
FROM IDENTITY TO AUTONOMY: SELF-IDENTIFICATION AS AN EMERGING CONSTITUTIONAL RIGHT IN INDIA AND SOUTH AFRICA

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ABSTRACT

The question of who defines a person's gender identity the individual or the state sits at the heart of modern constitutional democracy. This paper examines self-identification as an emerging constitutional right in India and South Africa, two post-colonial democracies committed to transformative constitutionalism, yet both struggling to translate that commitment into legislative reality. In India, the Supreme Court's landmark judgment in *NALSA v. Union of India* (2014)¹ recognised self-identification as a fundamental right protected under Articles 14, 19 and 21 of the Constitution. However the Transgender Persons (Protection of Rights) Act 2019² and the Amendment Bill 2026³ have progressively dismantled this right by reintroducing medical certification and bureaucratic gatekeeping directly contradicting the constitutional mandate. In South Africa, despite the explicit protections of Sections 9 and 10⁴ of the Constitution and a progressive judicial trajectory from *Fourie*⁵ to *KOS*⁶ to *Jordaan*, the Alteration of Sex Description and Sex Status Act 49 of 2003 continues to impose surgical prerequisites for legal gender recognition, excluding non-binary persons entirely. Through doctrinal and comparative legal methodology, this paper analyses the constitutional frameworks of both jurisdictions, exposes the legislative contradiction in each, and draws inspiration from Argentina's Gender Identity Law 2012 and the Yogyakarta Principles to propose a self-declaration model that is constitutionally grounded, administratively achievable and consistent with international human rights law. The paper concludes that self-identification is not an emerging right it is already constitutionally mandated in both jurisdictions, and the legislature's failure to honour that mandate is not a policy choice but a constitutional violation.

Keywords: Self-Identification, Gender Identity, Transgender Rights, Transformative Constitutionalism, NALSA, Yogyakarta Principles, Comparative Constitutional Law, India, South Africa

¹ National Legal Services Authority (NALSA) v. Union of India AIR 2014 SC 1863

² Transgender Persons (Protection of Rights) Act, 2019

³ Transgender Persons (Protection of Rights) Amendment Bill, 2026

⁴ Constitution of South Africa, 1996

⁵ Minister of Home Affairs v. Fourie (2005) ZACC 19

⁶ KOS v. Minister of Home Affairs 2017 (6) SA 588 (WCC)

Introduction

Generally identity means a characteristic or qualities that defines who you are, the core question of humankind is about who you are ? and to collect the evidence and support for their existence. Humans are the only creature who has capacity to reason and enlighten themselves. When we talk about the question of identity or existence, gender of the person takes the center stage, when we say someone identifies him/herself as a man or woman, we clearly get the picture of their experiences, belief, opportunities, opinions, achievements etc. However the same is not true for gender diverse people; they are still struggling to identify themselves with the deeply felt internal gender which may or may not correspond with sex assigned at birth. The struggle for self identification is a core question of their existence, and it cannot be achieved by the legislation which restricts the persons right to self identify and only recognised that sex which was assigned at time of birth.

Chapter 1: Conceptual and Constitutional Framework

Framers of the Constitution of India frame the constitution on the modern principles of Liberty, Equality, Fraternity, Social Justice and Welfare of society. They envisage that aspiration and need of the society and nations will be changing so they make a living document which can change with the changing pulses of society and nation. India does not limit the applications of the provisions of fundamental rights to any specific gender but they include the word “Person” or “citizen” in those provisions to make it inclusive in nature. Rights given in Article 14, 15, 16, 19, 21 are not limited for any specific person but it is for all the persons and citizens of the nation. So when any gender diverse person is discriminated on gender identity or sexual orientation then their right is protected under the Fundamental rights of the Constitution of India.

Who are the transgender, non-binary, trans sexual and gender diverse people? Internationally gender diverse people are defined by two aspects. one of the aspects is Sexual Orientation which means “ a person’s emotional capacity, affection, sexual attraction and intimate sexual relations with individual of different gender.” Second aspect is Gender Identity “it is a person's deeply felt internal and individual experience of gender which may or may not be correspondence with sex assigned at time of birth.” The Supreme Court in the case of *NALSA v. Union of India* defined transgender as an umbrella term for the person whose gender identity, gender expression or behaviour does not conform to their biological sex. The above definition

clearly includes the biology and psychology aspect of gender which is suggested by the American Philosopher Judith Butler.

