

Over Two Years After Landmark Judgment, Transgender People Are Still Struggling

BY [SHREYA ILA ANASUYA](#) ON [15/05/2016](#)

Activists say that implementation has been piecemeal and inadequate, and a new draft bill by the Central Government does not include key provisions.



Credit: Reuters/Stringer.

New Delhi: A prominent transgender rights activist and transwoman in India underwent a hospital procedure – a combined testes and penis removal surgery – at a subsidised rate. The hospital authorities were publicly unwilling to advertise that they facilitated the transition process of transgender people, so they did not give her any documentation.

Then, a widely hailed judgment was passed by the Supreme Court in India that recognised the rights of transgender people and said they should enjoy all the fundamental rights enshrined in the Indian constitution. The judgment – National Legal Services Authority v. Union of India, colloquially called the NALSA judgment – gave broad directives to the Central and state governments on affirmative action, public health, social welfare and other services to be made available for transgender people.

After the judgment was passed, the transwoman went to a local court in her city as a first step towards changing the sex listed on her official documents. By most accounts, the Supreme Court had recognised her right to identify as the gender in line with her self-identification, and made it illegal for authorities to refuse her identification based on whether she had had surgery or not.

However, at this court, the officers insisted they could not help her without a medical certificate of ‘sex change’. As she left, frustrated, she heard them laughing at her.

Other things have happened that should not have happened since the NALSA judgment was passed in April 2014.

In June 2014, [reports revealed](#) that a transgender person died following an accident, as doctors could not decide which ward – male or female – to use for treatment. In February 2015, the Telangana Hijra Transgender Samiti reported 40 attacks on transgender people within a six-month period.

A [Human Rights Watch release](#) from 2015 details several instances of mistreatment of transgender people by the police. A [recently released study](#) by the National Institute of Epidemiology conducted with 60,000 transgender participants across 17 Indian states found that the greatest perpetrators of violence against transpeople are police and other law-enforcement officials.

All this, and more suggests that the supposed paradigm shift that took place when the NALSA judgment was passed in April 2014 has not yet translated into reality. As a [briefing paper](#) on the implementation of the NALSA judgment by the International Commission of Jurists (ICJ) says, “...the Indian Central and state governments have still not implemented some of the core directions set out in the judgment.”

Aniruddha Dutta, an academic and transgender rights activist told *The Wire*: “Leave alone the implementation of concrete steps, even the spirit of the NALSA judgment is being blatantly disregarded.”



Transgender voters in India. Credit: PTI.

Gaps in implementation

Transgender activist Vyjayanti Vasanta Mogli agrees. “Access to education and consequently to employment continue to evade the transgender community. Transpeople continue to face the violation of their right to life, facing unreported and unregistered hate crimes. There is very poor access to health and medical care, and many transpeople continue to be pathologised as having ‘gender identity disorder’ due to inaction by the Medical Council of India,” Mogli told *The Wire*.

Akkai Padmashali, transwoman and the co-founder of organisation Ondede said, “I’m thankful to the Supreme Court, which delivered a judgment based on constitutional equality, and spoke about rights. They took the issue very seriously. But they directed the governments to develop a policy, and I feel that the states largely have failed to do this.”

This is despite the fact that the NALSA judgment explicitly asked an expert committee on transgender rights which had already been constituted by the Central Government to examine its recommendations based on the legal declarations made in the NALSA judgment, and implement them within six months.

Part of the delay can be attributed to what transpired after the NALSA judgment was passed. In September 2014, the Ministry of Social Justice and Empowerment (MSJE) asked the Supreme Court of India to clarify certain aspects of the NALSA ruling. According to the ICJ report, these included clarifying “which groups fall within the ambit of ‘transgender’ persons for the purposes of implementing the NALSA judgment” and “what classification and

procedure, given existing frameworks, should be followed while designing affirmative action policies for transgender persons in public institutions.”

The MSJE also asked whether the six-month time limit for implementation could be extended, arguing that the recommendations were too broad to be implemented so swiftly. Unfortunately, the Supreme Court has still not responded to the ministry on this matter.

Activists are now saying that the delay has been used by state governments to stall action. Laxmi Narayan Tripathi, transgender activist and one of the original petitioners in the NALSA judgment said, “There may be a pending issue of clarification in the court, but I don’t understand why that has to stop policy-level decisions. That’s the excuse they’re giving us at the state-level, which is obnoxious. It is sad that the governments are waiting for petty things when the community has been facing discrimination and ostracisation for hundreds of years.”



Celebrations after the NALSA judgment. Credit: Reuters/Anindito Mukherjee.

