

IDENTITY AS DATA: A CRITIQUE OF THE NAVTEJ SINGH JOHAR CASE AND THE JUDICIAL IMPETUS TOWARDS DATABASING OF IDENTITIES

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The Supreme Court in 2018 issued a landmark judgment, wherein §377 of the Indian Penal Code, which criminalized unnatural sex against the order of nature, was read down to the extent it criminalised sexual actions between consenting adults. The judgment marked a victory for queer politics and rights of queer persons in India, especially given the long and continued struggle leading up to it. However, more than a year since the judgement, a critical analysis of the principles upheld and the manner in which these principles have been transposed (or rather, ignored) in public policy merits equal discussion. Of importance here, is the ‘innateness’ approach to sexual orientation, which formed the foundation for the unanimous judgment passed by the bench, as this construct seeks to stabilise and essentialise queer identities. The translation of this construct into gender identity legislations such as the Transgender Persons (Protection of Rights) Act, 2019 and bills such as the Personal Data Protection Bill, 2018 is also worrying. The effect, of an ‘innateness’ approach to identity being codified into legislations, is to silo identities into neatly segregated and essentialised categories that can be easily ‘watched’ and protected as ‘data’, as opposed to individuals proclaiming and performing these identities being granted equal recognition before the law.

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“...if I didn’t define myself for myself, I would be crunched into other people’s fantasies for me and eaten alive. My poetry, my life, my work, my energies for struggle were not acceptable unless I pretended to match somebody else’s norm.”¹

— Audre Lorde, *Learning from the 60s*.

“The architecture of the law often has little patience for lived experience.”²

— Danish Sheikh, *Contempt*.

I. INTRODUCTION

In 2001, the Naz Foundation, an organisation focused on ensuring access to HIV treatment, filed a petition before the Delhi High Court, challenging the constitutionality of §377 of the Indian Penal Code, 1860 (‘§377’). Since then, the Indian judiciary has consistently been privy to arguments on the unconstitutionality of a legal provision that criminalises “carnal intercourse against the order of nature”. Yet, in 2004 the Delhi High Court dismissed the petition filed by Naz Foundation as it could not sit in judgment of an ‘academic challenge’ to the constitutionality of §377.³

Seventeen years later, the Supreme Court of India in a unanimous decision in *Navtej Singh Johar & Ors. v. Union of India* (‘*Navtej Singh Johar*’), upheld the constitutional challenge to §377, and read it down to the extent the provision (both in intent and effect) criminalised consensual sexual intercourse between consenting adults.⁴ Victory was the public call in response to this judg-

¹ Blackpast, (1982) Audre Lorde, “*Learning from the 60s*”, August 12, 2012, available at <https://www.blackpast.org/african-american-history/1982-audre-lorde-learning-60s/> (Last visited on December 20, 2019).

² Danish Sheikh, *Contempt of Court*, 2018, available at https://www.academia.edu/36818954/Contempt_-_A_Theatrical_Rendition_of_the_Section_377_Hearings (Last visited on December 20, 2019).

³ *Naz Foundation v. State* (NCT of Delhi), 2009 SCC OnLine Del 1762, ¶1.

⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

ment. And victory it was, particularly because in a political milieu centred on otherisation, a formidable legal institution chose to stand with those who had, for centuries, been marginalised by a colonial law.

Navtej Singh Johar thus merits attention and celebration. But, more than a year since the judgement, a critical analysis of the principles upheld and the manner in which these principles have been transposed (or rather, ignored) in public policy merits equal discussion. Of specific importance here, is the construction of sexual orientation as “essential”, as “innate”, which forms one of the pillars on which the judgment stands.

From this perspective, this article seeks to present a critique of Navtej Singh Johar, the critique being the space that the judgment provides for reducing identities to their essentialized forms under the garb of freedom, dignity and privacy. The effect of such a judicial precedent that is premised on the construct of sexual orientation as “innate” to an individual, is to foster (and perhaps even legitimise) the exercise of bio-power through the reduction of complex identities to subjects of a regulatory homogenisation. This imperative, in fact, plays out quite clearly in the Transgender Persons (Protection of Rights) Act, 2019 (‘TPPR Act’) and the Personal Data Protection Bill, 2019 (‘PDP Bill’). I seek to argue that the ultimate end-result of the TPPR as well as the PDP Bill (to a certain extent), is to reduce complex identities to mere data points, and build stable cartographies of identities through databases.

In Part II of this paper I argue that while the construct of privacy as dignity forms the bedrock of the judgments in Navtej Singh Johar, the linear manner in which a majority of the judges understand and construct the queer identity poses a potential and significant challenge, particularly in terms of the precedential value of the judgement. In Part III of this paper, I analyse specific provisions of the TPPR Act to highlight the manner in which the “innateness” approach to sexuality, as upheld by the Supreme Court in Navtej Singh Johar, also forms the backbone for the construct of gender identity as embedded in the TPPR Act. In Part IV, I delve into international benchmarks with regard to a gender identity law and contrast the TPPR Act against such benchmarks. In this part, I also briefly explore the need to undertake a social sciences-inspired inquiry into the definition of ‘data’ and the manner in which identities intersect with data under the agenda of a data protection law. Here, I set out snippets from the PDP Bill in analysing the possible ways in which the PDP Bill might interact with the TPPR Act. Through this analysis, I seek to demonstrate the manner in which each such initiative reduces identities and sexualities to data points. Here, I argue that the consistent push towards datafication of persons as the preferred mode by which the State chooses to discharge its welfare obligations, is at odds with its obligations to protect the privacy and dignity of individuals. Finally, Part V presents the conclusions and possible ways in which dialogue and policy towards addressing the concerns highlighted in Part III and Part IV can be structured.

II. BREAKING DOWN THE NAVTEJ SINGH JOHAR JUDGMENT

A critical analysis of the Navtej Singh Johar judgment necessarily requires an analysis of other landmark Supreme Court judgments that preceded it and were relied upon by the bench in Navtej Singh Johar. One key judgment was that of the Supreme Court in *K.S. Puttaswamy v. Union of India* ('Puttaswamy').⁵

The bench in Puttaswamy unanimously held that the right to privacy is a fundamental right under the Indian Constitution. Further, as part of their analysis, individual judges also elaborated on the various facets of privacy. Across these six judgments, privacy is rooted in different theories – ranging from liberty, dignity and autonomy, democracy and fraternity, and finally, freedom. Throughout all six judgments however, one commonality is the culling out of privacy as a right emanating from the various freedoms encompassed within Part III of the Constitution. Linked to this commonality is the vesting of the right of privacy in individuals, and not institutions, spaces or relations.

Once the focus became the individual, ideas of autonomy and dignity began to be fused into the right of privacy. With the construct of privacy as dignity and decisional autonomy as one of its pillars, the Navtej Singh Johar judgment discusses the different ways in which §377 as it stood then thwarted the ability of queer persons⁶ to fully and freely exercise this right. In this regard, Justice Chandrachud imports the theory of indirect discrimination, to hold that if a statutory provision is facially neutral in terms of whom this provision applies to, the provision can nonetheless have the effect of impeding the right to privacy of certain sections of society. This then leads to perhaps the most important part of the Navtej Singh Johar judgment for the purpose of this article – the judges' analysis of sexuality as "innate" to individuals, and therefore deserving of constitutional protection as a facet of the right to privacy.

A. PRIVACY AND PERSONHOOD

This idea of locating the right to privacy in individuals and thereby breaking away from a more traditional and spatialist understanding of this right, is not new. For instance, the Andhra Pradesh High Court in *T. Sareetha v. T. Venkata Subbaiah* ('T. Sareetha')⁷ and the Delhi High Court in *Naz Foundation v. State (NCT of Delhi)* ('Naz Foundation')⁸ adopted this individual-centric construct of privacy, and thereafter expounded on the nexus between privacy and dignity.

⁵ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁶ The term "queer persons" is used in this article as an inclusive term to refer to all persons within the gender/sexuality spectrum.

⁷ *T. Sareetha v. T. Venkata Subbaiah*, 1983 SCC OnLine AP 90.

⁸ *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762.

In *T. Sareetha*, a landmark judgement discussing the public-private divide as well as a feminist conception of privacy, the Andhra Pradesh High Court was confronted with a challenge to §9 of the Hindu Marriage Act, 1955, which allowed for restitution of conjugal rights. The Court specifically outlined the problems inherent in conceptualising the right to privacy as rooted in ‘spaces’, *i.e.*, an approach where the right to privacy of a woman is constructed within the institution that is marriage and the space that is the family. It elaborately analysed the manner in which §9 stripped a woman of any autonomy over her body and her identity, both of which clearly disrupted her ability to lead a life of dignity.⁹ Cognizant of the inequalities inherent in certain spaces and social institutions in the Indian context, such as marriage and family, the Andhra Pradesh High Court chose to correct this by placing the individual, and not these spaces, at the heart of a right to privacy.¹⁰ The Court specifically held that a constitutionally recognised right to privacy should include the “body’s inviolability and integrity and intimacy of personal identity”.¹¹

The Delhi High Court’s bench in *Naz Foundation* adopted this construct of privacy specifically in the context of harms caused by §377 and the chilling effect of this provision. The Court began by foregrounding protection of the dignity of individuals as a constitutional value. To this extent, Justice Shah wrote that –

“Dignity as observed by L’Heureux-Dube, J is a difficult concept to capture in precise terms [*Egan v. Canada*, (1995) 29 CRR (2nd) 79 at 106]. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person’s freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others.”¹² (emphasis supplied)

Thereafter, drawing from a range of international and domestic precedent, the bench went on to articulate that the right to privacy lies in “persons, not places”.¹³ Taking note of various studies placed on record on the adverse effects of criminalisation of private consensual sexual acts between homosexual adults, Justice Shah writes that §377 was an impediment to the ability of queer persons to

⁹ *T. Sareetha v. T. Venkata Subbaiah*, 1983 SCC OnLine AP 90, ¶38.

