

UNJUST CITIZENSHIP: THE LAW THAT ISN'T

*Dipika Jain & Kavya Kartik**

This article argues that the State enacts legislative violence upon transgender persons by establishing a regulatory framework that is paternalistic, cis-heteronormative and detrimental to transgender persons' basic identity. The legislative violence inflicted on transgender persons is evident from the Transgender Persons (Protection of Rights) Act, 2019 and Draft Rules, which violate the fundamental rights of transgender persons. Such violence also medicalises transgender identities under the guise of biological determinism. In this article, we critically explore State structures that monitor and survey trans bodies based on exclusionary cis-heteronormative standards, seeking particularly to regulate non-binary and non-traditional gender identities. The nation state itself is built through exclusion of various groups, leading to differential forms of citizenship. In the second part of the article, we explore recent efforts of the State to create citizenship structures hinging on documentary identification, through the Citizenship Amendment Act, 2019—National Register of Indian Citizens nexus. It is reasonable to predict that the majority of transgender persons and gender-variant persons will be excluded from citizenship due to lack of requisite documentation. Although civic citizenship of transgender persons is purportedly based on 'equality', the legal citizenship advanced by this nexus, is nothing more than performative citizenship. The legal framework enacted for the 'protection of rights' of transgender persons is excessively paternalistic in nature, ignoring the fact that transgender persons mobilise powerfully against the state to resist injustice and reclaim avenues of negotiation. Such resistance and negotiations are seen through protests, policy engagements and

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invoking of constitutional challenges, opening the door to alternative citizenship structures and changes in political participation.

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I. INTRODUCTION

In December 2017, Grace Banu, a Dalit transgender rights activist, wrote an open letter to the President and Prime Minister of India on the subject of The Transgender Persons (Protection of Rights) Bill, 2016, which the Ministry of Social Justice and Empowerment ('MSJE') was keen to introduce in the winter session of Parliament. Banu wrote:

"We, the transgender people of India, the children of this 'Independent' land who have been disowned by our families, by the government, and have been made refugees in our own land. I am writing this with the sweat and blood of the transgender community and request you to at least euthanize us. The Transgender Persons (Protection of Rights) Bill 2016 has lost the essence of the Indian Democracy and targets the transgender community with its toxic policies. We are suffering in between life and death due to your toxicity. It is far better to die rather than to wander in between life and death. So, please euthanize us".¹

¹ Grace Banu, *Dear President and PM of India, please euthanize us: A transgender woman's open letter*, THE NEWS MINUTE, December 1, 2017, available at <https://www.thenewsminute.com/article/dear-president-and-pm-india-please-euthanize-us-transgender-woman-s-open-letter-72502> (Last visited on August 25, 2020).

Banu's challenge to the government, to euthanize transgender² persons rather than let them suffer through the *legislative violence* of this Bill is a powerful one. In Mahasweta Devi's 'Operation? – Bashai Tudu', the main character, Bashai Tudu, member of a Santal tribe fighting for the rights of agricultural labourers, makes this observation about the Constitution:

“The Indian constitution respected every citizen's fundamental right to become whatever he could by dint of his guts. The poor therefore had the right to become poorer still”.³

Devi's story covers a 10-year period from 1967 to 1977, focusing on an agrarian revolution by landless Adivasi labourers in the Naxalbari region of Darjeeling, West Bengal. Bashai Tudu is present whenever labourers are agitating against oppressive laws or rules, leads them to revolt, is killed during the struggle and yet appears again at the next site of protest. It is clear that the revolution is kept alive with every successor of Tudu taking his place. This story also exposes the 'myth of independence' for marginalised persons in India; at one point, Tudu states that “laws are made only because they have to be made, that they need never be enforced, and that those for whom the laws are made need never reap the benefits”.⁴ Mahasweta Devi thus points out that independence never really existed for certain groups of people.⁵

Through this short story, Devi questions the meaning of citizenship, and its claim to universality. Both Banu's letter and the story, speak to larger questions of citizenship and laws that ignore the lived realities of the very communities, they are intended to benefit. The definition of citizenship in the Indian Constitution deems “every person” a citizen who was born in India, or either of whose parents were born in India, or who was a resident of India for at least five years prior to the commencement of the Constitution.⁶ The citizenship conceptualised here, is almost a classically liberal one,⁷ and thus ostensibly applies to all persons irrespective of gender, caste, religion, sexuality and other considerations. In this open letter, however, Banu speaks of transgender persons as 'refugees' in their

² We have used the term 'transgender' in this article mainly because the term 'transgender' was used by the Supreme Court in the NALSA judgment and by the Parliament in the Transgender Persons Act and Draft Rules. We are aware that the term 'transgender' is not inclusive and its meaning varies across regions, cultures and nations. We recognize that it does not fully represent the diversity and heterogeneity among transgender persons in India.

