Shifting Subjects of State Legibility: Gender Minorities and the Law in India

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INTRODUCTION

This article will examine rights of gender minorities in India, within the context of emerging international recognition and protection of their rights. Recent jurisprudence in India indicates the emergence of legal protection for transgender people. Despite legal recognition, the implementation and practical scope of the judicial progression remains to be seen. In order to understand the progress that the courts have made, it is important to reflect on the legal history of gender-variant people in India. This article does so and reveals the influence of colonial laws on the rights, or lack thereof, of gender-variant individuals. The article then critiques the recent seminal judgment on transgender rights in India, *NALSA* v. *Union of India*, with particular reference to the Supreme Court's construction of the "transgender" community in India.

Within the last decade, a trend of increasing recognition and legal protection of transgender people has emerged across the globe. In 2008, for example, Germany's Federal Constitutional Court declared unconstitutional a law that required transgender individuals to divorce their same-gender spouse after the recognition of their new gender identity.[1] The Court found that the law affronted

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human rights as it forced individuals to choose between their gender identity and their right to marry.[2] Within a span of a few months, Australia followed suit, increasing rights for transgender individuals. In 2011, the High Court of Australia held that transgender individuals were not constitutionally required to undergo gender-affirming surgery in order to legally change their gender.[3] The Court's decision rested heavily on the concept that a person's chosen identity is important regardless of their physical characteristics.[4]

In the past few years, a significant number of countries have advanced the legal and social rights of transgender people. Argentina passed one of the most expansive and progressive laws on the American continents for transgender individuals, offering gender-affirming surgery and hormone therapy under government-run health plans.[5] In the United States, California passed a bill to expand the rights of transgender students in 2013.[6] The bill allows California public school students to choose their bathrooms and gender-segregated programs

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I do not intend to speak on behalf of the Gender Variant Community or the Queer movement in India. This article is written from my location and training of a legal academic and offers a close critical reading of the NALSA Vs. Union of India judgement. As a cis gender queer feminist academic, I remain attentive to my location of privilege. Over the past few years, I have learnt immensely from my personal interaction and writing of friends, activists and scholars including Abhina Aheer, Gee Imaan Semmalar, Karthik Bittu Kondaiah, A. Revati, Simran Sheikh, Satya, Raveena, Amrita, Laxmi Narayn Tripathi, Gauri Sawant, Janet Halley, Kimberly Crenshaw, Duncan Kennedy, Ratna Kapur,Upendra Baxi, Ashley Tellis, Dean Spade, Sharmila Regge, Vikramaditya Sahai, Sumit Baudh, Akhil Kang, Patricia Williams, Angela Davis, Prabha Kotiswaran, Svati Shah and Aniruddha Dutta. Finally, I am indebted to my mother, Kamlesh Jain and, our son Rivaan's Mausi (nanny) Sushma Dungdung, for looking after Rivaan in my absence. I would have never been able to get back to work and write this piece, had it not been for their support.

1. Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvL 10/05, 121 BVerfG 175 (Germany 2008).
2. *See* Gregory A. Knott, *Transsexual Law Unconstitutional: German Federal Constitutional Court Demands Reformation of Law Because of Fundamental Rights Conflict*, 54 St. Louis U. L. J. 997, 1010 (2010) (claiming that the court ruled the law unconstitutional because individuals had to choose between right to marry and "individual integrity").
3. AB v. Western Australia, 244 CLR 390 (Australia 2001).
4. *Id.*
5. *See* Joshua Keating, *Argentina passes landmark transgender rights law*, Foreign Policy, 10 May 2012, available at https://perma.cc/J347-M8JX.
6. California Assembly Bill No. 1266 (12 Aug. 2013), available at https://perma.cc/CY4S-7KXV.

and activities based on their own gender identity (in contrast to the sex marked on their birth certificate).[7] In *Doe v. Regional School Unit 126*, the Maine Supreme Court held that a school unfairly discriminated against a transgender student by preventing her from using the restroom matching her gender identity.[8] Similarly, in March 2016, the New York City mayor passed an executive order granting people access to the public facilities (such as bathrooms and locker rooms) that match their gender identity.[9]

Recent developments in Europe provide additional examples of the global trend towards greater legal recognition of transgender people's rights. In 2012, Sweden reformed its Gender Recognition Act to allow applications for recognition of a different sex than the one indicated on civil registration at the time of birth.[10] Further, a Swedish Administrative Court held in *N.N. v. National Board of Health and Welfare* that a mental health diagnosis was not a prerequisite for obtaining legal gender recognition.[11] In 2014, the Swedish government undertook an official inquiry to examine and suggest reforms to the Gender Recognition Act,[12] which culminated into two bills proposed in 2015. These legislative proposals reduce the minimum age requirement from eighteen to fifteen for Swedish residents who wish to change their legal gender, and allow for people between the age of twelve and fifteen to do so with the consent of their guardians.[13] Further, the bills eliminate the requirement of medical intervention to change one's gender identity in order to obtain legal recognition.[14] They also allow people aged fifteen and above to undergo a gender-affirming surgery if a psychiatrist has recommended surgery.[15] In 2014, Denmark no longer required a diagnosis of 'gender identity disorder' in order to have one's gender identity recognized.[16] Scotland also now allows people to change their gender on identification documents while remaining married.[17] In 2015, Malta enacted a law[18] that allows individuals to change their

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7. *See id.*
8. Doe v. Regional School Unit 126, 86 A.3d 600, 606 (Supreme Ct. Maine 2014).
9. Bradford Richardson, *Bill de Blasio mandates transgender access to NYC bathrooms*, The Washington Times, 7 Mar. 2016, available at https://perma.cc/QR8Q-8KUQ.
10. Transgender Europe [TGEU], *Sweden Gender Recognition Act (Reformed 2012),* (2014), last visited 10 Mar. 2017, available at https://perma.cc/YRX2-MHG8.
11. N.N. v. National Board of Health and Welfare, Case No. 24931-13 (16 May 2014 Sweden), available at https://perma.cc/96CR-BKUW. *See Swedish Court outlaws diagnosis requirement*, Transgender Europe [TGEU], 7 Sep. 2014, available at https://perma.cc/VK54-XG8J.
12. *See* Transgender Europe [TGEU], *Swedish Report on Age Requirement* (2014), last visited 8 Mar. 2017, available at https://perma.cc/AR6F-RMF4.
13. "Gender Madness Reaches New Climax in Sweden," Agenda Europe, 20 Feb. 2015, available at https://perma.cc/FXD6-ULQJ (last visisted 20 Mar. 2017).
14. *Id.*
15. *Id.*
16. *See Denmark becomes Europe's leading country on legal gender recognition*, European Parliament's Intergroup on LGBT Rights, 12 Jun. 2014, available at https://perma.cc/N42N-9RRG.
17. Marriage and Civil Partnership (Scotland) Act, § 29–30 (2014), available at https://perma.cc/C6AL-T8YP.
18. Malta Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC Bill), Act

gender markers on legal documents without requiring a gender-affirming surgery or a prior medical diagnosis.[19] Similarly, in July 2015 Ireland passed the Gender Recognition Act, a landmark law that allows adults to change their gender markers on legal documents without any medical or state intervention.[20]

Following this trend, the European Court of Human Rights delivered two significant judgments in 2015. In the case of *Y.Y. v. Turkey*, the Court held that a state could not require transgender individuals to be sterilized before legally changing their gender.[21] Furthermore, in *Identoba and Others v. Georgia*, the Court clarified that Article 14 of the European Convention of Human Rights protects all transgender individuals from discrimination based on "gender identity."[22]

In Asia, Thailand passed the Gender Equality Act in 2015, which protects LGBTQ rights and punishes discrimination based on gender identity or sexual orientation with a sentence of up to six months imprisonment or a fine of 20,000 baht, approximately $583 (USD).[23] The Act specifically defines "unfair discrimination among the sexes" as any action that "segregates, obstructs or limits the rights" of a person because they have "a sexual expression different from that person's original sex."[24] Against the backdrop of talks to include the phrase "third gender" in Thailand's new constitution, the enactment of this anti-discrimination statute has been welcomed by the vibrant community of transgender and gender-nonconforming people in Thailand.[25] The National Assembly of Vietnam also passed a new civil code in November 2015 that provides that "[g]ender transformation shall be carried out in accordance with the law."[26] This amended law provides for "gender transformation" through the legalization of gender affirming surgery and by ensuring legal gender recognition for individuals who have undergone such surgery.[27] This reform coincided with Vietnam's recognition

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No. 11/2015 (14 Apr. 2015), available at https://perma.cc/YDR6-KGRE.

19. Kurt Sansone, *Malta is leading Europe on gender identity protection*, Times of Malta, 12 May 2015, available at https://perma.cc/8F4S-JCUG.
20. Ireland Gender Recognition Act, Act No. 25/2015, §18 (2015), available at https://perma.cc/KQR4-EHE2; *see* Henry McDonald, *Ireland passes law allowing trans people to choose their legal gender*, The Guardian, 16 Jul. 2015, available at https://perma.cc/7ATW-KZQX.
21. Y.Y. v. Turkey, No. 14793/08 (European Ct. of Human Rights 2015).
22. Identoba and Others v. Georgia, No. 73235/12, 22 (European Ct. of Human Rights 2015); *see European Court of Human Rights: "Gender Identity" Protected Against Discrimination*, Transgender Europe [TGEU], 15 May 2015, available at https://perma.cc/48CP-RYDE.
23. Thailand Gender Equality Act, B.E. 2558 (2015), available at https://perma.cc/T6FR-9TT5.
24. *See* Joe Williams, *Thailand introduces first law to protect LGBT people*, PinkNews, 15 Sep. 2015, available at https://perma.cc/358R-ZVYW.
25. *See* Naith Payton, *Thailand to recognise third gender*, PinkNews, 15 Jan. 2015, available at https://perma.cc/P8J2-NYBM.
26. *See* Nghia T. Pham, *Gender transformation in Vietnam: from offence to legal right*, Oxford Blavatnik School of Government Blog, 1 Dec. 2015, available at https://perma.cc/J5S4-3QZB. This law came into effect in January 2017.
27. "Vietnam: Positive Step for Transgender Rights," Human Rights Watch, 30 Nov. 2015, last accessed 27 Feb. 2017, available at https://perma.cc/DD3U-572F.

of same-sex marriage.[28] A progressive trend in legally recognizing both gender identity and sexual orientation highlights the intersectionality between gender and sexuality. More pertinently, the ability of the Vietnamese National Assembly to acknowledge such intersectionality stands in stark contrast to the Indian judicial trajectory that has treated questions of gender identity (in *NALSA*) and sexual orientation (in *Koushal*) as separate without recognizing their inherent intersectionality, which is discussed later in the paper.

In South Asia, Nepal and Pakistan provide pertinent examples of the legal development of transgender rights given their geographical proximity to India. In 2007, Nepal's Supreme Court in *Pant v. Nepal Government* held that transgender individuals are equal before the law and that the Nepali government should "make necessary arrangements" in legal provisions to ensure nondiscrimination.[29] The Court reasoned that third gender individuals are "also Nepali citizens and as natural persons, they should be allowed to enjoy rights with their own identity as provided by the natural laws, the Constitution and international human rights instruments."[30] In May 2011, the Central Bureau of Statistics officially recognized a third gender option for individuals taking the census.[31] These progressive reforms in Nepal are a guiding beacon for the courts and policymakers of India as the nation moves towards addressing the rights of transgender persons.