¹⁰ Gautam Bhatia, *The Constitution and the Public/Private Divide: T. Sareetha vs Venkatasubbaiah*, July 30, 2017, available at <https://ssrn.com/abstract=3010972> (Last visited on December 21, 2019).

¹¹ *T. Sareetha v. T. Venkata Subbaiah*, 1983 SCC OnLine AP 90, ¶24.

¹² *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762, ¶26.

¹³ *Id.*, ¶¶47-48.

live a dignified life.¹⁴ He added that even when not enforced, there is a significant chilling effect caused by the prevalence of §377 –

“The studies conducted in different parts of world including India show that the criminalisation of same-sex conduct has a negative impact on the lives- of these people. Even when the penal provisions are not enforced, they reduce gay men or women to what one author has referred to as “unapprehended felons”, thus entrenching stigma and encouraging discrimination in different spheres of life.”¹⁵ (emphasis supplied)

An analysis of the T. Sareetha and Naz Foundation judgments can be taken one step forward to contend that constitutional protection of the right to privacy as an enabling freedom has been upheld.¹⁶ By rooting the right to privacy in individuals and, by extension, their dignity, Courts have affirmed an understanding of the right to privacy rooted in individual autonomy, and not an understanding rooted in ‘spaces’ or institutions such as marriage.¹⁷

One can argue that the overturning of both the T. Sareetha judgment (by the Delhi High Court)¹⁸ and the Naz Foundation judgment (by the Supreme Court),¹⁹ at some level, indicates the discomfort embedded in State institutions towards the usage of the right to privacy as a sword for dismantling discriminatory Hindu institutions or ideals of Victorian morality that have been and have continued to remain embedded in certain laws. With the Puttaswamy judgment, the individual autonomy-based construct of the right to privacy is brought back to the centre stage.

B. PRIVACY AS DECISIONAL AUTONOMY

Since the individual was recognised as the basic normative unit of the right to privacy, one of the constructs of privacy that was upheld by most judges in Puttaswamy was the idea of privacy as decisional autonomy – the idea that to lead a life of dignity, an individual must have autonomy over fundamental personal choices.²⁰

¹⁴ *Id.*, ¶50.

¹⁵ *Id.*

¹⁶ Saptarshi Mandal, ‘Right to Privacy’ in Naz Foundation: A Counter-Heteronormative Critique, 2 NUJS L. Rev. 536- 538 (2009).

¹⁷ See GAUTAM BHATIA, TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN Nine ACTS 273-277 (2019).

¹⁸ Harvender Kaur v. Harmander Singh Choudhry, 1983 SCC OnLine Del 322; Saroj Rani v. Sudarshan Kumar Chadha (1984) 4 SCC 90.

¹⁹ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

²⁰ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶95 (per Nariman J.).

In a similar vein, Justice Chandrachud in his judgment in Puttaswamy, grounds the right to privacy in, *inter alia*, dignity,²¹ autonomy,²² and bodily and mental integrity.²³ He however goes one step further to lay out, what Gautam Bhatia calls the ‘heart and soul’ of the Puttaswamy judgment – the idea that the right to privacy sits on the spectrum of all freedoms.²⁴ The ability to create a zone of privacy is integral in enabling an individual to exercise numerous other constitutionally guaranteed freedoms. This is because it is the zone of privacy that allows the individual to determine *how* to exercise such freedoms.²⁵ And in the absence of the right to undertake such decision making, one could argue that freedoms granted to individuals under the Indian Constitution, such as the freedom of speech, freedom of association and freedom of religion, are redundant.

Interestingly, Justice Chandrachud also comments on the philosophical underpinnings of autonomy. He holds that while autonomy is inherent to individuals, the exercise of such autonomy is, to a certain extent, bound by social circumstances. Individuals therefore, are limited by certain reasonable expectations, which he culls out as “objective principles” underlying the exercise of individual autonomy.²⁶ As an example, Justice Chandrachud cites the case of building regulations. Consider a zoning regulation prescribes the height at which a boundary wall can be erected. Justice Chandrachud states that the right to privacy of an individual owning a plot of a land within the jurisdiction to which the regulation applies, is conditioned by the regulations itself, which is designed to protect the interest of the community in planned spaces. And this regulation therefore, in Justice Chandrachud’s example, was the “objective principle” that defines the reasonable expectation of privacy of an individual.

Along similar lines, Justice Bobde in his judgment outlines both the descriptive and normative values of privacy, and states that both of these are constitutionally protected. He states that the descriptive value of privacy, i.e, the act of carving out of a space where individuals can exercise cognitive freedom, is provenance to the concept of privacy.²⁷ And it is the normative value of privacy that enables individuals to meaningfully exercise their constitutionally guaranteed freedoms of liberty, dignity and expression.²⁸ For this reason, among others, the right to privacy must be recognized as a fundamental right on equal footing with other fundamental rights it enables.²⁹

²¹ *Id.*, ¶¶107, 169 (per Chandrachud J.).

²² *Id.*, ¶106 (per Chandrachud J.).

²³ *Id.*, ¶168 (per Chandrachud J.).

²⁴ *Id.*, ¶169; See also Gautam Bhatia, *The Supreme Court’s Right to Privacy Judgment – I: Foundations*, August 27, 2017, available at <https://indconlawphil.wordpress.com/2017/08/27/the-supreme-courts-right-to-privacy-judgment-i-foundations/> (Last visited on December 15, 2019).

²⁵ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, ¶169 (per Chandrachud J.).

²⁶ *Id.*

²⁷ *Id.*, ¶¶22-25 (per Bobde J.).

²⁸ *Id.*, ¶26 (per Bobde J.).

²⁹ *Id.*

The judges in *Navtej Singh Johar* go on to root their judgments on the unconstitutionality of §377, to the extent it pertains to consensual sexual actions between adults, within this framework of dignity and decisional autonomy.

Justice Mishra (writing for himself and Justice Khanwalikar) starts by establishing the right to sexual orientation as an integral part of personhood. He does this by stressing on the importance of identity itself, and states that the freedom to explore one's identity without fear and stigma is a constitutionally protected freedom.³⁰ He then holds that §377 significantly impedes the exercise of this freedom, owing to the fear inculcated by the criminalisation of certain consensual acts based on historical and social perceptions.³¹

The link that Justice Mishra draws is: *first*, autonomy is a pre-requisite to establish identity,³² and decisional autonomy has been recognized as an important facet of the right to privacy; and *second*, this ability to choose one's identity (including one's sexual orientation) then enables a life of dignity, also a constitutionally protected freedom.³³ Justice Mishra then notes that the protection of the right to autonomy, privacy and dignity should not be contingent on the number or percentage of persons seeking claim to these rights, but should be *de facto* extended to all individuals.³⁴

Justice Malhotra also follows a similar train of thought. She holds that the existence of §377 takes away decisional autonomy of such persons to make choices consistent with their sexual orientation.³⁵ As a result, §377, to the extent it criminalises consensual sexual actions between consenting adults, falls foul of the right to privacy as dignity as it interferes with decisions that inhere in the most intimate space of an individual.³⁶

Justice Nariman, on the other hand, addresses the issue of presumptive constitutionality of §377, and states that because the Indian Penal Code and §377 itself was drafted by a "foreign body", there cannot be an automatic inference that the law was made by a parliament that represents and understands its people. As a result, he rejects application of the principle of presumptive constitutionality to §377. He also grounds his substantive reasoning on the principles of dignity, expression, autonomy and privacy, embedded in Articles 14, 19 and 21 of the Indian Constitution, and concludes that on all these parameters, §377, to the extent it criminalises consensual sexual actions between consenting adults, fails the test of constitutionality.

³⁰ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶9 (per Mishra J.).

³¹ *Id.*, ¶135 (per Mishra J.).

³² *Id.*, ¶149 (per Mishra J.).

³³ *Id.*

³⁴ *Id.*, ¶171 (per Mishra J.).

³⁵ *Id.*, ¶16.2 (per Malhotra J.).