³ MAHASWETA DEVI, BASHAI TUDU (1990). Alessandra Marino, *Where is the Time to Sleep? Orientalism and Citizenship in Mahasweta Devi's Writing*, Vol. 50(6), J. POSTCOLONIAL WRITING, 688-700 (2014).

⁴ Alessandra Marino, *Where is the Time to Sleep? Orientalism and Citizenship in Mahasweta Devi's Writing*, Vol. 50(6), J. POSTCOLONIAL WRITING, 688-700 (2014).

⁵ Gabrielle Collu, *Adivasis and the Myth of Independence: Mahasweta Devi's "Douloti the Bountiful"*, Vol. 30(1), ARIEL: A REVIEW OF INTERNATIONAL ENGLISH LITERATURE, 44 (1999).

⁶ The Constitution of India, 1950, Art. 5.

⁷ Dipesh Chakrabarty, *Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts?*, Vol. 37 REPRESENTATIONS, 9 (1992).

own land. Without the ability to obtain identity documents that reflect their self-identified gender (and name), transgender persons are effectively rendered stateless. Their citizenship is called into question due to the complex web of legislative and administrative barriers that prevent them from exercising their right to self-determination, and their right to life and liberty. Citizenship is ‘phrased in a language of universalism’, with an essentially dual nature of inclusion and exclusion.⁸ The notion of ‘common’ general will – interests and perspectives of citizens which pull them together to overcome individual differences – is offset by the requirement of homogeneity between citizens that is imposed as a demand.⁹

While the liberal conceptualisation of citizenship has suggested that citizenship is egalitarian in its capacity to expand and bring more people within its fold,¹⁰ this universality is based on “a series of occlusions” of gender, caste, race, ethnicity, and class.¹¹ It is imperative to question whether it is even possible to comprehend citizenship without situating it within the larger structural, political, historical and social context. As Hugo Gorringer argues, the construction of the ‘Indian citizen’ has always had an “upper-caste hue”.¹² The period of contradictions that India would enter into on January 26, 1950, as Babasaheb Ambedkar warned in his final speech to the Constituent Assembly, is evident in the Constitution itself which guarantees fundamental rights to all citizens, while also containing protections for the ‘sacred Hindu cow’.¹³ Citizenship is considered the cornerstone of participation in public life.¹⁴ However, Dalits are excluded from public spaces, and there is stigma and pollution attached to the Dalit identity, which consequently prevents them from exercising their citizenship.¹⁵ Waghmore writes that “the project of Dalit citizenship” is a complex and violent process that is tied to the rules of caste and Hinduism.¹⁶ Furthermore, as Gopal Guru states, any legal citizenship status accorded to Dalits by the Constitution is stripped away by the indignities that Indian civil society heaps on them.¹⁷

⁸ Leti Volpp, *Feminist, Sexual and Queer Citizenship* in THE OXFORD HANDBOOK OF CITIZENSHIP, (Oxford University Press, 2017).

⁹ *Id.*

¹⁰ ANUPAMA ROY, GENDERED CITIZENSHIP: HISTORICAL AND CONCEPTUAL EXPLORATIONS, (Orient Blackswan, 2005).

¹¹ *Id.*

¹² Hugo Gorringer, *The Caste of the Nation*, Vol. 42(1), CONTRIBUTIONS TO INDIAN SOCIOLOGY, 123–149 (2008).

¹³ B.R. Ambedkar, *Why BR Ambedkar’s Three Warnings in his Last Speech to the Constituent Assembly Resonate Even Today*, SCROLL, January 26, 2016, available at <https://scroll.in/article/802495/why-br-ambedkars-three-warnings-in-his-last-speech-to-the-constituent-assembly-resonate-even-today> (Last visited on August 25, 2020); See also SURYAKANT WAGHMORE, CIVILITY AGAINST CASTE: DALIT POLITICS AND CITIZENSHIP IN WESTERN INDIA, (Sage India, 2013).

¹⁴ Nicolas Jaoul, *Beyond Citizenship: Adivasi and Dalit Political Pathways in India*, Vol. 76, FOCAAL—JOURNAL OF GLOBAL AND HISTORICAL ANTHROPOLOGY, 3-14 (2016).

¹⁵ WAGHMORE, *supra* note 11, at 3.

¹⁶ *Id.*

¹⁷ Gopal Guru, *Citizenship in Exile: A Dalit Case in Civil Society, Public Sphere and Citizenship: Dialogues and Perceptions* (Rajeev Bhargava, Helmut Reifeld eds., 2005).

