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большой брат под контролем?

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Европейской Конвенции

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КОНСТИТУЦИОНАЛИЗМ И СУДЕБНЫЙ КОНТРОЛЬ CONSTITUTIONALISM AND JUDICIAL REVIEW



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The Categorical Other: Going Beyond the Gender Binary in Law in India

Abstract

The paper looks into specific aspects of the 2014 decision of the Indian Supreme Court which introduced a new “third gender” category and analyses the decision in light of the diversity of the trans* people in the Indian sub-continent. It summarises the salient features of the decision, and then critiques it, and briefly looks into the aftermath of the decision.

Keywords: trans*, India, Hijra, constitutional rights, third gender, colonial laws.

Иная категория: преодоление гендерной бинарности в праве в Индии

Аннотация

Автор статьи рассматривает решение Верховного суда Индии, который в 2014 году установил категорию «третий пол», и анализирует это решение в контексте разнообразия проживающих на Индийском субконтиненте представителей социальных групп, которых можно отнести к категории трансгендера. В статье даётся общая характеристика решения, его критический анализ, а также рассматриваются его последствия.

Ключевые слова: трансгендер, Индия, хиджра, конституционные права, третий пол, колониальные законы.

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THE CATEGORICAL OTHER: GOING BEYOND THE GENDER BINARY IN LAW IN INDIA

Introduction

In this day and age of human rights, it may seem that there is recourse against violations of fundamental rights on the basis of perceived difference as well as actual difference. However, constitutionally entrenched rights and claims against the state are often hard for certain groups of people to access, where, despite the constitutional notion of equality, they remain socially unequal.

Sexual and gender minorities may be said to be such a bloc. While the LGBTQI movement has gained momentum across the world, the T (as in trans^{*1}) bloc is a minority within a minority – doubly marginalised, they have often been swept under the carpet in the larger rhetoric comprising of Lesbians and Gays. The perceived difference and the actual difference being stronger with the trans* people, they have been successfully “othered” and have often required to move ahead by themselves, while they are still grouped with sexual minorities.

When the British left the sub-continental area, in their wake they left two new nations and the beginnings of a third. India and Pakistan were born, and within a few decades, Bangladesh came about. However, while the nationhood initiated was new, the legal systems, which prevailed, were a mix of the old Mughal laws and what the colonial masters with their Victorian ideals had left behind. The colonial masters, with little understanding of the sub-continental values and cultures, had stepped out to “civilise” the natives in the 18th and 19th Century². In turn, they, inadvertently, criminalised a full section of society under the penal codes on the basis of their sexual behaviour as well as gender dysphoria. The British imposed the Criminal Tribes Act³, criminalising various bands of people including nomads and the transgender communities who identified themselves as *Hijras*. It was not till the late 20th Century that they were decriminalised in India – almost 40 years after the independence. However, decriminalising did not give them the

social recognition they required – of being identified equal citizens, but under a separated gender marker beyond their bodily gender. Thus they kept on living on the fringes of the social fabric. Social acceptance of a trans* person in India is still a distant reality.⁴

When the new Constitution of India was drawn up, great care was taken to incorporate what the Indian Constitution calls Fundamental Rights (civil and political rights) and Directive Principles of State Policy (used to empower economic, social and cultural rights). It was written in the wake of the Second World War, when the world was just about coming to terms with the concept of human rights.

The Constitution of India guarantees fundamental rights to all its citizens, irrespective of sex and gender. However, in practice, it has been something of a challenge to try and create a space where rights are not seen as privileges granted to a meagre few, but universal claims against the State. Unlike countries like South Africa and Brazil, both of which have very detailed rights entrenched within their Constitutions (which were written about forty years after the Indian Constitution), India did not make any specific space within the legal framework for sexual and gender minorities. However, as we shall read below, the Constitution has been interpreted to include rather than exclude.

It was not till the National AIDS Control Organisation⁵ took cognizance of the fact that HIV was a health hazard within the transgender community in India that people from the community achieved mainstream status – however, it was always under very specific circumstances – health issues, national conferences, and the spectre of HIV. The gaze was always that of difference, deviance and disease.

2009 was a landmark year in the field of LGBT activism in India. Many years of mainstream activism finally achieved the decriminalising of the LGBT community of India by the Delhi High Court⁶. This epoch-making decision angered many groups, es-

pecially the religious right wing. The case was taken on appeal to the Supreme Court of India by them, where, after many months of being in legal limbo, in 2013, the LGBT people were re-criminalised on the basis of their sexual behaviour. In other words, henceforth it was perfectly legal to be gay, but not to have gay sex.

However, in barely a few months from then the Supreme Court of India created a wave by granting trans* people the right to their own gender identification – male, female or other⁷. Thus, in a way, while the earlier decision takes away the right to sexual gratification in non-procreative manners, the latter decision gives transgender people autonomy over their bodies– to determine which side of the gender spectrum they fall on, or whether they are a separate category - a third gender⁸ – thus creating legal space for them to exist within the constitutional ambit. The decision, however, was received with misgivings within the trans* community itself with the way it has handled various definitions and exactly what it is supposed to be interpreted as.

This article engages with the decision handed down by the Supreme Court of India and analyses it. I shall go through the way the issue reached the Supreme Court's jurisdiction, from which I shall draw out the main features of the decision. Going from there, I shall analyse the decision in light of the previous decision on Section 377 of the Indian Penal Code, and point out its shortcomings and limitations in implementation, and the way forward.

