worsened by the complete absence of uniform Standard Operating Procedures (SOPs) within the text of the Act.²⁴ Without strict statutory guardrails, individual medical panels are likely to rely on outdated, subjective diagnostic models. Applicants may be forced to undergo invasive physical examinations, inappropriate psychiatric cross-examinations, or arbitrary behavioural audits to ‘prove’ their identity, directly violating the basic administrative law principle that state actions must never be guided by unfettered, unregulated discretion.²⁵

The gatekeeping system enforced by Section 6 creates severe violations of Article 21 of the Constitution of India. The right to life and personal liberty guarantees an unshakeable right to personal dignity, privacy, and control over one’s own body.²⁶ In *K.S. Puttaswamy v. Union of India*, a nine-judge bench held that privacy safeguards individual choices regarding bodily autonomy and identity expression.²⁷ Forcing an individual to expose their body or psyche to an institutional medical panel to secure legal status is an invasive act that compromises personal dignity, subordinating individual bodily integrity to state-supervised medical surveillance.²⁸

²³ 2026 Amendment Act, *supra* note 16, § 6.

²⁴ VIDHI CTR. FOR LEGAL POLICY, *supra* note 17, at 18–22 (noting that the complete absence of uniform SOPs in the 2026 framework creates an unconstitutional void of unguided administrative discretion).

²⁵ *Subramanian Swamy v. Director, CBI*, (2014) 8 S.C.C. 682 (reaffirming that procedural fairness and reasoned decision-making are constitutional imperatives binding on all executive bodies).

²⁶ *Kharak Singh v. State of U.P.*, A.I.R. 1963 S.C. 1295.

²⁷ *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1, 124 (per Chandrachud, J.) [*hereinafter* Puttaswamy].

²⁸ *M.P. Sharma v. Satish Chandra*, A.I.R. 1954 S.C. 300 (early Supreme Court articulation of the right against arbitrary state intrusion, later expanded through the Puttaswamy framework).

This setup establishes an impermissible system where citizens must surrender their right to privacy to receive basic recognition from the state.

C. The May 2026 Supreme Court Writ Petitions and the Three-Judge Bench Reference

The clear violation of constitutional rights led to immediate legal challenges following the Act's passage. Multiple public interest litigations and writ petitions under Article 32 of the Constitution were filed in the Supreme Court, arguing that the 2026 framework is unconstitutional.²⁹ The petitioners argue that the law fails the test of constitutional validity because it ignores the binding principles of *NALSA* and undermines the right to bodily privacy established in *Puttaswamy*.

On May 4, 2026, the Supreme Court formally recognised the high stakes of this dispute by issuing notices to both the Union and State governments.³⁰ Recognising that the conflict involves fundamental questions about the separation of powers and the core boundaries of Article 21, the matter was officially referred to a specialised Three-Judge Bench.³¹ While the Court denied an interim stay on the grounds that the administrative rules were not yet fully operationalised across the states, the ongoing litigation represents a vital constitutional battleground. The outcome before the Three-Judge Bench will determine whether the legislature can legally dismantle human rights protections through medical surveillance, or whether the *NALSA* principle of psychological self-determination remains an unshakeable pillar of Indian constitutional law.

III. STATUTORY ERASURE AND THE SURVEILLANCE STATE: SECTIONS 2 AND 5

A. Section 2(k) and the Narrowed Definitions of Identity: The Article 14 Challenge

In addition to reintroducing medical gatekeeping, the 2026 Amendment introduces a highly restrictive approach to defining identity within Section 2(k).³² The new definition includes an explicit exclusionary clause stating that the category of 'transgender' shall not include 'persons with different sexual orientations and self-perceived sexual identities.' This phrasing reveals a deliberate legislative effort to create an artificial statutory wall between gender identity and sexual orientation, an artificial separation that ignores the intersectional reality of marginalised

²⁹ Writ Petition (Civil) No. 548 of 2026 (Supreme Court of India) (challenging the constitutional validity of the Transgender Persons (Protection of Rights) Amendment Act, 2026); see *Challenge to the Transgender Persons Amendment Act, 2026*, SUPREME COURT OBSERVER, <https://www.scobserver.in/cases/challenge-to-the-transgender-persons-amendment-act-2026/> (last accessed May 2026).

