

A critique of the Transgender Persons (Protection of Rights) Bill, 2018

Rachana Mudraboyina & Kranti L C

On 15th April 2014, while deliberating on the rights of transgenders in the *NALSA* case, the Supreme Court departed from its regressive position on sexuality in *Koushal* to break new ground.

In the *NALSA* verdict, while the two Justices delivered separate opinions, they concurred on the future course the Centre and State Governments ought to follow. Their directives are reproduced below:

1. Hijras, Eunuchs, apart from binary gender, be treated as “Third Gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
2. Transgender persons’ right to decide their self- identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as Male, Female or as Third Gender.
3. Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
4. Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/Transgenders face several sexual health issues.
5. Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma,

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etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

6. Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and provide them separate public toilets among other facilities.
7. Centre and State Governments to take steps for framing various social welfare schemes for their betterment.
8. Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.
9. Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

The Supreme Court further observed “We are informed an Expert Committee has already been constituted to make an in-depth study of the problems faced by the Transgender community and suggest measures that can be taken by the Government to ameliorate their problems and to submit its report with recommendations within three months of its constitution. Let the recommendations be examined based on the legal declaration made in this Judgment and implemented within six months.”

This Expert Committee had been constituted by the Ministry of Social Justice of the Union of India. In its exhaustive and well written report, among other prescriptions it provided for the definition of a transgender person.

Transgender persons: All persons whose own sense of gender does not match with the gender assigned to them at birth. They will include trans-men & trans-women (whether they have undergone sex reassignment surgery or

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hormonal treatment or laser therapy, etc.), genderqueers and a number of socio cultural identities, such as kinnars, hijras, aravanis, jogtas, etc. The term 'transgender' shall be construed accordingly

In light of the directives of the Supreme Court, the aforesaid definition holds the field.

The prescription in *NALSA* and, thereafter, the *Puttaswamy* judgement fait accompli-ed the deliberations on Section 377 of the IPC in *Navej Singh Johar*.

Parliament had a few options on hand.

1. It could have let the NALSA directives hold the field, like it did with the Vishakha directives on Sexual Harassment for over 15 years. The risk it ran was that leaving the course uncharted could allow the Constitutional Courts to evolve jurisprudence it may not be in agreement with.
2. It could affect them through a commensurate enactment like it did with the Right to Food case with the Act on Food Security or say the NREGA. This too we must remember was done to cap determined judicial progress to combat hunger and malnourishment in the face of government apathy.
3. It could alternatively break rank with the Supreme Court like it did in response to the verdict in the Shah Bano case and its recent attempt to undo the Privacy Judgment *viz-a-viz* private players.

The subsequent developments were heartwarming and then chilling.

A proactive Member of the Rajya Sabha, Tiruchi Siva from the DMK, introduced a Private Member's Bill to affect rights of trans-persons titled the Transgender Persons (Protection of Rights) Bill, 2014. While this Bill met with some mandates at NALSA, it fell short on a few and it went further on others. Curiously, the Bill sailed through the Rajya Sabha, a first in many decades for a

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Private Member's Bill. The deliberations on the Private Member's bill aside, the Rajya Sabha had spoken to further the NALSA mandate.

What followed has been a bitter experience of the trans community with our heteronormative society.

The current Ministry of Social Justice and Empowerment instead of facilitating the 2015 Bill, introduced a horrendous piece of prejudiced guile titled the Transgender Persons (Protection of Rights) Bill, 2016. The entire text was a litany of offences against trans-persons, be it in its definition of a trans-person as someone who was neither wholly female nor wholly male or a combination of female or male; or neither female nor male; to taking away self determination of gender and handing this to district committees consisting of social workers, doctors, psychiatrists etc with a quiet burial to reservations so necessary for inclusion and integration. The list of offences were endless.

After its introduction in the Lok Sabha, the 2016 Bill was referred to a Parliamentary Standing Committee. While the minutes of the deliberations of the Standing Committee are not at hand, what we have is the text of the Transgender Persons (Protection of Rights) Bill, 2018, a modified version of the appalling 2016 bill and the deliberations of the Lok Sabha which passed the Bill on 17th December, 2018. Our assessment of the developments between the proposition of the Ministry to the Bill passed by the Lok Sabha is clear. It reflects a failure to grapple with the law as it stands today, the will of the Rajya Sabha as expressed in Tiruchi Siva's Bill and an utter disregard for any attempt to know the celebration of the struggle for life and dignity encapsulated within each trans-person.