³⁶ *Id.*

C. CASE AGAINST NEUTRALITY

Justice Chandrachud, while reaching the same conclusion, adopts a slightly different approach. He invokes the test of indirect discrimination to hold that §377 is unconstitutional, to the extent it criminalises consensual sexual intercourse between queer persons. He writes that even though §377 is neutrally worded in that there is no *specific* reference to certain sexualities or gender identities, the effect of this provision is to deprive queer persons of fundamental rights.³⁷ He goes on to draw from the Delhi High Court's analysis of 'facial neutrality'³⁸ of §377 in the Naz Foundation judgment. He holds that the intent of the legislators in drafting a legislation is less relevant than the effect of this legislation on individuals.³⁹ He further states that, historically, certain kinds of 'non-natural' sexual actions have sought to be censored, owing as such actions and conduct not confirming to heteronormative expectations of society.⁴⁰ He also holds that the evidence presented before the bench clearly indicates the disproportionate usage of §377 to target queer person. He therefore concludes that "the effect of §377, thus, is not merely to criminalize an act, but to criminalize a specific set of identities. Though facially neutral, the effect of the provision is to efface specific identities. These identities are the soul of the LGBT community."⁴¹

Because of the targeted and selective erasure of queer identifies promulgated by §377 in the way it read, Justice Chandrachud finally holds that it is violative of Article 15 of the Indian Constitution. Further, the social impact of §377 was to create an environment of shame and stigmatise the assertion of alternate 'non-natural' sexualities by queer persons. The right to adopt, profess and perform one's sexuality was definitively recognised as a fundamental right by the Supreme Court in the Puttaswamy judgment. Against this background, the continued existence of §377 prevented individuals from exercising their fundamental right to sexuality and stripped them of dignity, which was also recognised as a constitutionally protected value. Thus, Justice Chandrachud goes on to hold that §377, to the extent it criminalised consensual sexual actions between queer persons, also falls foul of Article 21 of the Indian Constitution. He does this by relying on the autonomy-identity-dignity nexus set out in the Puttaswamy judgment.

Justice Chandrachud's expositions in the Navtej Singh Johar judgment are perhaps illustrative, in decoding his own opinion in the Puttaswamy judgment on 'objective principles' conditioning the exercise of the right to privacy. Justice Chandrachud patently rejected the idea that Section 377 was 'neutral' or that it was an "*objective principle*" rightfully circumscribing the right to privacy and dignity of queer persons. In fact, he eloquently presents argument

³⁷ *Id.*, ¶41 (per Chandrachud J.).

³⁸ *Id.*, ¶42 (per Chandrachud J.).

³⁹ *Id.*, ¶34 (per Chandrachud J.).

⁴⁰ *Id.*, ¶¶44, 47 (per Chandrachud J.).

⁴¹ *Id.*, ¶51 (per Chandrachud J.).

after argument on the influence of existing heteronormative norms and societally constructed notions of ‘deviance’ to elaborate on the manner in which §377 has been disproportionately and selectively used against queer persons.⁴² He further goes on to state that, in the absence of any change to the provision, §377 has and will continue to foster homophobic environments, as the provision provides legal sanction to the construction of queer persons as “socially and legally constructed miscreants”.⁴³

The question that then arises is - what amounts to an ‘objective principle’ that is a reasonable restriction of sorts on the exercise of the right to privacy, as Justice Chandrachud outlines in his judgment in *Puttaswamy*? This question acquires particular significance in the context of the TPPR Act, as outlined in Part III of this paper.

D. IDENTITY AND SEXUAL ORIENTATION – FIXED OR FLUID?

On a related note, in making their argument on Article 21 of the Indian Constitution encompassing the right to identity and the freedom of self-identification as far as sexual orientation is concerned, the judges comprising the bench for *Navtej Singh Johar* seem to have adopted different approaches. The thrust of Justice Mishra’s articulations, for instance, is two aspects that, in his opinion form an integral part of Article 21 – the right to choose and express one’s sexual orientation and the right to a union.⁴⁴ While he does repeatedly refer to the right of self-identification, he also refers to the innateness and immutability of sexual orientation in equal measure.⁴⁵ In doing so, he draws extensively from research undertaken in the “science of sexuality”, which has proved that attraction towards individuals stems from neurological and hormonal factors.⁴⁶ Similarly, Justice Malhotra holds that sexuality manifests at an early age and is thus, an innate attribute of an individual’s identity.⁴⁷

As Saptarshi Mandal notes, the language employed by the judges in *Navtej Singh Johar* seems to be at odds with the globally accepted language of sexual rights.⁴⁸ To truly encapsulate the autonomy involved in adopting a gender identity and sexual orientation, the language of sexual rights is careful to avoid attribution of any essence to these categories, including grounding these categories

⁴² *Id.*, ¶52 (per Nariman J.).

⁴³ *Id.*; See also Pratik Dixit, *Navtej Singh Johar v Union of India: Decriminalising India’s Sodomy Law*, 12 INT’L J. OF HUMAN RIGHTS (2019).

⁴⁴ Saptarshi Mandal, *Section 377: Whose Concerns Does The Judgment Address?*, September 12, 2018, available at <https://www.epw.in/engage/article/section-377-whose-concerns-does-judgment> (Last visited on December 18, 2019).

⁴⁵ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶¶4, 9 (per Mishra J.)

⁴⁶ *Id.*, ¶143 (per Mishra J.)

⁴⁷ *Id.*, ¶13.1 (per Malhotra J.)

⁴⁸ Mandal, *supra* note 44.

in the body.⁴⁹ The language adopted by the judges in Navtej Singh Johar, on the other hand, reinforces an essentialist understanding of sexuality. By rooting sexual orientation in the rhetoric of ‘naturalness’, the effect of the different judgments in Navtej Singh Johar is to stabilise both gender and sexuality and root it in the body – where the body ‘evidences’ one’s sexual orientation.

At this stage, the theorisations of two important scholars – Michel Foucault and Judith Butler, acquire particular importance. For these two scholars, through their work on gender, sexuality and biopolitics, provide useful theoretical frames to analyse the manner in which identities are constructed and how certain constructions further the agenda of regulatory power.

1. The Rise of Biopolitics

Michel Foucault, in ‘The History of Sexuality’, which is regarded as one of his seminal works on genealogy and the history of sexuality, locates the ‘invention’ of homosexuality in the workings of two kinds of power – disciplinary power and regulatory power.⁵⁰ In essence, Foucault argues that the traditional conception of sovereignty, which is that of a monarch setting down ‘rules’ that his subjects were required to follow, has been replaced by a new kind of power and governance.⁵¹ This new power takes two forms – disciplinary power (*i.e.*, a system of power targeted at the body to eventually produce a subjected and ‘docile’ body)⁵² and regulatory power (*i.e.*, a system of power that is targeted at the populace as a whole, to achieve a homogenization of the populace itself).⁵³

As an example, Foucault argues that sexuality has become a field of interest since the nineteenth century as it is located *in between* the body and the populace.⁵⁴ Through the historical regulation of sexuality, Foucault argues that one can find evidence of both disciplinary and regulatory power at play. For instance, he argues that the continued discourse on procreation during the nineteenth century, or what he refers to as a proliferation of ‘truth’ on procreation, had as its goal the expansion of the productive labour force.⁵⁵ By virtue of this disciplining discourse centred on procreation, heterosexual bodies came to be ‘normalised’.⁵⁶ Later, through the nineteenth century and into the twentieth century, Foucault argues that sexuality became ‘regulated’ through the development of medicine.

⁴⁹ Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8(2) HUMAN RIGHT L. REV (2008).

⁵⁰ MICHEL FOUCAULT, *The History of Sexuality* (1st ed., 1978); *See also* TASNIM SPARGO, FOUCAULT AND QUEER THEORY 17-22 (2000).

⁵¹ MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 241 (Mauro Bertani & Alessandro Fontana, 1st edn., 2003).

⁵² MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 138. 139 (Alan Sheridan, 1st edn., 1977).

⁵³ *Id.*, 241-242.

⁵⁴ *Id.*, 251.

⁵⁵ *Id.*, 252.

⁵⁶ *Id.*

In addition to the disciplining of individual bodies, the populace was regulated through medical developments and discourse on procreation.⁵⁷ The ultimate object of regulatory power, or ‘biopower’ as he later terms it, is to achieve an overall state of equilibrium (or a “*sort of homeostasis*” as Foucault calls it) such that the populace as a whole can be protected from any internal dangers or disruptions and thereby be more effectively controlled.⁵⁸

And here is where norms become important. Norms determine the manner in which disciplinary power and regulatory technologies intersect, and the direction in which exercise of biopower is motivated.⁵⁹ For instance, through Foucault’s historical analysis of the disciplining of bodies and regulation of heterosexuality, the agenda of procreative sex as the underlying norm guiding the exercise of these powers becomes evident.

Even while Justice Chandrachud draws from Foucault’s theorisations, the adoption of the innateness approach to sexuality (and extending into gender identity) by three other judges in Navtej Singh Johar, ignores theorisations on how the body itself is disciplined and how the populace is regulated. While denouncing the centrality of the norm of procreative sex in legal regulation, the adoption of the innateness approach in Navtej Singh Johar, which has formed the backbone of the TPPR Act and the PDP Bill, provides impetus to a new form of homeostatis – one where identities are siloed into neatly segregated and essentialised categories that can be easily ‘watched’, in effect rendering the right to self-identification nugatory.⁶⁰ Therefore, if self-determination is practically redundant, what is left of the right to privacy as dignity?

