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The Evolution of Transgender Personhood in India: Historical Presence, Social Acceptance, Constitutional Recognition and the Criminal-Law Position After the Bharatiya Nyaya Sanhita, 2023

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Abstract
From culturally embedded gender-diverse communities to colonial criminalisation, constitutional recognition, statutory protection and renewed debates over identity, bodily autonomy and criminal-law protection, a forgotten face and mostly the body has faced it lot. That face and body is of third sex popularly known as Kinnar in India also known as transgenders globally. There anatomy has not only amused society but has also entered in the books of law , which only deepened the discrimination faced by them. This conflict between law, society and anatomy only opened gates of hell causing immense social boycott, sexual violence for kinnar/transgender/third sex. Law and Society forgot that they are also humans rather than some sexual or gender identity. However as the time passed by and jurisprudence evolved, law of land evolved to make kinnar/transgender/third sex a non-separable part of the society.

Keywords: transgender; hijra; kinner; gender identity; NALSA; constitutional law; Transgender Persons Act; BNS 2023; sexual violence; social inclusion.

KEY FINDINGS

This paper traces the evolution of transgender and gender-diverse communities in India from pre-colonial cultural and institutional settings to the present legal order. It asks three connected questions: how gender-diverse persons appeared in Indian history; how far their social position amounted to acceptance; and what their legal and social status is after the commencement of the Bharatiya Nyaya Sanhita, 2023 (BNS), read with later developments in transgender-specific legislation.

The central argument is that Indian history does not support either a romantic claim of uninterrupted acceptance or a claim that transgender people were wholly absent or uniformly rejected. Hijras and other gender-diverse communities occupied visible ritual, courtly, household and community roles in different periods. Such visibility, however, coexisted with hierarchy, patronage, social control and exclusion. Colonial governance transformed older forms of social regulation into a more systematic regime of surveillance and criminalisation, most notably through the Criminal Tribes Act, 1871.

The constitutional turning point was National Legal Services Authority v Union of India (2014), which recognised transgender persons as a third gender and affirmed self-identification. The Transgender Persons (Protection of Rights) Act, 2019 created statutory recognition and anti-discrimination duties, but attracted criticism for its certification framework, limited penal consequences and weak implementation. The BNS, effective from 1 July 2024, retains a gender-specific definition of rape in section 63: the perpetrator is framed as a man and the victim as a woman. The Parliamentary Standing Committee expressly identified the non-inclusion of transgender women and the comparatively low penalty under the 2019 Act as a gap.

A further development is indispensable to any account current as at 4 November 2026: the Transgender Persons (Protection of Rights) Amendment Act, 2026, brought into force on 25 May 2026. It narrows the statutory definition, removes the express self-perceived identity clause, introduces medical-board scrutiny and expands section 18 offences. This creates a major constitutional and policy debate alongside the BNS.

The paper concludes that legal visibility is not equivalent to substantive equality. Effective inclusion requires self-determination, gender-neutral protection from sexual violence, accessible identity documentation, education, employment, housing, healthcare, police accountability and meaningful participation of transgender persons in law-making.

RESEARCH QUESTIONS, SCOPE AND METHOD

The research is organised around the following questions: (i) what historical forms of gender diversity and transgender community organisation existed in the Indian subcontinent; (ii) how did social acceptance vary across religious, regional, class and political settings; (iii) how did colonial law alter the status of hijras; (iv) what constitutional principles and judicial decisions now govern gender identity; (v) what protections and limitations arise under the 2019 Act, the BNS 2023 and the 2026 amendment; and (vi) what reforms are necessary to secure substantive equality.

The method is doctrinal and socio-legal. Primary legal sources include the Constitution, the BNS, the Transgender Persons (Protection of Rights) Act, 2019 as amended in 2026, the 2020 Rules, and leading Supreme Court decisions. Secondary sources include historical monographs, anthropological studies and peer-reviewed legal scholarship. Newspaper investigations and reported interviews are used to illuminate the gap between formal law and everyday experience. They are not treated as proof of a universal experience.

Terminology requires care. “Transgender” is a contemporary umbrella term. “Hijra”, “kinner”, “aravani”, “jogta”, “kothi” and other community names are not interchangeable labels for every person whose gender differs from sex assigned at birth. Some are socio-cultural identities with distinct histories, kinship structures, ritual practices and regional meanings. Intersex variations concern sex characteristics and are not synonymous with transgender identity. Sexual orientation is also distinct from gender identity.

The paper therefore avoids collapsing all gender and sexual minorities into one category. It also avoids projecting modern identity categories backwards onto historical persons. Historical sources frequently used terms such as “eunuch”, but these were often imprecise and shaped by the observer’s assumptions. The analysis proceeds chronologically while testing claims of acceptance against evidence of power, exclusion and legal regulation.