1. Judicial Progress through the Courts of Law

When the case against Section 377 was initially filed, it was filed for the entire queer community but from the perspective of health issues, specifically HIV and how it affected the MSM, trans* and *Hijra* communities in India because of them being forced to carry on with their lives in a clandestine manner. In the mean time, in 2012, the instant case was filed to get trans* people the socio-legal space they have been denied for centuries as equal citizens and to ask for the recognition of the third gender category.

The National Legal Services Authority (henceforth referred to as NALSA) was set up as a statutory body⁹ to aid people who were incapable of hiring legal help for themselves. In this case, NALSA

brought a public interest litigation as the primary petitioner (more in line with the US Class Action Suits), representing the trans* people of India, especially the *Hijras*, asking the Court to give recognition to their plight, and their unengaged existence within the constitutional set-up of India. The other petitioners were Poojya Mata Nasib Kaur Ji Women Welfare Society and Laxmi Narayan Tripathi, more famously known as Laxmi, a *Hijra* activist.

The matter was filed directly at the Supreme Court of India¹⁰ in September, 2012, as a civil Writ Petition.¹¹ The judgement was passed in April, 2014. It was heard by a two-judge bench, the judges being K.S. Panicker Radhakrishnan and Arjan Kumar Sikri, JJ¹².

1.1. Salient features of the decision

The decision acknowledges the marginalisation of the transgender community in India, and considers the non-recognition of their gender identity as a constitutional violation of articles 14 and 21 which state:

“Article 14. Equality before law.

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

(...)

Article 21. Protection of life and personal liberty.

No person shall be deprived of his life or personal liberty except according to procedure established by law”.¹³

It took cognizance of the different experiences submitted before the court by transgender people of specific communities. The petitioner invoked Article 21 multiple times¹⁴ and the Court acknowledged that. It also read the Yogyakarta Principles¹⁵ alongside the decision.

Most importantly, for the first time, the Supreme Court of India gave the Indian Judiciary a working definition of transgender as an “umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. TG may also takes [*sic*] in persons who do not identify with their sex assigned at birth, which include *Hijras*/Eunuchs who, in this writ petition describe themselves as “third gender” and they do not identify as either male or female”¹⁶ while explaining further about the pre sexual reassignment

surgery and post sexual reassignment surgery gender identification and transsexuals¹⁷.

Thus, the Supreme Court of India gave the following directives pertaining not just to civil and political rights, but also socio-economic rights¹⁸:

1. The Central and State Governments are to grant legal recognition of gender identity as chosen by the individual, be it male, female or the Third Gender.

2. The Third gender category has been officially acknowledged and recognised as the Court understands the need of fundamental rights to be available to every citizen, and considers the non-recognition of the Third Gender in all civil and criminal statutes pertaining to marriage, divorce, adoption, etc. as discriminatory.

3. The Court gives the basis of the psyche of a person to determine the alternation between the gender binaries of male and female, and does not consider sexual reassignment surgery as a precondition for gender reassignment.

4. Measures need to be taken by the Central as well as State governments to mete out medical care to transgender people in the hospitals and also provide them with facilities specifically built for them. Within this scenario, it is also important that transgender people be given targeted and tailor-made measures regarding HIV interventions vis a vis cis gendered men and women.

5. Reservations are to be created in educational institutions and public appointments for transgender people as a socially and economically backward class, and other social welfare schemes are to be instituted.¹⁹

6. The community at large needs to be sensitised and made aware of transgender people and their need to regain their status and respect in society, and create a more inclusive environment, so that they may feel more at home with mainstream society and not live in exclusion on the fringes of humanity. Moreover, many psychological illnesses, which follow from social stigmatisation, the inability to deal with gender dysphoria and exclusion, need to be dealt with, such as self-stigmatisation, depression and suicidal tendencies.

2. Placing the decision in the socio-cultural and socio-legal context of India

2.1. Giving it a place in history

In order to base its decisions in the context of India, the Supreme Court looked into the historical background of the trans* people in India. It looked into religious texts, which speak of transgender people, such as the epics of *Ramayana* and *Mahabharata*²⁰, while also looking into the *Puranas*²¹.

The Supreme Court looked into the role of transgender people in more recent times, such as in the courts of the Ottomans and the Mughals, and then looked at the British Colonial Empire in the sub-continental region where the first criminalisation of transgender people started as a specific group. A statute was put into place - the Criminal Tribes Act, 1871 - which allowed arrest without warrant of any of the people listed in the Act. The Act was repealed in 1949, but at the time, there was no debate on the need to step out of the sexual binary in the newly formed Parliament of India, for they were still trying to put together the Constitution.

At the same time, the Supreme Court of India briefly looked into Section 377 of the Indian Penal Code of 1860, which has been the subject of much litigation in the recent past as it criminalises peno-non-vaginal sexual behaviour without any exception²². As the Supreme Court had recently given its judgment on the constitutionality of the section, and why it should be retained as a blanket ban, the current bench refused to opine on it.

2.2. Modern Human Rights and India in the Comparative Perspective

India became independent from British domination in 1947, when the world was just recovering from the aftermath of the Second World War. A new rhetoric in human rights was taking shape, and the foundations for several organisations were laid around the same time, starting with the United Nations. In order to secure its own place in the new world order, India spoke up at the United Nations against apartheid in South Africa as soon as it was given a seat²³. It also became a signatory to various international conventions and covenants in the following years.