2. The Self as Sexed

Judith Butler takes this analysis forward in her poststructuralist work on gender and sex. However, while Foucault seems to suggest that the individual or the body is the *subject* that is regulated by way of norms, Butler argues that the self itself is *formed* through the matrix of gender relations,⁶¹ and similarly, that the self *becomes* sexed through the regulatory norms of sex which work in the service of the heterosexual matrix.⁶² In her early work therefore, Butler argues that, in contrast to the binary understanding of sex as natural, the naturalisation of the heterosexual body is itself achieved through repetitive actions (or performative speech

⁵⁷ *Id.*

⁵⁸ *Id.*, 249.

⁵⁹ *Id.*, 252-253.

⁶⁰ See Zara Rahman, *Can Data ever know who we Really are?*, May 16, 2019, available at <https://deepdives.in/can-data-ever-know-who-we-really-are-a0dbfb5a87a0> (Last visited on December 1, 2019).

⁶¹ JUDITH BUTLER, *BODIES THAT MATTER: On the Discursive Limits of “Sex”* 7 (1993).

⁶² *Id.*, 12 (1993).

acts, as she refers to them). It is these actions, or norms, that naturalise certain “bodies, genders and desires” and thereby constitute the heterosexual matrix.⁶³

The adoption of the ‘innateness’ model by the Supreme Court in Navtej Singh Johar, is effectively a step back from Butler’s poststructuralist understanding of gender and sex as well. The underlying premise in the statement that ‘sexuality is innate to individuals’, is that the body as the material marker of sexuality, exists as a subject in its own right. Instead, Butler as well as various queer theory scholars and transgender studies scholars, have argued that sex itself does not precede gender, but is an effect of the cultural construction of gender.⁶⁴

If the body evidences one’s gender identity or sexual orientation, this assumes that in addition to the body/self being a subject in its own right, the body/self is also a *static* subject. The implications of this logic on the construction of a transgender identity are significantly detrimental. Because this logic, taken to its conclusion, suggests that owing to the innateness of gender/sexuality, the body will *always* evidence this identity. For transgender persons, non-binary persons or persons with gender dysphoria, the body itself is not a fixed point of reference. While some seek to align their body to what they perceive as their innate gender identity, some seek to discard any binary construction of the body altogether. The only manner in which each of these individuals can choose, adopt and perform their gender identities and sexualities and, if they choose, seek intervention in the form of equal legal recognition or medical treatment, is if the construct of identity is rooted in self-determination. The ‘innateness’ model of sexuality adopted in Navtej Singh Johar, which has been transposed into the understanding of gender identity captured in the TPPR Act, unfortunately, does not provide this freedom to individuals, as highlighted below in Part III of this paper.

III. THE MANY INIQUITIES OF THE TPPR ACT

From the analysis set out above, two key strands emerge from the Navtej Singh Johar judgment, which bear importance for the analysis set out in this part.

One strand is the recognition of privacy as dignity of individuals. To this effect, the judges in Navtej Singh Johar at least seem to have adopted a historical approach, of tracing the social and cultural underpinnings of §377 and the manner in which it has been selectively deployed against queer persons. To this extent, the importance of decisional autonomy in enabling and fostering dignity has also been unanimously upheld.

⁶³ JUDITH BUTLER, GENDER TROUBLE 194 (1999).

⁶⁴ See Jay Prosser, *Judith Butler: Queer Feminism, Transgender and the Transubstantiation of Sex* in THE TRANSGENDER STUDIES READER 260 (Susan Stryker & Stephen Whittle, 2006).

The second strand is the adoption of the innateness approach to identity. This approach, however, provides fillip to chip away at true dignity and autonomy of queer persons. It feeds the disciplining and regulation of sexualities and gender identities. But more importantly, it assumes that the self is a static subject and as such, stabilises the queer identity in the body, thereby cutting off space for identification outside of the heteronormative binary.

A case in point, that incorporates both these strands of the Navtej Singh Johar judgment is the infamous TPPR Act. At the outset is the labelling adopted and perpetuated by the TPPR Act. For instance, §2(k) defines a ‘transgender person’ to mean –

“a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta”.⁶⁵

The TPPR Act then goes on to codify an interesting dichotomy. §4 of the TPPR Act vests on each transgender person the right to a ‘self-perceived gender identity’⁶⁶ but in the same breadth, states that transgender persons shall have the right to be recognised as such “in accordance with the provisions of the (TPPR) Act”.⁶⁷ The choice that the TPPR Act seems to provide to individuals to adopt, perform and claim rights on the basis of a gender identity is immediately circumscribed by the codified manner in which this choice is to be exercised.

The TPPR Act then goes on to stipulate the manner in which a transgender person may seek a ‘certificate of identity’, based on which the allegedly ‘self-declared’ gender of such person will be recorded in official documents.⁶⁸ To obtain a certificate of identity, a person is required to make an application to the District Magistrate together and submit copies of documents ‘as prescribed’.⁶⁹ Further, after obtaining a certificate of identity, if such person undergoes sex reassignment surgery (‘SRS’), to obtain a revised certificate of identity, the person is required to make a separate application and submit a certificate from an identified medical officer of the institution that has performed SRS.⁷⁰

While the TPPR Act in its current formulation leaves much to be desired, two particular problems have been culled out in detail below. The first

⁶⁵ The Transgender Persons (Protection of Rights) Act, 2019, §2(k).

⁶⁶ The Transgender Persons (Protection of Rights) Act, 2019, §4(2).

⁶⁷ The Transgender Persons (Protection of Rights) Act, 2019, §4(1).

⁶⁸ The Transgender Persons (Protection of Rights) Act, 2019, §§6, 7.

⁶⁹ The Transgender Persons (Protection of Rights) Act, 2019, §5(1).

⁷⁰ The Transgender Persons (Protection of Rights) Act, 2019, §7.

problem is the construction of a ‘legal’ transgender identity as a stable identity. Drawing from Foucault’s work, transgender studies contributors Aniruddha Dutta and Raina Roy articulate the problems with creating stable cartographies for transgender identities. The second problem, following on from the first, is the manner in this construction of a stable transgender identity actually derives legal sanctity from the Navtej Singh Johar, despite pushing certain queer persons further into the margins.

A. BUILDING STABLE CARTOGRAPHIES OF TRANS IDENTITIES

Aniruddha Dutta and Raina Ro, in their work on the legally constructed transgender identity, argue that even a legal definition that is inclusive in nature, similar to the definition set out in the TPPR Act, assumes a non-fluid stable model of gender that is based on “primary, singular and consistent identities”.⁷¹ While the definition of a ‘transgender’ under the TPPR Act includes, for example, persons who identify as genderqueer, which includes but is not limited to an identity commonly used by people who do not identify or express their gender within the gender binary,⁷² as well as indigenous identities such as *kinner* and *aravani*, the imperative of this legal provision is to build essentialised identities.

On one level, under the TPPR Act, a genderqueer person can claim the rights and remedies set out in the TPPR Act *because* they are recognised as a transgender person. By contrast, genderqueer persons should have equal claim to these rights and remedies by virtue of their performance and adoption of an identity as a genderqueer person and should not be dependent on whether they fit within a legally constructed transgender identity.⁷³ There is power in the act of

⁷¹ Aniruddha Dutta, *Decolonising Transgender in India: Some Reflections (with Raina Roy)*, 2(4) TRANSGENDER STUDIES QUARTERLY 331 (2014).

⁷² Trans Student Educational Resources, *LGBTQ+ Definitions*, available at <https://www.transstudent.org/definitions> (Last visited on February 1, 2020) (“Genderqueer: An identity commonly used by people who do not identify or express their gender within the gender binary. Those who identify as genderqueer may identify as neither male nor female, may see themselves as outside of or in between the binary gender boxes, or may simply feel restricted by gender labels. Many genderqueer people are cisgender and identify with it as an aesthetic. Not everyone who identifies as genderqueer identifies as trans or nonbinary”).

⁷³ See, e.g., Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2007, Principle 3 (“Everyone has the right to recognition everywhere as a *person* before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life”); See also Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to complement the Yogyakarta Principles, 2017, Principle 31 (“Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them”).

naming oneself.⁷⁴ The TPPR Act however, robs individuals of this power and vests the same with the state, by clubbing a host of different gender identities and sexual orientations within the umbrella term that is ‘transgender’.