PRE-COLONIAL INDIA: CULTURAL AND TEXTUAL PRESENCE

Gender variance and non-conforming gender roles have a long presence in South Asian cultural memory. Religious narratives, devotional traditions, regional folklore, performance practices and courtly institutions contain figures who cross, combine or complicate conventional masculine and feminine roles. These materials demonstrate cultural intelligibility and visibility; they do not establish that all transgender people enjoyed equal status or that modern transgender identities existed in exactly the same form.

Texts and stories are often invoked to argue that Indian civilisation was uniformly inclusive. Such readings require caution. Mythological figures may be transformed into contemporary symbols of gender plurality, but mythology is not a census of social conditions. Normative religious texts also contain hierarchies and prescriptions that do not map neatly onto lived practice. Historical analysis must distinguish symbolic recognition from enforceable social rights.

Serena Nanda's ethnographic work describes hijras as a socially organised community with distinctive forms of belonging, ritual activity, economic adaptation and internal leadership. Adnan Hossain and Serena Nanda situate hijra identities within changing religious, political and global contexts, including Hindu mythological references, Islamic influences, Mughal-era institutions and contemporary media [1–2]. These studies underline that the community is neither a timeless relic nor a simple equivalent of Western categories.

In many regions, hijras have been associated with blessings at childbirth and weddings, performance, ritual exchange and community networks. These roles could confer a recognised place in public life and a culturally specific authority. Yet the relationship was often ambivalent: the community might be invited for auspicious performances while being excluded from ordinary family life, respectable employment, housing or public institutions. Ritual demand did not necessarily translate into civic equality.

A sound account of pre-colonial India must therefore resist two extremes. The first is the claim that gender-diverse persons were always fully accepted. The second is the claim that their lives were historically only marginal or criminal. The evidence instead points to varied arrangements of visibility, patronage, livelihood, stigma and social negotiation.

MUGHAL AND REGIONAL COURTLY CONTEXTS

The Mughal and other South Asian courtly worlds included people described in Persianate sources by terms such as khwajasara and eunuch. Some held positions as palace guards, administrators, military figures, confidants, intermediaries and custodians of restricted domestic spaces. These roles were shaped by court hierarchy and should not be conflated automatically with the contemporary hijra community. A person described as a eunuch in a court record might have had a different social identity, bodily history and institutional role from a hijra living in a community household.

Jessica Hinchy's archival study of the colonial period cautions that European observers frequently confused different categories of gender-nonconforming people. Her research shows how the colonial state's understanding of hijras was constructed through administrative anxieties, local elite attitudes and moral regulation [3]. The distinction matters because colonial records often grouped people under labels that erased their own identities.

Courtly service could provide access to influence and material security for some individuals. It did not create general social equality for all gender-diverse people. Court status depended on patronage, political

circumstances and the individual's proximity to power. Nor should courtly inclusion be used to deny the exploitation associated with forced castration, enslavement or other forms of bodily control in particular historical settings.

The social world was also regionally diverse. Terms, rituals, kinship structures and relationships with religious institutions varied across North, South, East and West India. Aravani traditions in Tamil Nadu, jogappa/jogta identities in parts of Karnataka and Maharashtra, and hijra/kinner networks in northern India should be understood in their own contexts. The modern category "transgender" can provide a rights-based umbrella, but it should not flatten these histories.

The most defensible conclusion is that gender-diverse people could occupy recognised and sometimes influential positions in particular institutions, while remaining vulnerable to social hierarchy and exclusion. Historical visibility is important, but it is not proof of universal acceptance.

COLONIAL TRANSFORMATION AND CRIMINALISATION

Colonial rule brought a decisive change in the legal treatment of hijras. British administrators increasingly viewed gender-nonconforming public performance, feminine presentation and community organisation through Victorian moral assumptions and the administrative logic of surveillance. The Criminal Tribes Act, 1871 contained provisions directed at "eunuchs". These provisions enabled registration, monitoring, restrictions on movement and performance, and interference with children and property. They sought to suppress the community as a public and social presence.

Jessica Hinchy's Governing Gender and Sexuality in Colonial India: The Hijra, c.1850–1900 documents how colonial officials and sections of the Indian elite came to frame hijras as a threat to social order. The Act's purpose was not merely neutral identification; it was connected to an explicit project of reducing and ultimately eradicating the community's public presence [3]. This is a key rupture in the historical trajectory.

Colonial criminalisation was reinforced by the Indian Penal Code, 1860, including section 377, which criminalised certain "carnal intercourse against the order of nature". Although section 377 was not a transgender-specific law, it contributed to a wider environment in which non-normative sexuality and gender expression were policed. Police discretion, public-order provisions and social stigma could work together to make ordinary life precarious.

The colonial legacy did not disappear with independence. The Criminal Tribes Act was repealed in 1952, but denotified communities continued to face stigma and surveillance under other legal and administrative practices. Likewise, the social consequences of colonial classification survived beyond the repeal of the specific statute. The category "eunuch" continued to shape official and popular understandings.