The Supreme Court of India referred to multiple

international conventions²⁴ to which India is a signatory. It started with the Universal Declaration of Human Rights (hereinafter referred to as the UDHR), wherein India is a signatory since the very inception of the Declaration. It started with the very first article, which states “that all human beings are born free and equal in dignity and rights”. Article 3 of the Universal Declaration of Human Rights states “that everyone has a right to life, liberty and security of person”²⁵.

While it is considered to be *jus cogens* today, at the time of its promulgation, it was a just a declaration. However, many of its values were laid out later in the International Convention on Civil and Political Rights (hereinafter referred to as the ICCPR) in 1966, from which the Supreme Court gleaned through Article 6 “that every human-being has the inherent right to life, which right shall be protected by law and no one shall be arbitrarily deprived of his life”²⁶. It also read Article 5 of the UDHR with Article 7 of the ICCPR, from which it drew that “no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment”²⁷. Article 12 of the UDHR and Article 17 of the ICCPR were read together, which call for the State’s protection of a person from “arbitrary or unlawful interference with his privacy, family, home or correspondence”. Article 16 of the ICCPR was given specific importance, wherein “[e]veryone shall have the right to recognition everywhere as a person before the law”, an issue which has assailed trans* people across the globe, and not just in India.

The Supreme Court also referred to the United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment of 2008 that aims at the protection of persons or peoples marginalised or discriminated against. Specifically, it looked at paragraph 21 of the Convention, which requires ratifying States to prevent torture of and protect all people from ill treatment, irrespective of sexual orientation and gender identity, especially in contexts of people being in the custody of the State. It went further to look into the General Comment No. 20 of the UN Committee on Economic, Social and Cultural Rights on the issue of non-discrimination that also mentions sexual orientation and gender identity: “‘Other status’ as recognized in article 2, paragraph 2, includes sex-

ual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace.”²⁸

While looking at documents such as the UDHR and the ICCPR, the Court also referred to the Yogyakarta Principles on the application of International Human Rights law in relation to sexual orientation and gender identity and acknowledged the validity of the Principles, citing various UN bodies who have also acknowledged the Principles. The main aspects referred to by them are as follows²⁹:

“Principle 1. The Right to the Universal Enjoyment of Human Rights

All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

States shall:

a) Embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;

b) Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;

c) Undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;

d) Integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

Principle 2. The Rights to Equality and Non-discrimination

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of

the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

States shall:

a) Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;

b) Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

c) Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

d) Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;

e) In all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;

f) Take all appropriate action, including programmes of education and training, with a view to

achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

Principle 3. The Right to recognition before the law

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

a) Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;

b) Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;

c) Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity;

d) Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

e) Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;

f) Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

Principle 4. The Right to Life

Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

States shall:

a) Repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them; (...)

c) Cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

Principle 9. The Right to Treatment with Humanity while in Detention

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall:

a) Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse; (...)

d) Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population; (...)

f) Provide for the independent monitoring of detention facilities by the State as well as by non-gov-

ernmental organisations including organisations working in the spheres of sexual orientation and gender identity;

g) Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

Principle 18. Protection from Medical Abuses

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

States shall:

a) Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;

b) Take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration; (...)

e) Review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;

f) Ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

Principle 19. The Right to Freedom of Opinion and Expression

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart informational and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

States shall:

a) Take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;

b) Ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;

c) Take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;

d) Ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;

e) Ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;

f) Ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation

in public debate.”

Apart from looking into the above-mentioned principles, the Court considered persuasive jurisprudence from around the world on sexual reassignment surgery, starting with the United Kingdom. *Corbett v. Corbett*³⁰ was a decision narrowly tailoring gender requirements as fixed at birth, despite any sexual reassignment surgery. The same decision was followed in *R. v. Tan*.³¹ Other countries in the Commonwealth such as Australia and New Zealand have not upheld the decision of Corbett, and have actually criticised it for being a poor decision. The Court positively acknowledged the New Zealand case of *Attorney General v. Otahuhu Family Court*³² and decided that once a Transsexual is operated on, the person cannot “operate in his or her original sex”³³ thus making it imperative for the post-operative scenario to be suited for the person to embrace his or her new gender. Australia went a step further in a case regarding the validity of a marriage, in *Re Kevin*³⁴ by saying that the relevant statute defining marriage should be allowed to mean “man” and “woman” in a marriage in a contemporary capacity – thus it should include people in their post-operative capacities.

Another case from New Zealand, *Secretary, Department of Social Security v. “SRA”*³⁵ specifically pointed out that *Corbett* and *Tan* should not be followed as the decisions were based on biological determinism and did not take other aspects into consideration.

In *Bellinger v. Bellinger*³⁶, the House of Lords, once again, went ahead on the same path as Corbett and did not give any importance to the psychological factor in the case of trans* people.

Malaysia, however, took *Corbett’s* principle of biological determinism in *Re J G*³⁷, but backed it up by medical counsel and affirmed the gender reassignment of a woman post- surgery while including the psychological aspect of the person.

The Supreme Court of India looked into the European Court of Human Rights’ judgment in *Christine Goodwin v. United Kingdom*³⁸ which stated that the UK not following up a sexual reassignment surgery by a gender change on paper is bad in law as it infringes upon human dignity and freedom. After this decision, the UK passed the General Recommendation Act, 2004, wherein even without sexual

reassignment surgery, gender reassignment may be carried out on the basis of a person's psyche.

Australia, while it had the Sex Discrimination Act, 1984, in place to prevent discrimination on the basis of gender, amended it in 2013 to redefine gender identity to go beyond biological and medical determining factors, and considers a person to be aggrieved if discriminated against on the basis of sexual orientation or on the basis of gender identity.