On another level, the TPPR Act is a perfect example of the law co-opting the structural imperative of stable gender recognition. It is this structural imperative that underpins claims of queer people having been ‘born this way’. Justice Mishra (writing for himself and Justice Khanwalikar) and Justice Malhotra’s expositions in Navtej Singh Johar, as discussed above, also seem to be drawn from this understanding of gender identity and sexuality as innate to individuals, instead of these identities being constructed, influenced and moulded by social, cultural and political norms. But more importantly, Aniruddha Dutta and Raina Roy, drawing from Foucault’s theorisation on biopolitics and governance, argue that analysis of legal definitions of transgender need to account for systems of power within which such laws operate.⁷⁵ The structural imperative of gender stems from a system that seeks to attach legitimacy to individuals, if they are reduced to their *primary* identities. In the present case, the TPPR Act seeks to compel queer persons to –

“exert a strong mono-gendered claim to trans womanhood (or manhood)—one fallout of which is the neat separation of binary and nonbinary identities, recreating a majority-minority dynamic wherein (trans) men and women *are followed by* a trail of genderqueer/bigender/agender ‘others.’”⁷⁶ (emphasis supplied)

Thus, while the TPPR Act seems to provide transgender persons the *choice* to identify as such as claim rights on the basis of such an identity, it exacerbates mono-gendered performance of certain queer identities by individuals. For example, there is a structural imperative inherent in the TPPR Act for a trans woman to practice an essentialised womanhood - a full ‘transition’ into the dominant conception of womanhood - to be able to claim the rights and remedies set out thereunder in a relatively easier manner compared to genderqueer or non-binary persons. The model of authentication of the transgender identity by a District Magistrate further fuels this claim, for the likelihood of a bias by a District Magistrate in favour of a trans woman who displays the characteristics of dominant womanhood is greater, owing to their class/caste location.⁷⁷ As a consequence therefore, even though for instance, genderqueer is included within the umbrella definition of ‘transgender’, there are structural barriers for genderqueer persons, who are explicitly and exclusively non-binary persons, to access the rights under the TPPR Act.

⁷⁴ See Heidi M. Levitt, *Being Transgender: The Experience of Transgender Identity Development*, 61(12) JOURNAL OF HOMOSEXUALITY 1132 (2014).

⁷⁵ Dutta, *supra* note 71, 332.

⁷⁶ *Id.*

⁷⁷ See GAYATRI CHAKRAVORTY SPIVAK, A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT 361 (1999).

B. WHAT IS 'INNATE'? WHAT IS 'ESSENTIAL'?

Here is where Navtej Singh Johar is important, because the innateness approach to understanding gender identity and sexuality read together with the Supreme Court's ruling in *National Legal Services Authority v. Union of India* ('NALSA'),⁷⁸ underpins three judges' opinions, and lends support to the manner in which the TPPR Act constructs the transgender identity. Suggesting that sexual orientation is an innate part of personhood, leads one to ignore the historical, social and political factors that underpin the essentialisation of certain kinds of identities and the construction of other identities as oppositional, and therefore inferior, to the dominant.⁷⁹ And inherent in this approach, as elaborated earlier, is the idea that the self is a static subject on which these historical, social and political norms play out.

For example, the idea that queer people are 'born this way' is an idea queer theory has consistently sought to debunk. In adopting the stance that queerness is 'fixed' at birth and that sexuality is immutable, the refrain in effect operates as a *justification* for why queer people are different from the dominant, the heterosexual. It compels queer persons to lay out a linear narrative for their sexuality, an act inherently at odds with the historical liminality that a queer identity has sought to espouse and stand for.⁸⁰ That is not to say that I or even all queer theorists and transgender studies scholars reject assertion of a stable identity by queer persons, but rather to critique the structural imperative of this kind of identification.

Three out of five judges in Navtej Singh Johar, unfortunately, did not explore post-modern theorisations on identities. While Justice Mishra for instance, does place reliance on the Yogyakarta Principles,⁸¹ he seems to ignore the

⁷⁸ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 (where the Supreme Court held that gender identity is an integral part of the personality and one of the most basic aspects of self-determination, dignity and freedom. Thus, no one can be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy as a requirement for legal recognition of their gender identity. The court went on to hold that the right to choose one's gender identity is integral to the right to lead a life with dignity and therefore falls within the scope of the right to life. The court upheld transgender persons' right to self-identify their gender, and declared that the Centre and State governments must grant legal recognition of gender identity as male, female or third gender).

⁷⁹ While the focus of the Navtej Singh Johar judgment was on the innateness of sexual orientation, I extend the argument to gender identity as well. Inherent in this is my adoption of Judith Butler (and many others') work on problematising the sex/gender binary, and co-opting the approach that bodies are given meaning by social, historical and cultural norms (and these norms influence the construction and performance of both sex and gender).

⁸⁰ Callie Hitchcock, *What's the DNA of Desire?*, March 28, 2019, available at <https://slate.com/human-interest/2019/03/born-this-way-queer-identity-fluidity.html> (Last visited on April 17, 2020); See also EVE KOSOFSKY SEDGWICK, *TENDENCIES* 5-9 (1993) (articulating the different meanings and purposes of 'queer').

⁸¹ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, March 2007, available at <https://www.refworld.org/docid/48244e602.html> (Last visited on December 24, 2019).

usage of fluid vernacular in these principles when defining queer identities, the rationale for which is to avoid attributing any core or essence to these categories. The TPPR Act plays right along, in adopting the immutability approach to gender identity.⁸² The idea that *a body* needs to be ‘inspected’ and ‘certified’ before the *self* can exercise core rights is effectively what the identity construct adopted by the Supreme Court in Navtej Singh Johar fosters. This construct feeds the idea that a trans identity needs to be ‘authenticated’ before exercise of rights on the basis of this identity, where the reference point for such authentication is likely to be bodies that visibly demonstrate innate binary heteronormative characteristics of masculinity/femininity.

In this context, the next question that arises is whether the effects-based test of indirect discrimination, propounded by Justice Chandrachud in Navtej Singh Johar, can then be used in relation to the TPPR Act. At the outset, the application of this test itself needs to be analysed, where the law that the test is sought to be applied at is not ‘facially neutral’.⁸³ The TPPR Act is clear in its selective application to what it identifies as ‘transgender persons’, and the same can be justified from the perspective of positive/affirmative discrimination. An argument can therefore be made, that the state is well within its power to pass a legislation meant exclusively for the benefit and welfare of a certain section of individuals.

On a second level, if the essentialisation of gender identity is accepted as falling within the construct of identity that has been granted constitutional protection by virtue of the Navtej Singh Johar judgment, can the requirement of obtaining a ‘certificate of identity’ for transgender persons to exercise the rights set out under the TPPR Act be justified as an ‘objective principle’ conditioning such persons’ exercise of their right to privacy? The answer to this as well, is likely to be in the affirmative, because of the bench’s collective understanding of sexual orientation (and by extension gender identity) as being rooted in what is innate or natural to an individual, and not in the fluidity exercised by an individual through self-identification. In fact, the logic that is likely to be used is as follows: if a person’s sexual orientation (which, in the language adopted by the judges in Navtej Singh Johar, seems to be synonymous with gender identity) is natural to them and manifests in sexual attraction that stems from (as Justice Mishra states in his judgment) their hormones, then seeking a verification of such person’s professed identity should not pose any problem *per se*, as their body would necessarily evidence their transgender identity.

⁸² See Ramya Jawahar Kundekallu, *Why Transgender Community is Struggling in Spite of NALSA Judgment*, February 3, 2017, available at <https://www.dailyo.in/politics/transgender-nalsa-judgment-aadhar-card-gender-rights-self-identification/story/1/15462.html> (Last visited on December 24, 2019) (Back when a draft of the Transgender Persons (Protection of Rights) Bill, 2016 was floated for public consultations, Ramya Kundekallu outlined the problems with the medicalisation of gender identity through the verification construct set out in the Draft Bill).

⁸³ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶43 (per Chandrachud J.).

And herein lies the rub. The effect of taking this logic to its full conclusion, is to say that individuals seeking to identify as ‘transgender’ for the purpose of the TPPR Act need to necessarily ensure that their body matches the gender identity they seek to perform. This feeds the argument made above – that the TPPR Act creates an environment where, for example, a trans woman feels compelled to transition into an essentialised womanhood, where both her performance as a woman and her body belie dominantly understood feminine traits. And as an additional consequence, a body that belies neither masculine nor feminine traits, is likely to be a body that fails the authentication sought under the TPPR Act.

It is apparent that this compulsion is inherently at odds with the right to privacy as decisional autonomy. In fact, such consequences are also evidence of the law marginalising and otherising those at the margins even more. As Akhil Kang succinctly puts it – “.if one indulges in the legal exercise of medicalisation of trans* bodies, then it implies a legally valid criteria of how only certain bodied individuals could claim those rights”.⁸⁴ For non-binary persons for example, it is unclear what their body must evidence, for such persons to claim the rights enumerated under the TPPR Act. If anything, instead of actually fostering decisional autonomy and enabling all queer persons to lead a life of dignity, the TPPR Act seeks to monitor and regulate queer persons and their bodies.

IV. WELFARE AND DATAFICATION: AN INSIDIOUS NEXUS

With the TPPR Act, even if the *prima facie* intent of the legislation is progressive in recognising gender identities outside of the binary, the effect is still to essentialise what are inherently fluid identities into codifiable categories. Establishment of identity through a process of verification and authentication takes away the historical liminality and the freedom of autonomous identification associated with queer identities, particularly trans identities. It also takes away the space to understand how the body itself is sexed, through the regulatory impact of norms that work in the service of the heterosexual matrix. Instead, these characteristics and necessary complexities are replaced with the ability to have ‘transgender’ as another category in a drop-down box – a data point.

At this stage, it is pertinent to analyse the different ways in which the TPPR Act could have materialised into law. A comparative analysis of similar legislations adopted by Portugal, Argentina and Belgium offer useful insights.

