

## GENDER

# The First Boys in Parliament and Their Two Years of Not Knowing the 'Third Gender'

The Supreme Court's decision not to clarify NALSA's definition of the third gender will have the unintended consequence of playing into the Hindu right's interests.



In this 2014 file photo, transgender persons dance to celebrate after India's Supreme Court recognised a third gender. Credit: Reuters/Anindito Mukherjee

It takes just Rs 7/day from readers like you to keep The Wire going. [Click here to supp](#)

## Debaditya Bhattacharya



GENDER 06/JUL/2016



In this 2014 file photo, transgender persons dance to celebrate after India's Supreme Court recognised a third gender. Credit: Reuters/Anindito Mukherjee

The decision of a Supreme Court bench to summarily reject the Centre's plea for clarification on the National Legal Services Authority (NALSA) verdict's definition of the term "third gender" may be technically justified, but it will send out all the wrong signals for purposes best suiting the interests of the ruling party. Particularly so, because the decision comes within a day of another **writ petition** filed by members of the LGBT community (**now referred to the chief justice of India**), challenging the constitutional validity of section 377 of the Indian Penal Code. The timing of this coincides exactly with **India's decision to abstain** from the UN Human Rights Council (UNHRC)

vote on setting up an office of independent experts on matters relating to social discrimination against LGBT communities.

Ironically, the Supreme Court's reinstatement of a restrictive definition of the third gender will have an unintended effect. It can now be used by the political conservatism of the Hindu right to legitimise structural exclusion of gay, lesbian and bisexual people from constitutional commitments. The outcome is already evident from the arguments placed by the external affairs ministry spokesperson for not being able to take a position on the UNHRC vote – that the issue of sexual minority rights is currently subjudice in India and hence warrants 'status quoism'.

### **'Hijras' as Indian citizens: *NALSA vs. Union of India, 2014***

The judgment delivered on April 15, 2014 by a Supreme Court bench comprising of justices K.S. Radhakrishnan and A.K. Sikri in, response to a writ petition filed by NALSA, was hailed by legal activists and rights bodies alike as unmistakably progressive. In its 113-page verdict, the judges left no scope for confusion on the import of the term 'third gender'. Showing an extraordinary amplitude of legal reasoning, it detailed an archive of historical and textual attitudes towards transgenders and recounted international human rights provisions as well as judicial opinion across several nations to argue for a policy of affirmative action on the part of the Indian state.

The apex court maintained in its verdict that "[t]he rule of law is not public order...[It] is social justice based on public order". Towards this end of social justice, it ordered the state to not only ensure all fundamental civil rights for members of the transgender community, but also implement reservations for them in public institutions of learning and government jobs within a subsequent period of six months. In recognising the third gender as a socially and educationally backward class, the verdict mandated its inclusion within social welfare schemes, public healthcare entitlements and economic empowerment programmes as much as it demanded definitive attempts on the part of the state to prevent forms of targeted harassment.

### **The Hindu right and gender trouble**

The BJP government, coming into power within one month of this verdict, was obviously intent on subverting its essence and the processes of social justice set underway by it. The stated position of the Hindu right on questions

of sexual deviance and the right to sexual identity has never been in doubt, given **Rajnath Singh's vehement public denunciation** of homosexuality as “unnatural” or **Subramanian Swamy's dubbing** of such practice as genetic disorder. In September that year, the Ministry of Social Justice and Empowerment (MSJE) under the Narendra Modi government contested the NALSA judgment by filing an application for clarifications on roughly three broad grounds. While this clearly gave the government a chance to delay and derail the Supreme Court recommendations with regard to both legislative provisions and infrastructural reform, the queries raised by the MSJE unequivocally proved the element of mischief and ideological designs at work. First, the Centre feigned ignorance on the jurisdiction of the term ‘third gender’ by deviously asking whether lesbian, gay and bisexual people were to be considered worthy of legal recognition under the “umbrella term”. This was despite the fact that the Radhakrishnan-Sikri verdict had gone to great lengths to conclusively resolve the question of identity and its prerogative of identification. It fundamentally maintained a distinction between ‘gender identity’ and ‘sexual orientation’ for purposes of legislative applicability and non-ambiguity in points 19 and 20 of the judgment:

Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category. Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person... 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 and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

## **NALSA and the right to sexual self-determination**

By considering the right to self-expression of gender identity as guaranteed by the constitutional freedom of speech, the judgment squarely placed the onus of identification on the citizen herself or himself rather than clinical apparatuses of diagnosis or surveillance structures of the state. It thus discredited the 'biological test' for gender identity in favour of the 'psychological test' and accorded sovereign rights of sexual self-determination to transgender subjects, "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".

The bench noted that Section 377 is being misused by agents of the state to criminalise transgender sexual practices and went on to rule that the legal category of third gender can only be incumbent on the self-declaration of the appellant, extending to self-expression "through dress, words, action or behaviour or any other form" and including "persons who do not choose to undergo or do not have access to operation [Sex Re-assignment Surgery]". Penal constructions of sexual activity therefore cannot be used for identification and categorisation.