The United States of America is considered to be inconsistent due to its highly federalist nature. State Laws differ from each other, but nevertheless the Center has passed the The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 2009, which increases the extent of Federal Hate-crime Law by expanding it to offences incited by actual or perceived gender identity.

South African laws provide for the change of gender status post-operation under the Alteration of Sex Description and Sex Status Act, 2003. However, South Africa does not give a very inclusive definition of transgender, and excludes any person who does not undergo sexual reassignment surgery.

At the same time, Argentina has shown greater inclusiveness³⁹ than South Africa, where gender reassignment is not dependent on sexual reassignment surgeries⁴⁰ (akin to the General Recommendation Act of the UK).

Germany has promulgated law allowing non-cis gendered children to be named without sexual categorisation, as well as allowed "X" as a category for passport gender identification along with "M" and "F" for those trans* people who do not identify with either male or female⁴¹.

Thus, the Indian Supreme Court, while being very careful to point out that they wouldn't consider any international law repugnant to the Indian Constitution and laws, it very firmly planted the decision in the lap of an intersection of international covenants to which India is party to, persuasive international jurisprudence to the fundamental rights guaranteed to each and every citizen within the Indian Constitution, as is described below.

3. The Indian Take on Transgender people

Importantly, the Supreme Court of India gives descriptions of the indigenous transgender com-

munities in India, who have existed throughout the history of the sub-continent, and have parallel communities in Pakistan, Nepal and Bangladesh. It examines the report of United Nation's Development Programme, "*Hijras/Transgender Women in India: HIV Human Rights and Social Exclusion*", published in December 2010, which looks at the specific populations of sexual and gender minorities as well as statistical details of HIV prevalence.

In this context it outlined various recommendations for lowering HIV prevalence rates, which the Supreme Court of India looked into, while at the same time acknowledging that there are community-specific issues faced by gender non-conforming people:

" 1. Address the gape [*sic*] in NACP-III: establish HIV sentinel serosurveillance sites for *Hijras/TG* at strategic locations; conduct operations research to design and fine-tune culturally-relevant package of HIV prevention and care interventions for *Hijras/TG*; provide financial support for the formation of CBOs run by *Hijras/TG*; and build the capacity of CBOs to implement effective programmes.

2. Move beyond focusing on individual-level HIV prevention activities to address the structural determinants of risks and mitigate the impact of risks. For example, mental health counseling, crisis intervention (crisis in relation to suicidal tendencies, police harassment and arrests, support following sexual and physical violence), addressing alcohol and drug abuse, and connecting to livelihood programs all need to be part of the HIV interventions.

3. Train health care providers to be competent and sensitive in providing health care services (including STI and HIV-related services) to *Hijras/TG* as well as develop and monitor implementation of guidelines related to gender transition and sex reassignment surgery (SRS).

4. Clarify the ambiguous legal status of sex reassignment surgery and provide gender transition and SRS services (with proper pre-and post-operation/transition counseling) for free in public hospitals in various parts in India.

5. Implement stigma and discrimination reduction measures at various settings through a variety of ways: mass media awareness for the general public to focused training and sensitization for police and health care providers.

6. Develop action steps toward taking a position on legal recognition of gender identity of *Hijras/TG* need to be taken in consultation with *Hijras/TG* and other key stakeholders. Getting legal recognition and avoiding ambiguities in the current procedures that issue identity documents to *Hijras/TGs* are required as they are connected to basic civil rights such as access to health and public services, right to vote, right to contest elections, right to education, inheritance rights, and marriage and child adoption.

7. Open up the existing Social Welfare Schemes for needy *Hijras/TG* and create specific welfare schemes to address the basic needs of *Hijras/TG* including housing and employment needs.

8. Ensure greater involvement of vulnerable communities including *Hijras/TG* women in policy formulation and program development."⁴²

The Supreme Court also acknowledged the fact that gender non-conformists face social exclusion and discrimination, and while there may be a growing space for different gender narratives when it comes to male-to-female trans people in India (including *Hijras*), female-to-male trans people lack visibility. However, the fact that their visibility is low does not mean that they have a lesser violence, social exclusion or discrimination to deal with. They also acknowledged that the Constitution of India does not use the gender binary when it refers to individuals, but to "persons, thus giving them the scope to expand and elucidate the inclusiveness of the Constitution.

Among the Fundamental Rights in the Constitution of India⁴³, the Supreme Court based its decisions on the following articles:

- The right to equality⁴⁴, comprising of equality and equal protection before the law, non-discrimination on any grounds, including caste⁴⁵ and sex. This constitutional provision also gives the parliament the authority and power to provide affirmative action where required.

The Constitution of India often uses the word "person" as opposed to the gender binary, which gave the Supreme Court the scope to expand on the inclusiveness of the Constitution. In order to mitigate the extreme discrimination faced by the non-recognition of trans* people in India, the Supreme Court read them with the Directive Princi-

ples of State Policy asking for social equality⁴⁶.

The Supreme Court also looked into Articles 19 (1) and 21⁴⁷, which guarantee the right of freedom and the right to life and liberty to all citizens. The right to freedom includes speech and expression, assembly and unionization and the right to practice any line of work as long as it is lawful – something which is particularly pertinent for trans* people, given that they are socially shunned, thus making it difficult for them to attain mainstream employment.