⁸⁴ Akhil Kang, *Disciplining Trans Bodies: Some Cases from Malaysia and India*, July 21, 2015, available at <http://orinam.net/disciplining-trans-bodies-malaysia-india/> (Last visited on February 1, 2020).

A. *INTERNATIONAL BENCHMARKS FOR GENDER IDENTITY LAWS*

From 2010 onwards, Portugal was one of the first European nations to have a gender identity law in place. Under the 2010 version of the gender identity law however, a request for change in sex or gender identity in the civil registry had to be accompanied with a report by a “multidisciplinary team of clinical sexology clinic at the health facility public or private, domestic or foreign that proves the diagnosis of gender identity disorder”.⁸⁵ This was met with discontent and dissent from civil society organisations as well as trans, intersex and queer individuals. What followed thereafter were numerous consultations and meetings, post which a new law was promulgated in April 2018. And despite the hitches on the way, this law became effective in August, 2018.⁸⁶ In its current form, the Portuguese law allows all persons to seek a change in their sex or gender identity, by making an application to the concerned identity *without* providing any supporting documents or evidence of gender dysphoria.⁸⁷

From across the Atlantic, Argentina’s gender identity law also contains a similar stipulation. Specifically, it states that a person’s request for change of their recorded sex, first name and picture in official documents is not required to be backed with proof “that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place”.⁸⁸ The Argentinian law also goes on to clarify that once an application has been submitted by a person to the relevant district office, no further administrative or legal procedure is required to be undertaken nor is any fee required to be paid, for the change to the applicant’s records to become effective.⁸⁹ Another relevant aspect of the Argentinian law is the ability for an applicant to change their amended records more than once, albeit with prior judicial authorisation.⁹⁰ A similar provision does not find mention in the Portuguese law, leaving open a grey area regarding whether a person can seek changes to their official records more than

⁸⁵ Law of Gender Identity, 2010, Art. 3(1)(b) (Portugal).

⁸⁶ See Louisa Wright, *Portugal’s Parliament Approves New Gender Identity Bill*, July 13, 2018, available at <https://www.dw.com/en/portugals-parliament-approves-new-gender-identity-bill/a-44655418> (Last visited on February 1, 2020) (The President of the Portuguese Republic vetoed passage of the new gender identity law, in May, 2018. While the President, Mr. Rebelo de Sousa said he was in favor of no longer considering transgender identity as “an abnormal pathology or mental situation,” he still wanted a medical report to be presented by minors between the ages of 16 to 18, showing support for their decision).

⁸⁷ Agence France-Presse, *Portugal Parliament Approve New Gender Change Law*, July 13, 2018, available at <https://www.thehindu.com/news/international/portugal-parliament-approves-new-gender-change-law/article24406630.ece> (Last visited on April 10, 2020).

⁸⁸ Gender Identity Law, 2012, Art. 4 (Argentina).

⁸⁹ Gender Identity Law, 2012, Art. 6 (Argentina).

⁹⁰ Gender Identity Law, 2012, Art. 8 (Argentina).

once. For these reasons, the Argentinian law is often considered the benchmark for gender identification laws, by many activists and scholars.⁹¹

Coming back to Europe, and as an interesting contrast to the Argentinian law, is the gender identity law implemented in Belgium in 2018.⁹² Self-determination forms the centre of this legislation as well. However, to prevent identity misuse and fraud, which is often perceived as the direct and more prevalent pitfall of an identity law based purely on self-identification, the Belgian law introduces certain ‘safeguards’. For instance, a request for change in one’s gender identity is not required to be backed with any ‘medical’ or pathologising evidence, and only a declaration is required to be issued by the applicant stating that they seek to change their gender identity on official documents.⁹³ However, after a waiting period of three months and no later than six months from the date of making this declaration, the applicant is required to make *another* declaration, *confirming* that they still seek a change of their gender identity.⁹⁴ Further, during this three month wait period, the public prosecutor is empowered to reject an application, if he ascertains that an applicant had fraudulent intent in making the declaration.⁹⁵ It is unclear how the public prosecutor can even arrive at this decision, especially since no supporting material or ‘evidence’ is required to be submitted by an applicant together with their declaration seeking change of their gender identity.⁹⁶

Certain provisions of the Belgian gender identity law were challenged before the Belgian Constitutional Court. In its judgment however, the court notes that the waiting period requirement and the power of the public prosecutor to identify and reject fraudulent applications during this period, are in fact viable measures to prevent misuse of the gender identity law.⁹⁷ The fact that perhaps misuse may not be as significant a concern has not been addressed either at the legislative or judicial level in Belgium. For instance, considering the existing marginalisation and stigmatisation of transgender identities, it is unlikely that a large number of individuals may seek a change in their gender identity to avail gender-specific benefits.⁹⁸

⁹¹ Richard Köhler & Alecs Recher, *Legal Gender Recognition in Europe*, TRANSGENDER EUROPE 49 (2013).

⁹² An Act to Reform Regimes relating to Transgender Persons with regard to the Mention of an Amendment to the Registration of Sex in Civil Status Documents and its Effects, 2017 (Belgium) available at <http://www.ejustice.just.fgov.be/eli/loi/2017/06/25/2017012964/justel> (Last visited on April 10, 2020).

⁹³ Gender Recognition Act, 2017, Art. 3(2) (Belgium).

⁹⁴ Gender Recognition Act, 2017, Art. 3(5) (Belgium).

⁹⁵ Gender Recognition Act, 2017, Art. 3(4) (Belgium).

⁹⁶ Pieter Cannoot, *New Belgian Gender Recognition Act: Shouldn't Self-Determination also Include Non-Binary People?*, March 21, 2018, available at <https://blog-iacl-aidc.org/the-third-gender/2018/6/3/new-belgian-gender-recognition-act-shouldnt-self-determination-also-include-non-binary-people-gwh56> (Last visited on February 1, 2020).

⁹⁷ Press Release on Judgment 99/2019, BELGIAN CONSTITUTIONAL COURT, June 19, 2019, available at <https://www.const-court.be/public/e/2019/2019-099e-info.pdf> (Last visited on April 21, 2020).

⁹⁸ Cannoot, *supra* note 96.

In any case, the commonality across the gender identity laws in Portugal, Belgium, Argentina as well as a few other European states,⁹⁹ is the recognition and codification of self-determination into a gender recognition law. All these laws are clear, in that no verification of one's chosen gender identity is to be undertaken, to effect this change in official documents of such person. The TPPR Act stands in stark contrast, and is clearly not in line with international best practices.

For one, the Yogyakarta principles read with the legislations analysed above, are clear evidence of states vesting persons the right to proclaim and identify based on a gender identity of their choosing. The TPPR Act on the other hand, requires persons seeking to identify as 'transgender' to provide medical proof of SRS. The pathologisation of a transgender identity, or any queer identity for that matter, is clearly not in line with international benchmarks or with principles under human rights law.¹⁰⁰ Additionally, the legislations analysed above provide individuals the space to choose a gender identity of their own, albeit in some cases from a drop down list. The TPPR Act on the other hand, requires that, for example, all transgender persons, intersex persons and genderqueer persons necessarily identify with the stabilising 'transgender' category. The legal discourse in India therefore, drawing from the *Navtej Singh Johar* judgment and the TPPR Act, is still limited in scope and has not accounted either for international practice or even criticism and dissent from within the Indian queer community.¹⁰¹

B. SELF-DETERMINATION IN DATA, AND DATA AS SELF-DETERMINATION

In fact, the discussion in European countries such as Belgium and Germany, is on the datafication of identities. For instance, the Belgian gender identification law, allows self-determination only for individuals who identify within the heteronormative M/F binary. Non-binary persons and gender-fluid persons, as a result, do not have the ability to seek identification as such, under the Belgian law. This facet of law formed part of the challenge raised on the constitutionality of the law. And in its ruling in March, 2019 the Belgian Constitutional Court noted that the absence of identification for such individuals was a void in the law, which

⁹⁹ Key examples being: (i) the legislation passed by Netherlands (December, 2014). See Human Rights Watch, *The Netherlands: Victory for Transgender Rights*, December 19, 2013, available at <https://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights> (Last visited on April 21, 2020); (ii) the Gender Recognition Act of 2015, passed by Ireland (July, 2015); and (iii) the Gender Identity, Gender Expression and Sex Characteristic Act passed by Malta (April 2015).

¹⁰⁰ Jens T. Theilen, *Depathologisation of Transgenderism and International Human Rights Law*, 330-331 HUMAN RIGHTS LAW REVIEW 14 (2014).