Similarly, Pakistan also made progress with expanding and protecting the rights of transgender people. In 2009, Pakistan's Supreme Court legalized the recognition of third gender as a category for state official identification documents and ordered the National Database and Registration Authority to issue third gender identity cards.[32] In addition, the Supreme Court directed the Social Welfare Department of Pakistan to ensure admission of transgender people to educational institutions and accommodation within employment.[33]

The trend toward institutionalized rights for transgender people is indicative of a growing willingness to create inclusive spaces for transgender and gender-variant people. Beyond recognition of the right of transgender people to change their legal gender marker to male or female, more countries like Nepal and

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28. *Id.*

29. Pant v. Nepal Government, Vol. 2 National Judicial Academy Law Journal 285, (2008).

> Therefore, this directive order is hereby issued to the Government of Nepal to make necessary arrangements towards making appropriate law or amending existing law for ensuring the legal provisions which allow the people of different gender identity and sexual orientation in enjoying their rights as other people without any discrimination following the completion of necessary study in this regard.

Id.

30. *Id.* at 284.

31. Manesh Shrestha, *Nepal Census Recognizes 'Third Gender*, CNN, 31 May 2011, last visited 4 Mar. 2016, available at https://perma.cc/TGK2-FUYC.

32. Salman Masood, *Pakistan: A Legal Victory for Eunuchs*, New York Times, 23 Dec. 2009, available at https://perma.cc/A7RQ-RRPS.

33. Dr. Muhammad Aslam Khaki and Anr. v. Senior Superintendent of Police (Operation), Rawalpindi and Ors., 2013 SCMR 188 (Pakistan 2009), last visited 20 Apr. 2017, available at https://perma.cc/4AGQ-WAHT; Khaki v. Senior Superintendent of Police, 2013 SCMR 188 (Pakistan 2009).

Pakistan are permitting individuals to identify as third gender in legal documents. This is also the case in Bangladesh,[34] Germany,[35] New Zealand,[36] and Australia.[37] India is moving in a similar direction but not without challenges, most of which go unrecognized. Section III will discuss these challenges, focusing on the implementation of these laws within a social fabric still ordered by a gender binary.

Today, India's gender minorities have come into the national and international spotlight due to judicial recognition of their rights to express their gender identities and receive equal treatment in *NALSA v. Union of India*.[38] Many distinct gender-variant groups have existed in India and other parts of Southeast Asia and South Asia for a long time.[39] For example, the Artha-sastra, a classic treatise on economics and political science by ancient Indian philosopher Kautilya (400 BCE–200 CE), mentions the term kliba, "imperfectly translated as eunuch," intended to refer to transvestites.[40] In fact, most Sanskrit texts reference gender-variant persons.[41] The Kamasutra, an ancient Hindu text on human sexual behavior (third century CE), includes the term tritiya prakrti ("third nature"). This indicates the presence of gender-variant persons long before modern institutional recognition in the Indian sub-continent.[42] In fact, Vedic literature classifies the sex of human beings according to prakriti, or nature. Prakritimay be pums-prakriti (male), stri-prakriti (female), or tritira-prakriti (third sex).[43] Whereas the term "sex" is used to refer to biological characteristics and "gender" to psychological identity, prakriti suggests a semblance of cohesion between the two.[44]

In 2014, the Indian Supreme Court recognized transgender rights as fundamental human rights in the landmark *NALSA* judgment.[45] In this article, I

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34. *See* Aaron Day, *Bangladesh: Third Gender Hijra to be Recognised in Official Documents*, PinkNews, 12 November 2013, available at https://perma.cc/B5HK-ETBC.
35. *See* Jacinta Nandi, *Germany Got It Right by Offering a Third Gender Option on Birth Certificates*, The Guardian, 10 Nov. 2013, available at https://perma.cc/3F7Q-T3LV.
36. *See* Simon Collins, *X Marks the Spot on Passport for Transgender Travelers*, N.Z. Herald, 5 Dec. 2012, available at https://perma.cc/RYQ3-8LFR.
37. *See* Emily Christie & Scott McDonald, *Neither Male nor Female – A Great Victory for Norrie*, The Guardian, 2 Apr. 2014, available at https://perma.cc/UM9A-SXSQ.
38. 5 S.C.C. 438, 2 (2014); *see India Court Recognises Transgender People as Third Gender*, BBC News India, 15 Apr. 2014, available at https://perma.cc/FBD9-DBJL. NALSA v. Union of India, 5 S.C.C. 438, 2 (2014).
39. Wendy Donigher, *The Hindus: An Alternative History*, 331–34 (2010).
40. Brian Schnarch, *Neither Man nor Woman: Berdache—A Case for Non-Dichotomous Gender Construction*, 34(1) Anthropologica 105, 108 (1992) ("A transvestite is a person whose gender assignment and gender identity are in correspondence with each other but are both in contrast to the gender association of the clothes that this person wears.").
41. Wendy Donigher, *The Hindus: An Alternative History*, 332 (2009).
42. Bret Boyce, *Sexuality and Gender Identity Under the Constitution of India*, 18(1) The Journal of Gender, Race and Justice 6 (2015); *see also* Wendy Donigher, *The Hindus: An Alternative History,* 332 (2009) ("A 'third nature' or perhaps a 'third sexuality' in the sense of sexual behavior: tritiya prakriti.").
43. Amara Das Wilhelm, *Tritiya-Prakriti: People of the Third Sex*, 4 (2004).
44. *Id.*
45. NALSA, 5 S.C.C. at 2.

critically explore how Indian law and the recent *NALSA* and *Suresh Kumar Koushal v. Naz Foundation* decisions have impacted the gender-variant community in India. I contextualize these legal rights within the history of transgender rights both in India and internationally. In Section I, I explore how one homogenous category came, through the trajectory of language and translation in colonial India, to describe a heterogeneous gender-variant community. This analysis reveals the influence of colonial law on the legal rights of transgender individuals and contextualizes the discrimination they face today. In Section II, I explore the *NALSA* Court's reliance on international law and on evidence of discrimination as a framework for guaranteeing the right to identify as third gender and to be free from discrimination. In Section III, I compare *NALSA* and *Suresh Kumar Koushal v. Naz Foundation*[46] to explore the different ways the court uses evidence of discrimination to interpret sexual and gender minority rights in the Indian Constitution. In Section IV, I demonstrate how *NALSA* defines and constructs the transgender community divorced from the lived realities of the gender-variant community.

While the Supreme Court uses the term "transgender" in the judgment, it is imperative to understand that in the South Asian context, transgender does not accurately describe the diversity of this heterogeneous community. Transgender has multiple meanings depending on the region, culture, or nation in which it is used. Thus, I have decided to use the more inclusive term "gender-variant people" to recognize the diversity of identities under consideration.[47] The next section describes the process by which the diversity of gender identities in India has been subsumed first under the term "eunuch," then under "transgender."

I. "EUNUCH" UNDER COLONIAL RULE

During Colonial rule, the British had several Hindu texts translated into British English to aid in accessibility for judges and uniformity amongst courts.[48] According to Bernard Cohn's work on the modalities of governance utilized by the British, "the British conceived of governing India by codifying and reinstituting the ruling practices that had been developed by previous states and rulers."[49] Through the acquisition of cultural and historical knowledge from Indians, the British could strategically represent the past and re-interpret the present. This in turn "normalized a vast amount of information that formed the basis of their capacity to govern."[50]

Several problems confronted such translated texts. Knowledgeable pandits[51]

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46. Suresh Kumar Koushal v. Naz Foundation (India), 1 S.C.C. 1 (2014).
47. *See* Aniruddha Dutta and Raina Roy, *Decolonizing Transgender in India: Some reflections,* Vo. 1 No. 3 Transgender Studies Quarterly 320 (2014).
48. *Id.*
49. Bernard S. Cohn, *Colonialism and Its Forms of Knowledge: The British India*, 5 (1996).
50. *Id.* at 3.
51. A Hindu scholar of Sanskrit, Hindu philosophy, and ancient scriptures, and typically a practicing priest. *See generally* Brian A. Hatcher, *What's Become of the Pandit? Rethinking*

had to work in conjunction with British scholars and officials.[52] In many instances, pandits misquoted or mistranslated Hindu texts.[53]

The translations of these texts for the purpose of governance also resulted in the creation of a new social and legal category of "eunuchs."[54] In the process of translation, the words of ancient texts were passed through a British social, political, and moral filter.[55] This filter, in turn, produced not merely a translation but a lingual interpretation of these texts by the colonizer.[56] In the words of Shane Gannon, the use of the English term "eunuch" "constructed this figure as a depository of social meaning."[57] The British societal lens influenced the translation of a wide variety of Sanskrit and Pali terms for persons deviating from British "modes of masculinity."[58] According to the British, "eunuch" referenced castrated men.[59] Despite its narrow meaning, the term subsumed a wide variety of Sanskrit and Pali terms.[60]

Several social groups were erroneously included within the "eunuch" category. "Eunuch" included all of the following Sanksrit terms: kliba, shandha, pandaka, napumsaka, tritiya prakriti, and kesava.[61] These terms referred to a wide variety of social groups such as: "priests of the goddess Bauchara and Huligamma, hermaphrodites, castrated men who served in the royal courts and zenana (harems) of the houses of wealth in India, those whom the colonial writers identified as mukhanna (effeminates), as well as other various castes and social groups."[62]

An extreme example of the over-inclusive use of the label "eunuch" is the application of the term to include the Sanskrit term, shandha. Shandha, as derived from the Mahabharata, is a complicated figure that includes various groups of individuals such as men that can have sex with women only twice every month, men that have illicit sex, and men that are impotent.[63] In translating shandha to "eunuch," the British severely reduced and simplified shandha's complex and ambiguous meaning.[64]

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the History of Sanskrit Scholars in Colonial Bengal, 39(3) Modern Asian Studies 683, 683–723, (2005).

52. Ludo Rocher, Studies in Hindu Law and Dharmasastra (2014).
53. *Id.*
54. *See* Shane Gannon, *Exclusion as Language and the Language of Exclusion: Tracing Regimes of Gender through Linguistic*, 20 Journal of the History of Sexuality 1, 1 (2011), available at https://perma.cc/8N8B-AEN5.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *See generally id.*; *see* Jessica Hinchy, *Troubling Bodies: 'Eunuchs', Masculinity and Impotence in Colonial North India*, 4 South Asian History & Culture 196 (2013), available at https://perma.cc/KZW9-8983.
60. *See* Gannon, *Exclusion as Language and the Language of Exclusion*, at 2.
61. *Id.* at 6, 13.
62. Gannon, *Exclusion as Language and the Language of Exclusion*, at 2.
63. *Id.* at 3.
64. *Id.* at 5; *see generally,* Walter Penrose, *Hidden in History: Female Homoeroticism and Women of a "Third Nature" in the South Asian Past*, 10(1) Journal of the History of Sexuality

Scholars have speculated that the conflation of "eunuch" and other gender markers was intentional and based on the British ideals of masculinity.[65] British society assumed that an "un-masculine" man was impotent, and thus, likely to be a "eunuch". As a result of including a wide variety of social groups within the term "eunuch," additional meanings arose regarding the masculinity and reproductive capacity of such persons.[66] This translation process created a new homogenous category of persons from several diverse social groups.[67] Homogenization in turn allowed for a history that presented all of these groups as part of a single story: that of the "eunuch."

