

# CONTRADICTIONARY TENDENCIES: THE SUPREME COURT'S NALSA JUDGMENT ON TRANSGENDER RECOGNITION AND RIGHTS

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*The article analyzes the 2014 Supreme Court judgment (National Legal Services Authority v. Union of India<sup>1</sup>) that affirms the constitutional rights of transgender persons and promises legal identity recognition and reservations for transgender people and communities. The article argues that the judgment oscillates between broad and narrow interpretations of the 'transgender' category, and between gender self-determination (understanding gender identity as determined by oneself) and biological essentialism (seeing 'biological' or physical characteristics as the basis for gender identification). Such contrary tendencies suggests that the actual interpretations and implementation of the judgment will be uneven and varied, potentially excluding diverse gender variant people and restricting its promised gains such as legal identity recognition and affirmative action.*

The year 2014 has been significant in terms of the legal recognition of transgender persons as subjects of citizenship and rights. First, in January, the Ministry of Social Justice and Empowerment (MSJE) brought out a report on 'issues relating to transgender persons' drafted by an 'expert committee' that it had constituted after consultations with representatives from the transgender community in 2013.<sup>2</sup> Second, in April, the Supreme Court delivered a judgment following a writ petition filed by NALSA (the National Legal Services Authority) and supported by prominent transgender activists like Lakshmi Narayan Tripathi. The NALSA judgment, which gained rapid media coverage and activist attention, included directives for the legal recognition of

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<sup>1</sup> (2014) 5 SCC 438.

<sup>2</sup> Ministry of Social Justice and Empowerment, *Report of the Expert Committee on the Issues relating to Transgender Persons*, 27-1-2014, <<http://socialjustice.nic.in/transgenderpersons.php>> (hereinafter MSJE).

transgender persons' identities and the provision of reservations in jobs and education.<sup>3</sup> Then, in September 2014, MSJE followed up with an "Application of clarification/modification" to the Supreme Court, which sought to clarify the implications of the judgment vis-à-vis the recommendations of the aforementioned expert committee report.<sup>4</sup>

These developments mark the increasing visibility and influence of transgender activism in India, particularly the prominent role of *hijra* and other trans feminine communities in LGBT and HIV-AIDS related activism over the last decade or so. From the late 2000s onward, influential national and transnational bodies like the National AIDS Control Organization (NACO) and the United Nations Development Programme (UNDP) have responded to demands from transgender-identified and *hijra* activists by organizing meetings and formulating policies on transgender issues.<sup>5</sup> In many ways, the latest set of interventions from the MSJE and the Supreme Court follow from these initiatives. This essay proceeds on the assumption that the Supreme Court judgment has to be understood in this wider intertextual context, i.e. with reference to other related texts, particularly the MSJE report that immediately preceded the judgment and the subsequent MSJE application for clarifications to the NALSA judgment. Indeed, there are a few significant common threads running through these documents. Like previous policy documents on transgender issues brought out by UNDP or NACO, these documents attempt to delineate the contours of the term 'transgender', and to clarify who is (or is not) transgender. In addition, they also deal with the legal identity of transgender persons and how to implement the recognition of such a legal identity. These questions are fundamental to their vision of how empowerment of transgender persons must take place.

As I will argue later in this essay, the NALSA judgment, like several preceding policy documents, oscillates between a broad definition of 'transgender' as an 'umbrella term' for a variety of gender non-conforming identities and practices, and a more restricted definition based largely on *hijra* and trans women identities.<sup>6</sup> As activists and community members from trans masculine communities have argued, trans men and trans masculine identities have been

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<sup>3</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

<sup>4</sup> MSJE, *supra* note 2, Application of Clarification/Modification of Judgment.

<sup>5</sup> For example, see United Nations Development Programme, *Missing pieces: HIV related needs of sexual minorities in India*, (24-10-2008), <[http://www.undp.org.in/reports\\_publications](http://www.undp.org.in/reports_publications)> (hereinafter UNDP); Solidarity and Action Against the HIV Infection in India, *Report of the regional TG/Hijra consultation in eastern India*, (2009), <[http://www.saathii.org/orissapages/tg\\_hijra\\_issues\\_consultation%20.html](http://www.saathii.org/orissapages/tg_hijra_issues_consultation%20.html)> (hereinafter SAATHII).