This period is central to understanding why modern transgender rights cannot be assessed only by asking whether Indian culture historically recognised hijras. The law itself helped produce exclusion. The transition from pre-colonial patronage and varied social roles to colonial registration and criminalisation demonstrates how state power can convert difference into suspicion and vulnerability.

POST-INDEPENDENCE: VISIBILITY WITHOUT EQUALITY

After 1947, the Constitution promised equality, liberty and dignity, but transgender and gender-diverse persons remained largely invisible in mainstream public policy. Many experienced family rejection, school exclusion, barriers to formal employment, harassment in public spaces and difficulty obtaining

identity documents. For some, community-based kinship networks provided safety and livelihood; for others, survival depended on begging, ritual performance or sex work in conditions shaped by limited alternatives.

The post-independence legal system often continued to rely on binary assumptions about sex and gender. Official forms, educational records, employment procedures, prisons, shelters and healthcare systems were generally designed around male/female categories. Where no suitable category existed, transgender persons could be misclassified, denied documentation or forced to disclose intimate details.

HIV/AIDS policy and community health activism in the late twentieth century brought some transgender and gender-diverse groups into public-health research and civil-society programmes. This visibility sometimes generated resources and advocacy, but it could also reduce people to epidemiological risk categories. A rights-based approach must recognise that healthcare needs are broader than HIV prevention and include mental health, primary care, gender-affirming care, reproductive health, ageing and protection from violence.

Serena Nanda's Neither Man nor Woman: The Hijras of India remains an influential anthropological account of hijra social organisation and the tensions between community life and wider society [1]. A. Revathi's autobiographical The Truth About Me provides a first-person account of gender identity, family rejection, community belonging, violence and the struggle for dignity [4]. First-person narratives are especially important because official records often describe transgender persons as objects of administration rather than as authors of their own lives.

Post-independence India thus presents a paradox: the community was visible in certain streets, rituals and cultural representations, but largely absent from the institutions that distribute rights and opportunities. The gap between visibility and equality became the foundation for later constitutional litigation and organised activism.

SOCIAL ACCEPTANCE: FAMILY, EDUCATION AND WORK

Social acceptance is not a single condition. It may mean toleration in a ritual setting, respect within a family, equal treatment at school, access to employment, safety in public spaces or recognition by the State. A transgender person may be welcomed to bless a newborn but rejected as a son or daughter by their own family. Such selective inclusion is not equivalent to equal citizenship.

Family rejection can result in homelessness, interrupted education, economic dependence and vulnerability to exploitation. Schools may fail to prevent bullying, misgendering, harassment in toilets and exclusion from sports or residential facilities. Without supportive teachers and grievance mechanisms, transgender students may leave education early. Employment discrimination then compounds the problem: lack of formal qualifications and hostile recruitment practices push people towards informal work.

The Indian Express's 2024 report marking ten years since NALSA described both progress and continuing discrimination. It profiled a transgender professional working in the corporate sector who still faced misunderstanding and discrimination at work, illustrating that professional achievement does not automatically remove stigma [5]. The report also described the importance of ordinary public-space access, voting and identity documents.

The Times of India reported in November 2024 that only 11 States and Union Territories had established transgender protection cells, despite the statutory framework and rules envisaging such institutional mechanisms [6]. This demonstrates the distance between a law on the statute book and local

enforcement. A protection cell is meaningful only if it is accessible, trained, adequately staffed and accountable.

Acceptance must therefore be measured through outcomes: school completion, secure housing, access to toilets and public transport, decent work, equal pay, healthcare, family safety, police response and participation in decision-making. Ceremonial visibility and isolated success stories should not conceal structural exclusion. The social question is not whether transgender persons are occasionally seen in public life, but whether they can participate in ordinary life without having to negotiate humiliation or danger at every step.

SOCIAL ACCEPTANCE: RELIGION, MEDIA AND COMMUNITY AGENCY

Religion and popular culture have had a complex role in shaping public attitudes. Some religious narratives and ritual practices provide cultural vocabularies through which gender diversity can be understood. At the same time, religious institutions and families may reproduce conventional gender expectations. The same community may be invited into a ritual space and excluded from everyday social relationships. This ambivalence should be recognised rather than simplified.

Cinema, television and news media have historically represented hijras through stereotypes of comic relief, menace, sexualised spectacle or misfortune. Such portrayals can intensify stigma. More recent reporting and documentary work increasingly foreground transgender professionals, students, elected representatives, artists, lawyers and activists. Yet representation remains uneven, and sensational coverage can expose people to unwanted scrutiny.

Community-led organisations have been central to changing this position. Activists have challenged police violence, demanded identity documents, developed peer support, negotiated with health systems and litigated for constitutional recognition. Their work has also shown that transgender communities are internally diverse, including differences of caste, class, religion, language, region, disability and access to medical transition.

