

Marginalities Aren't Hermetically Sealed. The Decade-Old 'NALSA' Judgment Ignores This



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Reading a marginality through the marginality of another (even if intersecting) group can fail to do something crucial in matters of representation and recognition.



'Foremost, in its omission of caste, NALSA lost a potential to learn from the existing legal discourse on caste, class, and affirmative action.'
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Before we get to celebrating a decade of the Supreme Court's decision in the 2014 *National Legal Services Authority (NALSA) v. Union of India* case in April next year, we should look at the problems in the representation of marginalities and the role played by the empty rhetoric of analogies.

The opening paragraph of *NALSA* states:

"[O]ur society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables."

The underlying assumption of this analogy is that transgender and "untouchable" persons are two marginalised groups distinct from each other. The assumption fails in the face of Dalit and Adivasi transgender persons such as [Living Smile Vidya](#), [Kiran Nayak](#), and [Grace Banu](#).

Rhetorical claims – such as ‘transgender persons are treated as untouchables’ imply that marginalised groups are placed in mutually exclusive either-or sets. The emerging understanding of one group is said to be just like the previously existing understanding of another. In the US, “Gay is the new black” is an example of a rhetorical claim that set apart gay persons from black persons, as if all gay persons were posited as white. Not only was this empirically false, it channelled a discursive understanding of one marginality into another.

These rhetorical claims and distortions are amplified within legal movements. As a result, a group recognised as discriminated against is disabled from representing a newly emerging group, also discriminated against. Rhetoric and analogies generate blind spots that make “untouchable” transgender persons invisible, and also disable their representational agency as “class representatives.”

‘Untouchable’

If the Supreme Court had considered the reality of “untouchable” transgender persons in *NALSA*, it would have seen an overlapping function of caste, sex, and gender categories. The court would have considered some of the similarities and differences between the emerging legal understanding of the third gender and the existing Scheduled Castes (SC) categories. The two categories could be said to be similar, because both gender and caste are assigned at birth. They are different because gender categories can be legally changed, whereas the SC categories cannot be changed. This characteristic has significance in the doctrinal understanding of anti-discrimination law. Some categories are so immutable that the discriminated-against groups cannot choose to opt out of the categories to which they are assigned.

What about these similarities and differences?

Foremost, in its omission of caste, *NALSA* lost a potential to learn from the existing legal discourse on caste, class, and affirmative action. Amid other post-colonial continuities, the legal idea of “backwardness” finds explicit yet undefined mention in Article 16(4) of the constitution, which allows the state to make provisions for reservations in public employment in the favour of the backward classes of citizens.

There was no doctrinal requirement of comparing transgender persons with untouchables. A large bench of nine judges *Indra Sawhney v. Union of India* (1992) is sufficiently instructive in the matter that, “It is not necessary for a class to be designated as a backward class that it [be] situated similarly to the Scheduled Castes/Scheduled Tribes” (Para. 126). Thus, *NALSA* demonstrated insufficient familiarity with, and complete disregard for, a larger bench and a precedent of *Indra Sawhney*.

NALSA 2014 also did not explain why these analogies were being made.

Was it for an eventual recognition and declaration of transgender persons as a “backward class?”

Who decides this legal status of “backwardness,” how, and to what effect?

Is “untouchability” the same as “backwardness?”

Does this backwardness require parity of status with persons in the SC categories?

Who among the marginalised can represent?

Rather than inform itself of a legal discourse in *Indra Sawhney* (1992) that was binding on *NALSA*, the Supreme Court was informed by arguments based on more dominant frameworks of caste, sex, and gender. In addition to the National Legal Services Authority (NALSA) as the first petitioner, there were a few “impleadment applications,” including one from a Hijra activist by the name of Laxmi Narayan Tripathy – a name that discloses the applicant’s caste denomination as Brahmin, the highest echelon of caste-based hierarchies. This is significant for an understanding of how certain dominant segments within minority groups were privileged as “class representatives” in an emerging legal discourse.

Regardless of any explicit self-identification on the part of Tripathy, caste associations and identities are enmeshed and encoded within some surnames – such that their reception goes beyond any self-awareness, declaration, intent, and consciousness.

Had the court been alert to this salience of caste in naming, it would have noted a contradiction of sorts – a certain reverse mobility of caste-based hierarchies – that allowed a Brahmin to be similarly situated as an “untouchable.” An imminent contradiction in this analogy is especially ironic in a caste-based hierarchy that accords the highest stature to Brahmins and the lowest stature to “untouchables.”

Despite the lack of any explicit labelling or signage of this Brahmin identity in *NALSA*, the arguments of Tripathy’s intervention were aligned with well-known Brahmanical ideas. The intervention foregrounded a more favourable historical background of transgender persons within Hindu mythology, Vedic, and Puranic literatures (*NALSA* 2014: Para. 6), which are also considered historically exclusive knowledge-domains of the Brahmins and sources of pervasive caste and gender-based inequality (such as *Manusmriti*). Tripathy’s intervention made references to “the repealed Criminal Tribes Act, 1871 and ... the inhuman manner by which they were treated at the time of a British Colonial rule” (*NALSA* 2014: Para. 6).

NALSA endorsed and validated these arguments by further elaborating on them (2014: Paras. 12–17). This was a selective foregrounding of the ills of colonial oppression, while neglecting and remaining silent about the historic ills of caste-based subordination and inequality.

At the level of a failed eventual outcome, *NALSA*'s declaration of transgender persons as a "socially and educationally backward class" failed to be recognised in the legislative framework to follow – in the **Transgender Persons (Protection of Rights) Act of 2019** – perhaps because the identification of "backward classes" is a constitutional function of the governments at the federal and state levels, not the judiciary. In an eagerness to declare affirmative action for transgender persons, *NALSA* appropriated a function of the executive branch of the state.

The juridical thinking of *NALSA* is an illustration of an analogy drawn from anti-caste discourse and a failure to engage with that discourse. Analogies, and assertions of identities, must engage with surrounding discourses for an improved understanding of marginalization and for generating more inclusive discourses on matters of representations, recognition, and intersectional solidarities worldwide.

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