The evolution of citizenship operates on masculine and cis-heteronormative presumptions,¹⁸ with cis-hetero-males being the envisioned subjects and gender non-normative persons being denied full membership. In India, queer citizenship has been marked in recent times by “the nationalist resolution of the homosexual question”,¹⁹ whereby homosexuality is subsumed into conceptions of the Hindu nationalist state.²⁰ The contemporary neoliberal state, which proounds a “science-development-governance idea of progress” that is offset by the “Hindutva return-to-Indian-culture movement” has become increasingly tolerant of, and complicit with the rise of Hindu nationalism in the country.²¹ As Yuval-Davis argues, however, “nationalist projects would be more open to incorporate some groupings of women than others”.²² Extending this to the Indian context, the inclusions and exclusions of citizenship are contingent not only on gender but also caste, class and religion.

The marginalisation, exclusion and ‘othering’ of women, Dalits and persons with non-normative gender identities have provoked the examination of structures of citizenship, with a contemporary focus on transgender persons, in view of The Transgender Persons (Protection of Rights) Act, 2019 (‘Transgender Persons Act’) and its pursuant rules (‘Draft Rules’). Transgender persons, who are already seen as gendered subjects outside cis-heteronormative societal institutions, are further excluded from full citizenship, even though they are subject to the coercive might of the state through laws that penalise their way of life.²³ Surya Monro argues that their full inclusion to citizenship rights would entail fundamental changes “to the current system of sex and gender categorization” and to the way that gender is conceptualised by policymakers.²⁴

The Transgender Persons Act was passed by Parliament in November 2019, and came into force in January 2020. It has been around in the form of Draft Bills since 2014 when Member of Parliament, Tiruchi Siva, introduced it as a Private Member Bill in the Rajya Sabha.²⁵ The progressive clauses of this Bill, including provisions for reservations for transgender persons in education and

¹⁸ We use the term ‘cis-heteronormative’ in reference to the power, privilege and normative status invested in heterosexuality and heteronormativity of the dominant binary society.

¹⁹ Oishik Sircar & Dipika Jain, *New Intimacies/Old Desires: Law, Culture and Queer Politics in Neoliberal Times*, Vol. 4(1), JINDAL GLOBAL LAW REVIEW, 1-16 (2012).

²⁰ Sayan Bhattacharya, *The Transgender Nation and its Margins: The Many Lives of the Law*, Vol. 20, SOUTH ASIA MULTIDISCIPLINARY ACADEMIC JOURNAL, 1-19 (2019).

²¹ Shrinkhla Sahai, *Mapping the Nation: Performance Art in India and Narratives of Nationalism and Citizenship* in GENDERED CITIZENSHIP: MANIFESTATIONS AND PERFORMANCE 99-116 (Bishnupriya Dutt, Janelle Reinelt & Shrinkhla Sahai eds., 2017).

²² Nira Yuval-Davis, *Gender and Nation*, Vol. 16(4), ETHNIC AND RACIAL STUDIES, 621-632 (1993).

²³ Upendra Baxi, *The (Im)Possibility of Constitutional Justice in India’s Living Constitution: IDEAS, PRACTICES, CONTROVERSIES* 31–63 (Zoya Hasan, E. Sridharan & R. Sudarshan eds., 2002).

²⁴ Surya Monro & Janneke Van Der Ross, *Trans* and Gender Variant Citizenship and the State in Norway*, Vol. 38(1), CRITICAL SOCIAL POLICY (2017).

²⁵ For a more detailed account of the legislative history of the Transgender Persons Act, see Dipika Jain, *Law-Making by and for the People: A Case for Pre-legislative Processes in India*, Vol. 20(20), STATUTE LAW REVIEW, 1-18 (2019).

employment, were significantly watered down in the Bills drafted by the MSJE. The 2016 version of the Transgender Persons (Protection of Rights) Bill was a major disappointment to transgender and intersex persons; one statement signed by activists and trans-led groups referred to it as a “diluted, criminalizing and anthropologizing text while standing on distorted premises that amount to human rights violations”.²⁶ A later version of the Bill called for the surveillance and verification of (highly conflated and confused) trans identities by a ‘screening committee’, in contravention of the right to self-affirm one’s gender.²⁷

The Transgender Persons (Protection of Rights) Bill, 2019 – which became the Transgender Persons Act – was also denounced by activists as a “murder of gender justice”.²⁸ The Act, while stating on the one hand, that transgender persons have the right to “self-perceived gender identity” in §4,²⁹ on the other, immediately seeks to remove any and all power, granted to trans persons under that provision. Subsequent sections mandate that transgender persons apply for certificates of identity before District Magistrates, and apply for certificates for ‘gender change’ only in the event that they go through “surgery to change gender either as a male or female”.³⁰ Under the guise of ‘protecting transgender rights’, the law serves to empower the state to police and survey transgender bodies, by providing legal sanction for identity verification through requirement of a surgery certificate in order to change gender from male to female or vice versa. The Act also considers intersex persons as ‘transgender’, thus conflating the two identities, as written by intersex activist, Gopi Shankar Madurai.³¹ Finally, the Act is drafted within a cis-heteronormative and hierarchical value system, adopting disproportionately light penal provisions for offenders committing crimes against transgender persons, when compared to punishments for the same offences against cisgender persons.