<sup>6</sup> This argument draws from a previous analysis of discourses on transgender identities in India by transgender activist Raina Roy and the present author [Aniruddha Dutta & Raina Roy, *Decolonizing Transgender in India: Some Reflections*, 1(3) TRANSGENDER STUDIES QUARTERLY 2014].

insufficiently represented the judgment as well as the preceding MSJE report.<sup>7</sup> Further, the NALSA judgment, like the preceding MSJE report, demonstrates contrary tendencies between an attempt to grant self-determination of gender identity (i.e. the ability to elect one's legal gender identity without having to meet external criteria such as surgery or hormonal transition), and the bureaucratic adjudication and imposition of gender identities. In a critical commentary on the judgment, Gee Imaan Semmalar points out how some parts of the judgment blend all *hijra* and transgender people into a 'third gender'; in other parts, the judgment seems to restrict who can identify as 'male' or 'female' based on external criteria like surgery or psychological tests.<sup>8</sup> The latter tendency draws from and feeds into biological essentialism, that is, the reliance on biological or physical attributes (such as genitalia or hormones) that are positioned as 'essences' of gender and used to verify or certify someone's gender identity. As we shall see, the questions about defining and delimiting 'transgender' become particularly complex and fraught when connected to the state-sanctioned allocation of resources to 'transgender' people through provisions like reservations.

Perhaps it would be useful to note that at the outset that the text of the NALSA judgment is not a seamless document. At a hundred and thirty pages, the text is written by two judges, Justice K.S. Radhakrishnan and Justice A.K. Sikri, and split into three distinct sections, which are in turn divided into further numbered paragraphs. First comes Justice Radhakrishnan's statement, then Justice Sikri's statement, and in the end are directives written and signed by both of them together. There are contradictions between these sections, and sometimes even within these sections, which are symptomatic of the aforementioned tension between broad and restrictive definitions of 'transgender', and between gender self-determinism and biological essentialism. As we shall see, on the whole, Justice Radhakrishnan's section seems to favor a somewhat more open-ended interpretation of 'transgender', and be more accepting regarding gender self-determination, whereas Justice Sikri's section tends to favor a more restrictive definition of 'transgender' based on essentialist criteria. These contradictions have created problems of interpretation regarding the implications of the judgment.

## I. DEFINING 'TRANSGENDER'

The 'transgender' category evolved in the activism of the United States and western Europe as an 'umbrella term' to encompass a spectrum of people who transgress gender norms, widening the scope of the older and more

<sup>7</sup> Gee Imaan Semmalar, *Gender Outlawed: The Supreme Court Judgment on Third Gender and its Implications*, ROUNDTABLE INDIA, 19-4-2014, available at <[http://roundtableindia.co.in/index.php?option=com\\_content&view=article&layout=detail&id=120&Itemid=133](http://roundtableindia.co.in/index.php?option=com_content&view=article&layout=detail&id=120&Itemid=133)> (hereinafter Semmalar).

<sup>8</sup> Semmalar, *Id.*; Dutta & Roy, *supra* note 6.

medicalized term 'transsexual', which specifically connoted those who sought physical transformation through surgical procedures to affirm their gender identity.<sup>9</sup> The coinage and popularization of 'transgender' in the 1990s grew partly from the recognition that there are numerous forms of gender variance, and many people may not want surgical intervention or follow linear 'male'-to-'female' or 'female'-to-'male' trajectories of transition. In India, during the first regional consultation on transgender and Hijra issues supported by UNDP in 2009, 'transgender' was also defined as an 'umbrella' term as per both western precedent, and also the distinctive Indian and South Asian reality of many communities and identities of people who are marginalized for their gender expression and/or identity, including but not limited to the well-known *hijra* community (a socio-religious group of feminine-identified people assigned male or intersex at birth).<sup>10</sup> Indeed, some of these pre-existing terms are umbrella categories in themselves: for instance, within working class/caste gender variant communities, the term *kothi* connotes a spectrum of feminine-identified people assigned male at birth, with various sub-types depending on *inter alia* attire, sexual behavior, and there are several sub-types within the *hijra* category as well, based on physical state of transition. However, since the late 2000s, 'transgender' gradually became established as a more recognized term in state policy compared to non-Anglophone terms for gender variant people, marking the gradual ongoing constitution of a national and transnational discourse of gender and sexual identities as opposed to terms and practices that become positioned as regional/vernacular. As I have argued elsewhere, the establishment of 'transgender' as a trans/national umbrella term seeks to consolidate gender non-conforming people as stable and bounded 'identities' and 'populations' through their interpellation within mechanisms of state and legal recognition, and constitutes them as biopolitical subjects for care and management by the state.<sup>11</sup> This process may pave the way for specific provisions and affirmative action for gender variant people, but may also override discourses of gender/sexual variance that are not entirely legible to the state, and further position them as merely 'regional' or 'vernacular' even if they actually span multiple regions within South Asia.