The two bills

Meanwhile, MP Tiruchi Siva introduced a private member’s bill – the Rights of Transgender Persons bill – in the Rajya Sabha, which was unanimously passed in April 2015. As the ICJ paper says, “The structure and substance of the Bill draws heavily from the NALSA judgment. The Bill’s broad definition of the term transgender relies on the judgment’s call for inclusiveness. The different rights recognised and given protection under the Bill include the right to equality, life, free speech, community, integrity, family, along with the right to be free from torture and other abuse.” Siva’s bill is yet to be passed in the Lok Sabha.

Then, in late 2015, the MSJE [published a draft bill](#) of the same name on its website with what activists say includes a number of problematic changes. “The gatekeeping of transgender identities is facilitated and institutionalised by the ministry in its bill,” says Dutta, referring to the provision that says a state-level authority will issue a certificate that a person is transgender.

“Say a transgender person wants to file a case against perpetrators of hate crime, assault or discrimination: will they then have to first obtain a certificate from the state proving that they are trans? If one already has other ID cards saying ‘other’ or ‘trans’, would one still need this certificate?” Arguing that this manner of legislating identity is extremely restrictive, Dutta asks what would happen if a transperson wanted a male or female ID card, instead of one that identifies them as third gender.

Although the draft bill says that transpeople will be given OBC status, Dutta points out that it is also confusing on the matter of affirmative action. “The MSJE bill takes away incentives for private sector reservations, which the Tiruchi Siva bill had included. It also does not specify how reservations will be allocated. Obviously transpeople can also be dalit, so do they get two sets of reservations? How about OBC transpeople: do they not get anything new? It is highly likely that a cisgender OBC person would be chosen over a transgender OBC person for most posts,” says Dutta.

Mogli says, “The government’s bill has altogether deleted the section of the private member’s bill that gave transgender people recourse to the Executive Magistrate apart from the police. Also, there is no reservation in the government’s bill for education, but there is one for employment. How will anyone access employment without access to education?”

Transgender activist Raina Roy, too, takes exception to the provision for the formation of state welfare boards to give out transgender identification. “We need to understand the consequences of this kind of gatekeeping very thoroughly. It is bound to include a few, and is likely to exclude a majority of people.” On this matter, Mogli asks, “Would women be alright with the Women’s Commission being given the power to reject their womanhood?”

In [its response to the draft bill](#), the Telangana Hijra Intersex Samiti tackles precisely this issue, demanding that the bill be amended to clearly allocate 2% reservations for transpeople in every government establishment. “When it comes to the issue of reservations, we as a community would like a clearly demarcated internal reservation quota based on gender – within the SC/ST or OBC categories depending on whether the transgender/intersex individual is born SC/ST or not, respectively,” reads the text.

Another collective, Sampoorna, [asks for the inclusion of intersex people](#) in the scope of the bill: “All intersex people face acute issues like lack of access to healthcare, education, employment and face violence, stigma and discrimination at multiple levels. Moreover, there are people with intersex variations who also identify as transgender.” Recommendations were also sent to the Ministry by a group of activists with a special focus on [transmasculine communities](#).

Activists have also criticised the manner in which the bill has been drafted by the MSJE, saying that the process has been largely undemocratic and non-transparent. When the ministry made an updated version of the draft bill available on their website in January 2016, they asked for responses to be sent via email within a short time.

After transgender rights collectives across the country protested, the deadline was extended by another ten days, but remained restricted to people who could read English and access the Internet, leaving a majority of people out of the conversation.

Both Dutta and Padmashali told *The Wire* that the subsequent in-person consultation held in New Delhi was also not nearly as inclusive as they feel it should have been. “How many working class, non-English speaking transpeople have gone through this bill?” asks Padmashali.

Another huge problem, one that is central to the exercise, says Padmashali, is the fact that parliamentarians are not sensitised or educated about transgender issues and rights. “I went to the New Delhi consultation and asked some senior ministers and bureaucrats: ‘what is transgender?’ None of them had any idea. Our political leaders simply don’t understand how diverse transgender communities are, and without awareness and education, how can they make a policy for us?”

Roy feels that a change in the law is not enough given the level of sensitisation that is required among the people who are required to implement the law, from officers in lower courts, to lawyers and the police force. “Even if the judgment recognises transgender people, society is still transphobic and patriarchal. It is the government’s responsibility to properly sensitise people, otherwise it is very difficult and painful for us to avail things that should be simple, like an ID change. Advocacy is required at every level,” she says.



Problems with the NALSA judgment

A lot of the confusion has actually arisen from the much-hailed NALSA judgment. Even as the mainstream press and civil society was celebrating the judgment, many transgender commentators were pointing out its inherent problems and contradictions.

The fact that transgender is an umbrella term for people whose gender identity and/or expression is different from the gender assigned to them at birth, and specifically in the case of India, may be used to describe a variety of identities, such as kothi, transman, transwoman, hijra, aravani, genderqueer, etc. is not clearly outlined in the judgment.