²⁶ ORINAM, *Responses from the Trans & Intersex Communities*, available at http://orinam.net/content/wp-content/uploads/2016/08/Trans-led_CommunityResponse_to-StandComm_TGBill_2016.pdf (Last visited on August 25, 2020).

²⁷ HINDUSTAN TIMES (Dhamini Ratnam), *Transgender Rights Bill: Removal of Disputed Screening Clause Hailed*, July 20, 2019, available at <https://www.hindustantimes.com/india-news/transgender-rights-bill-removal-of-disputed-screening-clause-hailed/story-NND4nEaaWKUeeBLtp0r2DO.html> (Last visited on August 25, 2020).

²⁸ Vijayta Lalwani, *What Next for Transgender People, as India Clears a Bill that Activists Call “Murder of Gender Justice”?*, QUARTZ INDIA, November 27, 2019, available at <https://qz.com/india/1756897/indias-transgender-rights-bill-disappoints-the-lgbtq-community/> (Last visited on August 25, 2020).

²⁹ The Transgender Persons (Protection of Rights) Act, 2019, §4. The Section reads as follows:
Recognition of identity of transgender person.—(1) A transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act; (2) A person recognised as transgender under sub-section (1) shall have a right to self-perceived gender identity.

³⁰ *Id.*, §§5 – 7.

³¹ Prashant Singh & Gopi Shankar, *Modi Govt Releasing Draft Rules on Transgender Persons Act in Lockdown a Blow to Community*, THE PRINT, May 5, 2020, available at https://theprint.in/opinion/modi-govt-releasing-draft-rules-transgender-persons-act-lockdown-a-blow/414331/?fbclid=IwAR1_pm7RbMuqjL3OiXEPnSz3RR7rKt7szBxuga8k-t9YA1lah56u-f2UKdw (Last visited on August 25, 2020).

In this article, we argue that the State enacts legislative violence upon transgender persons by establishing a regulatory framework that is paternalistic, cis-heteronormative and detrimental to transgender persons' basic identity and being, and which seeks to deny them their rights to self-determination and sanctions the regulation of their gender identities as well as the surveillance of their bodies. The legislative violence inflicted on transgender persons is evident from the very nature of the Transgender Persons Act and Draft Rules, which, we demonstrate, violate the fundamental rights of transgender persons. Such violence also medicalises transgender identities under the guise of biological determinism, making 'legal' citizenship contingent on 'biological citizenship' as examined below.

This form of violence against transgender persons is not new; it has a long history that includes The Criminal Tribes Act of 1871, a colonial legislation, that considered "eunuchs" as criminals by birth.³² The Criminal Tribes Act was repealed in 1952 and replaced by The Habitual Offenders Act, 1952 which did not explicitly mention 'eunuchs' but continued to apply to transgender persons who were still seen as criminals.³³ As recently as 2011, the Karnataka Police Act, 1963 was amended to "control undesirable activities of eunuchs" and the state agreed to remove the provision only in 2016, after a petition filed in the High Court by the Karnataka Sexual Minorities Forum.³⁴ In 2018, three transgender activists filed a petition in the Andhra Pradesh High Court challenging the constitutional validity of The Telangana Eunuchs Act, 1919. The Court read down certain provisions and stated that there should be no arrests under the Act.³⁵ The legislative violence of the Transgender Persons Act is made clear not only in the exclusionary process of drafting and enacting it, but also in the rights and benefits it confers on (or strips away from) transgender persons. Despite the widespread protests against the Act, the State continues to push ahead with it, through the drafting of Rules and other notifications, in the middle of the pandemic.³⁶ This trend of introducing legislation

³² 'Eunuch' is a derogatory, colonial term used for hijras. The NALSA judgment also uses the term several times, interchangeably with hijra. See Gee Imaan Semmalar, *Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India*, Vol. 42(3-4), WOMEN'S STUDIES QUARTERLY, 286-291 (2014); Dipika Jain, *Shifting Subjects of State Legibility: Gender Minorities and the Law in India*, Vol. 32(1), BERKELEY JOURNAL OF GENDER, LAW AND JUSTICE (2017).

³³ *Id.*

³⁴ DECCAN CHRONICLE, *State to remove 'eunuch' from Karnataka Police Act*, January 13, 2016, available at <https://www.deccanchronicle.com/current-affairs/130116/state-to-remove-eunuch-from-karnataka-police-act.html> (Last visited on August 25, 2020).

³⁵ THE NEWS MINUTE (TNM Staff), *Law Targeting Transgender Persons in Telangana Read down Temporarily*, September 20, 2018, available at <https://www.thenewsminute.com/article/law-targeting-transgender-persons-telangana-read-down-temporarily-88662> (Last visited on August 25, 2020).