The term "eunuch" also carried with it legal significance and prohibitions. In 1871, Indian Parliament passed the Criminal Tribes Act, specifying that certain tribes in India had a higher propensity to become criminals.[68] Membership in these tribes was sufficient grounds to establish a reasonable suspicion that the person would commit a crime.[69] In 1897, the Act was amended to include "eunuchs," which established a registry for "eunuchs" and prohibited such persons from making gifts, having children, and inheriting property.[70]

In 1952, the Criminal Tribes Act was repealed,[71] and the Habitual Offenders Act that replaced it did not mention "eunuchs".[72] Still, because the law referred to "habitual offenders" with previous criminal records, it continued to apply to "eunuchs."[73] The immediacy with which the repealed Criminal Tribes Act was replaced by the Habitual Offenders Act led to the understanding that the same class of "hardened criminals," who were previously criminalized under the 1871 Act, was the target group of the 1952 Act as well.

Hijras, in particular, were seen as especially prone to break the law by engaging in "carnal intercourse against the order of nature" prohibited by Section 377 of the Indian Penal Code (1860).[74] For example, a "eunuch" was once arrested for singing in a public area while in feminine dress and prosecuted under Section 377 for sodomy even though the only incriminating evidence was the distortion of the orifice of the anus, the mark of a "habitual sodomite."[75]

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3 (2001).

65. *Id.*
66. *Id.*
67. *Id.*
68. Criminal Tribes Act (CTA), 1871 (as amended in 1897), available at https://perma.cc/HG8X-HZXH.
69. *Id.*
70. *Id.*; *see* Siddharth Narrain, *Crystallizing Queer Politics – The Naz Foundation Case and Its Implications for India's Transgender Communities*, 2 National University of Juridical Science Law Review 455, 459 (2009), available at https://perma.cc/E2ES-7275.
71. Criminal Tribes Laws (Repeal) Act, 1952, available at https://perma.cc/42M5-W723.
72. *See* Habitual Criminals (Preventive Detention Act) 1951, available at https://perma.cc/WAT6-X7N5.
73. *Id.*
74. *See* The Indian Penal Code, 1860, Sec. 377; Siddharth Narrain, *Crystallizing Queer Politics*, at 457 n.2.
75. Queen Empress v. Khairati (Allahabad H. C.), ILR 6 All 204 (1884); *see generally* Alok Gupta, *Section 377 and the Dignity of Homosexuals*, Economic and Political Weekly (2006),

Discrimination against gender-variant individuals, including de facto criminalization in certain areas, is not just a historic phenomenon. In 2011, Karnataka amended its Police Act to "control undesirable activities of eunuchs," a provision which is very similar to those found in the Criminal Tribes Act.[76] Specifically, in requiring the "maintenance of a register of the names . . . of all eunuchs residing in the area . . . reasonably suspected of kidnapping or emasculating boys or of committing unnatural offences,"[77] the state legislation revives the terms of the colonial statute and blindly regurgitates the colonial regulation of gender variance. This is one indicator of the ongoing misunderstanding of and discrimination against gender-variant individuals which continues from India's colonial legacy.

In February 2017, at the Karnataka Sexual Minorities Forum, Akkai Padmashali and Jeeva, filed a joint writ petition that challenged the register provision in the Criminal Tribes Act, the government responded by informing the High Court that it had issued a gazette notification to replace the word "eunuch" with "persons."[78]

In 2014, the Supreme Court of India decided *NALSA v. Union of India*, which, for the first time, recognized "third gender" people in Indian law. This decision changed the law's purpose from the colonial principle of trying to control "eunuchs" to trying to protect the rights of gender-variant people in India.

II. *NALSA* AND THE INDIAN SUPREME COURT

In April 2014, the Supreme Court held in *NALSA* that India recognizes a third gender category (beyond the male-female binary) entitled to equal rights under the Constitution of India.[79] The judgment in *NALSA* is a clear departure from the Supreme Court's restrictive analysis and narrow constitutional reasoning in the recent, widely publicized judgment recriminalizing private consensual same-sex sexual acts in *Suresh Kumar Koushal* v. *Naz Foundation*.[80] The *NALSA* judgment, delivered by Justice Radhakrishan and Justice Sikri, relies on three main arguments: international law obligations, increasing international recognition of transgender rights, and constitutional obligations. Each argument will be discussed in turn.

A. *NALSA:* International Law Obligations

First, the *NALSA* Court notes that numerous international conventions and

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available at https://perma.cc/Z6T6-QAE6 (providing an overview of Section 377 and its impact).

76. Karnataka Police Act Sec. 36A (1963), available at https://perma.cc/CH4X-NSN6.
77. *Id.*
78. "Govt to HC: word 'eunuch' removed from Police Act," Deccan Herald, available at https://perma.cc/E5J3-L69E.
79. NALSA, 5 S.C.C. 438.
80. Koushal v. Naz Foundation, 1 S.C.C. 1.

declarations, many to which India is a signatory, recognize that transgender and other gender-variant persons have the right to recognition, non-discrimination, and equal treatment.[81] The Court cites the Universal Declaration of Human Rights,[82] the International Covenant on Civil and Political Rights,[83] and the Yogyakarta Principles[84] for evidentiary support.[85] The Court relies heavily on its power to create new law in order to respect India's obligations under international convention (as long as the new law does not contradict current statutory law).[86] The Court notes that India is required to recognize the rights of gender-variant people per its obligations under the aforementioned international conventions and declarations. According to the Court, "if the Indian law is not in conflict with international covenants particularly pertaining to human rights, to which India is a party, the domestic court can apply those principles in the Indian conditions."[87] Finding no contradictory statutory law, the Court concludes that the rights in issue must be protected to conform to India's international obligations.[88]

B. *NALSA:* Increasing Recognition of Transgender Rights

Second, the Court argues that the current international trends support the recognition of transgender rights, particularly the right to determine one's gender identity, without requiring gender-affirming surgery or hormone therapy.[89] The Court references cases in several European countries that exemplify the progress made to recognize transgender rights: Great Britain (which held sex and gender to be fixed at birth),[90] New Zealand (people can only change gender markers when they have undergone surgical and medical procedures to change sex),[91] and Australia (gender defined as not only a matter of chromosomes but also a personal choice).[92] The Court notes that international statutory law also points to an

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81. NALSA, 5 S.C.C. at 16–29.
82. *Id.* at 23; Universal Declaration of Human Rights, General Assembly Resolution 217 (Ill) A, U.N. Doc. A/RES/217(III) (1948), available at https://perma.cc/CGY4-YQY5.
83. *Id.*; International Covenant on Civil and Political Rights, 6 International Legal Materials 368 (1967), available at https://perma.cc/GB6N-75JS.
84. *Id.* at 25; International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2007), available at https://perma.cc/TU55-F56R.
85. NALSA, 5 S.C.C. at 18–19.
86. *Id.* at 57; *see also* India Constitution Article141.
87. NALSA, 5 S.C.C. at 57–58.
88. *Id.* at 58.
89. *Id.* at 39. The judgment uses the term "sexual reassignment surgery," or "SRS." This article will use the term "gender-affirming surgery" to indicate that the surgery is not necessarily a method used to "switch genders" but rather is a tool to affirm and confirm an individual's gender identity. The article will preserve the original term when quoting the *NALSA* decision. *See* Loren S. Schecter, "'Gender Confirmation Surgery': What's in a Name?" The Huffington Post, 2 Feb. 2016, available at https://perma.cc/G4G3-HLGD.
90. NALSA, 5 S.C.C. at 29 (citing Corbett v. Corbett, 2 All E.R. 33, 18 (United Kingdom 1970)).
91. NALSA, 5 S.C.C. at 30 (citing Attorney-General v. Otahuhu Family Court, 1 N.Z.L.R. 603 (H.C.) (New Zealand 1995)).
92. NALSA, 5 S.C.C. at 32 (citing AB v. Western Australia, H.C.A. 42, 7 (Australia 2011)).

increased recognition of the right to specify one's gender on identity documents and the right to be free from discrimination.[93] The judgment cites several foreign statutes that have guaranteed equality and even mandated certain legal and social entitlements to transgender and gender-nonconforming individuals. These include Australia's Sex Discrimination Act[94] and Sex Discrimination Amendment,[95] European Union Legislation (Recital 3),[96] and Argentina's Gender Identity Law.[97]

C. *NALSA:* Constitutional Obligations

Third, the Court states that India's Constitution requires the state to recognize the personhood of gender-variant individuals.[98] This includes the rights to determine their own gender, to be free from discrimination, and to be equal under the law.[99] The judgment details how Articles 14, 15, 16, 19, and 21 of the Indian Constitution individually and collectively mandate the Court's decision. The Court holds that Article 14, the constitutional right to equality, requires the government to ensure equal protection and to promote the equality of gender-variant people because "equality includes the full and equal enjoyment of all rights and freedom."[100] Justice Sikri's concurring opinion goes so far as to say that "anything which is not reasonable, just and fair" is not equal and is, therefore, in violation of Article 14.[101]

The judgment next examines the intersection of Articles 15 and 16, the rights to be free from discrimination and equality of opportunity in matters of public employment, with issues facing gender-nonconforming persons in India. According to the Court, Articles 15 and 16 prohibit discrimination on the basis of gender, despite the fact that the language of the Articles only mentions discrimination on the basis of sex.[102] The Court holds that gender identity is part of the term sex and is therefore included within the protection of Articles 15 and 16. In conclusion, the judgment states "both gender and biological attributes

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93. NALSA, 5 S.C.C. at 39–45.
94. *Id.* at 41-43 (citing Sex Discrimination Act, Australia 1984).
95. *Id.* (citing Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013 (Australia)).
96. *Id.* at 44.

> The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of this purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

Id.

97. *Id.* at 45–46 (citing Law No. 26743, 23 May 2012 (Argentina), last accessed 6 Mar. 2017, English translation available at https://perma.cc/6U8Z-X7XC.
98. *Id.* at 60–75, 120.
99. *Id.*
100. *Id.* at 60–61.
101. *Id.* at 83.
102. *Id.* at 62–66.

constitute distinct components of sex" with the result that gender is protected.[103]

The Court next evaluates the rights of transgender persons under Article 19 and 21.[104] Article 19 protects the freedom of speech and expression of Indian citizens. The Court holds that the right to determine one's gender expression and gender identification is included within Article 19.[105] The Court concludes its analysis of the constitutional rights of transgender individuals with an investigation of which rights are guaranteed by Article 21, which protects the right to life and personal liberty.[106] The Court holds that transgender people's right to express their gender identities is a core part of their being and is, therefore, a necessary element of their right to personal liberty.[107]

The judgment has had immediate positive effects for the gender-variant community and has directly influenced State case law to expand and protect constitutional rights of this community. In April 2015, a transgender woman petitioned the Madras High Court to direct the Tamil Nadu to allow her to continue employment as a female police constable.[108] The petitioner had been terminated from her employment after a medical examination revealed that she was not biologically female. Justice S. Nagamuthu's opinion held that transgender individuals would not be required to undergo medical examinations to identify their sex, since such a requirement would constitute a violation of fundamental rights, including the right to privacy.[109] The Court held that the petitioner would be allowed to join the police force as a woman because she identified as that gender.[110] Furthermore, the Court noted that the petitioner could choose to identify as a third gender, if she desired to do so, once the Supreme Court's judgment in *NALSA* was implemented.[111]

Despite the apparent progress made by the *NALSA* case in transgender rights, India has yet to confront its colonial past in terms of rights based on sexual orientation. There remain many questions about the interpretation of transgender rights in accordance with the discriminatory provisions of Section 377 of the Indian Penal Code.[112] The ruling in *Koushal* case of 2013 appears to contradict the new rights recognized by the *NALSA* Court a year later. It is imperative to read *NALSA* as the "aftermath" of the *Koushal*. The next section will discuss these two cases.