Thus, after acknowledging the fact that Pakistan and Nepal have already upheld the recognition of local trans* people in their own chosen identity, and that various states within India have taken measures to alleviate the plight of trans* people already, the Supreme Court of India gave legal recognition to the need for a "third gender" and directed the government to make necessary changes across all laws so as to not infringe on any right, especially to equality, privacy and family⁴⁸ and spoke of gender identity as one of the most fundamental aspects of life and defines it in detail –

"Gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons may born with bodies which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender at birth is found to be at variance with the assumed gender identity. Gender identity

refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category."⁴⁹

For the first time in the judicial history of independent India, the Supreme Court of India gave a highly comprehensive non-legalistic definition of gender, which may open up the gateways for more rights' litigation in the future, and is being viewed most optimistically by lawyers and activists alike.

4. Not All is Rosy: The Problematics of the Judgment

4.1. Of Bemusements and Confusions

At the outset, the judgment seems to be a paean on self-determination and the right to bodily autonomy. However, while going through it, one cannot help but feel that it is more about putting the trans*/*Hijra* populations of India into a manageable category. For instance, on page 102 of the judgment, the Court says the following:

"In order to translate the aforesaid rights of TGs into reality, it becomes imperative to first assign them their proper 'sex'. As TGs in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of these constitutional rights."

Paragraph 34 of the judgment goes to the extent of stating that, in order to determine transgenderism/transsexuality, among trans* people who have undergone sexual reassignment surgery, a Psychological test ought to be used, as the person's thought process would receive primacy "because psychological factor and thinking of transsexual has to be given primacy than binary notion of gender of that person. Seldom people realize the discomfort, distress and psychological trauma, they undergo and many of them undergo "Gender Dysphoria' which may lead to mental disorder." This language, at best, is ambiguous and confusing.

In paragraph 106, the confusion goes unchecked, when the Court goes to the extent of stating that "a person has a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but has become his/her physical form as well." This suggests that those who identify themselves as the third gender are not required to undergo any gender alignment surgery, but those who want to be identified on either side of the gender binary – as either male or female – cannot do so merely on the basis of a psychological evaluation⁵⁰. Fortunately, the final judgment in paragraph 129, sub-paragraph 5, in contradiction to whatever has been previously stated, says "any insistence for SRS for declaring one's gender is immoral and illegal."

When reading the judgment, the conflation of terms and the ambiguous nature of various parts of the decision is highly pronounced, not to mention the glaring mistakes it makes in getting to where it did. For instance, page 93 of the judgment states:

"107. At the outset, it may be clarified that the term 'transgender' is used in a wider sense, in the present age. Even Gay, Lesbian, bisexual are included by the descriptor 'transgender'."

It continues on a similar note, and specifically mentions that Hijras are incapable of being parents in their biological capacity and that all of them refer to themselves under the umbrella of the third gender⁵¹. This is problematic on a variety of levels as not all *Hijras* undergo castration, emasculation or sexual reassignment surgery. Also, many of them may refer to themselves as cis-gendered men or women.

4.2. The Problem of Reservations under the OBC Categorization

From the very outset of the Indian Constitution, room had been made for affirmative action in order to make marginalized groups and minorities enjoy equal rights enshrined in the Constitution. Scheduled Castes and Scheduled Tribes are affirmative action categories, which are given a high degree of reservations in seats across governmental institutions. Another category is the "Other Backward Castes" or OBC category, under which people are given reservations as well, over and above Scheduled Castes and Tribes.

However, in a place like India, there is no blanket identity solution for all. Every region has its own set of social rules and regulations, dominant religions and so on. The intersection of caste with the *Hijra* population in India is as intricate as caste interactions with every other Hindu citizen. Within the *Hijra* population, there are people who identify themselves as upper caste, as Dalits⁵² (some of whom are categorized under Scheduled Caste) and some identify as Muslim or Christian (both minority religions in India, and which are part of affirmative action programmes) as well. Thus, the Supreme Court's decision to categorise all *Hijras* as OBC has brought about a dilemma⁵³ – what happens to those who identify as upper caste? What happens to those who are already under the Scheduled Caste?

5. Who is trans* enough?

5.1. Subjecting all Indian Trans* People to a Similar Classification

India was formed as a unionisation of several princely states that (for the most part), in 1947, acceded to the Indian constitution in favour of a constitutional democracy. This brought together different ethnicities, different religions, different languages and ideas of internal self-determination which are practiced till today, with larger states breaking up to form smaller states along ethnic lines and language lines⁵⁴. With all these regional differences, even trans* people are regarded differently in different states, and by the time the Supreme Court decision came out, some states had already taken several steps to make local trans* people feel more included and protected.

Indian trans* people do not all identify within the ethnic indigenous markers of *Hijra* and other regional group names. Many of them feel uncomfortable about identifying themselves with the indigenous trans* groups because of the social stigma attached to them.

Thus, with a decision which talks mostly about granting a “third gender” status for all trans* people in India, those who are not a part of the majority rhetoric can fall through the sieve of the identity markers being decided by the court of law.

5.2. The Aftermath of the Decision

After the Supreme Court handed down the decision, the celebrations were marred by discontent from some activists for whom the decision was felt to be half-hearted⁵⁵. Also, the issues of quota and affirmative action politics have come to the surface as well. With new trans* welfare boards being set up in different states which do not yet have an established rule book on who is trans* enough to qualify for the special benefits⁵⁶, different politics are playing in regional politics. Those trans* people who do not identify with indigenous trans* markers may not get the recognition they deserve.