A rights-based approach must not assume that every transgender person belongs to a hijra gharana or wants to participate in traditional community structures. Equally, it must not treat traditional community life as inherently coercive or backward. The relevant principle is individual autonomy and freedom of association: people should be able to form, maintain or leave community relationships without violence or compulsion.

The strongest form of social acceptance is ordinary inclusion. It is achieved when a person's gender identity does not become a reason to deny education, employment, tenancy, healthcare, family protection, public services or political participation. Public awareness campaigns can help, but they cannot substitute for enforceable duties, institutional training and remedies against discrimination.

CONSTITUTIONAL FRAMEWORK AND NALSA (2014)

The Constitution supplies the normative foundation for transgender equality. Article 14 guarantees equality before the law and equal protection of the laws to "any person". Articles 15 and 16 prohibit specified forms of discrimination and guarantee equality of opportunity in public employment. Article 19 protects freedoms including expression, while Article 21 protects life and personal liberty, interpreted to include dignity, privacy and decisional autonomy. These guarantees are not confined to cisgender citizens.

In National Legal Services Authority v Union of India, (2014) 5 SCC 438, the Supreme Court recognised transgender persons as a "third gender" and affirmed that gender identity is integral to dignity and personal autonomy. The Court held that persons have the right to identify as male, female or third gender and directed governments to take steps concerning legal recognition, social welfare, healthcare, education and reservations [7].

NALSA was transformative because it moved the issue from administrative tolerance to constitutional entitlement. It rejected the idea that legal recognition must depend exclusively on surgery or medical intervention. It also acknowledged the historical and social marginalisation of transgender persons and required the State to address substantive disadvantage.

However, judicial recognition did not itself create a complete implementation system. The Court's directions required legislative and executive follow-through. The subsequent statutory framework did not fully implement every dimension of NALSA, particularly the question of reservations and the practical ease of self-identification.

The judgment must also be read alongside Justice K.S. Puttaswamy v Union of India, (2017) 10 SCC 1, which located privacy, autonomy and decisional freedom within Article 21, and Navtej Singh Johar v Union of India, (2018) 10 SCC 1, which decriminalised consensual same-sex relations under section 377 to the extent it applied to consenting adults [8–9]. Navtej was not a transgender-specific judgment, but its emphasis on dignity, choice and constitutional morality strengthened the broader equality framework.

NALSA remains the constitutional baseline against which subsequent legislation, including the 2026 amendment, must be evaluated.

OTHER IMPORTANT JUDICIAL DEVELOPMENTS

Indian courts have increasingly recognised that gender identity affects civil status, education, public employment, family life and access to public services. The judicial approach has not been uniform, and individual cases must be read in their factual and jurisdictional context. Nevertheless, the constitutional principles of dignity, autonomy and non-discrimination provide a coherent framework.

Navtej Singh Johar v Union of India (2018) held that consensual same-sex relations between adults could not be criminalised under section 377 of the IPC. The judgment did not itself resolve every question concerning transgender rights, but it rejected constitutional reasoning founded on majoritarian morality and affirmed the dignity of sexual minorities [9]. The distinction between sexual orientation and gender identity remains essential: a transgender person may have any sexual orientation.

In Arunkumar v Inspector General of Registration, 2019 SCC OnLine Mad 8779, the Madras High Court interpreted the term "bride" in the Hindu Marriage Act in a manner that included a trans woman, illustrating how statutory terms may be interpreted consistently with gender identity and dignity. The decision is significant in the context of civil recognition, although it should not be overstated as a nationwide legislative settlement of all marriage questions.

The Supreme Court's decision in Supriyo v Union of India (2023) declined to judicially recognise a right to marry for queer couples under the Special Marriage Act, while acknowledging constitutional protections and leaving legislative choices to Parliament. The decision illustrates the continuing limits of judicially created remedies in personal law and family status [10].

Courts have also been approached over access to identity documents, educational facilities, hostels, employment and protection from police abuse. ThePrint reported in November 2025 that transgender citizens continued to approach courts for basic entitlements such as identity documents, welfare access

and hostel accommodation [11]. This reporting suggests that judicial remedies often compensate for gaps in administrative implementation.

The broader lesson is that constitutional recognition is dynamic. Courts can invalidate discriminatory rules and interpret statutes consistently with dignity, but systemic inclusion requires legislation, budgets, trained institutions and accountability.

THE 2019 ACT AND 2020 RULES: PROTECTION AND LIMITATIONS

The Transgender Persons (Protection of Rights) Act, 2019 came into force on 5 December 2019. It was enacted to protect transgender persons and provide for their welfare. In its original form, section 2(k) used a broad definition that included persons whose gender did not match the gender assigned at birth, irrespective of whether they had undergone surgery, hormone therapy or other treatment. It also referred to socio-cultural identities such as kinner, hijra, aravani and jogta, intersex variations and genderqueer persons [12].