¹⁰¹ Kyle Knight, *India's Transgender Rights Law isn't Worth Celebrating*, December 5, 2019, available at <https://www.hrw.org/news/2019/12/05/indias-transgender-rights-law-isnt-worth-celebrating> (Last visited on April 10, 2020); Jayna Kothari, *A Law that Defeats its Purpose*, December 29, 2018, available at <https://www.thehindu.com/opinion/op-ed/a-law-that-defeats-its-purpose/article25854190.ece> (Last visited on April 10, 2020).

had to be addressed by the legislators.¹⁰² While no amendment or modification has been introduced since this judgment, the discourse in Belgium is now centred on the manner in which non-binary and gender fluid persons should be ‘identified’ under law i.e. whether all such persons should be clubbed within the umbrella ‘third gender’/‘third option’ or whether the spectrum should be broadened to accommodate each different identity.¹⁰³ In opposition to the gender registration model are certain queer activists groups that reject the idea of gender registration entirely.¹⁰⁴

The discourse and legal developments in India on identity recognition seem to have taken a different turn. As the starting point, the position adopted by the Supreme Court in *NALSA*, i.e. the adoption of the ‘third gender’ model and sanction of the use of psychological tests to ascertain the validity of an application for change in gender in legal documents,¹⁰⁵ has been translated into law by virtue of the TPPR Act. In doing so, there was not enough engagement by the legislators, either amongst themselves or with civil society, on adoption of the third gender model itself. In fact, the verdict of the Supreme Court in *NALSA*, which mandated that trans persons be permitted to identify as belonging to the ‘third’ gender in official documents, has itself been subject to criticism on the ground that the applicability of the judgment to genderqueer and non-binary persons is not clear.¹⁰⁶

The TPPR Act in its current form however, bolstered in some ways by Navtej Singh Johar, has effectively closed off discourse on how the principle of self-determination should be translated into law and the types of categorisation that should be captured in a gender identity legislation to achieve the same. Perhaps aiding this, is the manner in which civil society’s engagement itself takes place in silos – with most public discussions on gender recognition and registration law and on data protection laws running in parallel, without much intersection, when in fact both these legislations deal with ‘categorisation’ of a certain kind. With the PDP Bill being opened up for public comments, it is even more important that this discourse be reignited.

In India, starting with *NALSA*, and culminating in the TPPR Act, the legal approach towards categorisation is that transgender persons can identify within a third category of the “transgender” prior to an SRS, and have the option

¹⁰² Press Release on Judgment 99/2019, BELGIAN CONSTITUTIONAL COURT, June 19, 2019, available at <https://www.const-court.be/public/e/2019/2019-099e-info.pdf> (Last visited on April 21, 2020).

¹⁰³ Tuur Desloover, *Transgender Laws in Transition: European Courts on Non-Binary Gender Recognition*, August 11, 2019, available at <https://ohrh.law.ox.ac.uk/transgender-laws-in-transition-european-courts-on-non-binary-gender-recognition/> (Last visited on February 1, 2020).

¹⁰⁴ Grietje Baars, *New German Intersex Law: Third Gender but not as we Want it*, August 24, 2018, available at <https://verfassungsblog.de/new-german-intersex-law-third-gender-but-not-as-we-want-it/> (Last visited on February 1, 2020).

¹⁰⁵ National Legal Services Authority v. Union of India, (2014) 5 SCC 438, ¶111.

¹⁰⁶ Diksha Sanyal & Namrata Mukherjee, *The Supreme Court NALSA Judgment: Where now?: A Brief Critique*, May 2015, available at <http://orinam.net/content/wp-content/uploads/2015/06/25-sc-nlsa-tg-petition-verdict-gap-analysis-wbnujs-fnl.pdf> (Last visited on February 1, 2020).

to identify as “male” or “female” only post an SRS. While an Expert Committee of the Ministry of Social Justice and Empowerment recommended that transgender persons be given the choice to identify either as “men”, “women” or “transgender” independent of any surgery or medical procedure, the TPPR Act seems to have followed a slightly different approach.¹⁰⁷ Both these approaches however, do not fully further self- determination.

In the approach adopted by the TPPR Act, as analysed in Part III above, the umbrella approach to gender identity (prior to an SRS) where transgender persons, inter-sex persons, genderqueer persons and non-binary persons are all required to identify as “transgender”¹⁰⁸ very clearly strips people off the right to name themselves in a manner of their choosing. Further, the fact that an individual is permitted to identify as “male” or “female” only post an SRS, is further evidence of the pathologisation of gender identity and a further loss of power for such individual. The Expert Committee on the other hand, while still adopting an umbrella definition of ‘transgender’, follows the “drop-down box” approach, where transgender persons can choose to identify as either “male”, “female” or “transgender” regardless of medical procedures like an SRS. While this “drop down approach” seems to offer some flexibility in identification, it also limits self-determination as individuals desirous of changing their gender identity have to choose an option from within a legally prescribed checklist. The analysis here is also one of power. While individuals have the choice to opt for a gender identity, their pool of options is limited by the State. Effectively therefore, the power to name an individual (and through this naming, exercise both disciplinary and regulatory power), is in the hands of the State in both the ‘umbrella’ categorisation approach and the ‘drop-down box’ approach. The State’s agenda, as discussed in Part III above, is one of regulatory power – where the boundaries cast on the manner in which an individual can name themselves are to ensure that the population as a whole achieves a “homeostasis” and individuals become easily regulatable subjects.

A gender identity law where this power to name oneself is in the hands of the individual, is where this individual is given the freedom to opt for a gender identity of their choosing (by, for example, filling out a subjective field in a gender change application) and without submission of any “proof”.¹⁰⁹ As a response to demands for overhauling of the TPPR Act and its replacement with a legislation that encapsulates the principle of self-determination as set out above, the State is likely to argue that to effectively grant transgender persons welfare benefits and roll out affirmative action policies, some form of state-sanctioned identification mechanism is necessary.¹¹⁰ The argument might flow as follows –

¹⁰⁷ MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, *Report of the Expert Committee on the Issues Relating to Transgender Persons*, 34 (January 27, 2014).

¹⁰⁸ The Transgender Persons (Protection of Rights) Act, 2019, §2(k).

¹⁰⁹ *Supra* note 107, 23.

¹¹⁰ See Gautam Bhatia, *The Constitutional Challenge to the Transgender Act*, January 31, 2020, available at <https://indconlawphil.wordpress.com/2020/01/31/the-constitutional-challenge-to-the>

to ensure that the recipients of welfare measures extended by the state reach the intended beneficiaries, it is necessary that these beneficiaries be “identified” and “verified” in some manner.¹¹¹ In other words, subjectivity in identification needs to be bounded in some manner, to prevent misuse of welfare legislations.

This issue however, can also be addressed by crystallising the powers of the District Magistrate, specifically their power to reject an application for change of gender identity. What is required, is the outlining of clear parameters for the exercise of such discretion in the mother legislation itself. And yet it is this aspect that is conspicuously absent from the TPPR Act as it currently stands.¹¹²

These fundamental legal and moral issues underpinning the TPPR Act make it even more important for legislators, civil society actors and activists to undertake a more nuanced engagement with a prospective legislation that seeks to, among other goals, protect identities as “data” - the PDP Bill. This is particularly crucial because approaches that seek to reduce complex identities to easily assimilable “bytes” of data (which is one of the dominant effects of the TPPR Act) and in turn, vest the protection of these bytes under a data protection law, are often a contextual and may cause more harm to those at the margins.

C. THE CONFLUENCE OF THE HETEROSEXUAL MATRIX WITH THE DATA PROTECTION AGENDA

One of the key aspects of the PDP Bill is the recognition of the following identities as types of sensitive personal data – sexual orientation, transgender status and intersex status.¹¹³ At each public consultation as well as in each draft of the PDP Bill, hardly any time has been spent by the legislators or actors in the public policy space, on the manner in which each of these ‘categories’ are even constructed.¹¹⁴ Instead, the proposed manner of regulation is simply to reduce

-transgender-act/ (Last visited on April 10, 2020).

¹¹¹ See Reetika Khera, *Aadhaar Failures: A Tragedy of Errors*, 54 (14) ECONOMIC AND POLITICAL WEEKLY (2019). (A similar strand of argument was presented by the UIDAI and the Central Government, in the context of the Aadhaar project).

¹¹² Bhatia, *supra* note 110.

¹¹³ The Personal Data Protection Bill, 2019, §3(36).

¹¹⁴ See also Nayantara Ranganathan, *Solving for Data Justice: A Response to the Draft Personal Data Protection Bill*, October 18, 2018, available at <https://internetdemocracy.in/reports/datajustice/> (Last visited on April 10, 2020) (Of the numerous responses provided by the public to the 2018 iteration of the Personal Data Protection Bill, I am aware of only the joint response issued by participants of two workshops conducted by the Internet Democracy Project, which urge the legislator to not view data not merely as a ‘resource’, but as an extension of our bodies as well as a product of labour. The signatories of the joint response urge the legislators to undertake contextual approaches in solving for data justice by adopting such alternate frames. One example is their recommendation on the inclusion of a positive obligation on both the State and private actors, to create an environment that allows individuals, particularly those at the margins, to exercise autonomy and provide consent for processing of their data. Their argument here is that a data protection law which merely stipulates obtaining the consent of individuals prior to processing,

these ‘categories’ to bytes of data that become the property of the data principal (*i.e.*, the individual), which can then be protected through techno-legal solutions.