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103. *Id.* at 64.
104. *Id.* at 65.
105. *Id.* at 65–66.
106. *Id.* at 68.
107. *Id.* at 69.
108. Jackuline Mary v. The Superintendent of Policees, Karur&Ors W.P. No. 587 (India 2014).
109. *Id.* at ¶ 38.
110. *Id.* at ¶ 40.
111. *Id.* at ¶ 43.
112. India Penal Code, 1860, Section 377.

III. TWO BENCHES: INCONGRUOUS JURISPRUDENCE ON SEXUAL AND GENDER MINORITY RIGHTS

India's recent Supreme Court decision is a welcome step towards equal rights for gender-variant persons in India. The *NALSA* decision makes progress through its recognition of the history of discrimination that gender-variant people have faced in India, through the recognition that this discrimination continues today, and a more protective and broader interpretation of constitutional violations.

First, the Supreme Court's judgment in *NALSA* invests considerable effort in a detailed discussion of the history of discrimination and abuse of the transgender community.[113] The Court recognized the significance of Section 377 of the Indian Penal Code and the colonially implemented Criminal Tribes Act within the history of India's treatment of gender-variant individuals. According to the Court, Section 377 has been used to harass and abuse hijras and transgender persons solely on the basis of their gender without any evidence of prohibited conduct.[114] *Koushal*, on the other hand, reflects the ongoing legally sanctioned discrimination against lesbian, gay, and bisexual individuals, as it ruled that homosexual intercourse was punishable as "carnal intercourse against the order of nature."[115]

Second, the Court in *NALSA* delves into the present realities of discrimination and inequality facing the transgender community as presented in evidence submitted by the petitioners and interveners.[116] In contrast, in *Koushal* the Court gave no such similar attention or weight to evidence of discrimination,[117] despite the fact that the Delhi High Court had considered extensive evidence of discrimination and mistreatments to reach its decision.[118] The Court in *Koushal* dismissively noted that, although numerous affidavits and quantitative evidence showed harassment of LGBTQ persons, these were the result of the misuse of Section 377.[119] As such, the Court concluded that the petitioner had "miserably failed" to furnish any such documentation showing discrimination and that there was no support for "a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment either by the State or its agencies or the society."[120] Beyond this point, the Court in *Koushal* went one step further to note that even if

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113. NALSA, 5 S.C.C. at 10–14.
114. *Id.* at 11–12.
115. Koushal v. Naz Foundation, 1 S.C.C. at 2–23.
116. NALSA, 5 S.C.C. at 5, 7–8, 11–12.
117. *See* Douglas McDonald, *Koushal v. Naz Foundation and the Lessons of International Refugee Law*, 4 Gender, Human Rights and Law 1, 12 (2013), available at https://perma.cc/TEU5-E55V.
118. Naz Foundation v. Government of NCT of Delhi, 160 DLT 277 at 21–22 (Delhi H.C. 2009).
119. *See* Koushal v. Naz Foundation, 1 S.C.C. at 9; *see also* Danish Sheikh, *The Road to Decriminalization: Litigating India's Anti-Sodomy Law*, 16(1) Yale Human Rights & Development Law Journal, 104, 107 (2013).
120. Koushal v. Naz Foundation, 1 S.C.C. at 8; *see also* Boyce, *Sexuality and Gender Identity Under the Constitution of India*, at 44.

there had been evidence of misuse (or discriminatory use) by the police authorities and others, such discrimination was "not a reflection of the vires of the section," meaning that potential or actual misuse of a legal provision had no bearing on the constitutional validity of the section, and therefore Section 377 was not unconstitutional.[121]

Third, the Court in *NALSA* took a broader stance on the potential for violations of constitutional rights than the *Koushal* Court. In *NALSA,* the Court indicated that it considered its role to be a proactive one in protecting against infringement of the rights of a community.[122] For example, according to the *NALSA* judgment, "a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights knowing the pulse and feeling of the community, though a minority, especially when their rights have gained universal recognition and acceptance."[123] This is far afield from the Court's interpretation of its duty and power in *Koushal*, which has been criticized for falling short of the Supreme Court's mandate as the repository of constitutional rights.[124] According to Justice Sikri's concurring opinion in *NALSA*, "this Court is only bridging the gap between law and life and that is the primary role of the court in a democracy."[125] The *Koushal* Court had a much more limited view of the judiciary, determining that the Court has no such obligation unless such discriminatory treatment is "mandated by the section" or "condoned by it."[126] Further, *Koushal* is representative of judicial restraint as the Court brandished the "presumption of constitutionality" of Section 377.[127] The Supreme Court refused to intervene in a supposedly legislative enterprise and test the constitutionality of the impugned provision on grounds of judicial restraint, which then resulted in a finding that Section 377 reflected the will of the people.[128] It is however difficult to fathom how Section 377 contained in the Indian Penal Code adopted by a committee of "twelve male Englishmen" appointed by the colonial government "somehow represented the will of Indian people."[129]

In addition to the issue of the Court's constitutional duty, the benches in *Koushal* and *NALSA* diverged widely on the scope of the rights guaranteed by the Constitution itself. The Court in *Koushal* held Section 377 constitutional because

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121. Koushal v. Naz Foundation, 1 S.C.C. at 9; *see also* McDonald, *Koushal v. Naz Foundation and the Lessons of International Refugee Law*, at 1.
122. *See* NALSA, 5 S.C.C. at 56.
123. *Id.*
124. *See* Tarunabh Khaitan, *Koushal v Naz: Judges Vote to Recriminalise Homosexuality*, 78(4) Modern Law Review 672, 675 (2015).
125. NALSA, 5 S.C.C. at 104.
126. Koushal v. Naz Foundation, 1 S.C.C. at 91.
127. *See* Boyce, *Sexuality and Gender Identity Under the Constitution of India*, at 46.
128. *See* Sujitha Subramanian, *The Indian Supreme Court Ruling in Koushal v. Naz: Judicial Deference or Judicial Abdication*, 47 George Washington International Law Review 711, 735 (2015).
129. Vikram Raghavan, *Taking Sexuality Seriously: The Supreme Court and the Koushal Case - Part II*, Law and Other Things Blog, 16 Dec. 2013, available at https://perma.cc/S8NT-5F9Y.

it did not criminalize "a particular people or identity or orientation,"[130] overruling the holding of the Delhi High Court.[131] The *Koushal* Court had a very limited reading of Section 377: "what Section 377 does is merely define the particular offense and prescribe punishment for the same," and did not adequately engage with fundamental rights arguments.[132] This marks a stark departure from the Delhi High Court decision in *Naz Foundation* that emphasized language of inclusiveness, tolerance, and the rights to equality, non-discrimination, health, privacy, and dignity.[133] In contrast, the *NALSA* Court concluded "that Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons."[134] Thus, according to the Supreme Court in *NALSA*, Section 377 resulted in discrimination against a particular identity. In light of *NALSA*'s finding that Section 377 was utilized in a manner to harass the hijra and transgender communities, the Court goes on to state, "we, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution."[135] Thus, the *NALSA* bench insinuates (some may argue strongly) that Section 377 is a form of unconstitutional discrimination as applied to the hijra and transgender communities, which is utilized to harass them on the basis of their gender identity.

Prejudice and bias can affect judicial decisions.[136] This is especially pertinent when it comes to social issues with deep-rooted biases. Professor Rhona Rivera published seminal research in 1979 on the disadvantaged legal status of gay and lesbian citizens in the United States, arguing that "judges in particular, as well as attorneys, need to examine their homophobic attitudes and the many popularly held myths and stereotypes . . . Only after such a reevaluation of judicial and societal attitudes can our legal system begin to achieve a fair and equal application of the laws to all persons."[137] The question arose in relation to the Indian Supreme Court's 2013 ruling upholding the criminalization of homosexuality: to what extent do judges "who are expected to be impartial

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130. Koushal v. Naz Foundation, 1 S.C.C. at 77.
131. Naz Foundation v. Government of NCT of Delhi, 160 DLT at 85, ¶ 104.
132. Koushal v. Naz Foundation, 1 S.C.C. at 82.
133. *See* Naz Foundation v. Government of NCT of Delhi, 160 DLT.
134. NALSA, 5 S.C.C. at 14.
135. NALSA, 5 S.C.C. at 73.
136. *See generally* Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (2005); Cass Sunstein, et. al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Virginia Law Review 301, 301–54 (2004).
137. Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 Hastings Law Journal 799, 1168 (1979); Susan J. Becker, *The Evolution toward Judicial Independence in the Continuing Quest for LGBT Equality*, 64(3) Case Western Reserve Law Review 865 (2004).

arbiters, reflect cultural prejudices?"[138]

Legal realists argue that judicial decision-making is essentially a fact-centered endeavor where decisions are consciously or unconsciously grounded in personal or political biases, public policy, individual experiences and "practical politics."[139] Legal rules and syllogistic reasoning are not controlling factors that determine the outcomes of cases,[140] which is exemplified by the common occurrence in which different levels of courts reach different outcomes on the same facts and same legal issues. In the alternative, a textualist would argue that the interpretation of the law is based on the ordinary meaning of the legal text. The legal realist perspective is more compelling and helpful in the context of analyzing *NALSA*, however, as unstated premises based on underlying biases or prejudices[141] likely lead the two different benches of the Supreme Court to view the constitutionality of Section 377 in diametrically divergent manners. Legal realism is especially helpful in the specific context of interpreting Section 377, as it accounts for the impact that a provision that criminalizes certain sexual acts of marginalized individuals is likely to have on judicial reasoning. Legal realism acknowledges that judicial reasoning in this context would have recognized the disproportionate impact of a provision that criminalizes certain sexual acts on a class of citizenry aligning with certain sexual identities.

The *NALSA* dicta expands this constitutional protection beyond gender identity to include sexual orientation—a question largely left unanswered in *Koushal*.[142] The *NALSA* court emphasizes throughout its opinion that sexual orientation and gender identity are fundamental: "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."[143] The Court in *NALSA* holds that this right applies to all persons (as seen in quoted portions above), whereas the Court in *Koushal* famously implied that homosexuals and heterosexuals were to be given different rights based on their class. The *Koushal* Court held that "[t]hose who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification."[144]

NALSA does not involve statutory law of any kind. In fact, the claim that the

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138. Jyoti Puri, "Correcting Legalized Bias: India and its Struggle to Decriminalize Homosexuality," 5 Feb. 2016, hosted by The Huffington Post, available at https://perma.cc/K7WN-KHMP.

139. Palsgraf v. Long Island Railroad, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting).

140. Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, University of Pennsylvania Law Review 17, 42 (1931).

141. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harvard Law Review 457, 460–461 (1897).

142. NALSA, 5 S.C.C. at 16; *see* Ratna Kapur, *Beyond Male and Female, the Right to Humanity*, 19 Apr. 2014, hosted by The Hindu, available at https://perma.cc/W7FN-V96E.

