

When Gender Identity Becomes State Certification

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On March 30, 2026, a day before International Transgender Day of Visibility and five months after India secured its seventh term on the United Nations Human Rights Council (UNHRC) for 2026-2028,^[1] the Transgender Persons (Protection of Rights) Amendment Act, 2026, received Presidential assent (the final step in India's legislative process).^[2]

The Amendment deletes Section 4(2) of the 2019 Act,^[3] which recognised *self-perceived gender identity*. It replaces self-determination with mandatory certification by medical boards.^[4] The redefined category *transgender person* now encompasses only named socio-cultural identities (*hijra, kinnar, aravani, jogta, eunuch*)^[5] and specified intersex variations; trans men, trans women, genderqueer, and non-binary persons are excluded from legal existence.^[6] A retrospective proviso declares that self-perceived identity *shall not include, nor shall ever have been so included*, such persons.^[7] This potentially invalidates the legal recognition of thousands of individuals who obtained certificates under the self-identification framework. This textual architecture transforms what the Supreme Court constitutionally recognised as a fundamental right in *National Legal Services Authority (NALSA) v. Union of India* (2014) into an administratively contingent state concession.^[8]

NALSA held that self-determination of gender identity constitutes a fundamental right under Articles 14 (equality), 15 (non-discrimination), 16 (equal opportunity), 19(1)(a) (freedom of expression), and 21 (dignity and liberty) of the Constitution,^[9] explicitly prohibiting medical examination as a condition for recognition.^[10] Justice Radhakrishnan wrote: *Gender*

identity... lies at the core of one's personal identity, gender expression and presentation, and therefore, it will have to be protected under Article 19(1)(a).^[11] The 2026 Amendment institutes the precise gatekeeping NALSA forbade.

The paradox this exposes is foundational. States can systematically violate norms while occupying positions meant to uphold them because international enforcement mechanisms operate through non-binding recommendations rather than adjudicatory authority with remedial power. The Amendment's passage, while India occupies the UNHRC (a position that carries reputational prestige but imposes no binding legal obligations), is not hypocrisy but rather reveals how the international human rights architecture distributes authority without corresponding accountability.



Pride in Kalkutta. Photo by [Dibakar Roy](#) via [Unsplash](#).

The Architecture of Non-Enforcement

India ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979 and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1993, but it has crucially not ratified the Optional Protocols establishing individual complaint procedures before treaty-monitoring bodies.^[12] Without ratification of the Optional Protocol, monitoring operates exclusively through periodic reporting and concluding observations, which constitute recommendations without binding force. India exemplifies this dynamic. The Human Rights Committee's 2024 concluding observations expressed concern about *ongoing discrimination and violence against LGBTI persons and significant barriers to gender transition recognition*. However, these produce no legal

obligation beyond diplomatic pressure.^[13] The Yogyakarta Principles state that *no one shall be forced to undergo medical procedures... as a requirement for legal recognition of their gender identity*, yet constitute expert interpretation rather than a binding treaty.^[14]

The Human Rights Committee's General Comment No. 36 lists *sexual orientation or gender identity* among prohibited discrimination grounds,^[15] and the World Health Organisation's International Statistical Classification of Diseases and Related Health Problems (ICD)-11 moved gender incongruence from Mental Disorders to Sexual Health. Yet, no enforcement mechanism compels domestic conformity with these standards.^[16] This is not an implementation gap but a structural design.

Understanding why requires interrogating how international human rights law actually functions. Third World Approaches to International Law (TWAIL), a critical scholarship tradition examining how international law perpetuates power asymmetries, offers analytical purchase here. Makau Mutua's foundational TWAIL critique demonstrates how international human rights discourse casts the West as saviour and non-Western states as perpetual violators.^[17] Yet this civilisational framing coexists with, and arguably enables, a system where powerful non-Western states face no consequences for violations. The crucial question becomes: why do material power relations, rather than the severity of violations, determine which abuses trigger intervention and which receive only rhetorical condemnation?

The answer lies in how international institutions actually derive legitimacy. They derive their legitimacy from serving as sites where states articulate norms, not from their capacity to enforce those norms against powerful states. The enforcement gap is not external to the system but constitutive of how international authority operates. When India invokes state sovereignty over domestic classification while occupying UNHRC leadership, the question is not inconsistency but how the system distributes authority without accountability. This enforcement gap enables not merely isolated violations but coordinated retrenchment across multiple jurisdictions.

Transregional Simultaneity and Postcolonial Instrumentalisation

Characterising the Amendment as isolated regression obscures its position within such documented transnational retrenchment. Between April 2025 and April 2026, democratic institutions across multiple continents restricted transgender and LGBTQ+ protections through distinct constitutional, legislative, and judicial mechanisms, with particularly concentrated activity in March-April 2026. This convergent timing reveals a pattern that singular cultural traditions cannot adequately account for.