This preceding discursive constitution of 'transgender' as a nationally recognized 'umbrella term' that subsumes more 'regional' terms and identities sets the stage for the NALSA petition and the resultant judgment. "Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex": thus begins the text of Justice Radhakrishnan's section (p. 1). But who are the aforementioned "members of the transgender community"? On Page 10, the judgment states, "Transgender

<sup>9</sup> DAVID VALENTINE, *IMAGINING TRANSGENDER: ETHNOGRAPHY OF A CATEGORY* (2007).

<sup>10</sup> SAATHII, *supra* note 5.

<sup>11</sup> See Dutta & Roy, *supra* note 6, at 320-337.

is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex.” This is a wide definition – it does not specify exactly how a ‘transgender’ person may identify, but only that trans people’s identities, expressions or behavior do not correspond to their socially assigned sex or gender role in some way. The paragraph goes on to mention that ‘transgender’ may include *hijras* who identify as neither men nor women, pre- or post-operative transsexual people who wish to undergo ‘sex reassignment surgery’ or SRS “to align their biological sex with their gender identity in order to become male or female”, and ‘transvestites’ who like to dress “in clothing of opposite gender” (p. 11). Subsequently, the judgment text further specifies that ‘transgender’ may encompass various prominent regional and trans-regional communities/identities like *hijras*, *kothis*, *aravanis*, *jogtas/jogappas*, and *shiv-shaktis* (pgs. 56, 109, 110). The language and terminology used in these various sections suggests that the judgment has drawn together definitions of the transgender category and associated communities found previously in various official documents such as the MSJE report and the UNDP consultation reports mentioned above. However, despite the apparent openness to a variety of trans identifications and embodiments, there are some major omissions. As Semmalar points out, trans men and trans masculine people (i.e. masculine-identified people assigned female at birth) are mentioned only at a few places (pgs. 35 and 61). In a judgment by the Madras High Court, the NALSA judgment has been interpreted as only applying to the male-to-female transgender spectrum and not to female-to-male trans people, thus potentially excluding a large number of trans people from the ambit of the judgment –though the Madras High Court does note that in its opinion, female-to-male trans people should also have the right to gender self-determination.<sup>12</sup>

Moreover, even for trans women and trans feminine people, the judgment text evidences the tendency of defining and marking the boundaries between various identities and population groups, which may impose generalized definitions and restrictive borders on complex and overlapping groups of people. On pages 10 and 11, following the wide generic definition of ‘transgender’ mentioned above, the text provides an overview of transgender groups, particularly *hijras*, ‘transsexual persons’ and ‘transvestites’. The *hijras* are described as being ‘third gender’; distinct from transsexual women who seek ‘SRS’ to become female; who are further distinct from ‘transvestites’ who do not seek SRS (one may note here that terms like ‘transvestite’ and ‘eunuch’, used at various parts of the judgment, may also be deemed as derogatory by people within trans communities<sup>13</sup>). This potentially flattens a wide variety of identification within *hijra* communities and assumes that all *hijras* will be automatically classifiable as a separate or ‘third’ gender – but, as Semmalar

<sup>12</sup> *Jackline Mary v. Supt. of Police*, WP No. 587 of 2014, ORINAM, (Madras High Court, 17-4-2014).

<sup>13</sup> On this issue, see Semmalar, *supra* note 7.

notes, some *hijras* may choose to identify as female rather than ‘third gender’. Further, this adjudication of identitarian boundaries also relies on biological essentialism, placing the value on physical attributes rather than self-determination as the baseline for gender identity. Thus, *hijras* are deemed as being ‘neither men nor women’ not because of their self-identification, but ‘since Hijras do not have reproduction capacities as either men or women’ (p. 10). Again, this homogenizes the *hijra* community in reductive biological terms – as many ethnographies note, *hijras* may be *akua* (non-castrated/penectomized) as well as *nirvan* (those who have undergone castration/penectomy). Further, trans men and women’s identities are premised on their willingness and ability to get ‘sex reassignment surgeries’ even though many, if not most trans people are unable to access such procedures (and some may not want them).