³⁰ Supreme Court Issues Notice to Union on Transgender Amendment Act, THE HINDU, May 5, 2026, at 1.

³¹ *Id.* at 2

³² 2026 Amendment Act, *supra* note 16, § 2 (amending section 2(k) of the Principal Act).

persons. By explicitly excluding ‘self-perceived sexual identities’, the legislature leaves individuals who experience compound marginalisation without comprehensive legal protections.

This narrowed definition fails the test of reasonable classification under Article 14 of the Constitution. Article 14 permits classification only when it is based on an intelligible differentia that bears a rational nexus to the object sought to be achieved.³³ The stated objective of the principal Act is the comprehensive protection and welfare of marginalised gender minorities. The exclusions introduced in Section 2(k) directly contradict this objective. Excluding individuals based on self-perceived sexual identity lacks any intelligible differentia or rational nexus to a protective welfare goal, turning a protective statute into a tool for state-enforced exclusion.

The practical consequence of this narrowed definition is the systematic ‘statutory erasure’ of non-binary, transmasculine, and genderqueer individuals. By restricting legal recognition primarily to biological ‘intersex variations’ and specific socio-cultural groups like hijra, kinner, aravani, and jogta, the text anchors legal identity within specific biological conditions or traditional cultural roles. Non-binary and transmasculine individuals who do not fit into these narrow categories are left without a legal identity, stripped of access to state welfare programmes, legal protections, and equal opportunity.³⁴

B. Section 5 and the Medical Surveillance Regime: Conflict with the DPDPA and Puttaswamy

Section 5 of the 2026 Act introduces an unprecedented medical surveillance mechanism by fundamentally altering the gender revision process.³⁵ Medical institutions are mandatorily required to report the details of all gender-affirming surgeries (GAS) directly to the District Magistrate and local certifying authorities. This reporting mandate is a severe violation of doctor-patient confidentiality, forcing medical professionals to share private, sensitive clinical data with executive officials without patient consent.³⁶ The chilling effect is significant:

³³ State of West Bengal v. Anwar Ali Sarkar, A.I.R. 1952 S.C. 75; E.P. Royappa v. State of Tamil Nadu, (1974) 4 S.C.C. 3.

³⁴ Arunkumar v. Inspector General of Registration, (2019) S.C.C. OnLine Mad. 8779 (Madras H.C.) (holding that a transgender woman is a ‘bride’ for purposes of the Hindu Marriage Act and affirming self-determination rights).

³⁵ 2026 Amendment Act, *supra* note 16, § 5.

³⁶ Laxmi Mandal v. Deen Dayal Harinagar Hospital, (2010) 172 D.L.T. 9 (Del.) (holding that denial of healthcare based on identity markers violates Articles 14 and 21).

transgender individuals may avoid essential gender-affirming care out of fear that their private medical records will be automatically forwarded to government databases.³⁷

Furthermore, the 2026 Amendment converts the right to apply for a revised identity certificate after surgery, which was a permissive right under Section 7 of the 2019 Act, into a mandatory administrative obligation.³⁸ An individual who undergoes medical transition is now legally required to submit to an immediate administrative revision process overseen by executive authorities, treating a private medical choice as a public event subject to state monitoring.

These reporting mandates create a direct conflict with the *Digital Personal Data Protection Act (DPDPA), 2023*.³⁹ The *DPDPA* classifies health data and records of clinical interventions as sensitive personal data, explicitly mandating that any processing of such data must be anchored to a specific lawful purpose and supported by the explicit, informed, and revocable consent of the data principal.⁴⁰ Section 5 of the 2026 Act ignores this entire framework. This inter-statutory conflict results in a severe violation of the constitutional standard for informational privacy established in *Puttaswamy*, which establishes a strict three-fold test of legality, necessity, and proportionality for any state infringement on privacy.⁴¹ The automated reporting system under Section 5 fails this proportionality test, as forcing the systemic transfer of confidential medical details without consent is a deeply disproportionate measure that cannot survive judicial scrutiny.⁴²