Several higher education institutions took on the initiative of including quotas for trans* people in their admission rules⁵⁷. However, several children who start identifying as trans* in their adolescent years often drop out of school due to the fear of being bullied or being misunderstood, thus making it impossible for them to reach higher education. As pointed out by the transgender activist Simran Shaikh, “a more holistic approach within the education system would definitely encourage more trans* children to finish schooling and pursue higher education”.⁵⁸

In 2015, a new bill on transgender issues was passed in Rajya Sabha, the Upper House of the Indian Parliament. This bill was brought in by a political leader, Mr. Tiruchi Siva, and encompassed several issues including “social inclusion, rights and entitlements, financial and legal aid, education, skill development to prevention of abuse, violence and exploitation”⁵⁹. However, this bill would require more working on, and can

With all this has come the need voiced by several people of having a National Commission to bring about a parity in the functioning of the various state level boards which are being formed.

Conclusion: A Pessimistic Take on an Optimistic Decision

The queer rights movement has suffered a definite setback because of Section 377 being kept intact in the *Naz* case, despite ample pressure from non-governmental bodies, people's movements and the primary stakeholders speaking out, along with support offered by some sections of the Indian government.

When embarking on deciding on the NALSA case, the Supreme Court mentioned that they would not go into the previous decision of the Court on Section 377, which had been decided by a different bench.⁶⁰

However, just the way the *Naz* case had depended on the HIV gaze, so did this decision - with health needs being cited as the mainstay of the decision, from which, of course, the Supreme Court went further, iterating the long suppressed rights of the trans* population of India.

In the NALSA decision, the Supreme Court has definitely given hope by empowering one aspect of the sexual and gender minorities, wherein it has accepted and acknowledged that “gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual recognition as ‘third gender’ would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver’s license, the right to education, employment, health so on”⁶¹ but has given out a decision which seems to be conflicting with its previous decision on Section 377. When the Court has decided that the right to marry and have a family life is to be enforced for trans* people, it overlooks the situation wherein non-procreative sexual acts have been re-criminalised but they are the primary sexual behaviour of the gender minority in question. Does the Supreme Court, thus, mean that a trans* person has the right to marry, but cannot have sexual intercourse with his/her/zher partner?

The Supreme Court of India has indicated that the Constitution grants equal rights to all humans, and that it is time for “social justice”⁶² to be done for the trans* population. However, the social reality of trans* people in India is such that mere legal changes will not be enough - there are several hundred *Hijras* out there who still lack basic amenities to survive on, have to beg for a living and often are ignorant of their HIV status. Empowered trans* people who have access to medical facilities, courts of law and other things which cis-gendered men and women take for granted are few and far between.

Deciding on a matter of constitutional importance, the Supreme Court of India has openly discussed legal theorists in its judgment and taken the idea of Rule of Law and advanced it beyond the definition and made it expansive. This also allows for future endeavours in making social justice claims on the basis of legal theories both old and new coupled with lived experiences.

This paper has endeavoured to shed light on certain aspects of the decision, as given its magnitude, it is not possible to look into every minute aspect of it in one article. While holding the beacon of great expectations for the decision, the paper has tried to critique the ambiguities that have come to light within the judgment itself.

In light of the decision, we can hope that it is not going to be a matter of tokenism, and that economic and political justice will actually be done for a much-maligned segment of the population.

Notes

- ¹ For the sake of this paper, Trans* (and trans*) shall be used to include all groups of transgender, transsexual and transvestite people in India, as well as *Hijras*. *Hijras* are defined as a cultural group found mainly on the sub-continental area of India, Pakistan and Bangladesh, of mostly male-to-female cross dressers who may identify themselves as transgender, but have more often referred to themselves as a “third gender”.
- ² While the sub-continental region was colonized not just by the British, but also by the Portuguese and the French, it was the British domination which left a far more lasting mark on the peoples of this area, including the law.
- ³ Promulgated originally in 1871, covering many tribes of people, including traveling salesmen, gypsies and the indigenous trans* tribes referred to as the *Hijras* (who were identified as eunuchs). This Act went into great details about what made these tribes dangerous and criminal in nature – either through “inborn” criminal tendencies or nurturing. In 1952, after the independence of India, this Act was replaced with the Habitual Offenders’ Act, and many tribes were de-notified (de-criminalised), including the *Hijras*. This would probably be the best example of the imperial need to regulate and classify everyone and everything seen as the colonized.
- ⁴ A report by the United Nations’ Development Programme states that “[a] primary reason (and conse-