Section 3 prohibited discrimination in education, employment, healthcare, access to public goods and services, movement, residence and other areas. Sections 4–7 dealt with recognition of identity and certificates. Section 8 placed welfare obligations on governments. Sections 9–12 addressed education, employment and related institutional duties. Sections 16–17 provided for the National Council for Transgender Persons. The 2020 Rules elaborated administrative processes and required protection cells and workplace measures [13].

The Act's strengths included formal recognition, an express anti-discrimination rule and a statutory basis for welfare programmes. It also created a national framework for identity certificates and government action. The Ministry of Social Justice and Empowerment has described initiatives such as the SMILE scheme, Garima Greh shelter homes, skill development and the National Portal for Transgender Persons [14].

Criticism focused on the certification process, the role of medical evidence in changing gender markers, lack of an express reservation framework, limited consultation and the comparatively low maximum penalty for abuse. Section 18 originally prescribed six months to two years' imprisonment and fine for specified wrongs, including forced labour, denial of public access, forcing a person from their residence and physical, sexual, verbal, emotional or economic abuse.

Shamayeta Bhattacharya, Debarchana Ghosh and Bandana Purkayastha argued that the Act recognised rights but did not provide sufficient structural guidance to secure substantive access to them [15]. The statute therefore represented progress, but not a complete equality code.

IMPLEMENTATION: CERTIFICATES, PROTECTION CELLS AND WELFARE

Implementation determines whether statutory rights can be used in practice. A transgender certificate may be necessary for access to welfare schemes, identity documents and some public services. Where application processes are unclear, slow or intrusive, the certificate becomes a gatekeeping device rather than an enabling instrument.

Scroll's November 2024 investigation into Delhi reported that only around half of applicants were able to obtain the relevant transgender identity document, describing bureaucratic obstacles, insensitive verification and the consequences for voting, employment, healthcare and education [16]. The report illustrates how an administrative process can reproduce the very exclusion it is intended to remedy.

The Transgender Persons Rules, 2020 require governments to formulate protective measures and establish transgender protection cells. Yet the Times of India's November 2024 report found that only 11 States and Union Territories had established such cells [6]. The absence of these cells weakens the capacity to monitor offences, register complaints, coordinate investigations and provide support.

Government welfare programmes are relevant but must be assessed by outcomes rather than announcements. SMILE and Garima Greh are intended to support livelihood, shelter, rehabilitation and skill development. Their effectiveness depends on geographic reach, accessible eligibility rules, sustained funding, community participation and independent evaluation. A shelter should not become a site of coercive control; a skill programme should connect participants to actual employment; and health services must respect informed consent.

Data also require caution. The 2011 Census recorded 487,803 persons in the "other" category, but this was not a comprehensive count of all transgender people. It depended on self-reporting and category design, and the "other" category was not exclusively transgender. The government itself has noted that it included anyone choosing that category [14]. Under-counting is likely where disclosure is unsafe or the available categories do not reflect lived identity. The implementation challenge is therefore both administrative and constitutional: access must be simple, non-stigmatising, confidential and consistent across States.

BNS 2023: COMMENCEMENT AND GENERAL STRUCTURE

The Bharatiya Nyaya Sanhita, 2023 replaced the Indian Penal Code, 1860 as India's principal substantive criminal law from 1 July 2024. It reorganised and renumbered many offences while retaining much of the earlier criminal-law architecture. For transgender persons, the most consequential issue is not that the BNS contains no generally applicable offences; it is that certain sexual offences remain framed in gender-specific terms.

The BNS applies to "every person" in its general operation. Offences such as hurt, grievous hurt, wrongful restraint, wrongful confinement, criminal force, assault, kidnapping, abduction, trafficking and criminal intimidation may be invoked where their ingredients are satisfied, regardless of the victim's gender. This is important: the absence of a transgender-specific offence in the BNS does not mean that violence against transgender persons is wholly outside criminal law.

However, the BNS's Chapter V is titled "Of Offences Against Woman and Child". Section 63 defines rape as an act committed by "a man" against "a woman", through specified forms of penetration or related conduct, in circumstances including lack of consent. The wording preserves a binary and sex-specific structure [17]. Section 64 prescribes punishment for rape. Other provisions in the chapter, including sexual harassment and assault with intent to disrobe, also use woman-specific formulations.

This drafting creates difficult questions for transgender women and other gender-diverse survivors. A transgender woman may face sexual violence, yet the text of section 63 does not expressly include her as a victim. A transgender man may also be excluded from a woman-specific offence despite being vulnerable to sexual violence. Conversely, gender-specific provisions may not recognise the full range of perpetrators and victim-survivor identities.

The BNS should therefore be analysed together with the Transgender Persons Act, the Constitution and general offences. A legal framework that criminalises violence in general but fails to provide equivalent recognition and punishment for sexual violence is not necessarily substantively equal.