Such definitions and distinctions tend to homogenize each category in terms of essentialist assumptions, and restrict the freedom of self-identification including potential overlaps and crossings between various identity categories. As I have argued elsewhere, and as also noted by several other researchers and community activists, there may be many different (trans)gender identities or subject positions among the communities mentioned in the judgment.<sup>14</sup> *Kothis* may identify also as *hijra* and vice versa; *hijras* may variably identify as female or a ‘third gender’, and *kothis* may variably identify as feminine same-sex desiring males, as trans women, or as a ‘third’/separate gender – often without undergoing medical transition. On pages 55-57, where the text describes these communities in detail, it does try to recognize the diversity and internal variety in these communities to some extent, and acknowledges that many people in these communities may have fluid identities and that identities may overlap (p. 56). But such nuances are undercut by the tendency evidenced at various points of the judgment to conflate ‘TG’ with ‘hijra’, making *hijras* the primary referent of the transgender category despite mentioning a variety of trans identifications and embodiments (e.g. p. 59, 111), and further, by associating all *hijras* with a ‘third gender’ identity (pgs. 81, 128).

Despite evidencing such limitations, Justice Radhakrishnan’s section goes on to give a broad interpretation of Articles 14, 15, 16, 19 and 21 of the Constitution, saying that the constitutional provisions for equality (Article 14) apply to all persons irrespective of gender (p. 70), and the provisions against discrimination on grounds of sex (Articles 15 and 16) should also be taken to apply to gender identity, and thus to transgender and *hijra* people (p. 74). Further, Radhakrishnan specifies that the legal provision for affirmative action in fields such as education, healthcare and employment should also apply to transgender people (p. 75). In the most wide-ranging part of the judgment, Radhakrishnan states that any “discrimination on grounds of gender or sexuality” goes against the Constitutional measures for “equality by the law or equal protection by laws guaranteed under our Constitution” (p. 86). The mention

<sup>14</sup> See *supra* note 11.

of 'sexuality' in addition to gender suggests that the judgment could potentially serve as a strategic tool to advocate legal rights for and counteract gender/sexuality-based discrimination against a wide range of LGBT persons and communities.

However, Justice Sikri's section goes on to narrow the scope of the judgment, defining 'transgender' in a much narrower sense than elsewhere in the judgment. Sikri explicitly leaves out Lesbian Gay and Bisexual (LGB) people from the ambit of 'transgender' (p. 109). This stands in contradiction to certain preceding sections of the judgment, as LGB people may also be gender variant, and the previous mention of 'transvestites' (p. 11) suggests that gay or lesbian people who cross-dress without necessarily identifying as the 'opposite' sex would also be covered under the judgment. Historically, several gender variant communities like *kothis* have organized under rubrics like 'MSM' or 'males who have sex with males', and *kothi* communities may overlap with both feminized male homosexual and male-to-female transgender identities.<sup>15</sup> A rigid distinction between LGB and T may therefore arbitrarily split overlapping community spectrums. Further, Justice Sikri goes on to state that transgender, for the purposes of the judgment, would particularly denote *hijras*: "therefore, we make it clear at the outset that when we discuss about the question of conferring distinct identity, we are restrictive in our meaning which has to be given to TG community i.e. hijra etc., as explained above." (p. 111). He also presumes that *hijras* would be generally identified as a 'third gender' (p. 113). This has bolstered reductive interpretations of the judgment that leave out other trans or gender variant groups such as trans masculine people, as mentioned above.

## II. THE LIMITS OF SELF-DETERMINATION

The judgment has been lauded by the Lawyer's Collective for upholding the self-determination of gender, that is, the right to determine one's gender identity irrespective of socially assigned sex or physical state of transition (surgery, hormones, et cetra).<sup>16</sup> Among the nine directives listed in the last section of the judgment, the second directive states that "transgender persons' right to decide their self-identified gender is also upheld", whether as male, female or third gender, and asks both the centre and the states to grant legal recognition of such identity (pg. 128). The directive does not mention a requirement for surgery or hormones, and indeed, a later directive (no. 5) states that "any

<sup>15</sup> See GAYATRI REDDY, WITH RESPECT TO SEX: NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA (2005).