³⁶ The Ministry of Social Justice and Empowerment has recently brought out two drafts of the Rules and invited public comments. This process being carried out in the middle of the COVID-19 pandemic is extremely problematic and reflective of the State's apathy towards an inclusive and democratic consultation process. Recently, the Ministry also notified the formation of a National Transgender Council under the Rules. See HINDUSTAN TIMES (Dhruvo Jyoti), *National Council for Transgender Persons Formed*, August 22, 2020, available at <https://www.hindustantimes.com/india-news/national-council-for-transgender-persons-formed/story-QXO57cxN8jhrpdmZZaWtbM.html> (Last visited on August 25, 2020).

during the pandemic has also been seen with the suspension of labour protections across the country in the midst of the pandemic, the introduction and passing of The Medical Termination of Pregnancy (Amendment) Bill, 2020 and the introduction of The Personal Data Protection Bill, 2019 by the Central Government.

Beyond this introduction, this article is divided into two parts. In the first part, we explore the structures of the State that closely monitor and survey the bodies of its subjects, based on exclusionary cis-heteronormative standards, seeking particularly, to regulate non-binary and non-traditional gender identities. We argue that the cis-heteronormative neoliberal nation state is built through continued exclusion and oppression of marginalised groups, leading to differential forms of citizenship, completely contrary to claims of universality put forth by citizenship models. Further, we contend that the legislative process behind the Transgender Persons Act, from 2016 onwards, has been nothing short of legislative violence against transgender, intersex and gender-variant persons.

In the second part of the article, we explore recent efforts of the State to create citizenship structures hinging on documentary identification, through The Citizenship Amendment Act, 2019 ('CAA') – NRICnexus ('CAA-NRIC').³⁷ If the NRC exercise in Assam is to be indicative for the rest of the country, it is reasonable to predict that the majority of transgender and gender-variant persons will be excluded from full and proper citizenship due to the lack of requisite documentation, as laid out by the cis-heteronormative nation state. Although civic citizenship of trans and gender-variant persons is purportedly based on 'equality', the legal citizenship advanced by the CAA-NRIC is nothing more than performative citizenship.

Finally, we argue that the legal framework enacted for the 'protection of rights' of transgender persons is excessively paternalistic in nature, ignoring the fact that transgender persons have a history of organic mobilisation and collectivisation to demonstrate resistance against draconian State measures. Transgender-led movements around the Transgender Persons Act and the preceding Bills serve as powerful illustrations of negotiation with the State in the face of legislative violence through non-deliberative, exclusionary and protectionist legislative processes. Such negotiations are seen through protests, policy engagements and judicial challenges to unconstitutional laws and open the door to alternative citizenship structures and more egalitarianism in political participation, in the public

³⁷ The National Register of Citizens (NRC) was an exercise carried out in Assam to document all the 'legal' citizens of the state and to identify undocumented immigrants. After the passing of the Citizenship Amendment Act (CAA) in 2019, Home Minister Amit Shah had declared that this register would extend to the entire country, thus paving the way for a National Register of Indian Citizens (NRIC). For a more detailed explanation of the NRIC, see K. Venkataraman, *Explained: What connects the NPR, NRIC and Census?*, THE HINDU, December 22, 2019, available at <https://www.thehindu.com/news/national/what-connects-the-npr-nric-and-census/article30368465.ece> (Last visited on August 25, 2020).

sphere. Grass roots movements, form the foundation for such negotiations with the nation state and challenges against exclusion from mainstream social institutions.

II. CIS-HETERONORMATIVE STATE AND LEGISLATIVE VIOLENCE

A. GENDER IDENTITY IN THE NATION STATE

The construction of gender and gender identity is essential to the construction of the nation state. “All nations depend on powerful constructions of gender”, writes Anne McClintock.³⁸ There is substantial scholarship on the ‘maleness’ of the Indian nation-state as well as the emergence of a militant Hindu masculinity used to justify violence through upper caste and anti-Muslim ideologies.³⁹ In India, the liberal capitalist order has been systematically hinged upon the “exclusionary, exploitative structural violence of the state”.⁴⁰ This order allows for any individual to be a citizen, but only as long as they “perform the prescribed codes of respectable citizenship”.⁴¹ Under colonial rule, the ‘manly British’ body was constructed in opposition to the effeminate colonial subject.⁴² Contemporary articulations of masculinity have their roots, in this period. Additionally, the ‘family trope’ is crucial to nationalism. National manhood was constructed as upper-caste and Hindu.⁴³ In the Hindutva imagination of the state then, recognition for transgender persons would be predicated on the “hegemonic constructs of the Hindu nation, the heteronormative Indian family” and how well they can fit into this mould.⁴⁴

Through regulation of sexuality and gender identity, the State has always been intimately involved in the lives of its subjects. The postcolonial Indian State’s “attempts to control and establish sovereignty over national culture and identity have manifested themselves by fortifying rigid gender and sexual identities”.⁴⁵ It is important to acknowledge, however, that the nation-state “remains the unit of power with which to negotiate rights and demand responsibility”.⁴⁶ Marginalised groups have always negotiated with the State through powerful social and political movements, challenging their exclusion and exploitation. Transgender movements

³⁸ ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER AND SEXUALITY IN THE COLONIAL CONTEST*, (Routledge, 1995).