143. NALSA, 5 S.C.C. at 16.

144. Koushal v. Naz Foundation, 1 S.C.C. at 82.

transgender community is abused and discriminated against is based only on evidence of social realities and treatment, not on the presence of any law that prohibits this discrimination. This lack of statutory protection did not bar the claims. Indeed, the Court held that the "absence of suitable legislation protecting the rights of the members of the transgender community" caused the discrimination and therefore required Court intervention.[145] In contrast, the Court in *Koushal* noted that Section 377 had actually violated only a "miniscule" number of people's constitutional rights (or "so-called rights of LGBTQ persons"),[146] and therefore, there was no constitutional infringement that would warrant Court intervention. In fact, the *Koushal* Court accepted the argument that there was an absence of empirical data to validate the existence of a homosexual "community" or "class" for Section 377 to be tested on the anvil of Article 14.[147] As such, the *Koushal* Court deliberately ignored the findings of the Delhi High Court counting the number of members of the MSM community (men who have sex with men) at around 2,500,000 (or 25 lacs) and the number of lesbian and transgender individuals at several hundred thousand well.[148] Setting a *de minimus* threshold for being worthy of the Court's protection and access to fundamental rights puts the judiciary's role as a counter-majoritarian institution in jeopardy.[149] The *NALSA* judgment, on the other hand, makes no such objection or attempts to even determine the number of persons within the transgender community whose rights could potentially be violated.[150] Instead, the *NALSA* Court directly rebukes any interpretation that would make constitutional rights dependent on the size of the community impacted: "These TGs [transgender individuals], even though insignificant in numbers, are still human beings and therefore have every right to enjoy their human rights."[151]

In February 2016, the Supreme Court granted a curative petition filed by the Naz Foundation to refer the *Koushal* case to a five-judge constitutional bench.[152] In the same year, a transgender activist, Dr. Akkai Padmashali, filed a writ petition in the Supreme Court challenging the constitutional validity of Section 377 of the Indian Penal Code on the ground that it violates the fundamental rights of

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145. NALSA, 5 S.C.C. at 55.

146. Koushal v. Naz Foundation, 1 S.C.C. at 83; *see* Danish Sheikh, *The Quality of Mercy, Strained: Compassion, Empathy and Other Irrelevant Considerations in Koushal v. Naz*, 6(4) NUJS Law Review 587, 594 (2013).

147. Koushal v. Naz Foundation, 1 S.C.C. at 21; *see* Sheikh, *The Road to Decriminalization*, at 123.

148. Naz Foundation v. Government of NCT of Delhi, 160 DLT at 43.

149. Chintan Chandrachud, *Proportionality, Judicial Reasoning, and the Indian Supreme Court*, forthcoming in Anti-Discrimination Law Review, University of Cambridge Faculty of Law Paper No. 12/2016, 6, (2016), available at https://perma.cc/QV22-BYB5; *see* Sheikh, *The Quality of Mercy, Strained*, at 594.

150. *See* Tarunabh Khaitan, "NALSA v Union of India: What Courts Say, What Courts Do," 24 Apr. 2014, last visited 26 Feb. 2016, hosted by United Kingdom Constitutional Law Association, available at https://perma.cc/9JYW-3YT2.

151. NALSA, 5 S.C.C. at 105.

152. Krishnadas Rajagobal, *Five-judge Constitution Bench to take a call on Section 377*, The Hindu, 2 Feb. 2016, available at https://perma.cc/FBX9-67T7.

transgender people under articles 14, 19, and 21 of the Constitution.[153] Since Section 377 criminalizes intercourse "against the order of nature,"[154] that is, non-penile-vaginal intercourse between a man and a woman, the Petitioner averred that if transgender persons were to have intercourse with their partners, they would be particularly vulnerable to being criminalized under Section 377.[155] The curative petition offers hope for a reconsideration of *Koushal* and reflects a demand from the movement to understand sexual orientation and gender identity intersectionally. It is the last judicial resort for the applicants and it is significant that it has even been granted.[156] One can hope the case will be reviewed in light of the *NALSA* case to provide some gender-variant community with more fundamental rights of sexuality and sexual intimacy protected by the Indian Constitution in terms of sexuality and dignity.

IV. CRITICAL READING OF NALSA: FLUIDITY BOXED?

LGBTQ activists in India and across the globe are hailing *NALSA v. Union of India* as a significant step forward for the fundamental rights and human rights of the transgender community in India. Although *NALSA* may help set the benchmark for other countries in Asia and the world, the judgment is beleaguered by several substantial and potentially consequential deficiencies. This section attempts to problematize the definitions of various categories of gender-variant communities constructed, adopted and endorsed by the judiciary, and highlight the disjuncture between such judicial definitions divorced from social realities on one hand, and the fluidity of gender-variant communicty celebrated in the Queer movement in India on the other.

First, the Court's judgment is under-inclusive and leaves the rights of many gender-variant people and communities without explicit recognition. In the initial passages of the judgment, the Court attempts to define the class of persons concerned with the rights in question. The Court refers to such persons as the "Transgender Community" ("TG community" for short) which it defines as people wanting "legal declaration of their gender identity [other] than the one assigned to them, male or female" as well as "hijras/eunuchs."[157] However, this definition is later narrowed through the discussion of the "Historical Background of Transgender people in India" which states, "TG community comprises of *Hijras,* eunuchs, *Kothis, Aravanis, Jogappas, Shiv-Shakthis*etc."[158] As a result, the category of transgender community, as understood and described by the Court, appears to consist of only hijras and other people who were assigned male at birth

153. Dr. Akkai Padmashali & Ors. v. Union of India & Ors., Writ Petition (Civil) No. ____ of 2016, 6, available at https://perma.cc/7PT5-CPED.
154. Indian Penal Code, Section 377 (1860).
155. Dr. Akkai Padmashali & Ors. v. Union of India & Ors., Writ Petition (Civil) No. ____ of 2016, 6, available at https://perma.cc/7PT5-CPED.
156. As of May 2017, there were no further dates or orders for the next hearing.
157. NALSA, 5 S.C.C. at 2.
158. *Id.* at 10.

who belong to third gender categories.[159] This trend is seen throughout both Justice Radhakrishnan and Justice Sikri's *NALSA* opinions. According to Sikri, "it is to be emphasized that Transgenders in India have assumed a distinct and separate class/category which is not prevalent in other parts of the world except in some neighboring countries. In this country, TG community comprises of Hijras, eunuch, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc."[160] As seen in the quote, only male-assigned people who belong to third gender groups are mentioned.

The term "eunuch" is used twenty times in the judgment. It is baffling to see the liberal usage of this derogatory term, which carries with it a colonialist connotation, in an otherwise progressive decision of the highest court of the country. Gee Imaan Semmalar, an independent activist, for instance, reflects on the term "eunuch" "as being offensive and related to a history of colonial, medicalized, oppression."[161] Laxmi Tripathi, a transgender activist, has reiterated the derogatory nature of the term "eunuch" and attributed it to lack of gender sensitization amongst office-holders.[162] The term is typically used for castrated or otherwise impotent men, and viewed derogatorily on account of rigid notions of masculinity or manhood.[163]

Instead of using "eunuch" and therefore continuing a colonial or post-colonial Western hegemonic discourse, the Court should have taken into account the South Asian context and used appropriate expressions. Ratna Kapur argues that the cultural expression of alternative sexual identities (almost always reduced to same-sex orientations) has a prescribed methodology, which is significantly influenced and sanctioned by the Euro-American narrative.[164] Importantly, the taxonomy of queer discourse in South Asia requires that terms like "sexual subaltern" remain unstable and inclusive of sexual minorities like *hijras*, *kothis*, *panthis*, etc.—categories that must avoid further obfuscation in the post-colonial context.[165] However, the consistent reference to "eunuchs" in the judgment reflects adamancy on the part of the bench to uphold the colonial taxonomy.

The judgment first includes "transvestites" within the ambit of "transgender," suggesting that lesbian, gay, and bisexual persons who "cross-

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159. *See* Aniruddha Dutta & Raina Roy, *Decolonizing Transgender in India: Some Reflections*, 1(3) Transgender Studies Quarterly 320, 328 (2014) (noting the exclusion of trans masculine identities and other local gender-variant people by use of "transgender" as a transnational umbrella term).

160. NALSA, 5 S.C.C. at 94.

161. Gee Imaan Semmalar, "Gender Outlawed: The Supreme Court judgment on third gender and its implications," 19 Apr. 2014, last accessed 4 Mar. 2017, hosted by Round Table India, available at https://perma.cc/X7YC-SWGK.

162. *See* Clara Lewis, *EC rejects demand for 'transgender' on voter ID*, The Times of India, 21 Jul. 2014, available at https://perma.cc/2HS8-QWXQ.

163. *See* Laxmi Murthy, "Women, Men and the Emerging Other," 23, 42 in *Missing: Half the Story: Journalism as if Gender Matters* (ed. Kalpana Sharma) (2012).

164. Ratna Kapur, "Unruly desires, gay governance and the makeover of sexuality in postcolonial India," 115, 118 in *Global Justice and Desire: Queering Economy* (eds. Nikita Dhawan & Antke Engel) (2015).

165. *Id.* at 119.

dress" "without necessarily identifying as the 'opposite' sex would also be covered under the judgment."[166] However, Justice Sikri narrows the scope of "transgender" to expressly exclude lesbian, gay, and bisexual people.[167] The judgment's discussion of identity offers another example: "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."[168] This trend is especially prevalent in the historical background section of the judgment where only the history of the hijra is discussed.[169] Satya, founder and facilitator of Sampoorna, a network of trans and intersex Indians across the globe, for instance, attributes the sidelining of non-traditional transgender identities in the judgment to the Report of the Expert Committee convened by the Ministry of Social Justice and Empowerment and submitted by the respondents during the course of the proceedings. Particularly, the Committee failed to incorporate representation and ensuing perspectives across caste, class and intersectionalities in preparing its report and recommendations to the Ministry.[170] The Committee moreover highlighted a discriminatory undertone in naming trans women on the Committee as members and the two persons invited as representatives from the trans men, intersex, and intergender community as "special invitees," indicating a form of erasure of certain prevalent identities.[171]

The over-emphasis on hijras and other third gender groups as the only or the most important identity or set of identities included within the umbrella category of transgender is apparent throughout the Court's reasoning. One example of this is when the Court casually commented that "TGs in India **[]** are neither male nor female."[172] Thus, the Court inadvertently redefines the gender identity of transgender persons to be third gender within the dicta of the judgment despite the fact that transgender individuals may not define themselves in such a way.[173]

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166. Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights*, 5 Journal of Indian Law and Society 225, 231 (2015). *See* NALSA, 5 S.C.C. at 9-10.

> Further, there are persons who like to cross-dress in clothing of opposite gender, i.e. transvestites. Resultantly, the term 'transgender,' in contemporary usage has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative, and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex; male and female.

Id.

167. *See* Ash Kotak, *India's transgender law is no help to its lesbian, gay and bisexual communities*, The Guardian, 17 Apr. 2014, available at https://perma.cc/2AXG-Y5EU.
168. NALSA, 5 S.C.C. at 95.
169. *Id.* at 10-14.
170. *See* Satya Bansal, *Why the transgender verdict is an incomplete one*, Live Mint, 17 Apr. 2014, available at https://perma.cc/7ES7-86FG.
171. *Id.*
172. NALSA, 5 S.C.C. at 102.
173. *See* Aniruddha Dutta, "Thoughts on the Supreme Court Judgment on Transgender Recognition and Rights," 19 Apr. 2014, last accessed 4 Mar. 2017, hosted by Orinam, available

Nowhere is this more apparent than the Court's constant reference to the petitioning persons whose rights are under review as "Hijra/Transgender" or "Hijra/TG" persons; thus, implying that these distinct groups of persons are one and the same.[174] This is clearly fallacious. Again, as highlighted in these quotes, hijras are the predominant focus of the judgment and the Court does not equally engage other gender-variant persons.[175] The judgment mentions the trans men community only three times and fails to mention or acknowledge the wider groups of other gender-variant groups such as: intergender (a person whose gender identity is between genders or a combination of genders), Bhaiya, Thirunambi (trans-masculine persons living in Tamil Nadu), genderqueer or Gandabasaka (an umbrella term for people whose gender identity is outside of, not included within, or beyond the binary of female and male), other non-binary, and intersex (a person who is born with sex chromosomes, external genitalia, and/or an internal reproductive system that is not considered "standard" or normative for either the male or female sex).[176] Moreover, the overemphasis on hijras effectively homogenizes the hijra community to become a "separate or third gender,"[177] ignoring the existence of hijras who identify as female and not third gender. Radhakrishnan's express conclusion that "Hijras/Eunuchs, therefore, have to be considered as Third Gender, over and above binary genders under our Constitution and the laws"[178] deprives hijras of personal autonomy and makes the decision of choosing the third gender for them.[179] Specifically, the relief portion of the judgment, in its first directive, explicitly upholds a distinction between hijras (along with other third gender categories) and transgender persons, thereby precluding their right to identify as male or female.[180]

The Court's emphasis and conflation of hijras and other third genders while erasing other identities within the larger "TG" category, may be linked to the identities of the petitioners and interveners. For example, none of the petitioners or interveners represented trans men or intersex communities. In this case, the National Legal Services Authority initiated a public interest litigation (PIL). An individual can file a PIL in any High Court or in the Supreme Court in order to seek judicial redress of a public injury.[181] The petitioner need not have suffered personal injury or grievance to litigate, nor do they need to facilitate or consult with relevant communities and stakeholders beforehand. The *NALSA* case is only one example of a greater phenomenon where the outcome of a public interest

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at https://perma.cc/C6XY-HSQK.