- quence) of the exclusion is the lack of (or ambiguity in) legal recognition of the gender status of *Hijras* and other transgender people” in Chakrapani, Venkatesan and Narrain, Arvind, *Legal Recognition of Gender Identity of Transgender People in India: Current Situation and Potential Options*, in UNDP Policy Brief, 2012, India. However, while the legal reality may have changed, social realities are often hard to evolve.
- ⁵ The National AIDS Control Organisation, often referred to as NACO, was formed in 1992 in India, in order to implement the National AIDS Control Programme which was brought about a few years after the first case of HIV was detected in India. In order to find out more about their programmes and areas of implementation, please refer to <http://www.naco.gov.in/>.
- ⁶ *Naz Foundation v. Government of NCT and Delhi* (2009), 160 Delhi Law Times 277, overturned by the Supreme Court of India in *Suresh Kumar Kaushal and Anr. v. Naz Foundation and ors.*, Civil Appeal No. 10972 of 2013 (referred to as *Kaushal v. Naz* hereinafter). The law in question is Section 377 of the Indian Penal Code, 1860, which, by itself does not outlaw non-normative sexuality, but non-normative, non-procreative sexual behavior.
- ⁷ *National Legal Services Authority v. Union of India*, WP (Civil) No 604 of 2013, decided on April 15, 2014, henceforth referred to as the Judgment, available online at <http://supremecourtindia.nic.in/outtoday/wc40012.pdf> (last accessed 09-09-2014).
- ⁸ This, by itself, is problematic as it does not take into account various aspects of gender fluidity which is a highly debated topic by itself. The decision catered in many ways to the *Hijras* of India, more than the trans* population, but does expand its scope. The negative aspects have been discussed later in the paper.
- ⁹ The National Legal Services Authority Act, 1994. For the full text of the Act, please go to <http://nalsa.gov.in/actrules.html> (last accessed on 09-09-2014).
- ¹⁰ The Supreme Court of India is the highest Court of the land, and a court of original jurisdiction if any person wants to raise an issue of constitutional importance. Otherwise it acts as an appellate court for all the High Courts of the various states, who also have a limited original jurisdiction, and act as an appellate jurisdiction for all lower district-level Courts. The decision of the Supreme Court of India is binding across the country, and the Legislature is expected to follow it up with legislations to help strengthen it.
- ¹¹ The Indian Judiciary has been very proactive in initiating public interest litigation, especially under the aegis of the former Justice P N Bhagwati. This was a way for the judiciary to react against the high-handedness of the Prime Minister, Indira Gandhi, and her actions during the period of “emergency” she had declared in India between 1975-77. This period saw the absolute derogation of fundamental rights (aka human rights). For more information on the emergency, and its aftermath, refer to Kuldip Nayar, *The Judgement: Inside Story of the Emergency in India* (1977-Vikas Publishing House).
- ¹² The main body of the decision was drafted by Radhakrishnan J., with Sikri J. agreeing with every aspect of it, adding to the critique of the historical discrimination faced by Trans* people in India. Instead of taking the name of the justices individually, for the sake of brevity, I have referred to the judgment as that of the Supreme Court of India.
- ¹³ The full text of the Constitution of India is accessible online on <http://www.constitution.org/cons/india/const.html>.
- ¹⁴ P. 5, Judgment.
- ¹⁵ “In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright.” – taken from <http://www.yogyakartaprinciples.org/> (last accessed 09-09-14). These principles are considered to be the first of its kind wherein sexual and gender minorities are expressly spoken about in a highly inclusive manner, and specific issues faced by them due to non-recognition, mis-recognition by multiple countries are outlined and the need to prevent atrocities arising out of them is also given out.
- ¹⁶ P. 9, Judgment.
- ¹⁷ The Supreme Court of India hastens to state that it is deciding only on the matters of the Indian transgendered people, notably the *Hijras*, and not the umbrella term of transgender as generally understood globally. I have delved into this later on in the paper.
- ¹⁸ Distilled from the judgment. The Court gave these directives in light of the Ministry of Social Justice and Empowerment Expert Committee Report on Issues Relating to Transgenders, available online at <http://socialjustice.nic.in/transgenderpersons.php>.

- ¹⁹ The state of Tamil Nadu instituted a pension programme for transgender people, which was announced in September 2012, and has been launched since. For the press release, please go to http://www.tn.gov.in/advanced_search/pension?page=12&set=1.
- ²⁰ The *Ramayana* and the *Mahabharata* are two epics of the subcontinent in which the heroes are supposed to be incarnations of the Hindu God Vishnu, and characters (also often tied to various Hindu Gods) in the epics are seen to change their gender as well as act as transvestites. These epics are considered to be not just of mythological significance, but also of religious significance, given that they are tied to the Hindu pantheon. For more information through a non-religious ontological account on the Hindus, please read Doninger, Wendy, *The Hindus: An Alternative History* (New York: Penguin, 2009).
- ²¹ The *Puranas* are ancient Indian texts eulogising various divinities of the Hindu Pantheon, and often refer to various Gods and Demi-Gods taking of the form of the opposite gender as characters in stories.
- ²² *Kaushal v. Naz*.
- ²³ The United Nations General Assembly of 1946, where India was given a seat even before gaining independence. For a detailed analysis of India's position in the UN General Assembly, please refer to Lloyd, Lorna, 'A Most Auspicious Beginning': The 1946 United Nations General Assembly and the Question of the Treatment of Indians in South Africa, *Review of International Studies*, Vol. 16, No. 2 (Apr., 1990), pp. 131-153, Cambridge University Press, available online at <http://www.jstor.org/stable/20097216>.
- ²⁴ Judgment, pp. 53-54, para. 47.
- ²⁵ *Ibid.*
- ²⁶ *Ibid.*
- ²⁷ *Ibid.*
- ²⁸ See Judgment, para. 23, p. 28.
- ²⁹ For the sake of brevity, I have omitted certain parts of the principles.
- ³⁰ (1970) 2 AER 33 at 48 f/g.
- ³¹ (1983) Q.B. 1053, a case of a transgender woman being sentenced for prostitution, which brought up the issue of whether she was to be tried as a man or a woman, the effect being harsher penalties for males.
- ³² (1994) 12 FRNZ 643.
- ³³ Judgment, p. 30.
- ³⁴ (2001) Fam CA 1074.
- ³⁵ (1993) 43 FCR 299.
- ³⁶ (2003) 2 All ER 593.
- ³⁷ *JG v. Pengarah Jabatan Pendaftaran Negara* (2006) 1 MLJ 90.
- ³⁸ Application No.28957/95, Judgment of 11 July 2002.
- ³⁹ Argentina Gender Identity Law (2012) – the English translation is available online at <http://tgeu.org/argentina-gender-identity-law/>.
- ⁴⁰ *Ibid.*, Article 3.
- ⁴¹ An article on it in The Guardian described the situation succinctly, as well as what the reactions were from all parts of society:, Nandi, Jacinta, "Germany got it right by offering a third gender option on birth certificates", *The Guardian*, November 10, 2013, available online at <http://www.theguardian.com/commentisfree/2013/nov/10/germany-third-gender-birth-certificate>.
- ⁴² Page 12, "Hijras/Transgender women in India: HIV, Human Rights and Social Exclusion" *United Nations Development Programme Issue Brief*, December 2010, available online at http://www.undp.org/content/dam/india/docs/Hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf.
- ⁴³ Part III, Constitution of India.
- ⁴⁴ Articles 14,15 and 16 viz.:
14. Equality before law.
- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
- (a) access to shops, public restaurants, hotels and places of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
- (3) Nothing in this article shall prevent the State from making any special provision for women and children.
- (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]
16. Equality of opportunity in matters of public employment.
- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appoint-