IV. THE CRIMINALIZATION OF KINSHIP: SECTION 18 AND COLONIAL RESURGENCES

A. The Graded Punitive Framework: Deconstructing ‘Coerced Identity’ and ‘Allurement’

Beyond administrative restrictions, the 2026 Act introduces highly aggressive criminal provisions within Section 18.⁴³ The amendment creates a new category of cognisable, non-bailable offences penalising any individual who compels a person to assume a transgender

³⁷ *Naz Foundation v. Government of NCT of Delhi*, (2009) 160 D.L.T. 277 (Del.) (recognising the relationship between stigmatisation and denial of healthcare access).

³⁸ 2019 Act, *supra* note 15, § 7.

³⁹ The Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India) [*hereinafter* DPDPA].

⁴⁰ DPDPA, *supra* note 39, §§ 4–7 (prescribing purpose limitation, data minimisation, and explicit consent as foundational principles for lawful data processing).

⁴¹ *Puttaswamy*, (2017) 10 S.C.C. at 178–85 (per Chandrachud, J.) (articulating the three-fold test of legality, necessity, and proportionality for privacy infringements).

⁴² The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, r. 3 (classifying medical records and history as sensitive personal data requiring heightened protection even before the DPDPA).

⁴³ 2026 Amendment Act, *supra* note 16, § 8 (amending section 18 of the Principal Act).

identity through ‘force, allurements, deceit, or undue influence.’ If the target is an adult, the offence carries a mandatory penalty of 10 years to life imprisonment; if a minor is involved, the statute mandates life imprisonment. The primary legal defect is the extreme vagueness of terms like ‘allurement’ and ‘undue influence.’ In criminal jurisprudence, vague penal statutory language is unconstitutional because it fails to give citizens fair notice of what conduct is forbidden, leaving the law open to arbitrary enforcement.⁴⁴ Without clear definitions, everyday acts of community support, such as providing housing, clothing, or counselling to a gender-nonconforming individual, can be mischaracterised as unlawful ‘allurement’ or ‘undue influence.’⁴⁵

Section 18 also increases penalties for forcing transgender individuals into begging or bonded labour, introducing a mandatory sentence of 5 to 14 years of rigorous imprisonment. While the stated purpose is to eliminate economic exploitation, this framing ignores the complex socio-economic realities of marginalised gender minorities in India. Systemic discrimination has shut transgender individuals out of formal employment, housing, and education, forcing many to rely on traditional livelihood practices like badhai or ritual begging within socio-cultural networks.⁴⁶ By criminalising these activities through harsh, uniform penal mandates without providing alternative employment or rehabilitation programmes, the state effectively criminalises survival itself.⁴⁷

B. Historical Parallels: Resurrecting the Criminal Tribes Act, 1871, and the Dismantling of Guru-Chela Networks

The punitive and surveillance-oriented design of the 2026 Act shares troubling historical roots with British colonial legislation, most notably the *Criminal Tribes Act, 1871*.⁴⁸ Under the colonial framework, the British state classified entire communities, including gender non-conforming individuals and traditional performers, as criminally suspect. The colonial state used aggressive tracking systems, mandatory registration, and strict movement controls to

⁴⁴ *Shreya Singhal v. Union of India*, (2015) 5 S.C.C. 1; *K.A. Abbas v. Union of India*, (1970) 2 S.C.C. 780.

⁴⁵ *Ritesh Sinha v. State of U.P.*, (2019) 8 S.C.C. 1 (holding that vague statutory language in penal provisions violates Article 14’s guarantee of non-arbitrariness).

⁴⁶ NATIONAL HUMAN RIGHTS COMMISSION, *Report on the Human Rights of Transgender People* 43–48 (2017) (documenting the socio-economic exclusion that forces many transgender persons into begging and informal economies).