Sex or Gender of the person always understood on the biological or physiological lenses until the last 20th century. However in the year of 1990 Judith Butler published a book “ Gender Trouble” in which the author brilliantly explains that gender is not only formed or shaped by the biology of the person but also by the psychology and social interaction of the person. This was the turning point in understanding gender on broader aspects which also include psychology of the person, which further included in the international definition of gender. Once its established that gender is not purely biological but psychological and social, it becomes clear discriminating against gender diverse people is discrimination on the ground of sex which violates the Article 14, 15, and 16 of Constitution of India.

Article 14 states that all the persons shall be equally treated before the law and equal protection of law should be given to the persons, Article 15 states that states shall not discriminate against any citizen on grounds of sex, Article 16 provides equal opportunity in public employment irrespective of sex. Trinity of 14,15 and 16 is the foundation of right to equality, gender diverse people have the same and equal right irrespective of sex, the rights man and woman enjoy in their lifetime is also available to the gender diverse people. Equality includes the full and equal enjoyment of all rights and freedom, Therefore supreme court in NALSA case significantly describe that “The discrimination on the ground of ‘sex’ under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression ‘sex’ used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.” Further, nonrecognition of identity of Hijras /transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities for Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment. However equality in paper is nothing if a person cannot express who they are, here the article 19 and 21 become equally important.

The Constitution of India under Article 19(1)(a) and 21, provided freedom of expression and

dignified life to every individual which are the basic human rights to live a free and dignified life as a human being. According to article 19(1) (a) every citizen has a freedom of speech and expression, here expression not only include belief, faith, opinion but also to present yourself the way you like, self identified gender can be expressed through dress, words, action, behaviour, sexual orientation etc. No restriction can be imposed on the choices of gender diverse people under article 19(2). The freedom of expression guaranteed under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc. Principles referred to above clearly indicate that Gender identity, therefore, 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) of the Constitution of India.

Article 21 is the heart of the constitution of India and a one of the exhaustive right, it gives every person life and personal liberty, it takes in its ambit every aspect of life which are essential to live a dignified human life. Autonomy for self identification is one of the essential aspects to live a dignified human life. In *Nangai v Superintendent of police* the Madras High court held that "a person to undergo a medical examination to determine their gender violates Article 21 of Indian Constitution." Also, in *Anjali Guru Sanjana Jan v. SOM*, the SC held that "Applicant had the right to self-identify her gender under Article 21". Further, in *K.S. Puttaswamy*, the SC upheld the right to privacy, which also includes the right to have an intimate relationship of one's choice and the right to sexual orientation and gender identity. *Anuj Garg v. Hotel Association of India* (2008) 3 SCC 1 (paragraphs 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 1 SCC 608 (paras 7 and 8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings".

Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc.

Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. India's constitutional framework therefore already contains everything needed to protect the right to self-identification the same is equally true of South Africa, whose post-apartheid Constitution makes this commitment even more explicitly."

South Africa's post apartheid Constitution of 1996 is one of the most progressive constitutions in the world and it makes an explicit commitment to gender justice that goes further than most. Section 9 of the Constitution prohibits unfair discrimination on the grounds of sex, gender and sexual orientation making South Africa the first country in the world to constitutionally prohibit discrimination on the basis of sexual orientation. Section 10 guarantees every person the inherent right to dignity which the Constitutional Court has consistently interpreted as requiring the state to affirm rather than deny a person's sense of self. These two provisions together create a constitutional foundation for self-identification that is as strong as India's Articles 19 and 21 and in some respects even more explicit.

The Constitutional Court in *Minister of Home Affairs v. Fourie* (2005) established that the state cannot impose identity categories that demean a person's humanity. In *KOS and Others v. Minister of Home Affairs* (2017) the Western Cape High Court extended this principle directly to transgender persons holding that married transgender persons cannot be barred from obtaining legal recognition of their gender change merely because of their marital status. Most recently in *Jordaan v. Minister of Home Affairs* (2025) the Constitutional Court struck down gendered restrictions on identity documentation reaffirming the trajectory toward gender neutral recognition. Both constitutions India and South Africa have therefore already done their job. The failure lies not in the constitution but in the legislature

Chapter 2: Legislative Reality and Constitutional Contradiction

After the judgment of NALSA in which SC upheld individuals right to perceive self identification, parliament of India enacted the Transgender Persons (Protection of Rights) Act, 2019 appeared as a progressive step towards gender diverse people, it defined transgender persons, recognised self perceived identity and protection from discrimination. it defined "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has

undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.