174. *Id.*

175. *See* Dutta, *Contradictory Tendencies*, at 229 (noting, for example, "major omissions" of trans men and trans masculine people).

176. *See* Bansal, *Why the transgender verdict is an incomplete one*.

177. *See* Dutta, *Contradictory Tendencies*, at 229–30.

178. NALSA, 5 S.C.C. at 72.

179. *See* Gee Imaan Semmalar, "Gender Outlawed," 2014.

180. *See* Dutta, *Contradictory Tendencies,* at 232.

181. Aradhana Singh, "Public Interest Litigation: Remedies - Public Interest Litigation (PIL) - Part: 1," NGOs India, last accessed 4 Mar. 2017, available at https://perma.cc/B7PM-5EHV.

litigation, a judicial non-adversarial innovation in India, is overwhelmingly influenced by the lack of procedural mechanisms that the innovation has tried to do away with. Relaxed rules of standing allow certain individuals who are not necessarily representative of the entire social movement and who often lack a comprehensive understanding of the movement's aspirations and litigation goals, to appear before the Court. In addition, some scholars argue that relaxed rules of locus standi and evidentiary rules for petitioners and intervenors, supplemented with "over-extensive reliance on socio-legal commissions of enquiry may provide a judge with a partial and possibly biased view of facts."[182] Judgments arising out of fragmented representation in such litigations would both divorce one cause of the movement from another, and fragment the movement altogether.

The *NALSA* court focused on the need to recognize a third gender in order to resolve the issue of transgender rights. According to the judgment, this focus seems to come from the National Legal Services Authority's argument that "since the TGs are neither treated as male or female nor given the status of a third gender, they are being deprived of many of the rights and privileges which other persons enjoy as citizens of this country."[183] The judgment itself acknowledges that its primary interest is in the establishment of a third gender category and not on the question of whether a person has the right to identify their own gender. Justice Sikri described that "it is the second issue [whether transgender individuals have a right to identify with a third gender] with which we are primarily concerned in these petitions, though in the process of discussion, the first issue, [the right to self-identify gender identity] which is somewhat inter-related, has also popped up."[184]

The Court took a controversial position to guarantee transgender individuals their rights, by effectively relating gender to caste. Thus, it is important to analyze their reasoning and the steps taken in purportedly widening the scope of entitlements for the third gender category. While intending to apply significant fundamental rights to TG individuals, the Court has inadvertently placed them within the category of Socially and Educationally Backward Classes (SEBCs), in order to provide them constitutional protection under Article 15(4). The Indian Government uses the SEBC classification to identify groups that are socially and educationally disadvantaged in order to ensure their development through affirmative action.[185] While it is one thing to recognize that the third gender deserves the same legal entitlements as the rest of society in terms of gender self-identification and right to life with human dignity, a formal acknowledgment of transgender individuals as SEBCs or "part of vulnerable groups and marginalized

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182. Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37(3) The American Journal of Comparative Law 495, 507 (1989).

183. NALSA, 5 S.C.C. at 3–4.

184. *Id.* at 76.

185. India Const. III, Provisions relating to Socially & Educationally Backward Classes (OBCs), last visited 9 Mar. 2016, available at https://perma.cc/CH6L-X8BM.

section of the society" has more consequences.[186] Historically, the SEBC category has primarily addressed caste as a major factor of social marginalization. By treating the transgender community as SEBCs, the Court has effectively drawn a parallel between caste and gender, without paying heed to the fact that members of the transgender community may belong to a wide range of castes. The third directive in the relief portion of the judgment particularly stipulates reservation for "them" (presumably referring to "transgender persons") "in cases of admission in educational institutions and for public appointments."[187]

Many gender-variant individuals have vehemently objected to being classified as Backward Classes, a designation used by the Indian government to classify socially and educationally disadvantaged classes, since such a designation erases the caste privileges enjoyed by *savarna.* The *savarna*, i.e. caste Hindu, is a reference to members of any of the four categories within caste hierarchy amongst Hindus in India.[188] This is problematic by itself given the exercise of caste privilege by some members of the community. Members previously belonging to backward classes, such as the Thevar and Pillaimar castes, retain their caste identity even after entering the hijra community.[189] Furthermore, previously low-caste or dalit transgender persons have voiced their discontent with OBC reservations, which, according to them, would only benefit *savarna* transgender individuals and dalit men.[190] Isolating a person's trans identity and granting them reservations results in an erasure of their other identities and undermines an understanding of the intersectional nature of their unique experiences of oppression and privilege. The Jogappas, for instance, are identified by their caste identity, and creating a provision of reservations for them because of their transgender identity artificially constructs a hierarchy within their multiple identities. Such a fragmented reading of identities prevents transgender Dalits from embracing their whole self. The judgment, by denying the existence of intersectionality, fails to legally recognize the interplay of caste, gender and sexuality.[191] As a result, one commentator called for a "mutual understanding between anti-caste and queer groups" to visibly narrow the gaps between identities.[192] Grace Banu, a Dalit transgender woman activist, in recalling the constant permeation of caste within gender identity that has produced unique personal experiences of discrimination and violence, views reservation in educational institutions as an ameliorative step towards mainstreaming transgender persons, the benefits of which ought to percolate to all sections of the

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186. NALSA, 5 S.C.C. at 108.
187. *Id.* at 110.
188. Living Smile Vidya, "(Trans)gender and caste lived experience - Transphobia as a form of Brahminism: An Interview of Living Smile Vidya," 1 Jan. 2013, Round Table India , available at https://perma.cc/AS6W-LQB9.
189. *Id.*
190. *Id.*
191. *See* Sumit Baudh, *Groom for Groom*, The Indian Express, 25 May 2015, available at https://perma.cc/3L88-6BNE.
192. *Id.*

community.[193] Particularly, Banu has advocated for a subcategory within the reservation pattern based on economic needs, similar to the increasingly accepted requirements within the Scheduled Caste, Scheduled Tribes and other categories for the purposes of affirmative action programs.

Gee Imaan Semmalar, an independent activist, argues that the judgment is representative of a larger saffronising[194] agenda that is not a Western import but rather a part of an endeavor to reinforce the construct of hijras as rooted in Hinduism: this entails heavy reliance on Hindu mythological texts such as the Ramayana and Mahabharata and mere cursory references to the Mughal period, when the region was ruled by a Muslim Turkish dynasty.[195] The hijra community traces its origins to legends in the Ramayana and Mahabharata epics[196] during the Mughal period, where they held important roles, such as royal advisors or offices in Mughal courts of law.[197] This is a clear attempt by the Court to ignore the Islamic cultural context that provided fertile ground for Hijra communities to flourish, and to Hindu-ise the community in question.[198] This language of exclusion has been adopted by institutional repositories of justice in the context of contemporary Islamaphobia, and ties in with the larger dominant narrative that fails to engage with intersectionality of religion, race, caste, and class with gender identity and sexual orientation. By classifying transgender individuals as SEBCs, *NALSA* ignores the multiple overlapping identities possessed by gender minorities, as well as the discrimination that individuals who are members of certain castes, race, or other statuses may face. Jasbir Puar, for example, highlights improper racialization (by embracing a fundamentalist religious identity) and sexual perversity as prerequisites for a citizen to be de-identified and materialized as a terrorist in the first place.[199] The fleeting reference to a transgender presence during Mughal rule and otherwise sheer dismissal of Muslim transgender persons indicates that this process of de-identification has already found a place in the judicial mind. The communal undertone is evident in the Court's attempt to ignore the Islamic cultural context that provided fertile ground for hijra communities to

193. "Grace Banu on Challenges of a Dalit Transperson in Education", Dalit Camera, 24 Jul. 2016, last accessed 22 Apr. 2017, available at http://www.dalitcamera.com/grace-banu-challenges-dalit-transperson-education/.

194. The term refers to a policy of Hindu nationalism most closely associated with the Bharatiya Janata Party (BJP.) *See* "Saffronisation: Activists rip through Textbook Society's defence," Deccan Heald, 14 Feb. 2012, available at https://perma.cc/F2WC-3C8W (illustrating one example of BJP saffronising policies and its critiques.); Brenda Cossman and Ratna Kapur, *Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy,* 38(1) Harvard International Law Journal 113, 113–170 (1997) (tracing the judiciary's intervention in issues of nationalism and secularism.)

195. *See* Semmalar, "Gender Outlawed."

196. Syed Zarir Hussain, *Eunuchs can guard frontiers, suggests Arunachal minister,* Thaindia News, 10 May 2010, last visited 13 Mar. 2017, available at http://perma.cc/PLG5-G9XF.

197. Lukáš Houdek, "Hijras: The Transgender Goddesses," 6 Jun. 2016, The Huffington Post, available at https://perma.cc/UU8J-RQ58; "Eunuchs want Mughal era role back," The Times of India, 27 Apr. 2008, available at https://perma.cc/7GL6-D8BX.

198. *See* NALSA, 5 S.C.C. at 10-12.

199. Jasbir K. Puar, "Terrorist Assemblages: Homonationalism," in *Queer Times*, 38 (2007).

flourish, and to instead Hindu-ise the community in question.[200] The study of intersectional identities requires a celebration of messy spatial and temporal assemblages of identity; yet a growing, but not articulately addressed, fear of one particular religious identity hinders a comprehensive engagement with rights of gender-variant communities, as was evidenced in *NALSA*.

