

# From bail to governance: Who speaks for transgender persons in court?

*The Madras High Court recently moved from the facts of an anticipatory bail application to a continuing supervisory jurisdiction over transgender welfare policy.*



Transgender Persons

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A recent order of the Madurai Bench of the Madras High Court in *V Sarathkumar v. State* begins as a relatively routine anticipatory bail proceeding. It does not remain one.

The petitioner, a YouTuber accused of circulating allegedly misleading information relating to the self-immolation of a transgender person, sought protection from arrest. The Court itself noted that the allegations against the petitioner were limited to re-transmission of material that had already been circulated by other media outlets. On that basis, the Court expressed its inclination to grant anticipatory bail.

Ordinarily, that would have concluded the matter.

Instead, the order takes a striking constitutional turn. Justice **KK Ramakrishnan** proceeds to issue a series of directions to the State of Tamil Nadu to formulate a “comprehensive rehabilitation scheme” for transgender persons at the taluk level, ensuring “self-employment and sustainable livelihood” and “meaningful inclusion” in society. The Chief Secretary of the State has been directed to coordinate implementation and submit a compliance report to the Court on or before July 26, with the matter to be listed again on August 3 for monitoring compliance.

What begins as adjudication transforms into governance.

The order is undoubtedly motivated by concern for transgender persons and by the precedents laid down in the Supreme Court’s 2014 decision, *National Legal Services Authority v. Union of India* (NALSA). Yet, precisely because the order seeks to act in the name of a marginalised constituency, it raises important constitutional questions about judicial process, representation and the limits of institutional authority.

## The problem of absence

The central difficulty with the order is not simply that it travels beyond the immediate dispute before the Court. Indian constitutional practice, particularly through public interest litigation, has long permitted courts to address structural questions that exceed the narrow facts of a case.

The more serious issue is that transgender persons themselves are absent from the proceedings through which these policy directions emerge.

No transgender organisation appears to have been impleaded. No representative body was heard. No affected constituency seems to have participated in shaping either the diagnosis or the remedy. And yet, the Court proceeds to formulate an institutional response in their name.

Recent hearings before the nine-judge Bench of the Supreme Court in the *Sabarimala* matters have reflected judicial concern about the ways in which constitutional litigation can sometimes be overtaken by ideological actors or “busybodies” claiming to speak for communities that are not present before the Court. Whatever one makes of that concern in the specific context of *Sabarimala*, the underlying anxiety is significant:

constitutional adjudication becomes difficult when courts begin constructing community interests without meaningful participation by the communities themselves.

That concern applies not only to PIL petitioners, but equally to courts exercising expansive constitutional authority *suo motu* (on their own motion).

Here, a constituency is converted into an object of governance without ever appearing as a subject of rights within the proceedings. The Court assumes both the existence of a problem and the form of its solution.

## What does “rehabilitation” assume?

The language of the order is also worth examining carefully. The Court repeatedly invokes “rehabilitation” as the framework through which the State must respond to transgender marginalisation.

But rehabilitation is not a neutral category. To rehabilitate is already to presume a condition requiring correction, restoration, or reintegration. The question is therefore unavoidable: rehabilitated from what? And into what?

The Court’s order gestures toward real structural vulnerabilities. It speaks of exclusion, social stigma, economic precarity and the conditions that compel many transgender persons into begging or forms of labour regarded as socially unacceptable. These concerns are not imaginary. They reflect longstanding forms of marginalisation.

At the same time, transgender persons are not a homogeneous category. Their experiences are shaped by caste, class, religion, region and by radically different relationships to family, labour and community structures. Some transgender persons seek inclusion within formal employment structures; others sustain themselves through social formations and livelihoods that exist outside conventional economic institutions. A singular framework of rehabilitation risks collapsing these differences into one administratively manageable narrative of victimhood.

This is a familiar pattern in Indian governance. In the context of sex work, State interventions have long proceeded through the language of “rescue and rehabilitation.” Sex worker collectives have repeatedly critiqued such interventions for erasing agency and imposing external moral frameworks under the guise of welfare. The point of that critique is not that exploitation does not exist. It clearly does. Rather, it is that vulnerability does not automatically justify paternalism.

The parallel here is not exact, but it is instructive. When courts and states act without participation by those they seek to protect, welfare can easily become managerial control.

## NALSA and the judicial voice

The Madras High Court’s order relies extensively on the Supreme Court’s landmark judgment in *NALSA*. That reliance is understandable. *NALSA* remains the foundational constitutional decision recognising transgender persons as rights-bearing subjects under the Indian Constitution.

But *NALSA* also inaugurated a broader constitutional pattern: courts increasingly articulating transgender interests through judicial discourse. This produced transformative outcomes in some respects, particularly recognition of gender identity and affirmative obligations upon the State. Yet, it also concentrated extraordinary representational authority within constitutional courts themselves.

The present order extends that trajectory. The Court moves from the facts of an anticipatory bail application to a continuing supervisory jurisdiction over transgender welfare policy. The transition is institutionally remarkable. It effectively converts a criminal proceeding into an ongoing governance process.

None of this is to suggest that courts must remain passive in the face of structural injustice. Judicial intervention has often been indispensable precisely because legislative and executive institutions have failed marginalised groups. But constitutional urgency does not eliminate constitutional process.

The legitimacy of institutional remedies depends not merely on benevolent intent, but on participation, consultation and accountability. These become even more important where courts move beyond adjudication into policy formation.

## From critique to participation

The significance of the Madras High Court's order lies precisely in the fact that it remains a live proceeding. The matter has not concluded. The State must return to the Court with a compliance report in July 2026 and the case is listed again in August for monitoring implementation.

That creates an important constitutional opportunity.

If the Court is serious about ensuring “meaningful inclusion” of transgender persons, then the process leading to rehabilitation measures cannot itself proceed through exclusion. Before accepting compliance from the State, the Court should require disclosure of the consultative processes through which these measures were formulated. Which transgender organisations were consulted? Which constituencies participated? How were differences within transgender communities addressed?

These questions are not peripheral. They go to the legitimacy of the entire exercise.

Indeed, one of the most important constitutional principles emerging from recent transgender rights debates is that policies concerning transgender persons cannot be designed solely through external expertise – whether judicial, bureaucratic, or medical. Effective representation matters not simply because it improves policy outcomes, but because it affirms transgender persons as constitutional participants rather than administrative subjects.

The Court's order itself contains the possibility of this more participatory approach. Its emphasis on livelihood, inclusion and welfare indicates an attempt to move beyond symbolic recognition toward material conditions. But that ambition can only succeed if transgender persons are not merely spoken about, but are meaningfully involved in shaping what rehabilitation itself should mean.

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