Judicial interventions in the United Kingdom and the United States proceeded through constitutional mechanisms. The UK Supreme Court, in *For Women Scotland Ltd v The Scottish Ministers* (April 2025), held that, under the Equality Act 2010, sex means biological sex, ruling that Gender Recognition Certificates do not change a person's sex for

equality law purposes.^[18] In the United States, on March 2, 2026, the Supreme Court decided *Mirabelli v. Bonta*, holding that California could not prevent schools from notifying parents about students' gender identity expressions at school, nor require schools to use students' preferred names and pronouns against parental wishes.^[19] On March 31, the day after India's Amendment, the Court decided *Chiles v. Salazar*, striking down Colorado's ban on conversion therapy for transgender minors as impermissible viewpoint discrimination.^[20] By subjecting the ban to strict First Amendment scrutiny, the Court rendered states constitutionally powerless to prohibit counselling practices aimed at eliminating gender incongruence, even for minors.

Legislative and constitutional mechanisms operated in parallel. Hungary constitutionalised binary sex definitions through its 15th Amendment to the Fundamental Law (April 2025).^[21] Indonesia's revised penal code, entering into force in January 2026, criminalised extramarital sex, thereby criminalising all same-sex relations in a jurisdiction where same-sex marriage is not recognised.^[22] This domestic retrenchment was paralleled by unprecedented contestation at international norm-setting institutions. The Commission on the Status of Women (CSW) 70th session (March 2026) addressed ensuring and strengthening access to justice for all women and girls, including by eliminating discriminatory laws and practices. The United States proposed eight amendments to the draft Agreed Conclusions (the session's outcome document), including defining gender as referring only to men and women based on biological sex, not to subjective notions of gender identity. After all US amendments were rejected, the Agreed Conclusions were adopted 37-1-6 through recorded vote rather than consensus (a departure from CSW's norm-building practice of unanimous agreement), breaking with CSW's traditional practice.^[23] This demonstrates that contestation now extends to the level where international norms themselves are articulated, with a major power attempting to insert exclusionary definitions into a mechanism designed to eliminate discrimination.

This convergent pattern demands theoretical interpretation beyond coincidence. Through genealogical analysis, David Eichert establishes that pre-colonial Indigenous and non-Western communities commonly recognised gender beyond the binary, suggesting that current restrictions are deliberate postcolonial choices about authorising particular cultural pasts.^[24] Similarly, Rahul Rao reveals that contemporary homophobia, while bearing colonial imprints, reflects postcolonial elites' active choices to stabilise national identity through sexuality at moments of political flux, shifting from imperial collaboration (1880s) to decolonial assertion (1990s).^[25] This rejects narratives that absolve postcolonial actors by attributing all agency to Western forces.

When anti-trans jurisprudence emerges concurrently across India, the United States, Hungary, Indonesia, and Britain, the convergence demonstrates retrenchment transcending individual cultural contexts. As Rao's intervention clarifies, postcolonial states bear responsibility for their contemporary choices about which pasts to authorise and which subjects to constitute through authenticity discourse. The transregional pattern

exposes the enforcement gap architecture not as an accidental weakness but as a structural design. International institutions articulate norms while lacking the capacity to prevent synchronised withdrawal from those commitments.

The enforcement gap thus becomes the mechanism through which postcolonial instrumentalisation operates at scale: states maintain formal treaty adherence while implementing domestic restrictions that international bodies cannot remedy. India's Amendment exemplifies this dynamic. Adopted one day before *Chiles* and within weeks of the CSW vote fracture, the Amendment participates in convergent retrenchment while remaining technically compliant with CEDAW reporting obligations.

Colonial Genealogies and Contemporary Agency

The Amendment's restriction to named categories performs governance with traceable colonial genealogy.[\[26\]](#) The Criminal Tribes Act (CTA) 1871 institutionalised colonial objectives articulated in 1865 administrative correspondence that explicitly aimed to bring about the *gradual extinction* of gender-non-conforming communities.[\[27\]](#) The CTA created *eunuchs* as an administrative category for registration and surveillance (Section 24), and criminalised public performance and feminine dress (Section 26).[\[28\]](#) Jessica Hinchy's archival work demonstrates that British administrators constructed the *eunuch* as a pan-Indian administrative category through the CTA 1871, muddying regional linguistic differences and creating a subcontinent-wide legal classification that collapsed diverse communities with distinct social organisations.[\[29\]](#)

Pre-colonial sources establish South Asian recognition of extraordinary gender diversity: Vedic-era concepts of *tritiya-prakrti* (third nature),[\[30\]](#) the *Mahabharata's* narrative of *Shikhandi's* sex change,[\[31\]](#) and *Khwajasarai* (eunuch-slaves) serving as military commanders, intelligence officers, and diplomats.[\[32\]](#)