By stating that medical therapies or surgeries are not required, the definition honoured the NALSA judgment which clearly stated that medical surgeries and therapies like SRS are immoral and illegal. Also definition included culturally gender diverse people to provide them protection from discrimination. The definition is inclusive and exhaustive in nature which not only considered biological aspects but also considered psychological and cultural aspects too. However, the act itself contradicts its provision by making it mandatory for medical certification under section 7 of the act and also the issuance of certificate is done by the district magistrate which makes the process bureaucratic in nature which ultimately bypass NALSA judgment on self identification. There is no doubt that the act was progressive step by the Indian Parliament for the inclusion and upheld fundamental right of gender diverse persons, however Transgender persons (protection and rights) amendment, bill 2026 was the nail in coffin for the gender diverse persons.

Transgender Persons (Protection of Rights) Amendment Bill, 2026 takes away the right of self-identification of gender diverse persons, which was given by the NALSA judgment and partly provided by the Transgender Persons (Protection of Rights) Act, 2019. The Amendment bill, 2026 replaced self identified based definition to medical, biological and criminal centric framework. It defined the transgender person strictly on the basis of the biological variation like primarily sexual characteristics, external genitalia; chromosomal patterns; gonadal development; endogenous hormone production or response, or such other medical conditions; it completely excluded the gender identity which does not match with sex assigned at birth, a psychological and emotional aspect of the gender identity. This definition also used regressive and derogatory terms like Eunuch which shows the colonial and inhuman mindset of the legislative body. Also, definitions try to criminalise the identity of gender diverse people by introducing police involvement. Also definition specifically excluded persons with different sexual orientations and self-perceived sexual identities. legislation completely takes a turn from the NALSA judgment. In 2014, the Supreme Court of India's landmark NALSA judgment ruled that self-identification of gender is a fundamental right, protected under the Constitution. By explicitly banning "self-perceived identities" from legal protection, the state asserts that transgender identity is not an internal feeling, but a strict medical or socio-cultural condition

subject to state verification. Further amendments make medical superintendence mandatory, in which the gender of person will be decided by a third party and not by the person in issue. even if the state's objective of preventing misuse is accepted as legitimate, medical certification is not a proportionate means to achieve it. The Supreme Court in *Modern Dental College v. State of MP* held that any restriction on fundamental rights must be proportionate. Medical gatekeeping of identity fails this test completely. It is one of the major setbacks for the gender diverse people because this medical certification procedure strips away their dignity in pieces and makes them prone to bureaucratic regulation. gender diverse people are already fighting social, economic, political, and gender discrimination, and they are already marginalised and prone to sexual assault, rape, inhuman practices, etc. Now the government is taking away their right to self-identify, which is one of the basic aspects of their existence as humans; the government is also denying the fundamental rights stipulated in Articles 14, 15, 16, 19, and 21, which is not the characteristic of a democratic state in this modern world, which is striving for individual rights and existence. As the Supreme Court held in *Navtej Singh Johar v. Union of India* (2018), constitutional morality must prevail over social morality and no legislation that violates constitutional morality can survive judicial scrutiny."

South Africa enacted the Alteration of Sex Description and Sex Status Act 49 of 2003 which on paper allowed transgender persons to legally change their recorded gender. However the Act has failed the very persons it was meant to protect in three fundamental ways. First, Section 2(1) of the Act requires that a person's sexual characteristics must have been altered by surgical or medical treatment before they can apply for gender recognition. This immediately excludes all transgender persons who cannot afford surgery, choose not to undergo it, or whose bodies cannot withstand it. It makes surgery the price of identity which is both medically dangerous and constitutionally indefensible under Section 10's dignity guarantee. Second, the Act recognises only male and female completely excluding non-binary and gender-fluid persons despite South Africa's Constitution being explicitly inclusive of all gender identities. This binary framework has no constitutional justification and directly contradicts the spirit of Section 9. Third, even for those who qualify under the Act, implementation has been deeply inadequate. The case of *KOS v. Minister of Home Affairs* (2017) revealed that the Department of Home Affairs was routinely refusing to process applications from married transgender persons meaning the law existed on paper but not in practice. As the Southern Africa Litigation Centre documented, Act 49 of 2003 has not been implemented in accordance with its own provisions consequently undermining its progressive potential. A right that cannot be accessed

is not a right, it is a promise broken.