<sup>16</sup> Lawyer's Collective, *Supreme Court recognizes the right to determine and express one's gender; grants legal status to "third gender"*, <<http://www.lawyerscollective.org/updates/supreme-court-recognises-the-right-to-determine-and-express-ones-gender-grants-legal-status-to-third-gender.html>> (last visited 10-3-2015).

insistence for SRS [sex reassignment surgery] for declaring one's gender is immoral and illegal" (p. 128).

However, the apparent promise of self-determination is contradicted and limited in the judgment in several ways. As Semmalar points out, the first directive declares that Hijras are to "be treated as 'third gender' for the purpose of safeguarding their rights", which seems to preclude their right to self-identify as 'female' or even 'male' (p. 127). Thus, there is actually a contradiction between the first and second directives. Apart from homogenizing *hijras* and restricting their self-determination, Semmalar points out that this also creates a confusion regarding whether one would have to be categorized as 'third gender' in order to access the safeguards and affirmative action promised by the judgment, or whether these would still be available if someone legally identified as the 'opposite' gender.<sup>17</sup> Further, at several points, the directives seem to conflate 'transgender' with 'hijra', as evidenced in the repeated use of the phrase 'hijra/transgender' in the fourth and fifth directives (pg. 128). Thus it is no wonder that in most media coverage, the judgment has been mostly taken to pertain to Hijras and their recognition as a 'third gender'; and the argument for self-determination of gender is largely forgotten or elided.

Further, the provision for self-determination is not only undercut by the imposition of categories such as 'third gender' on entire communities, but also through references to external testing and verification of gender identity. Indeed, the judgment is rather unclear and even contradictory on the question of the requirements for legal gender recognition, and veers between individual self-determination and external certification of gender. Justice Radhakrishnan's section appreciatively cites the Argentinian model of gender recognition which allows for self-identification of gender without requiring any sort of medical transition procedures, a model which has been lauded by many trans activists (pgs. 46, 53). Yet, at other points, Radhakrishnan suggests that instead of medical requirements one would have to apply a 'psychological test' for the self-identity of transsexual persons, and equates trans persons' identity with the psychological state of 'gender dysphoria', a clinical term for the feeling of discomfort and distress with one's assigned sex and strong identification with the other sex/gender (pgs. 45, pg. 84). The psychologization of trans identity (i.e. evaluating trans people's identities through a diagnosis of psychological gender dysphoria) potentially restricts the freedom of self-determination. As many trans activists have pointed out, common models of gender dysphoria in psychiatry and medicine are often based on binary and linear models of identification (e.g. being trapped in a 'wrong' body), which presume a binary framework of gender that may work for some but not other trans or gender variant people.

Justice Sikri's section is even more constrictive. Where Radhakrishnan suggests the substitution of 'psychological test' for 'biological test', Sikri seems

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<sup>17</sup> Semmalar, *supra* note 7.

to stipulate the biologically essentialist requirement that surgical transition to change ‘physical form’ would be necessary for recognition as (trans) male or female, even if such transition is not required for ‘third gender’ persons: “we are of the opinion 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” (p. 108, my emphasis).

Since the directives at the end of the judgment pass the onus for legal identity recognition on to the Central and State governments, it seems likely that different states will interpret the contradictory elements in their own ways and will fix the procedures for gender recognition that they deem fit. In a piece on gender change legalities in India, advocate Kaushik Gupta notes that despite the NALSA judgment, “there is no established procedure for change of gender identity in documents, nor is there any specific law governing the field”.<sup>18</sup> One option is to first get an affidavit affirmed by a First Class Magistrate, and subsequently approach relevant government departments to publish the change of gender in the state’s Official Gazette and to change gender markers on state-issued identity cards. However, while the NALSA judgment assures that citizens have the right to gender self-determination without necessitating gender affirmation surgery, a trans man commenting on Gupta’s piece notes that in West Bengal, the Official Gazette still requires documentation of SRS (sex reassignment surgery) to publish the change of gender from ‘female’ to ‘male’, and does not accept a pre-operation affidavit - despite the directive on the right to gender self-determination without requiring SRS.<sup>19</sup>