³⁹ Charu Gupta, *Anxious Hindu Masculinities in Colonial North India – Shuddhi and Sangathan Movements*, Vol. 61(4), *CROSS CURRENTS*, 441-454 (2011).

⁴⁰ Kalpana Wilson et al., *Gender, Violence and the Neoliberal State in India*, Vol. 119(1), *FEMINIST REVIEW*, 1-6 (2018).

⁴¹ Sircar, *supra* note 19, at 4.

⁴² Gupta, *supra* note 39, at 9.

⁴³ *Id.*

⁴⁴ Sircar, *supra* note 19, at 4.

⁴⁵ RUPAL OZA, *THE MAKING OF NEOLIBERAL INDIA: NATIONALISM, GENDER, AND THE PARADOXES OF GLOBALIZATION*, 2 (Routledge, 2006).

⁴⁶ *Id.*, 5.

in India continue to resist the State in myriad ways.⁴⁷ This is exemplified in the legislative history of the Transgender Persons Act which is marked by numerous protests and appeals across the country, by such movements. While the process by which the Transgender Persons Act came into force, highlights the cis-heteronormative character of the State, the recent resistance by transgender persons speaks to alternative ways of doing politics, which the liberal conception of citizenship does not account for.⁴⁸

On November 24, 2019, two days before the Transgender Persons Bill 2019 passed, Delhi held its 12th Queer Pride Parade.⁴⁹ Leading this parade were transgender activists, urging the Parliament, not to pass the Bill.⁵⁰ With absolute disregard for the protests, as well as the Constitutional spirit of equality and justice, the Rajya Sabha passed the Bill on November 26, 2019,⁵¹ much against the wishes of the people, whom the law was meant to protect. Trans activist, Revathi, wrote that “[t]he Central government should examine if the Bill recently passed is in accordance with the order passed by the Supreme Court and wishes of the transgender community. It should also examine if the Bill will really ensure the safety of the transgender community and act in deference to the wishes of the community”.⁵²

India celebrates Constitution Day on November 26 every year, to commemorate the adoption of the Constitution of India in 1950. Although the official announcement in recognition of this day was made only in 2015, Dalit and Adivasi communities across India have been celebrating it for many years, recognising the contributions of Babasaheb Ambedkar.⁵³ Despite the continued marginalisation of Dalit and Adivasi persons, it has been speculated that their faith

⁴⁷ Bhattacharya, *supra* note 20, at 4.

⁴⁸ Jaoul, *supra* note 14, at 3.

⁴⁹ THE PRINT (The Print Team), *In Pictures: Delhi Queer Pride Parade Takes on Transgender Bill 2019*, November 25, 2019, available at <https://theprint.in/in-pictures/in-pictures-delhi-queer-pride-parade-takes-on-transgender-bill-2019/325795/> (Last visited on August 25, 2020).

⁵⁰ THE QUINT (Parthavee Singh & Arpita Raj), *Pride Parade: LGBTQ+ Community Speaks Out Against Trans Bill 2019*, November 24, 2019, available at <https://www.thequint.com/neon/gender/delhi-and-bengaluru-pride-parade-trans-bill> (Last visited on August 25, 2020); THE HINDU (Sidharth Ravi), *Pride Parade Urges Scrapping of Transgender Protection Bill*, November 25, 2019, available at <https://www.thehindu.com/news/cities/Delhi/pride-parade-urges-scrapping-of-transgender-protection-bill/article30070865.ece> (Last visited on August 25, 2020); DECCAN HERALD (Rohini Banerjee), *Delhi Marched Against Trans Bill 2019 on Pride Day*, November 25, 2019, available at <https://www.deccanherald.com/national/national-politics/delhi-marched-against-trans-bill-2019-on-pride-day-779641.html> (Last visited on August 25, 2020).

⁵¹ THE HINDU, *Parliament Passes Bill to Protect Rights of Transgenders*, November 26, 2019, available at <https://www.thehindu.com/news/national/parliament-passes-bill-to-protect-rights-of-transgenders/article30087790.ece> (Last visited on August 25, 2020).

⁵² A. Revathi, *Transgenders' Bill 2019 Denies the Community to Decide their Own Identity — A Right Granted by the SC*, THE INDIAN EXPRESS, December 1, 2019, available at <https://indianexpress.com/article/opinion/columns/nartaki-nataraj-tiruchi-siva-my-gender-is-my-right-transgender-community-6144704/> (Last visited on August 25, 2020).