Serena Nanda's ethnography establishes that the *hijra* identity encompasses religious role, occupational niche, and gender variance, functioning as a *magnet* that collapses Western categorical distinctions between transsexuals, hermaphrodites, transvestites, and homosexuals into a culturally coherent third gender role.[\[33\]](#) Likewise, Gayatri Reddy demonstrates how *hijras* negotiate identity through koti (effeminate men) networks, nirvan ritual (complete emasculation), and izzat (respect) economies, constructing authenticity through moral practices and embodied differences that exceed reductive sexual categorisation.[\[34\]](#) However, the 2026 Amendment does not preserve these complex formations; instead, it freezes them as state-administered categories divorced from community practices.

Moreover, characterising the Amendment solely as colonial continuity obscures postcolonial agency. The Statement of Objects and Reasons explicitly declares: *The intention of the legislation was and is not to protect every class of persons with various gender identities.*[\[35\]](#) This was articulated exclusion, not oversight. Katyayani Sinha

demonstrates how the Indian state polices queer kinship through bureaucratic mechanisms, claiming protection while requiring submission to classification.[\[36\]](#) This postcolonial agency extends to the new criminal provisions that introduce 10 years to life imprisonment for *forcing* someone to assume transgender identity through *allurement, inducement, deceit, or undue influence*.[\[37\]](#) These terms lack precision, risking criminalising community support networks as *inducements*.

TWAIL methodology demands holding both truths: recognising the CTA established templates for population surveillance while insisting that postcolonial states exercise independent agency in choosing to reinscribe rather than dismantle colonial logics. The Amendment deploys anti-colonial sovereignty rhetoric while institutionalising colonial governance techniques.

The Function of Unenforceability

The simultaneity of India's UNHRC membership and the Amendment's enactment requires theoretical rather than moral interpretation. It reveals the international human rights architecture as a system in which norm articulation proceeds independently of enforcement capacity, permitting states to assume normative leadership while systematically violating articulated norms. The UNHRC functions as a forum for collective articulation, but enforcement depends on mechanisms states have structured to preserve sovereignty: periodic reporting, non-binding observations, and voluntary recommendations. Amnesty's characterisation of the Amendment as transforming identity into *something to be checked, certified, and controlled* captures the shift from right to concession,[\[38\]](#) a shift that monitoring bodies can only observe, not remedy. Human Rights Watch's condemnation operates similarly: expression without enforcement.[\[39\]](#)

Martti Koskeniemi's analysis demonstrates that contemporary international legal architecture operates through multiple regimes articulating norms without hierarchical coordination or centralised enforcement.[\[40\]](#) This fragmentation reflects states' preference for regime flexibility over binding constraints. Without a centralised adjudicatory authority, norm violations trigger observation but not remediation. The Amendment will ultimately be adjudicated under Indian constitutional law by courts applying *NALSA*, alongside the basic structure doctrine established in *Kesavananda Bharati v. State of Kerala*.[\[41\]](#) International law will serve a rhetorical function: litigants will invoke ICCPR Article 26 (equality), Yogyakarta Principles, and HRC General Comments as interpretive aids, but dispositive authority rests with Indian courts interpreting the Indian Constitution.

This domestication returns the TWAIL question: if international human rights law cannot bind states occupying the UNHRC, what is its function? Binding adjudication remains unavailable; the Optional Protocol architecture makes such enforcement optional, and most states decline it. International law thus functions as expressive vocabulary and aspirational benchmark, while enforcement depends entirely on domestic legal

mobilisation. Recognising this is not abandoning international frameworks but understanding their operation.

For scholars across regions confronting parallel retrenchment, international law's effectiveness depends less on normative sophistication than on domestic structures: independent judiciaries, sustained litigation capacity, and political movements resisting legislative erasure. The enforcement gap is not an incidental failure but an architectural feature of how international authority operates.

This structure has concrete consequences: thousands of individuals now depend on whether Indian courts will enforce *NALSA's* constitutional promise against parliamentary override.

Notes

[1] United Nations General Assembly, "Elections and Appointments: Election of the Human Rights Council: 14 October 2025," accessed April 18, 2026, <https://www.un.org/en/ga/80/meetings/elections/hrc.shtml>.

[2] Transgender Persons (Protection of Rights) Amendment Act, 2026 (India) (formerly Bill No. 79 of 2026).

[3] Transgender Persons (Protection of Rights) Act, 2019, No. 40, § 4(2) (India).

[4] *Transgender Persons Amendment Act, 2026*, § 4 (deleting subsection 2); § 2(aa) (inserting definition of authority as medical board).