Subsequent to the judgment, the MSJE has responded to some of its fallacies and has asked the Supreme Court to clarify whether all trans people should be clubbed as ‘third gender’ or does that only apply to Hijras specifically.<sup>20</sup> However, some states such as Chhattisgarh seem to have already interpreted the judgment to pertain only to ‘third gender’ identity recognition<sup>21</sup> Unless the Supreme Court comes up with clearer guidelines in response to the MSJE’s queries, procedures for identity recognition are likely to remain haphazard and vary between states. Further, there may be gender policing by state bureaucratic mechanisms (determining who can be third gender, who can be recognized as transitioned male or female, etc.). Indeed, trans/*kothi/hijra* people have already faced arbitrary bureaucratic requirements when making applications to change gender identity to their preferred option in legal documents such as voter I.D. cards or Aadhaar cards, and there have been cases where

<sup>18</sup> Kaushik Gupta, *More on Gender Change Legalities*, VARTA (20-1-2015), <<http://varta2013.blogspot.com/2015/01/more-on-gender-change-legalities.html?zx=590bc07ee4b1dc62>>.

<sup>19</sup> *Id.*

<sup>20</sup> MSJE, *Supra* note 2, at 7.

<sup>21</sup> Govt. of Chhattisgarh, 2014, “Tritiya Ling Varg ke Vyektiyon ke Utthan ke Sambandh Mein” (On the Empowerment of Third Gender Persons), Raipur, 10-10-2014.

they have been expected to show proof of medical transition.<sup>22</sup> Despite the provision for gender self-determination in the judgment, such experiences suggest that trans/gender variant people will continue to face various bureaucratic requirements and arbitrary rules regarding gender recognition in order to get the legal IDs they would need to access welfare measures like reservations.

The MSJE's intervention may only strengthen such bureaucratic requirements. On page 129, the judgment defers to the Expert Committee constituted by MSJE for suggesting measures and recommendations, which probably means that the MSJE report may provide some of the concrete procedural guidelines that are missing in the SC judgment.<sup>23</sup> The MSJE recommends on pg. 34 of its report that 'Certificate that a person is a transgender person should be issued by a state level authority duly designated or constituted by respective the State/UT', and these state-appointed committees will comprise a psychiatrist, social worker, two transgender representatives, etc. – the report rejects the simpler option that one could just submit affidavits by oneself and one's friends as proof of one's honesty in declaring their gender. This suggests that the "right to decide their self-identified gender" as male/female/third will not be accessible easily, and will be subject to the requirement to 'prove' one's gender identity to bureaucratic committees. Again, this leaves the door open for identity policing, and requirements like surgery/hormones may return, especially if one wants legal recognition as the 'opposite' gender.

### III. DETERMINING THE SOCIAL AXIS FOR RESERVATIONS

The designation of transgender and *hijra* people as a 'backward class' for the purpose of reservations has proved to be another contentious point regarding the judgment. Right from the opening sentence on the "trauma, agony and pain" suffered by "members of the transgender community", the judgment largely proceeds on the assumption of a homogenous social position of transgender and *hijra* people based solely on gender. It does not consider any other axes of social marginalization, such as caste and class, and their intersection with gender and/or sexuality, which may result in differences among trans people. At the same time, and somewhat paradoxically, it establishes a parallel *between* caste and gender, and indeed substitutes the latter for the former. As noted above, the judgment notes that Articles 15 and 16 of the Constitution, prohibiting discrimination on the grounds of sex, should extend to transgender and *hijra* people as well (pp. 74, 75). Further, it notes that 'TGs' have been hitherto excluded from constitutional measures to counteract the patterns of discrimination against disadvantaged groups, but such measures

<sup>22</sup> On this, see A. Dutta, "Shamajik Linga Vibhajan ebong Prantik Linger Aini Swikriti: Supreme Court-er Transgender Bishoyok Ray niye Kichhu Mantabya" (*Social Gender Differentiation and the Legal Recognition of Marginalized Genders: Some Comments on the Supreme Court's Transgender-related Judgment*), 1(1) PRANTASWAR: THE POLYMORPHOUS (2015).

<sup>23</sup> MSJE, *supra* note 2.

for affirmative action should be available to them as well: “TGs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied” (p. 75). However, historically, the paradigm through which ‘socially and educationally backward classes’ have been gauged is caste; thus the move to place ‘TGs’ as a whole as an SEBC simply substitutes the axis of gender in the place of caste without considering that ‘TGs’ may span a range of class and caste positions. Subsequently, the section on the directives proclaims, “We direct the 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” (p. 128). This has largely been interpreted to mean that transgender and *hijra* people should be given the benefits of affirmative action accorded to the OBC (‘other backward classes’) category (as evidenced by most media articles).<sup>24</sup> This conflation of ‘transgender’ with ‘backward classes’ in general and the OBC category in particular has created several problems of interpretation and application.