⁵³ Dilip Mandal, *Indian Democracy's Big Contradiction – Dalits Cherish Constitution, Privileged Want a Rethink*, THE PRINT, November 26, 2019, available at <https://theprint.in/opinion/>

in the Constitution that fails to protect them, comes from affirmative action provisions which the Constitution upholds.⁵⁴ The reality remains bleak, with Indian democracy surviving because of the ‘faith and hope of the underclass’, but failing to consider them as contributing citizens.

Dalit transgender activist and artist Living Smile Vidya has referred to transphobia as a type of Brahminism where the *hijra*,⁵⁵ “becomes the untouchable subject”.⁵⁶ Many transgender persons are able to rent houses, only in Dalit colonies, due to social ostracization and structural barriers preventing them, from accessing employment.⁵⁷ As stated earlier, Babasaheb Ambedkar’s final speech to the Constituent Assembly warned us of a ‘life of contradictions’ where there is equality in politics but inequality in social and economic life.⁵⁸ While these inequities persist even today, Ambedkar envisioned the Constitution to thrive on the principles of equality, liberty and fraternity,⁵⁹ and the celebration of Constitution Day by many Dalit and Adivasi groups, demonstrates the value that this document continues to hold for marginalised communities. This is exemplified in the petitions that have been filed in the Supreme Court, challenging the constitutional validity of the Transgender Persons Act.

The passing of this Bill on Constitution Day,⁶⁰ therefore, marked an unconstitutional moment in the exercise of law-making, as the legislation contravenes the fundamental right to self-determination in Article 21, the right to freedom of expression under Article 19(1)(a), the right to equality contained in Article 14, the right to non-discrimination in Article 15, and also breaches Article 16 due to the lack of affirmative action measures, as outlined in *National Legal Services Authority v. Union of India* (‘NALSA’).⁶¹ In the next section, we examine the NALSA judgment and the critique advanced by many transgender activists and scholars.

in-indian-democracy-dalits-cherish-constitution-privileged-want-a-rethink/326139/ (Last visited on August 25, 2020).

⁵⁴ *Id.*

⁵⁵ Hijra is a socio-cultural identity outside the heteronormative binary. Depending on their cultural and geographical location, hijras may identify as Aravani or Thirunangi in Tamil Nadu, Jogti in Maharashtra and Karnataka, Kinnar in Chattisgarh, Aradhi in Maharashtra etc.

⁵⁶ Semmalar, *supra* note 32, at 5.

⁵⁷ *Id.*

⁵⁸ Ambedkar, *supra* note 13, at 3.

⁵⁹ Akhil Kang, *Casteless-ness in the Name of Caste*, ROUND TABLE INDIA, March 4, 2016, available at https://roundtableindia.co.in/index.php?option=com_content&view=article&id=8491:casteless-ness-in-the-name-of-caste&catid=119:feature&Itemid=132 (Last visited on August 25, 2020).

⁶⁰ The President assented to the Bill on 5th December 2019, further cementing this unconstitutional moment.

⁶¹ (2014) 5 SCC 438 : AIR 2014 SC 1863, (‘NALSA’).

B. *NALSA AND THE SUPREME COURT CONSTRUCTION OF 'TRANSGENDER'*

The developments leading up to the Transgender Persons Act began with the NALSA decision of 2014 which recognised a 'third gender' category and upheld the principle of self-determination of gender identity. NALSA drew on India's international law obligations, the increasing recognition of transgender rights internationally, and the constitutional protection of rights.⁶² The Court stated that the Indian Constitution required the State to recognise the personhood of transgender persons using Articles 14, 15, 16, 19 and 21 individually and collectively to reach this conclusion.⁶³ The judgment has had positive effects for gender non-conforming communities and set a precedent for the expansion and protection of their constitutional rights.⁶⁴ It recognised the historical discrimination experienced by gender variant people in the country, as well as continued discrimination in current times, and the Supreme Court's understanding of this discrimination, was expressed through a detailed discussion on the ways in which transgender persons were discriminated against and abused through history.⁶⁵ The Court granted weight to the ongoing discrimination and inequalities faced by transgender persons based on evidence submitted in court, and took a broad view on the potential for constitutional rights violations, indicating its own proactive role in protecting against the infringement of rights of a particular community.