ment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office ¹¹[under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment. (4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.]

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.]

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

⁴⁵ Caste is a unique feature of the social scenario in India and Nepal, which is followed by the Hindus. What was essentially a relatively fluid system of social demarcations became rigid over the warping of the system over many millennia and has often been abused by the upper castes. This plays a dual role in the context of trans* people, especially *Hijras*, as caste issues often engage with gender issues, and dual discrimination can play a vital role in marginalization. While caste was constitutionally abolished, the Constitution guarantees special treatment as affirmative action to specific castes who have historically faced marginalization, thus creating a justification for upper castes to keep on propagating it socially.

⁴⁶ Article 38, Part IV, Constitution of India.

⁴⁷ Right to Freedom

19. Protection of certain rights regarding freedom of speech, etc.-

(1) All citizens shall have the right-

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) (removed by amendment)

(g) to practise any profession, or to carry on any occupation, trade or business.

21. Protection of life and personal liberty.

No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁴⁸ Judgment, para. 70, p. 70.

⁴⁹ Judgment, para. 1c9, pp.14-16.

⁵⁰ This view is my opinion on the matter, but is also shared by Aniruddha Dutta, mentioned in Dutta, Aniruddha, "Thoughts on the Supreme Court Judgment on Transgender Recognition and Rights", *The Hindu*, May 20, 2014, available online at <http://www.thehindu.com/todays-paper/tp-features/tp-sunday-magazine/equal-in-every-way/article5973899.ece>.

⁵¹ Judgment, para. 11, pp. 9-10.

⁵² Formerly referred to as "untouchables", they took on the term "Dalit", which means "trampled" in order to bring out the oppression faced by them from upper castes. For more on the Indian caste system, please refer to Dirks, Nicholas B., "Castes of Mind". *Representations*, no. 37 (1992), pp. 56-78, University of California Press.

⁵³ On January 18, 2016, The Telangana Intersex and Transgender Samiti responded to the judgment and the bill which was passed in the Upper House of the Parliament in an open letter on <http://orinam.net/telangana-samiti-response-msje-trans-rights-bill/>, and brought out the issue of the overlapping caste situations in Indian trans* people.

⁵⁴ This has been explained in a comparative study between Europe and India in Doornbos, Martin and Kaviraj, Sudipta (eds.) *Dynamics of state formation : India and Europe compared*, New Delhi: Sage

⁵⁵ The discontent has been primarily because of the paradox around Section 377 that has been highlighted throughout the judgment. Some queer rights activists voiced their concern in Johari, Areefa, "How the Supreme Court's Transgender judgment contradicts its own stance on gay sex", *Scroll.in*, April 16, 2014, available online at <http://scroll.in/article/661903/>

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- ⁵⁶ Gandhi, Jatin, "Bill promises welfare board, job quotas for transgenders", *The Hindu*, April 25, 2015, available online at <http://www.thehindu.com/todays-paper/tp-national/bill-promises-welfare-board-job-quotas-for-transgenders/article7139547.ece>.
- ⁵⁷ There are several press articles online which talk about various universities in India reacting to the Supreme Court's decision and included a third gender category in their admission forms and quotas, even before the Government put down any guidelines. One such article talks about one of the top business schools in India, the Indian Institute of Management, Ahmedabad, and its inclusive policies, by Rana, Niyati, "IIMs rise above sexual bias, open doors to third gender", *Daily News Analysis*, May 9, 2014, available online at <http://www.dnaindia.com/ahmedabad/report-iims-rise-above-sexual-bias-open-doors-to-third-gender-1986697>.
- ⁵⁸ Interview with Simran Shaikh, on August 17, 2015.
- ⁵⁹ Gandhi, Jatin and Ramachandra, Smriti K., "Rajya Sabha passes Bill on transgender rights", *The Hindu*, April 24, 2015, available online at <http://www.thehindu.com/news/national/rajya-sabha-passes-private-bill-on-transgenders/article7138056.ece>.
- ⁶⁰ At the time of this article, several curative petitions on Section 377 had just been filed at the Indian Supreme Court, and had been referred to a constitutional bench, as the matter was considered to be of constitutional importance.
- ⁶¹ Judgment, para. 113, pp. 99-100.
- ⁶² Judgment, para. 119, p. 102.

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