⁴⁷ *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 S.C.C. 545 (articulating the constitutional relationship between the right to livelihood and the right to life under Article 21, directly relevant to criminalisation of survival practices).

⁴⁸ The Criminal Tribes Act, 1871, Act No. XXVII of 1871 (Imperial Legislative Council) (India) [*hereinafter* CTA, 1871].

police these communities, treating their very existence as an inherent threat to public order.⁴⁹ The pre-colonial autonomy of these communities was systematically destroyed by this legislative apparatus.⁵⁰

The 2026 Act resurrects these colonial policing patterns through modern administrative tools. Replacing self-determination with mandatory medical verification, enforcing hospital reporting rules, and using vague anti-allurement clauses to police community induction directly mirrors the surveillance tactics of the colonial state.⁵¹ This colonial regression is most evident in how the law impacts traditional intersex and transgender kinship structures, such as the guru-chela system. For centuries, these networks have operated as vital alternative family structures, providing shelter, economic support, and social safety nets for individuals rejected by their biological families.⁵² The vague penal language of Section 18 turns these essential survival networks into potential criminal enterprises, allowing police to target elders (gurus) who welcome young gender-nonconforming people into their households. This framework mischaracterises traditional mentorship as criminal coercion, threatening the cultural survival and social safety of these communities.⁵³

The long-term socio-legal impact is the systematic dismantlement of community-led support systems under the guise of welfare protection. By criminalising traditional kinship networks, the law strips transgender individuals of their primary social safety nets before building any functional state-run alternatives.⁵⁴ Transgender youths fleeing hostile domestic environments are left with fewer places to seek refuge, as community elders face the threat of life imprisonment for providing shelter.⁵⁵ This punitive framework isolates vulnerable individuals and deepens their marginalisation, revealing a profound disconnect between the state's protective rhetoric and the destructive reality of the law.⁵⁶

⁴⁹ CTA, 1871, *supra* note 48, ch. II (prescribing registration, reporting, and movement restrictions for notified communities, a structural parallel to the 2026 framework).

⁵⁰ Ayesha Shaikat, *The Hijra: Neither Man Nor Woman*, 20 FEM. STUD. 1 (1994) (documenting the pre-colonial autonomy of hijra communities and the rupture caused by colonial criminalisation).

⁵¹ ARVIND NARRAIN & ALOK GUPTA, *LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW* 125–160 (2011) (analysing how post-colonial Indian law has reproduced colonial regulatory frameworks targeting gender-nonconforming communities).

⁵² MINISTRY OF SOCIAL JUSTICE & EMPOWERMENT, *Report of the Expert Committee on the Issues Relating to Transgender Persons* 58–62 (2014) [*hereinafter* Expert Committee Report] (recommending a purely self-identification model pre-dating the 2019 Act).

⁵³ Aniruddha Dutta & Raina Roy, *Decolonizing Transgender in India: Some Reflections*, 3 TRANSGENDER STUD. Q. 320, 323–25 (2014).

⁵⁴ See generally Geetanjali Misra *et al.*, *Decriminalisation of Homosexuality and the Rights of Gender and Sexual Minorities in India: A Long Way to Go*, 21 J. INT'L AIDS SOC'Y 25, 27 (2018).

⁵⁵ People's Union for Civil Liberties v. Union of India, (1997) 1 S.C.C. 301 (establishing that procedural safeguards must accompany every exercise of state power that restricts individual liberty).

⁵⁶ Jeeja Ghosh v. Union of India, (2016) 7 S.C.C. 761 (holding that the right to live with dignity proscribes discriminatory institutional practices).