Semmalar points out that many Dalit trans persons do not want to come under the OBC category, and lose out on the provisions granted to SC/ST categories.<sup>25</sup> Conversely, as I had observed during the post-NALSA consultations in West Bengal, a few upper caste trans and *hijra* leaders do not wish to be categorized as OBCs. In response to the question of reservations, there are at least two approaches that have been proposed by transgender and *hijra* community members. During a state-level consultation on transgender and *hijra* issues organized by the West Bengal Government’s Department of Health and Family Welfare on July 15, 2014, some transgender activists demanded the creation of a separate sub-category under OBC which could be called OBC-T, as they feared that otherwise OBC cis men and women would claim most of the benefits under the category. On the other hand, the Telangana Transgender Hijra Intersex Samiti in Telangana has asked for reservation on grounds on gender, rather than within caste-based categories like OBC.<sup>26</sup> In their proposal, ‘transgender’ would be a separate category and not fall under OBC or SC/ST; thus, Dalit trans people would be able to combine reservations based on both ‘TG’ and SC/ST categories (as they suffer from an intersection of oppressions based both on caste and gender), whereas *savarna* (upper caste) trans people

<sup>24</sup> For example, see Dhananjay Mahapatra, *Supreme Court Recognizes Transgenders as Third Gender*, TIMES OF INDIA, 15-4-2014, <<http://timesofindia.indiatimes.com/india/Supreme-Court-recognizes-transgenders-as-third-gender/articleshow/33767900.cms>>.

<sup>25</sup> Semmalar, *supra* note 7.

<sup>26</sup> Telangana Hijra Transgender Intersex Samiti, 2014. “Our Demands”. available at <<https://www.facebook.com/events/959039437443450/permalink/959061504107910/>>.

would draw upon only the TG category and not OBC or SC/ST categories (as presumably, they suffer discrimination based only on gender and not caste/class). The MSJE has also stepped into the fray, and has asked the SC to not club all trans people as OBC ('other backward classes') and to go through the procedures of the National Commission for Backward Classes for proposing categories for reservation or affirmative action (pp. 12-14, 20-22).

Given that there seem to be multiple options that have been proposed, and proposals have varied between states, it seems likely that it will take considerable time and deliberation before the Central or State Governments arrive at any schema of reservation or affirmative action – especially if, as the MSJE suggests, the state must go through the National Commission for Backward Classes to approve any reserved category. Moreover, the question of fixing a category for reservation will probably contribute further to restricting and narrowing the relatively wide-ranging definition of 'transgender' proposed at some parts of the judgment. This is already evident in the state of West Bengal, where a representative from the West Bengal Commission for Backward Classes asked the state government to fix a clear definition of 'transgender' for the purposes of reservation in the aforementioned July 15 consultation on transgender and *hijra* issues.

#### IV. CONCLUSION

In July 2014, Sumi Das, the secretary of Moitrisanjog Coochbehar, a community-based organization working with transgender *kothi* and *hijra* communities in the district of Coochbehar in West Bengal, published a public post on Facebook critiquing the exclusionary nature of the state-level consultations in West Bengal on transgender and *hijra* issues.<sup>27</sup> In her post (written in Bangla), Das pointed out that many small town organizations have been left out of the consultations, and critiqued how the state, powerful non-governmental organizations and activists often adjudicate who is to be recognized as 'transgender' and who is not, leading to the exclusion of less privileged and particularly rural communities from state initiatives. Das's post warned against petty politics and competition regarding which transgender people would get to be on the state transgender welfare boards or committees. This significant critique, coming from within the community affected by the judgment, serves as an important cautionary message against some of the perils of relying on the mechanisms of the law and the state to gain inclusion and citizenship. One can only hope that transgender, *hijra* and *kothi* communities will continue to question and strive beyond the governmental and legal adjudication and management of transgender identity, even as we stake our rightful claim to citizenship, rights and recognition.

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<sup>27</sup> S. Das, *Bhishon Bhalo Udyog Amader Poshchimbanga Shorkarer (A Good Initiative from our West Bengal Government)*, (26-7-2014), <www.facebook.com>.