The 2018 Bill needs to be called out for what it is, an abrasive text of proposed codification that seeks to snuff the very celebration it claims to protect and further.

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The 2018 Bill, falls short of the law, as laid down by the Supreme Court on the prescriptions easily discernible at its directives, namely; (a) recognising third gender in the law (b) The principle of self determination (c) Status as OBCs and consequential reservation in education and employment (e) medical support (f) welfare schemes (g) awareness and (h) inclusion.

Specifically;

1. While the definition of trans-person has been improved upon, we don't see how the same will be allowed to fructify in light of the procedure mandated for a trans person to assert so.
2. On the issue of self determination of one's gender, the Bill falters on three counts: 1) while in its 2018 version it introduces a sketchy provision of right to self perceived gender identity the same is available only to those who are recognised as per the proposed Act; 2) Contrary to mandate of the Supreme Court, the Bill proposes validation of one's gender by a Screening Committee which underlines the medical model decried by the Supreme Court; and 3) It makes mandatory sex reassignment surgery for asserting one's gender as male or female, in spite of an express declaration by the Supreme Court that any insistence for SRS for declaring one's gender is immoral and illegal.
3. The Bill is dead silent on the prescription of Horizontal or Vertical reservations for trans-persons in educational institutions and public appointments.
4. While the Bill does a minimal degree of lip service in terms of medical care for trans-persons, our experience with the public health sector being underfunded and run to the ground, reinforces our concern that the lack of commensurate budgetary, monitoring and accountability provisions was a conscious dereliction.

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5. Similarly, the prescription on trans-children, family care or the lack thereof and the quick overreach for institutional rehabilitation with disregard for conditions of the existing institutions of rehabilitation, none by the way which exist today for trans-persons.
6. There are a slew of legislations including the The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, that provide for inclusion, discrimination and redress that provisions to address exclusion and discrimination could have been referred to. This was not a new territory for the drafters. Yet, what we have is patchy and faint hearted prescriptions lacking assurances in terms of resources, monitoring, accountability and recourse on exclusion and discrimination.
7. Similar is the case of not only the lack of resources, monitoring, accountability and recourse but also of the lack of participation of the trans-community in framing and effecting welfare schemes for their betterment.
8. That said, the proposed National Council is a cruel joke on the aspirations for an accountable and workable oversight body. 33 Members. The less said the better. The lack of provisions at the State and District level is a bitter lapse in the proposed codification.

The bitter reality that trans-persons and their communities have lived since NALSA is an abdication by a majority of the States and the Central Government in effecting the directions of the Supreme Court and it isn't like trans-persons haven't struggled for its implementation. In the face of this apathy we are alarmed when an innocuous sounding provision on offences and penalties casts a shadow on the seeking of alms that even the Supreme Court acknowledges a vast majority of members of the trans community have resorted to in the face of social ostracization. This, when there has been little in the last five years that Governments have undertaken to create livelihood options to enable trans-persons to walk away from the seeking of alms and there is nothing

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concrete in the proposed law; this provision just does not add up. How this will play out when communities start to question the violence by state and non state actors is on the wall.

With the enactment of this proposed legislation, in the face of a conflict between the prescription at the Judgement and the prescription at the legislation, the go-to will be the prescription in the legislation. This will hold until constitutional challenges are mounted and accepted. Which means that many a reason for cheer for trans-persons when the NALSA verdict was pronounced will be denied to them till such a constitutional challenge is successful.

The LGBTQI+ community would do well, to take a deep breath and consider whether the mandate of the Supreme Court in *Navtej Singh Johar* will be met with the same disregard on blatant display in the form and shape of the Transgender Persons (Protection of Rights) Bill, 2018.

We wonder what words our courts will be forced to pen, when and if this proposed legislation is enacted and consequently dragged to the constitutional courts. While discarding Section 377 of the IPC, Justice Indu Malhotra's words rang loud amidst cheer in the courtroom. History, she said, owed us an apology. This vulgar attempt of furthering heteronormativity in our present times, has no excuse and will be met with our tears, blood and sweat. But what will our present times owe us, more than an apology.

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