BNS SECTION 63 AND THE EXCLUSION FROM RAPE LAW

The most significant BNS issue is section 63. Its opening words state that a man commits rape through specified acts against a woman. The provision does not expressly use a gender-neutral formulation such as "any person" as perpetrator and "another person" as victim. It also does not expressly include transgender women or transgender men within the victim category.

This is not merely a theoretical concern. The Parliamentary Standing Committee on Home Affairs, while examining the Bharatiya Nyaya Sanhita Bill, specifically recorded the "non-inclusion of trans-women in definition of rape". It observed that the rape provision was limited to a woman and did not include a transgender woman. The Committee further noted that the 2019 Transgender Persons Act recognised sexual abuse with a maximum punishment of two years and recommended that transgender women be brought within the rape law [18].

The Committee's observation is significant because it demonstrates that the omission was identified during legislative scrutiny. The final BNS did not resolve the concern through an express gender-inclusive amendment. The gap must be considered against the constitutional principles in NALSA, Puttaswamy and Navtej.

The 2019 Act's original section 18(d) covered physical and sexual abuse, among other forms of harm, but carried a maximum term of two years. This is substantially lower than the punishment for rape under the BNS. It also requires a prosecution to fit the facts within the statutory definition and prove the relevant elements. It cannot simply be assumed that every act that would constitute rape under section 63 is automatically and adequately prosecuted under section 18.

Other BNS provisions may apply depending on the conduct: assault, criminal force, hurt, grievous hurt, wrongful confinement, kidnapping, trafficking or intimidation. But those provisions are not necessarily equivalent to a rape offence. The absence of an explicit gender-inclusive sexual assault framework can affect charging decisions, punishment, survivor recognition and access to trauma-informed procedures.

Accordingly, the principal criticism is not that transgender people have no criminal-law protection at all, but that the BNS does not provide equal and express coverage for sexual violence against all gender identities.

OTHER BNS IMPLICATIONS AND PRACTICAL REMEDIES

The BNS has several provisions that may protect transgender persons where the facts satisfy the statutory ingredients. General offences concerning hurt, grievous hurt, wrongful restraint, wrongful confinement, kidnapping, abduction, trafficking, criminal intimidation and assault are not generally confined to cisgender victims. The Bharatiya Nagarik Suraksha Sanhita, 2023 and the Bharatiya Sakshya Adhiniyam, 2023 also govern procedure and evidence, and their operation must be considered in individual cases.

Nevertheless, formal availability of a general offence does not guarantee an accessible remedy. A survivor may encounter refusal to register a complaint, misgendering, insensitive medical examination, disclosure of private information, lack of safe shelter or pressure to compromise. Police training and clear protocols are essential. Investigators should record the survivor's chosen name and pronouns, preserve confidentiality, avoid invasive questioning unrelated to the case and ensure access to support services.

The BNS should also be assessed in relation to offences involving exploitation. Trafficking and forced labour provisions may be relevant where transgender persons are coerced into sexual exploitation,

begging or bonded labour. However, the law must distinguish voluntary participation in livelihood activities from coercion and must not use anti-trafficking frameworks to criminalise the people they are intended to protect.

A survivor-centred response should include immediate safety planning, accessible medical care, legal aid, counselling, witness protection where necessary and a clear route for complaint escalation. The Transgender Persons Act and general criminal law should operate cumulatively where their ingredients are met, subject to ordinary rules against double punishment for the same offence.

The most important legislative reform is a gender-neutral sexual-offence framework based on conduct, consent and harm, while preserving appropriate aggravated offences and procedural safeguards. This would avoid making the survivor's legal protection turn on whether the statute classifies that person as a "woman" or "man".

THE 2026 AMENDMENT: A NEW AND CRITICAL LEGAL TURN

Any account written as at 4 November 2026 must take account of the Transgender Persons (Protection of Rights) Amendment Act, 2026. Parliament passed the Bill in March 2026, and the amendment came into force on 25 May 2026 [19–20]. This is a major development beyond the BNS itself.

The amendment replaces the broad 2019 definition with a narrower statutory definition. It identifies specified socio-cultural identities such as kinner, hijra, aravani and jogta, eunuchs, and persons with specified congenital variations in sex characteristics. It also includes persons compelled to assume or outwardly present a transgender identity through force or other means. The amendment expressly excludes persons with different sexual orientations and self-perceived sexual identities from the statutory definition [19].

The amendment omits section 4(2) of the 2019 Act, which had expressly recognised a person's right to self-perceived gender identity. It introduces a medical board headed by a Chief Medical Officer or Deputy Chief Medical Officer, whose recommendation is to be examined by the District Magistrate in the certificate process. It also changes the process for obtaining a revised gender certificate after surgery and requires the medical institution to furnish details to the District Magistrate [19].