A comprehensive list of responses by commentators and collectives has been [posted by Orinam](#). In one of them, Gee Imaan Semmalar [offers in-depth critical analysis of the text of the judgment](#), and its possible implications. He points out that the judgment, which he calls “confused and confusing,” conflates a number of transgender identities, for example referring to all hijras as ‘third gender’.

Semmalar points out that the judgment also pathologises transgender people, does not address issues faced by transmen and repeatedly uses offensive terms like ‘eunuch’, a word which has been used to criminalise transgender communities.

In this piece, Semmalar predicted a lot of the problems of conceptualisation as well as implementation that are now apparent with the draft transgender rights bill, such as the issue of certification or reservations:

“To avail benefits like OBC reservation in jobs and education, would it be compulsory for trans women to get third gender identities? The process is not clear and neither is whether they have a choice. (...) What does a blanket OBC reservation mean to a community that has a large number of dalit trans people? An unwarranted promotion? What does an OBC status mean to internal hierarchies?”

He also argues that it is not clear from the NALSA judgment whether sex reassignment surgery would be necessary for gender identity to be legitimised by the state.

In [a written critique](#) of the NALSA judgment, Dutta also points out that the judgment is far from clear on its stance on the recognition of gender identity. “At one point it cites the Argentina model which allows for self-identification without requiring medical certification, a model which has been lauded by many trans activists. Yet at other points it seems to suggest that ‘psychological tests’ would be necessary, which is potentially very problematic given the constraints of how diagnosis of gender dysphoria works in psychiatry and medicine,” writes Dutta.

The road ahead

The MSJE has not yet uploaded a revised version of the draft bill onto its website, so it is unclear whether they have accepted any of the numerous suggestions given by transgender rights collectives.

Another concrete example of the huge lack of political will on the issue is the fact that [not a single ministry sent in its comments](#) on the draft bill during a process of inter-ministerial consultation. A senior official of the Ministry of Social Justice said, “But even after the passage of 15 days (the timeline on inter-ministerial consultation), the concerned ministries have not sent their comments, following which it was sent to the Legislative Department of the Law Ministry for finalising the Bill so that it can be sent to the Cabinet for approval.”

Meanwhile, transgender people continue to be effectively criminalised by the Indian state, over two years after the Supreme Court judgment that at the very least attempted to look at gender beyond the stultifying and violent binary of ‘male’ and ‘female’, and to address transgender people who identify at different points in the gender spectrum.

Mogli says, “The continued criminalisation of begging and sex work as traditional sources of livelihood for transgender and hijra communities allows the police to further victimise a highly marginalised and vulnerable population. There are enough and more instances of custodial sexual and physical torture and violence against transgender people. In the cases of custodial torture and sexual violence by the police that we complained against, no departmental action was initiated.”

“The criminalisation of begging is draconian and posited on the flawed classist approach of ‘garibon ko hatao’ (remove the poor) instead of ‘garibi hatao’ (remove poverty). The criminalisation of begging adversely and predominantly affects the poor just for being poor,” she adds.

Abhina Aher, transgender activist and national programme manager with the India HIV/AIDS Alliance says: “Things have moved very, very slowly by the government, and we are still struggling for basic things. There is immense violence against transgender people everyday. As for employment in the private sector, transpeople are facing a Catch-22 situation, where employers are perhaps not ostensibly transphobic, but expect qualifications and experience that most don’t have access to. The Prime Minister is talking about skill development programmes, I think there should be a specific skill development programme for transpeople. It shouldn’t be tokenistic, like the bar dancers in Maharashtra who were made to make agarbattis. Economic disempowerment and residential issues are also huge concerns.”

Padmashali says, “We are asking for identity, employment, education, recognition and dignity. We want human rights first and everything else next.”

As Dutta argues, despite its problems, the NALSA judgment “put in a strong pitch for two very positive things – the self-determination of gender, without insistence of gatekeeping or certification through surgery or hormones, and affirmative action for transpeople. At least it attempted to understand transgender identities in a relatively broad and intersectional fashion,

as opposed to one or two identities. However, the Ministry of Social Justice has had a much more limited and problematic approach overall.”

Roy adds, “People are getting beaten at home for being transgender. They are getting assaulted and ridiculed on the street. If I walk into the police station after being attacked, it is I who will be criminalised by the police officers. Trans sex workers are routinely harassed and beaten up by the police. Trans voters are being ridiculed when they are going to vote. Our gender identity is still not accepted, for all practical purposes. Leave alone human rights, people don’t even seem to see transgender people as human beings.”

This article has been taken from the Wire’s website: <https://thewire.in/35978/over-two-years-after-landmark-judgment-transgender-people-are-still-struggling/>