Given the degree of emphasis in the judgment on processes of self-assignment of gender, the Centre's call to empirically 'delimit' the exact number of beneficiaries of a third gender legislation is no less than an attack on civil rights. The same freedom that the NALSA judgment attests as an individual right is what the state appropriates for itself by reserving the authority to determine who to recognise as third gender and who not to. Going by the text and spirit of the Radhakrishnan judgment, this is an assault on the fundamental right to freedom of expression as including self-identifications of gender. Such illegal usurpation of an individual civil right by the government underscores an attempt to reduce a progressive ruling to a debate about definitions.

### **Section 377 and manipulating public opinion**

By deliberately asking for a reiteration of the restrictive limits of the third gender, the current dispensation only wanted to structurally exclude certain sexual minorities as incapable of claiming state protection or constitutional safeguards. The Supreme Court bench on Thursday unwittingly played into this design by cursorily dismissing the petition, without necessary rejoinders about the principles underlying the original judgment. National newspapers



and television channels rushed to manufacture headlines, focusing solely on the exclusion of “lesbians, gays, bisexuals” from the legal taxonomy of the third gender. The decision effectively converted the NALSA verdict into a moment of negative discrimination between transgender people as a legally and constitutionally valid category as opposed to the already criminalised lesbians, gays and bisexuals.

In this, the Modi government cleverly compounded the legitimacy of popular prejudice against queer communities as exceeding the constitutional rule of law and therefore cemented public opinion against the scrapping of section 377. The short lived nature of collective memory was made use of by suddenly forcing into public discourse a judgment more than two years old, shorn of any reference to the original terms of the case. The message that went into circulation thrived on media-driven myopia to transform a judgment advocating the cause of gender justice into a tool for renewed injury against targeted communities.

### **‘Hijras’ – Caste or choice?**

The two other grounds on which the central government challenged the 2014 judgment pertained to the modalities of including transgender citizens within the OBC quota. Claiming that there might be Dalit or Adivasi transgender people, it expressed doubts about the “political and practical implications” of clubbing caste-based and gender-based reservations – citing the former’s logic of ‘birth’ as a more urgent marker of discrimination over the transgender person’s agency of ‘choice’. Such an argument only bears out the patrilineal violence of the Hindu right that deems heterosexual reproduction as essential to relations of social production and therefore immune to legislative reach. To assume that the transgender is the site of a transformation ‘at will’ not only belies the right-wing’s debauched understanding of non-reproductive sexuality but also its impatience with the concept of sexual choice in general.

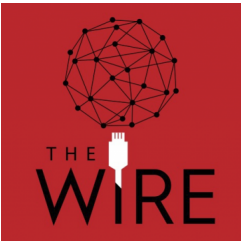
On the technical question of how to apportion state welfare under the OBC quota for transgenders from SC/ST communities, the state could have taken recourse to comparable legal precedent in cases like *Rameshbhai Dabhai Naika vs State of Gujarat and Others (2012)*, where the apex court argued that reservation claims may in the final instance be decided through reference to the ‘upbringing environment’ and lived experience of discrimination faced by a child, and not by the patrilineal inheritance of caste. For a low-caste

transgender person, therefore, the claimant might choose which quota she or he wants to apply through, on the basis of lived experiences. On the other hand, there is also the possibility of providing internal reservations within existing quotas for transgender applicants. It was in order to sort out these modalities that the 2014 judgment directed an already-constituted expert committee to submit its report to the government for effective implementation. The BJP government, instead of making structural policy amendments for appropriate action, decided to stall the court order and contest it on technical grounds of unfeasibility. While that is enough evidence of the political will of the ruling party and its commitment to ideals of social justice, the move was further calculated to polarise and fracture sexual minorities into internally warring factions – each clamouring for legal recognition as “third gender”.

### The ‘third’ as other, not one

The question of the ‘third’ is not a question of numbers, but what exceeds the numerical imagination of binaries. The third gender therefore is not what comes after the first two, but what exists independently of them. ‘Thirdness’ is an allegory of otherness, resisting absorption within structures of power that parade as knowable descriptions, definitions and numbers. The ‘third’ is a possibility for the infinite, not a determinate object-as-other who one can pin down in a clarification. The NALSA judgment of 2014 recognised this infinity at the heart of the third gender while still holding on to restrictive parameters. That is exactly what the central government wanted to contain by staging a theatre of enlistment. The officially ‘scheduled’ sexualities are now what must tame every other ‘otherness’ as unregistered and radically unrepresentable.

*Debaditya Bhattacharya teaches literature in a Calcutta University college and is a researcher on continental philosophy. He’s the co-editor of Sentiment, Politics, Censorship: The State of Hurt (Sage Publications, 2016).*



Support The Wire

---

₹20

₹200

₹2400

[T & C](#) [Privacy](#)

**Join The Discussion**

---

---

**TERMS & CONDITIONS | PRIVACY POLICY | REFUND POLICY**

---