The amendment substitutes section 18. It retains penalties for forced labour, denial of access to public places, forced displacement and harm, and adds serious offences involving abduction and bodily injury to compel a person to assume a transgender identity. It also criminalises compelling a person to present as transgender and using that person for begging, solicitation, servitude or forced labour, with higher penalties where children are involved [19].

The government's stated rationale is to protect a defined class facing severe social exclusion due to biological reasons and to address coercive exploitation. Critics argue that the narrowing excludes many trans men, trans women and non-binary people who do not fall within the listed categories, and undermines the self-identification principle in NALSA [20–21]. This constitutional tension is central to the current status of transgender rights.

CONSTITUTIONAL QUESTIONS ARISING FROM THE 2026 AMENDMENT

The 2026 amendment raises serious constitutional questions. The first concerns Article 14. A classification may be constitutionally valid if it is based on an intelligible differentia and has a rational nexus with the object of the law. The question is whether the new statutory categories are sufficiently

connected to the purpose of protecting people facing discrimination, and whether excluding other transgender identities is arbitrary or disproportionate.

The second concerns Articles 19 and 21. NALSA recognised gender identity and self-identification as integral to dignity and personal autonomy. Puttaswamy located decisional privacy and bodily autonomy within Article 21. A statutory scheme that makes recognition dependent on medical-board scrutiny may be challenged as an unjustified intrusion into personal identity, particularly for people whose identity is not defined by intersex variations or a listed socio-cultural identity.

The third issue is legislative competence and the relationship between Parliament and constitutional adjudication. Parliament may amend legislation and define eligibility for a statutory scheme, but it cannot simply legislate away fundamental rights or disregard binding constitutional principles. The critical question is whether the amendment regulates access to particular statutory benefits or effectively denies legal recognition to a class of persons whose constitutional identity remains protected.

The fourth issue concerns equality in protection. If a person is excluded from the amended statutory definition, that person may lose access to the Act's certificate-based protections and welfare architecture even though they may continue to claim constitutional rights and invoke general criminal law. The resulting fragmentation could create practical uncertainty for employers, schools, hospitals, police and public authorities.

The amendment's anti-coercion provisions may serve a legitimate protective purpose. Yet the State must ensure that those provisions are not misused to police voluntary gender expression, community affiliation or consensual identity formation. The difference between coercion and self-determination must remain clear.

These issues may require authoritative judicial interpretation. Until then, the amendment should be described accurately as the law in force, while its constitutionality remains open to challenge and debate.

MEDIA REPORTING AND THE GAP BETWEEN LAW AND LIFE

Newspaper reports are valuable because they reveal how laws are experienced outside courtrooms. The Indian Express's 2024 feature on the tenth anniversary of NALSA recorded advances in public visibility, voting and professional participation, while documenting family pressure and workplace discrimination [5]. It demonstrates that formal recognition may coexist with daily hostility.

The Times of India's report of 12 November 2024 found that only 11 States and Union Territories had established transgender protection cells [6]. This is a concrete indicator of implementation shortfall. A statutory obligation without an operational institution cannot provide an effective remedy to a person facing violence or discrimination.

Scroll's investigation into Delhi identity documents reported that bureaucratic barriers and insensitive verification could prevent applicants from obtaining a document needed for public services [16]. This demonstrates how documentation becomes a gateway to rights, and how administrative delay can produce exclusion.

ThePrint's 2025 report described transgender citizens continuing to approach courts for identity documents, welfare access, hostel accommodation and protection from police abuse [11]. This suggests that courts often function as a last resort where routine administration fails.

Media evidence has limitations. Individual interviews cannot establish national prevalence, and newspaper reports may focus on unusual or particularly newsworthy cases. Statistics quoted in reports must be checked against the original government dataset. The 2011 Census "other" category, for

example, is not a definitive count of all transgender persons. Nevertheless, investigative journalism is indispensable in identifying patterns that formal legal texts do not reveal.

The 2026 amendment itself has been widely debated in legal and media commentary. The Indian Express explained that the amendment removes the express self-identification provision, narrows the definition and introduces medical-board certification [20]. The South Asian Translaw Database similarly identifies the exclusion of several gender identities and the new certification and criminal provisions [21].

A responsible research paper uses such reporting critically: it identifies the report, date and publication, distinguishes reported facts from opinion, and corroborates legal propositions through primary sources.

COMPARATIVE ASSESSMENT: FROM RECOGNITION TO SUBSTANTIVE EQUALITY

The legal trajectory may be summarised in five stages. First, pre-colonial and early modern settings contained culturally recognised gender-diverse roles, though their social position was variable and hierarchical. Second, colonial law intensified surveillance and criminalisation, particularly through the Criminal Tribes Act, 1871. Third, post-independence constitutional guarantees existed alongside institutional invisibility and social exclusion. Fourth, NALSA (2014) recognised gender identity as a constitutional right, followed by the 2019 Act and 2020 Rules. Fifth, the BNS 2023 retained gender-specific rape provisions, while the 2026 amendment narrowed the statutory definition under the transgender-specific Act.