[5] South Asian gender-diverse identities; see discussion below in "Colonial Genealogies and Contemporary Agency."

[6] *Ibid.*, § 2(k) (substituted definition).

[7] *Ibid.*, proviso to § 2(k).

[8] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

[9] *Ibid.*, paras. 61-81.

[10] *Ibid.*, paras. 82-83.

[11] *Ibid.*, para. 72.

[12] United Nations Office of the High Commissioner for Human Rights, "Ratification Status for India," UN Human Rights Treaty Bodies Database, accessed April 18, 2026, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN.

- [13] United Nations Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of India*, UN Doc. CCPR/C/IND/CO/4 (July 25, 2024), para. 17.
- [14] International Commission of Jurists and International Service for Human Rights, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007), prin. 3, accessed April 18, 2026, https://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf.
- [15] United Nations Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/GC/36 (September 3, 2019), para. 61.
- [16] World Health Organization, “Gender Incongruence and Transgender Health in the ICD,” accessed April 18, 2026, <https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd>.
- [17] Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights,” *Harvard International Law Journal* 42, no. 1 (2001): 201-45, at 204-6.
- [18] *For Women Scotland Ltd v. The Scottish Ministers*, [2025] UKSC 16, paras. 264-65.
- [19] *Mirabelli v. Bonta*, No. 25A810 (U.S. Mar. 2, 2026) (per curiam).
- [20] *Chiles v. Salazar*, No. 24-539 (U.S. Mar. 31, 2026) (Gorsuch, J.).
- [21] Magyarország Alaptörvényének tizenötödik módosítása [Fifteenth Amendment to the Fundamental Law of Hungary], *Magyar Közlöny* [Official Gazette] No. 41 (April 14, 2025), art. 2.
- [22] Kitab Undang-Undang Hukum Pidana [Penal Code], Law No. 1 of 2023, art. 411(1) (Indonesia).
- [23] United Nations, Commission on the Status of Women, “Women’s Commission Annual Session Begins with Contentious Recorded Vote to Adopt Outcome Document, Calls to End Backlash against Gender Equality,” Meetings Coverage, WOM/2249, March 9, 2026, accessed April 18, 2026, <https://press.un.org/en/2026/wom2249.doc.htm>.
- [24] David Eichert, “Decolonizing the Corpus: A Queer Decolonial Re-examination of Gender in International Law’s Origins,” *Michigan Journal of International Law* 43, no. 3 (2022): 557-94, at 557, 577-86.
- [25] Rahul Rao, “The Location of Homophobia,” in *Out of Time: The Queer Politics of Postcoloniality* (New York: Oxford University Press, 2020), 33-74.
- [26] *Transgender Persons Amendment Act, 2026*, § 2(k) (substituted definition).

- [27] Jessica Hinchy, *Governing Gender and Sexuality in Colonial India: The Hijra, c. 1850-1900* (Cambridge: Cambridge University Press, 2019), 93-94.
- [28] Criminal Tribes Act, Act No. XXVII of 1871, §§ 24-26 (India, repealed 1952).
- [29] Hinchy, *Governing Gender and Sexuality*, 19-24.
- [30] Ruth Vanita and Saleem Kidwai, eds., *Same-Sex Love in India: Readings from Literature and History* (New York: Palgrave, 2001), 24-25.
- [31] *Ibid.*, 31-32.
- [32] Hinchy, *Governing Gender and Sexuality*, 24.
- [33] Serena Nanda, *Neither Man nor Woman: The Hijras of India*, 2nd ed. (Belmont, CA: Wadsworth Publishing, 1999), 19-20.
- [34] Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (Chicago: University of Chicago Press, 2005), 14-16, 57.
- [35] *Transgender Persons Amendment Act, 2026*, Statement of Objects and Reasons.
- [36] Katyayani Sinha, "The Regulation, Reclamation, and Resistance of Queer Kinship in Contemporary India," *Feminist Legal Studies* 30, no. 3 (2022): 281-307, at 283-87.
- [37] *Transgender Persons Amendment Act, 2026*, § 18 (substituted).
- [38] Amnesty International, "India: Presidential Approval of Regressive Transgender Bill a Major Step Backward for Human Rights," March 31, 2026, accessed April 18, 2026, <https://www.amnesty.org/en/latest/news/2026/03/india-presidential-approval-of-regressive-transgender-bill-a-major-step-backward-for-human-rights/>.
- [39] Human Rights Watch, "India's Transgender Rights Bill a Huge Setback," March 26, 2026, accessed April 18, 2026, <https://www.hrw.org/news/2026/03/26/indias-transgender-rights-bill-a-huge-setback>.
- [40] Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," UN Doc. A/CN.4/L.682 (April 13, 2006), para. 486.
- [41] *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

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