Second, the judgment both conflates and obfuscates the differences between gender identity, sex, and sexual orientation.[201] Gender identity is an individual's sense of being a woman, man, or other gender that is internal and not necessarily visible to others.[202] Sex is often considered a medical descriptor of a person's gonads, chromosome, and external organs (female, male, intersex etc.).[203] In contrast, Butler argues sex is socially constructed and "gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which 'sexed nature' or 'a natural sex' is produced and established as 'prediscursive,' prior to culture, a politically neutral surface *on which* culture acts."[204] Finally, sexual orientation describes a person's attraction to members of different sex groups (heterosexual, homosexual, bisexual, etc.).[205]

The Court fails to recognize these distinctions by problematically basing gender identity upon what the Court perceives as sexual disorders. A specific point of confusion lies in how hijras come to self-identify as the hijra gender.[206] According to the Court, "Hijras do not identify as female because of their lack of female genitalia or lack of reproductive capability," and thus they are distinct from male or female persons.[207] Similarly, the Court implies that the reason a person is transgender is because "genital anatomy problems may arise in certain persons."[208] Thus, the Court clearly implies that the identify of transgender and hijra individuals is because of biological sex abnormalities. This is problematic in several ways. First, sex (the medical term discussed above) does not control a person's gender identity. In drawing the boundaries of gender identities, the Court consistently places a premium on physical attributes and not self-identification, for instance, by defining Hijras upon "the absence of reproductive capacities associated with men or women" instead of individual self-identification.[209] This

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200. *See* NALSA, 5 S.C.C. at 10–12.
201. *See* Anindita Mukherjee, "SC landmark transgender judgment: What it says, what is good and what it muddled up," Legally India, 15 Oct. 2014, last accessed 6 Mar. 2016, available at https://perma.cc/99M4-99JZ.
202. "Definitions of terms in APA documents related to sexual orientation and gender diversity," American Psychological Association, available at https://perma.cc/4SRV-3VEB.
203. "Definition of Terms," Centers for Educational Justice & Community Engagement, U.C. Berkeley Division of Equity & Inclusion, available at https://perma.cc/5XRC-994U.
204. Judith Butler, "Subjects of Sex/Gender/Desire," in *Gender Trouble: Feminism and the Subversion of Identity*, 10 (1th ed. 2006).
205. "Sexual Orientation and Gender Identity Definitions," Human Rights Campaign, available at https://perma.cc/K3J7-XRH2.
206. *See* Dutta, *Contradictory Tendencies,* at 227.
207. NALSA, 5 S.C.C. at 70.
208. *Id.* at 77.
209. Dutta, *Contradictory Tendencies,* at 230; *see* NALSA, 5 S.C.C. at 70

demonstrates again the Court's essentialist assumption towards variations within the Hijra community, such as the akua (non-castrated/penectomized)" or nirvana (those who have undergone castration/penectomy)"[210] that feeds into the dominant transphobic narratives.[211] Furthermore, persons born of either sex (or intersex or any variation) can identify as a third gender or other. Thus, the belief that the hijra identity is based solely upon gonads or reproductive capacity is erroneous and largely a colonial legacy.

In addition, Justice Sikri's concurring opinion to *NALSA* demonstrates a problematic pathologization of gender variance. Justice Sikri writes in his concurring opinion, "that though a person is born as a male," it may happen that "because of some genital anatomy problems his innate perception may be that of a female and all his actions may be female oriented."[212] This conflation of gender identity and sex[213] continues throughout the remainder of Sikri's judgment: "In order to translate the aforesaid rights of TGs into reality it becomes imperative to first assign them their proper 'sex' . . . . Up to now, they have either been treated as male or female."[214] The judicial tendency to pathologize gender variance, that is to identify it was an illness or as rooted in "genital anatomy problems,"[215] reinforces the gender binary. Maria Victoria Carrera argues that "Medical science . . . creates the perfect climate for developing discriminatory social attitudes towards the trans community by pathologizing and highlighting people's 'sex/gender dissonance' and further imposing the assumption that sex/gender consonance is an incontestable and 'natural' fact."[216] Historically, pathologization has been used to legitimize otherwise coercive and involuntary "reparative" or "curative therapies" to alleviate gender non-conformity.[217] The call from various international human rights organizations to depathologize transgender identities and expressions[218] further reiterates why the reasoning adopted by the judiciary is a problematic way to engage with the rights of gender-variant communities.

Third, the Court's recognition of the right to self-identification of gender identity for all transgender and third gender persons is muddled at best and

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210. Dutta, *Contradictory Tendencies*, at 230.
211. *See* Semmalar, "Gender Outlawed"; "*Pathologization—Being lesbian, gay, bisexual and/or trans is not an illness*" *For International Day against Homophobia, Transphobia and Biphobia* (2016), Office of the High Commissioner on Human Rights (United Nation), last visited 18 Feb. 2017, available at https://perma.cc/D843-JD2B.
212. NALSA, 5 S.C.C. at 77.
213. *See* Semmalar, "Gender Outlawed."
214. NALSA, 5 S.C.C. at 100.
215. *Id.* at 15.
216. Maria Victoria Carrera et al., *Pathologizing gender identity: An analysis of Spanish law and the regulation of gender recognition*, 22(2) Journal of Gender Studies 206, 213 (2013).
217. *See generally* Julia Churchill Schoellkopf and Jasmine Mena, *Gender Identity Disorder: An Unethical Diagnosis of Normal Human Diversity*, Lesbian Gay Bisexual Transgender Queer Center, Paper 31 (2012).
218. *See, e.g.*, UN Office of the High Commissioner on Human Rights, *"Pathologization—Being lesbian, gay, bisexual and/or trans is not an illness,"* (2016), available at https://perma.cc/F396-7YQ4.

contradictory at worst. This confusion is particularly apparent in the Court's puzzled attempt to define what is required for people to change their gender marker on identity documents.[219] At times the Court rejects the need for any biological or medical test to prove a gender change, such as gender-affirming surgery.[220] Despite that, Justice Sikri's opinion notably states, "If a person has changed his/her sex in tune with his/her characteristics and perception . . . we do not find any impediment, legal or otherwise, in giving due recognition to the gender identity based on the reassigned sex after undergoing SRS."[221] Sikri's opinion does not consider legal impediments that fail to recognize an individual's gender identity for people that do not undergo gender affirming surgery and who identify with a gender that does not match their biological sex. Sikri therefore implies that gender-affirming surgery may indeed be needed to change gender identity markers. However, the fifth directive in the section for relief expressly condemns "insistence [on] SRS for declaring one's gender" as "immoral and illegal."[222] The judgment seems conflicted regarding the procedures required for granting recognition.[223] On one hand, Justice Radhakrishnan cites the Argentinean model which allows self-identification without any medical certification; on the other hand, it suggests the utilization of ambiguous psychological tests, without providing any details of this psychological test.[224] Moreover, the Court's attempt to equate gender identity with gender dysphoria is problematic; for one, the ordinary model of gender dysphoria in psychiatry runs along the assumption of a binary model of gender identification, precluding the very existence of transgender or gender-variant persons outside a rigid binary framework.[225] Pathologizing transgender individuals is not an appropriate or progressive way to recognize transgender rights. This has recently been acknowledged and there has been a shift from pathologizing transgender persons to a more "identity-based" perspective.[226] The judgment's muddled description of whether medical surgeries or psychological tests are required reveals that the Court is unsettled on the requirements for persons to exercise their right to "decide their self-identified gender."

The experiences of trans men, intersex, and other communities are excluded from the *NALSA* decision. As such, it appears that their rights are not considered

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219. *See* Dutta, *Contradictory Tendencies*, at 232.

220. NALSA, 5 S.C.C. at 16. As noted earlier in the article, the *NALSA* opinion uses the term "sexual reassignment surgery."

221. *Id.* at 92.

222. *Id.* at 110.

223. Gee Imaan Semmalar, "Gender Outlawed: The Supreme Court judgment on third gender and its implications," 19 Apr. 2014, last accessed 4 Mar. 2017, hosted by Round Table India, available at https://perma.cc/X7YC-SWGK.

224. NALSA, 5 S.C.C. at 37, 81.

225. *See* Aniruddha Dutta, *Contradictory Tendencies,* at 232.

226. Mel Wiseman and Sarah Davidson, *Problems with binary gender discourse: Using context to promote flexibility and connection in gender identity*, 17(4) Clinical Child Psychology and Psychiatry (2011) 528, 528; *see* Walter O. Bockting, *Transforming the paradigm of transgender health: a field in transition*, 24(2) Sexual Relationship Therapy (2009) 103–07.

in the same degree as those of hijras and other male-assigned third gender persons. Although the Court mentions trans men, this pales in comparison to the attention paid throughout both Justices' opinions to hijras and other third gender groups. This is especially apparent in the specific relief provisions allotted. Section (6), which mandates that the government provide transgender individuals separate public toilets, similarly loses sight of the issues facing trans women and trans men. Persons born female identifying as men or those born male who identify as women are considered by the Court in need of separate toilets; thus, the Court assumes they are incapable of using the men's or women's toilets and need a third gender toilet.[227] If these individuals' right to choose a gender within the male/female binary was recognized, they would be able to utilize the toilet of their identified gender. Section (9), which guarantees the respect and place of transgender individuals within culture and society, similarly rests on problematic grounds because it assumes that the Mughul history and previous cultural prestige of hijras applies to all persons included within the Court's definition of transgender.[228] Trans men have not had the same history as hijras, nor do they take on the same religious and cultural significance that hijras do today. By lumping all gender-variant groups into provisions specifically designed for hijras and other groups, the particular identities, needs, and desires of these groups (including trans women and trans men) are not accounted for.

As a result, courts have interpreted *NALSA*'s holding to only apply to hijras and trans women.[229] In cases referred from the Madras High Court in 2014, Justice Nagamuthu interpreted *NALSA* as only applying to hijras and trans women.[230] Thus, according to the Madras High Court's interpretation, trans men were not covered by *NALSA* and such persons must then identify as either male or female to ensure that their fundamental rights are protected. This, however, ought to be viewed in light of contrary interpretations taken by other High Courts in the country. Justice Mridul at the Delhi High Court, for instance, in condemning police harassment of a trans man and recognizing that "everyone has a fundamental right to be recognized in their chosen gender"[231] positively interpreted *NALSA* to encompass provisions of remedies to trans men, as well. Therefore, while the potential for subsequent misinterpretation of the judgment cannot be ruled out, it can be argued that *NALSA* principally does apply to all self-identified men, women, and gender-variant communities.

Implementation of the Court's judgment in *NALSA* is of utmost concern, especially because the judgment depends upon central and state governments to implement and recognize the legal identity of gender-variant people leading to the

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227. NALSA, 5 S.C.C. at 62, 110.
228. NALSA, 5 S.C.C. at 11.
229. *See* Aniruddha Dutta, "Thoughts on the Supreme Court Judgment on Transgender Recognition and Rights," 19 Apr. 2014, last accessed 4 Mar. 2017, hosted by Orinam, available at https://perma.cc/C6XY-HSQK.
230. *Jackuline Mary v. The Superintendent of Police, Karur & Ors,* W.P. No. 587 (India 2014).
231. Shivani Bhat v. State of NCT of Delhi and Ors., 2015 (4) JCC2476 at 10.

bureaucratization of transgender rights. The Court's holding that transgender peoples are entitled to affirmative action, without a clear understanding of transgender identity, "points to an administrative nightmare" if there is no "further clarification."[232] As a result, central and state governments have broad discretion to interpret the *NALSA* decision, which could result in haphazard procedures and bureaucratic gender policing that selectively determines who qualifies as third gender, thereby obtaining reservation and legal protection.[233] For instance, the Court defers the determination of procedural guidelines to an Expert Committee of the Ministry of Social Justice and Empowerment (MOSJE). Interestingly, the MOSJE report stipulates that certificates for transgender persons are issued by state level authorities.[234] These authorities are designated or established by the respective states/UTs, wherein the state-appointed committees would be made up of a psychiatrist, a social worker, two transgender individuals, and others.[235] This would effectively require third gender persons to 'prove' their gender identity to a bureaucratic body.