The central tension is between recognition and control. Recognition allows people to access documents, services and remedies. Control arises when the State decides who qualifies through narrow categories, medical scrutiny or intrusive verification. A rights-based framework should minimise the latter and make the former accessible.

The BNS presents a distinct but related problem. General offences protect persons irrespective of gender in many contexts, but section 63's gendered structure does not expressly include transgender survivors. The Parliamentary Standing Committee recognised this gap. A gender-inclusive sexual-offence law would better align criminal law with constitutional equality and the realities of sexual violence.

The 2026 amendment creates another tension. Its provisions against abduction, bodily injury and forced exploitation address serious harms. Yet the narrower definition and removal of self-identification may exclude people who experience discrimination precisely because their gender identity differs from sex assigned at birth. Protecting a historically marginalised subgroup should not require denying protection to another.

Substantive equality requires more than formal recognition. It requires material conditions in which transgender people can study, work, rent homes, access healthcare, participate in public life and seek justice without discrimination. The law must be evaluated by these outcomes, not only by the existence of statutes or schemes.

RECOMMENDATIONS FOR LEGISLATIVE AND POLICY REFORM

First, Parliament should consider amending the BNS to adopt a gender-inclusive definition of sexual assault and rape based on the nature of the act, lack of consent and relevant aggravating circumstances. The framework should recognise all survivors, including transgender women, transgender men and non-binary persons, while ensuring fair-trial protections and clear offence elements.

Second, the constitutional validity and practical effects of the 2026 amendment should be examined through transparent consultation with diverse transgender groups, including trans men, trans women, non-binary people, hijra and intersex-led organisations. Consultation should not be confined to a small set of institutional representatives.

Third, identity documentation should be accessible, confidential, time-bound and free from unnecessary medical gatekeeping. Medical assessment may be appropriate for specific healthcare decisions, but legal recognition of gender identity should not ordinarily depend on surgery, hormone treatment or a medical board's opinion. The State should publish clear reasons for any refusal and provide an effective appeal mechanism.

Fourth, governments should implement protection cells in every State and Union Territory, with trained officers, independent oversight, accessible complaint channels and periodic public reporting. Police and prison authorities should receive mandatory training on gender identity, privacy, safety and respectful treatment.

Fifth, the State should adopt measurable inclusion targets in education, public employment, vocational training, housing and healthcare. Reservation and affirmative-action measures should be developed in consultation with affected communities and supported by reliable data. Census design should permit voluntary, safe and accurate self-identification.

Sixth, healthcare policy should ensure non-discriminatory access to primary care, mental-health services, HIV prevention and treatment, gender-affirming care where sought, and protection from unqualified or coercive interventions. Public hospitals should maintain confidentiality and train staff.

Finally, schools, universities, employers and housing providers should establish anti-discrimination policies, accessible grievance mechanisms and appropriate facilities. Social acceptance cannot be legislated in full, but public institutions can be required to stop reproducing exclusion.

CONCLUSION

The evolution of transgender personhood in India is neither a linear story of progress nor a simple story of uninterrupted oppression. Historical evidence reveals gender-diverse people in cultural narratives, ritual life, community networks and courtly institutions. Their presence was often visible and sometimes institutionally valued, but this did not amount to universal acceptance or equal citizenship. Colonial governance introduced a particularly damaging regime of surveillance and criminalisation, the effects of which continued after independence.

NALSA marked a constitutional transformation by recognising transgender persons as a third gender and affirming self-identification, dignity and equality. The 2019 Act established a statutory framework against discrimination and for welfare, but its implementation was uneven and its design attracted serious criticism. Newspaper reporting from 2024 and 2025 shows that identity documents, protection cells, housing, employment and police accountability remained difficult to secure.

The BNS 2023 did not create a comprehensive gender-inclusive sexual-offence framework. Section 63 continues to define rape through a man/woman formulation. The Parliamentary Standing Committee expressly identified the exclusion of transgender women and the inadequacy of the then section 18 penalty under the 2019 Act. General criminal offences remain available in appropriate cases, but they are not a full substitute for equal recognition under sexual-offence law.

The 2026 amendment to the Transgender Persons Act is a further turning point. It narrows the statutory definition, removes express self-identification, introduces medical-board scrutiny and expands offences

relating to coercion and exploitation. Its protective provisions address grave harms, but its exclusions raise substantial questions under Articles 14, 19 and 21 and the principles in NALSA and Puttaswamy. The ultimate test is whether transgender persons can live as equal citizens without having to prove their identity to hostile institutions or accept a lower level of protection from violence. India's constitutional promise requires a framework based on autonomy, dignity, non-discrimination and effective remedies. Historical visibility must become social equality; judicial recognition must become administrative reality; and criminal law must protect every survivor.

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