My contention here, is not to suggest that gender identity and sexual orientation of individuals merit no protection under a data protection law – they do. The current information technology legislation, the Information Technology Act, 2000 read with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, have adopted a hierarchised approach to data protection, with “sensitive personal data” meriting a higher standard of protection.¹¹⁵ The PDP Bill takes forward this approach. The broader rationale here, is that while illegitimate processing of all data could cause harm to the individual to whom such data ‘belongs’, processing of certain types of data may cause more harm, either because of, for example, the social connotations of such data or increased risk of identifiability.¹¹⁶

The contention rather, is that the manner in which these identities are constructed must necessarily be appreciated when a data protection law is being deliberated, in order to ensure that a contextualized approach is adopted. For instance, the TPPR Act, as outlined above, takes forward the innateness construct of identity and requires ‘verification’ of one’s transgender identity for such person to access certain legal rights. At both levels – *one*, the umbrella manner in which this ‘transgender’ identity itself is constructed by the TPPR Act, and *two*, the essentializing and pathologising effect of the verification and authentication measures prescribed under the TPPR Act, it can be argued that the TPPR Act has failed to protect and further the rights of dignity, autonomy and privacy of persons who form the subject matter of this law. Now, if the PDP Bill is passed by both houses of Parliament in its current form, the interpretation of what amounts to ‘transgender status’ is likely to stem from the TPPR Act, owing to the latter being a specialized law on the subject.¹¹⁷

Effectively then, the problems outlined in the context of the TPPR Act, will be amplified by virtue of the PDP Bill (upon its conversion into a legislation). The self that is able to access legal rights such as those of non-discrimination

without understanding the social, economic and political aspects that influence who is able to provide consent and why, would not suffice in solving for data justice).

¹¹⁵ See The Information Technology Act, 2000, §43-A read with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, §§2(i),3,8.

¹¹⁶ See, *e.g.*, RAYMOND WACKS, *PERSONAL INFORMATION: PRIVACY AND THE LAW* (1989).

¹¹⁷ Interestingly, §3(36) of the PDP Bill recognises both ‘transgender status’ and ‘intersex status’ as sensitive personal data of the data principal (*i.e.*, the individual). §2(k) of the TPPR Act on the other hand, lumps both transgender and intersex persons within the umbrella identity category of ‘transgender’.

in employment,¹¹⁸ education¹¹⁹ and healthcare¹²⁰ (under the TPPR Act) and the self that seeks protection of manifestations of its identity as data under a data protection law, will both be the self that possesses an essentialized identity, an identity that is verified by its body. And so, as the discourse on data protection acquires more attention, questions of identity and self-determination will, ironically, be pushed further into the margins. While the body becomes more visibilised through the limited recognition of the body as data (a case in point being the treatment of biometric information as sensitive personal data), the body also becomes invisibilised as laws on data protection continue to work in the service of the heterosexual matrix.

But even beyond the paradigm of access to rights, the substance of what constitutes “data” for the purpose of the PDP Bill itself needs to be analysed. The push towards gender identity and sexual orientation laws needs to be centred on self-determination, as argued in sub-part A above. This means that the law should provide space for subjectivity, *i.e.*, the space for individuals to perform and identify with an identity of their choosing where the exercise of such right is not bounded by the State. But infusing subjectivity into law also makes the persons exercising such subjectivity difficult to regulate. The agenda of regulatory power, as argued by Foucault, is to homogenise populations to make such populations easy subjects of control and surveillance, and providing space for subjectivity and difference is inherently at odds with this agenda.¹²¹

The approach that underpins the TPPR Act and the PDP Bill currently, is one of regulatory power – where the individuals to whom these legislations apply are sought to be reduced to easily locatable, assimilable and monitorable data-points – characters that can easily fit into a ‘database’. Individuals and identities, therefore, are reduced to their simplified, essentialized versions – to something ‘objective’ like data. The approach however should be the other way around, with the individual and the body as the starting point, and analysis of how identities, individuals and bodies become translated into data driving the content of these legislations. A possible theoretical frame within which to conceptualise such an approach, is outlined below.

V. CONCLUSION: ACCOUNTING FOR THE HISTORICISATION OF THE BODY IN DATA PROTECTION DISCOURSE

One could argue that the articulation of informational privacy as a facet of the right of privacy by the Supreme Court in *Puttaswamy*¹²² is the

¹¹⁸ The Transgender Persons (Protection of Rights) Act, 2019, §§3(b), 3(c).

¹¹⁹ The Transgender Persons (Protection of Rights) Act, 2019, §3(a).

¹²⁰ The Transgender Persons (Protection of Rights) Act, 2019, §3(d).

¹²¹ Foucault, *supra* note 58.

¹²² *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, ¶¶177-178.

foundation on which a just data protection law can be built. But even within the framework of informational privacy, the starting point is information or data. And the manner in which rights are sought to be protected is by ascribing a relation of ownership between the individual and their data. Thus, data is viewed as an *object* that is within the realm of control of an individual.

By contrast, the purpose of categorisation of identities under a gender identity law is not so much to ‘propertify’ the identity itself, but rather to provide the self the power to name itself.¹²³ In this frame, an identity is not something distinct and severed from the self (which is often what data is constructed as), but is inherent to the construction of the self itself. It is here for example, that Butler steps in to articulate the manner in which the self is constituted through performative speech-acts such as gender.

The question then becomes how to protect digital manifestations of an identity under the aegis of a data protection law such that the power to name oneself and the constraints within which this power is exercised, is duly accounted for. Particularly, in India, where the TPPR Act has reduced the exercise of the power to name oneself to within the heterosexual matrix, the discourse on data protection needs to necessarily take note of this question instead of furthering the regulatory agenda of the TPPR Act, by design or otherwise.

Donna Haraway’s theorisations on cyborgs and the networked self are of prime importance here. Drawing from the evolution of technology, particularly biotechnology, she argues that the boundaries between animal and human and between animal-human and machine have become significantly blurred.¹²⁴ Drawing from her work, scholars have proposed alternative frames to ground a data protection law in. One such frame is that data should be analysed and looked at from the perspective of bodies – as data generated *from* bodies. More and more data either originates in or emanates from the body. Consider for example the manner in which the TPPR Act and the PDP Bill construct the transgender identity as originating from the body and later being verified against the body. And as technological and discursive practices of this kind flourish, the boundary between the body *itself* and information or data generated *from* the body cannot be taken for granted.¹²⁵ As a result, understanding the historicisation of the body becomes important, because what constitutes that ‘body’ and the ‘self’ is no longer constant, but is equally influenced by technology and discursive practices, by biopolitics.¹²⁶ If the frame adopted is information privacy (of which data protection is a subset), there is not much space to account for the historicisation of the body and solve for

¹²³ IAN BURKITT, SOCIAL SELVES: THEORIES OF THE SOCIAL FORMATION OF PERSONALITY 166-169 (1991).

¹²⁴ DONNA J. HARAWAY, A CYBORG MANIFESTO: SCIENCE, TECHNOLOGY AND SOCIALIST-FEMINISM IN THE LATE TWENTIETH CENTURY 10-11 (2016).

¹²⁵ Irma Van der Ploeg, *The Body as Data in the Age of Information* in ROUTLEDGE HANDBOOK OF SURVEILLANCE STUDIES 179 (2012).

¹²⁶ *Id.*

the same, as the presumption is that the self and the data that the self generates are distinct subjects of regulation.

On the other hand, incorporating the historicisation of the body into the discourse of data protection would be in-line with the privacy-as-dignity frame, as upheld by the Supreme Court. For through such incorporation, the focus moves away from the propertification of data and ensuring dignity of individuals by vesting them with control over such data. And instead, the focus shifts towards understanding data (and identities) in a more nuanced and fluid manner.¹²⁷

The aim of legislations such as the TPPR Act and the PDP Bill, at their core, needs to be furthering the rights of those at the margins. Queer persons must not be subject to the watchful gaze of the law, but rather, must be ‘seen’ by the law. Their lived experiences and unique histories need to be accounted for in and by the law. As it exists today, the direction of power is one-way – the State (through these legislations) determines the manner in which queer persons can name themselves and perform their identities. This regulatory power to reduce identities to something that can be captured in a ‘database’ is even more evident in the passage of the Citizenship (Amendment) Act, 2019, the resurgence of the National Population Register and continued implementation of the particularly problematic National Register of Citizens.

Through judgments such as Navtej Singh Johar, this flow of power should be altered, to disrupt the linear manner in which laws are created, interpreted and implemented. Even if the judgment itself is flawed, critiquing it and the manner in which it propels legislations like the TPPR Act is a starting point in addressing the (lack of) legality and morality in the general trend of State-sanctioned datafication. A step in this direction, is the constitutional challenge to the TPPR Act filed by Justice Swati Baruah.¹²⁸ As a protestor at the recent protests in Bangalore against the Citizenship (Amendment) Act, 2019 voiced through her placard – what we the people should, among other things, aspire for is “*Database se Azadi*.”¹²⁹

¹²⁷ Ranganathan, *supra* note 114.

¹²⁸ Shruti Mahajan, *SC agrees to Hear Petition Filed by Assam’s First Transgender Judge Challenging Validity of Transgender Act, 2019*, January 27, 2020, available at <https://www.barandbench.com/news/litigation/sc-agrees-to-hear-petition-challenging-validity-of-transgender-protection-of-rights-act-2019> (Last visited on April 10, 2020).

¹²⁹ Translated from Hindi, this phrase conveys a call for ‘Freedom from the Database.’