The *NALSA* decision reflects a larger tension between the capacity of litigation to serve social change and the inherent conservative nature of the legal system. While litigation may provide an "attractive option for groups disadvantaged in the political process . . . [t]he openness and accessibility that make courts so appealing to movement activists also yield risks of movement conflict and fragmentation."[236] Balakrishnan Rajagopal, reminds us that "[p]opular struggles have an ambivalent relationship with law. At one level, they tend to see law as a force for status quo and domination, which must either be contested as part of a larger political struggle or largely ignored as irrelevant. Yet, they can hardly avoid the law as it also provides them space for resistance."[237]

Litigation, which has often been criticized as a method for social transformation—because its often-symbolic piecemeal outcomes are divorced from the aspirations of the social movement themselves—is particularly problematic within the context of gender identity and sexual orientation. Boxing

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232. Danish Sheikh, *National Legal Services Authority versus Union of India—Preliminary Reactions Law and Other Things*, Law and Other Things Blog, 16 Apr. 2016, last accessed at 6 Mar. 2017, available at https://perma.cc/W9XN-8BGY.

233. Diksha Sanyal & Tanvi Pillai, *Identifying Gender: Thoughts on Implementation of the NALSA judgment*, Centre for Law and Policy Research, 17 May 2014, last visited 6 Mar. 2016, available at https://perma.cc/Q7BW-PD27.

234. *Report of the Expert Committee on the Issues relating to Transgender Persons* (2014), Ministry of Social Justice and Empowerment (India), last visited 9 Mar. 2016, available at https://perma.cc/7YMM-G2J8.

235. *See* Aniruddha Dutta, "Thoughts on the Supreme Court Judgment on Transgender Recognition and Rights," 19 Apr. 2014, last accessed 4 Mar. 2017, hosted by Orinam, available at https://perma.cc/C6XY-HSQK.

236. Douglas Nejaime, *The Legal Mobilization Dilemma* 61(663) Emory Law Journal (2012) 663, 665.

237. Balakrishnan Rajagopal, "Limits of Law in Counter-Hegemonic Globalization: The Indian Supreme Court and the Narmada Valley Struggle," in *Law and Globalization from Below: Towards a Cosmopolitan Legality*, (ed. Boaventura de Sousa Santos and Cesar A. Rodriguez-Garavito) (2005) 183.

the fluidity of gender identity and sexual orientation into legal categories calcifies the cornerstone of the social movement. Gerald Rosenberg speaks of rights litigation as a mirage that draws the movement, or at least a few representatives thereof, to systems of the appearance of justice that promise equality before the law.[238] However, these very social movements underscore that the realities of politics, and not just legal reasoning, impact adjudication outcomes.[239] Rosenberg demonstrates that legal rights do not trump politics and that legal success cannot be divorced from social realities.[240]

Due to the fluidity of gender and sexuality, it is especially challenging to utilize the law as an avenue for social change. Dean Spade argued accordingly that "[d]efining the problem of oppression so narrowly that an anti-discrimination law could solve it erases the complexity and breadth of the systemic, life-threatening harm that trans resistance seeks to end."[241] The fluidity of gender and sexuality has been conceptualized in different ways. First, it is important to examine Beauvoir's distinction between sex and gender. Butler summarized Beauvior's understanding of the difference between sex and gender as:

> [o]ne is perhaps born a given sex with a biological facticity, but . . . one becomes one's gender; that is, one acquires a given set of cultural and historical significations, and so comes to embody an historical idea called "woman." Thus, it is one thing to be born female, but quite another to undergo proper acculturation as a woman; the first is, it seems, a natural fact, but the second is the embodiment of an historical idea.[242]

Butler relies on Foucault's work and her interpretation of his concept and theory of sex to "flesh out" Beauvoir's work and claims "we only know sex through gender."[243] Butler hypothesizes that when a man acts in a "feminine" manner,

> the very meanings of "masculine" and "feminine" becomes fluid, interchangeable, and indeterminate, and their repeated usage in dissonant contexts erodes their descriptive power. Indeed, we might imagine a carnival of gender confusion that . . . institutes a new gender vocabulary, a proliferation of genders freed from the substantializing nomenclature of "man" and

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238. Gerald Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (2d ed. 2008).
239. *See generally* Kitty Calavita, *Invitation to Law and Society*, 117–47 (1st ed. 2010).
240. Gerald Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places,* 54 Drake Law Review 795, 797.
241. Dean Spade, "What's Wrong With Rights?" in *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law*, 79, 86 (2011).
242. Judith Butler, "Gendering the Body: Beauvoir's Philosophical Contribution," in *Women, Knowledge, and Reality: Explorations in Feminist Philosophy*, 253-62 (Ann Garry & Marilyn Pearsall) (Unwin Hyman 1989).
243. Samuel A. Chambers, *'Sex' and the Problem of the Body: Reconstructing Judith Butler's Theory of Sex/Gender*, Body&Society, SAGE Publications (2007) 56.

"woman."[244]

Fluidity of gender and sexuality has similarly been acknowledged by the LGBTQ movement. Gopi Shankar who identifies as intersex, defines gender as a "sociocultural and behavioral perception" of oneself, and focuses on the need to embrace gender-variant individuals as beyond the binary categories.[245] Gopi is provocative in calling for the systematic demolition of the binary, heteronormativity, homonormativity, or transnormativity, in order to mainstream formerly detached gender-variant group and individual identity within sites of social relations and institutions outside of the State-created legal infrastructure.

These theorists and activists have construed gender fluidity as unbounded or unconstrained. For example, Bornstein asserts that "gender fluidity recognizes no borders or rules of gender."[246] It has also been framed as being "about the (desired) rejection of identity."[247] However, as Butler argues, "Gender performances cannot be theorized apart from the forcible and reiterative practice of regulatory sexual regimes."[248] *NALSA*, in an attempt to legally recognize self-determination of gender identity principally, has regurgitated the state-sanctioned regulatory sexual regime which boxes gender fluidity and falls short of appreciating gender non-conformity. The language in *NALSA* molds and regulates certain rules of gender. By recognizing a particular category of gender variance, *NALSA* maintains and continues the framework of regulatory sexuality and the violence of exclusion.

CONCLUSION

This article critically examined how Indian law and the recent *NALSA* and *Naz* decisions have impacted the transgender community in India. First, it explored the history of language and laws of colonial India and their influence on the rights of gender-variant individuals. The article next discussed the *NALSA* judgment, specifically examining the Court's reliance on international law and evidence of discrimination as a framework for guaranteeing the right to identify as a third gender. The article then compared the *NALSA* and *Naz* decisions to examine the ways the court uses evidence of discrimination to interpret the Constitution. Finally, the article demonstrated how *NALSA* defines transgender rights in an exclusionary way that fails to address diverse gender-variant community.

NALSA offers historically oppressed gender minority groups—namely transgender and third gender persons—recognition and rights that have been long sought after. It has been over 100 years since the passing of the Criminal Tribes Act that criminalized "eunuchs" in India. Only now, with this judgment, has this

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244. Judith Butler, "Gendering the Body: Beauvoir's Philosophical Contribution," at 260.
245. Gopi Shankar, "Pains of Minority among Minorities," Srishti Madurai, last visited 22 Apr. 2017, available at https://perma.cc/6NHV-QQYY.
246. Kate Bornstein, *Gender Outlaw: On Men, Women, and the Rest of Us*, 52 (1994).
247. Erin Calhoun Davis, Situating "Fluidity": (Trans) Gender Identification and the Regulation of Gender Diversity, 15(1) GLQ: A Journal of Lesbian and Gay Studies, (2009), 97, 101.
248. Judith Butler, *Bodies That Matter: On the discursive limits of "Sex"*, 15 (1993).

group been formally recognized as a third gender deserving of equal rights. In addition, *NALSA* reflects a progressive step forward for transgender rights, namely, recuperating the fight for LGBTQ rights after the narrow constitutional judgment of *Koushal*. However, at what cost? The judgment's hazy construction and constrained understanding of gender non-conforming communities is likely to significantly impact the degree to which groups will realistically benefit from the decision. By casting a wide net for the term "transgender/TG community," the Court has lost several groups (namely binary identified transgender people) along the way in its path toward new rights for certain communities. Specifically, the Supreme Court explicitly recognized the right of transgender individuals to identify as male, female, or third gender. At the same time, the Supreme Court limited the choices of hijra individuals to only being able to identify as third gender. Therefore, the judgment's attempt at overrepresenting hijra individuals has effectively curtailed the right of transgender individuals to choose a gender identity other than that of third gender, which fails to fully recognize the identity of trans women and trans men. These persons may face new difficulties with the passage of the judgment. From whether gender-variant individuals should utilize public facilities that reflects their gender identity or that of the third gender, to whether gender-variant individuals are included as "transgender," the Court has redefined the gender-variant community in more ways than one.

The definitional ambiguities and conflation have practical impacts as well. On September 12, 2014, the government of India applied for a clarification/modification of the April 2014 order critiquing the problematic definitional aspects of *NALSA*.[249] The government sought the following three clarifications: (1) whether the government should only recognize hijras and "eunuchs" as "third gender" or if all transgender persons were declared "third gender"; (2) whether governments must adopt the broad definition of "transgender" recommended by the Expert Committee of the Ministry of Social Justice and Empowerment (which includes all transgender women, men and genderqueer individuals) and exclude the derogatory term "eunuch"; and (3) whether umbrella term "transgender" includes all LGBTQ individuals, and they are therefore entitled to third gender benefits.[250] In addition, the government sought further modifications to the previous order so that implementation of the Expert Committee's recommendations would be delayed and so that the government would have greater clarity of the reservations policy for transgender persons as members of Other Backward Classes.[251] Justice Sikri and Justice Ramana finally heard the interlocutory application on June 30, 2016 and responded to the government's requests by stating that the definitional aspects of the different gender minorities had already been "amply clarified" in the

249. I.A. No.____/2014 in Writ Petition (Civil) 400/2012 (S.C. India), last visited 6 Mar. 2017, available at https://perma.cc/P72N-73LN.

250. *Id.*

251. *Id.*

judgment.[252]

While the *NALSA* judgment is a watershed moment in the gender minority rights history in India, many questions remain unanswered. *NALSA* is certainly not devoid of shortcomings, and this article comprehensively highlights the critique of the juridical reasoning in *NALSA*. First, the paper illustrated the definitional hurdles entrapping the Court, such as the under-inclusiveness of the narrow definition of "transgender," liberal usage of the colonial derogatory term of "eunuch" in the transcript, overemphasis on a homogenous hijra identity, conflation of hijras with "transgender" persons, and virtual erasure of the lived experiences of trans men, intersex, and other gender-variant individuals. Second, the paper critiques the Court's placement of "transgender" persons within the category of Socially and Educationally Backward classes of citizens in order to direct the initiation of affirmative action schemes in their favor. And it also critiques the Court for its lack of understanding of intersectionality of gender, sexuality, and caste, which produces unique experiences of oppression and privilege in the politics of identity and recognition. Third, the paper elucidates upon the Court's failure to recognize distinctions between gender identity, sex, and sexual orientation through its constant pathologization of gender variance based on what the Court perceives as sexual disorders. Fourth, the paper questions the Court's inability to agree upon the requirements needed to effectuate a right to self-identification of gender identity for all transgender persons. Finally, the paper attempts to analyze actual and potential implementation obstacles in light of broad discretion in the hands of central and state governments and plausible bureaucratic gender policing that inhibits the actual realization of *NALSA's* celebratory declarations. It is important to challenge the social engineering capacity of litigation, and *NALSA* is a case in point to display the inadequacy of the institution of the law to serve the needs of a social movement advocating for gender fluidity.

Further questions include: To what uniform extent will the judgment be implemented? Will states and the central government provide the mandated entitlements to certain identities over others? Even with all of the ambiguity that remains after the *NALSA* decision, one thing is for certain: this judgment is a mere preface to a much longer and more nuanced story that has truly yet to begin.

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252. NALSA v. Union of India, Interlocutory Application No. 4 of 2014 in W.P. (Civil) No. 400 of 2012, MANU/SC/0879/2016.