Chapter 3: Comparative Analysis, challenges and way forward

In 2007, as a response to sexual assault, rape, discrimination, ill-treatment, social exclusion, honour killing, medical abuse, etc. A principle on the application of international human rights law in relation to orientation and gender identity, known as the Yogyakarta Principles, was formed; it became a guiding principle to uphold the rights of gender-diverse people. It defines two different entities 1) sexual orientation, 2) gender identity, it comprises both psychological and social factors of gender identity and become the acceptable definition worldwide. However India in its amendment act completely ignored this definition and solely defined gender diverse persons on the basis of anatomy which is regressive legislation. The Yogyakarta Principles describe 29 rights of gender diverse persons; these rights include the right to recognition before the law, the right to self-identification, the right to privacy, protection from medical abuse, etc. In the NALSA case supreme court draws inspiration from these principles. However, India and South Africa both, through severe legislative regression, completely violate constitutional and international mandates.

Both India and South Africa are post colonial countries, both have achieved their independence by freedom struggle which envisages the liberty, equality, freedom and dignity of the people. However with the procedure of medical certification and bureaucratic gatekeeping violating basic human rights of gender diverse persons. On the other hand, a post colonial and developing country like Argentina enacted a Gender Identity Law in 2012 which allows non binary and gender diverse people to hang their sex and name on official government documents by means of self declaration without any medical or bureaucratic procedure. The statue of Argentina proved three things.

1. Self-identification without medical prerequisites is administratively possible.
2. It does not create chaos or misuse as opponents argue.
3. It is the most constitutionally honest model identity belongs to the individual not the state.

This clearly suggests that when a developing country like Argentina upheld the rights of the gender diverse people from 2012, then there is no administrative and practical justification for India and South Africa to violate the basic human rights of non-binary and gender diverse

persons by imposing medical and bureaucratic gatekeeping in 2026. Both systems continue to consider a biological aspect as the sole criteria for gender recognition by imposing clinical verification rather than taking in consideration the emotional, human, psychological, social and cultural aspect of the person. It's ironic that in the modern world, striving for freedom and dignity, a gender diverse person can't express themselves the way they feel and believe without third-party intervention. Neither India nor South Africa has a robust legal framework for non binary persons. There is no framework for their protection, education, health benefits and social security of gender diverse people. They are the most neglected section of society but for their betterment there is little legal protection in both countries. It is not that there is no right present; constitutionally, both countries have a list of human rights, but the problem lies in the implementation of those rights. The implementation remains deeply inadequate due to bureaucratic resistance, lack of awareness and training, and social and cultural prejudice.

The Argentina and Yogyakarta principles have already proved that empowering and protecting the rights of non-binary persons is not a mountain task; it is achievable. It proves of the person can be protected and maintained and the modern state should always provide a dignified life to individuals. India and South Africa can draw a successful model for self-identification in three steps.

Step 1 – Self declaration model: a simple sworn declaration before a notary or magistrate should be sufficient for legal gender recognition without any medical certification.

Step 2 – Non binary recognition – Both countries must amend their legislation to recognise gender identities beyond the male and female.

Step 3 – Implementation mechanism- legal recognition alone is insufficient, it must be accompanied by anti discrimination enforcement, training of public officials and accessible grievance mechanism.

Conclusion

This paper set out to examine whether self-identification has crystallised into constitutional rights in India and South Africa. The answer emerging from the analysis is unambiguous - yes it has. In India NALSA, Puttaswamy and Navtej Johar together create an inviolable constitutional mandate rooted in Articles 14, 19 and 21. In South Africa Sections 9 and 10 and

the judicial trajectory from Fourie to KOS to Jordaan 2025 point in the same direction. Both constitutions have spoken clearly, gender identity belongs to the individual and the state has no constitutional authority to override it through medical or bureaucratic gatekeeping. However, by regressive

legislation of both countries both legislatures are operating in open contradiction with their own constitutional frameworks and more importantly with the lived dignity of millions of gender diverse persons. However, a developing country like Argentina proves its possible and achievable task to recognize gender without bureaucratic and medical certification. This is ultimately not just a question of transgender rights. It is a question of what kind of constitutional democracies India and South Africa choose to be. A constitution that guarantees dignity, equality and autonomy but allows the legislature to strip those guarantees from the most marginalised persons is not a transformative constitution it is a decorative one. The demand for self-identification is the demand that the constitution mean what it says. In a constitutional democracy that is not a radical demand. It is the minimum one.

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