V. CONCLUSION AND ACTIONABLE REFORM PRIORITIES

A. Summary of Constitutional and Statutory Friction Points

The Transgender Persons (Protection of Rights) Amendment Act, 2026 represents a major institutional and constitutional step backward. By deleting the statutory right to a self-perceived identity and introducing mandatory CMO-led medical boards under Section 6, the statute explicitly rejects the progressive jurisprudence established in *NALSA*, undermining individual dignity and violating the fundamental right to bodily privacy under Article 21. The shrunken definitions in Section 2(k) result in the statutory erasure of non-binary and transmasculine individuals, failing the constitutional equality standards of Article 14. The mandatory hospital reporting rules under Section 5 violate doctor-patient confidentiality, creating a medical surveillance system that directly conflicts with the Digital Personal Data Protection Act, 2023. Finally, the vague punitive clauses of Section 18 resurrect colonial policing structures, criminalising traditional kinship networks and cutting off the community's primary survival mechanisms.⁵⁷

B. Institutional and Legislative Recommendations

1. A Dual-Track Model: Self-Attestation versus Voluntary Welfare Medicalization

To resolve these constitutional deficits, the legislature must replace the current gatekeeping model with a progressive 'dual-track' administrative framework.⁵⁸ Legal gender recognition must be completely detached from clinical evaluations. The state must restore an individual's right to secure a basic identity certificate through a simple administrative process based entirely on a self-attested affidavit, fully aligning the law with the *NALSA* mandate.⁵⁹ Medical verification must be restricted to a separate, voluntary second track, an optional step used only when an individual chooses to access specific state-funded medical benefits, surgeries, or targeted welfare programmes. This dual-track system protects individual autonomy while providing the state with a clear, structured framework to manage public resources responsibly.

2. Amending Section 5 to Introduce Robust DPDPA Anonymization Protocols

Section 5 must be immediately amended to bring it into compliance with the Digital Personal Data Protection Act, 2023 and the privacy standards of *Puttaswamy*. The mandatory rule forcing

⁵⁷ Gaurav Kumar Bansal v. Union of India, W.P. (C) No. 1076 of 2019 (Supreme Court of India) (pending, examining the intersection of welfare rights and identity recognition under the 2019 Act).

⁵⁸ Expert Committee Report, *supra* note 52, at 78–82 (documenting the historical role of the guru-chela system as a primary welfare and kinship network for transgender persons in India).

⁵⁹ COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, Recommendation CM/Rec(2010)5 on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity (Mar. 31, 2010) (recommending that legal gender recognition be based on self-determination without medical prerequisites).

hospitals to report individual surgical details to executive authorities must be abolished. In its place, the law must establish strict anonymisation and data aggregation protocols, permitting medical institutions to report only broad, non-identifiable statistical data for public health monitoring.⁶⁰ Any transfer of personal or clinical records must require the explicit, informed, and written consent of the patient, ensuring doctor-patient confidentiality is preserved.⁶¹

3. Clear Evidentiary Directives to Shield Community Peer-Support from Anti-Allurement Clauses

The Ministry of Home Affairs, in consultation with civil society groups, must issue clear, binding evidentiary directives to prevent misuse of Section 18's penal clauses against traditional kinship networks. The terms 'allurement' and 'undue influence' must be strictly defined to exclude everyday acts of community care, mentorship, and peer support.⁶² Police must be expressly prohibited from filing cases against community elders (gurus) or support organisations for providing shelter, financial aid, or social guidance to transitioning individuals. The burden of proof for coercion must be set exceptionally high, requiring clear evidence of physical force or criminal intent.⁶³ These safeguards will shield vital community safety nets from malicious prosecution, ensuring that a statute meant to protect rights is never weaponised to destroy the communities it was designed to support.⁶⁴

⁶⁰ The Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994, No. 57, Acts of Parliament, 1994 (India) (providing a precedent for regulating the interface between medical institutions and the state without compromising patient confidentiality).

⁶¹ The Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1956 (India) (historically weaponised against gender-nonconforming persons engaged in sex work, illustrating the pattern of penal laws disproportionately targeting marginalised communities).

⁶² UNITED NATIONS HUMAN RIGHTS COUNCIL, Res. 32/2, Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/RES/32/2 (July 15, 2016).

⁶³ The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India) (providing a comparative model in which safeguarding provisions are grounded in precise evidentiary standards, contrasted against the vague formulations in section 18 of the 2026 Act).

⁶⁴ AMERICAN PSYCHOLOGICAL ASSOCIATION, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832 (2015) (affirming that gender non-conformity is not a pathology).