Scholars have argued, the construction of 'transgender' or 'third gender' as a stable category, as the judiciary does in NALSA, is problematic given the diversity and heterogeneity of transgender persons in India.⁶⁶ As Aniruddha Dutta notes, the category of 'transgender' evolved through activism in United States and western Europe encompasses "a spectrum of people who transgress gender norms".⁶⁷ Since the late 2000s, 'transgender' became established in state policy, thus subsuming all gender variant persons into "stable and bounded 'identities' and 'populations' through their interpellation within mechanisms of state and legal recognition".⁶⁸ People are deemed equal citizens only so long as they "perform certain prescribed codes of respectable citizenship which are for their own good".⁶⁹ Thus, although some people may be able to assimilate into the dominant culture,

⁶² Jain, *supra* note 32, at 6.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights*, Vol. 5, J. INDIAN L & SOC'Y (2014); Aniruddha Dutta and Raina Roy, *Decolonizing Transgender in India: Some Reflections*, Vol. 1, TSQ: TRANSGENDER STUDIES QUARTERLY (2014).

⁶⁷ Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights*, Vol. 5, J. INDIAN L & SOC'Y (2014).

⁶⁸ *Id.*

⁶⁹ Dipika Jain & Kimberly M. Rhoten, *Epistemic Injustice and Judicial Discourse on Transgender Rights in India: Uncovering Temporal Pluralism*, Vol. 26(1), JOURNAL OF HUMAN VALUES, 30-49 (2020).

and be included in the fold of citizenship, those who are unable to do so, will experience citizenship as conditional.⁷⁰ This has been seen in the case of women, as well as queer persons and those with other marginalised gender identities.⁷¹ Since citizenship is based on the selective exclusion of so-called undesirables by the State, some ‘conditional’ forms of citizenship are seen when these undesirables exhibit the capacity and inclination to be ‘consumers’ –and when they follow a code of conduct that establishes their respectability and desirability, by State standards.⁷²

Despite the critique of the NASLA judgement, at the heart of the judgment, as transgender activists and scholars such as Karthik Bittu Kondaiah, a scholar and an activist notes, is its explicit recognition of gender self-determination, i.e. the right of every individual to self-identify in any gender.⁷³ Specifically, the Court states that the right to freedom of speech and expression under Article 19(1)(a) includes the right to express one’s self-identified gender through dress, words, action or behaviour or any other form. Further, Article 21, which the Court describes as “the heart and soul of the Indian Constitution”,⁷⁴ guarantees the right to life and liberty, and includes all aspects of life that make life meaningful. The Court goes on to state that recognition of one’s gender identity is integral to the right to live with dignity and freedom.

This landmark jurisprudence led to a series of developments that resulted in the passing of the Transgender Persons Act. In the next section, we analyse these developments, as well as the recently introduced Draft Rules, and argue that the lack of a robust consultation process amounts to legislative violence against transgender persons.

C. LAWS ‘PROTECTING’ TRANSGENDER PERSONS AND THE LACK OF PRE-LEGISLATIVE CONSULTATION

Following the NALSA decision, MP Tiruchi Siva,⁷⁵ introduced The Rights of Transgender Persons Bill, 2014.⁷⁶ As Siva explained in an interview, he worked closely with transgender persons while drafting the Bill.⁷⁷ Though it

⁷⁰ Ditilekha Sharma, *Determination of Citizenship through Lineage in the Assam NRC Is Inherently Exclusionary*, EPW ENGAGE, April 6, 2019, available at <https://www.epw.in/engage/article/determination-citizenship-through-lineage-assam-nrc-exclusionary> (Last visited on August 25, 2020).

⁷¹ *Id.*

⁷² *Id.*

⁷³ NALSA *supra* note 61, ¶66 at 10; Karthik Bittu, *The Transgender Persons Bill misses key demands of the Community*, THE HINDU, June 15, 2019, available at <https://www.hindustantimes.com/analysis/the-transgender-persons-bill-misses-key-demands-of-the-community/story-0c6V-V1GvYuV4xqYL06zw8N.html> (Last visited on August 28, 2020).

⁷⁴ *Id.*, ¶68.

⁷⁵ Tiruchi Siva is a Member of the Parliament of India, representing Tamil Nadu in the Rajya Sabha.

⁷⁶ Upper House of the Parliament of India.

⁷⁷ Manoj C.G., *5 Questions: Tiruchi Siva, Man Behind Rights of Transgender Persons Bill*, THE INDIAN EXPRESS, April 25, 2015, available at <https://indianexpress.com/article/india/>

passed unanimously in the Rajya Sabha, the MSJE drafted a parallel legislation in 2015 and invited comments from civil society organizations and trans-led groups.⁷⁸ While the timeline was extremely short, several recommendations were still submitted, including suggestions to streamline the procedure for gender recognition and even to repeal §377 of the Indian Penal Code. It is unclear why the 2015 Draft Bill was never introduced in the Parliament. The MSJE then drafted and introduced another, more draconian legislation, titled the ‘Transgender Persons (Protection of Rights) Bill’ in the Lok Sabha in 2016.⁷⁹ Despite many trans groups, activists and civil society organisations speaking out against this Bill, the MSJE rejected *en-masse* all the recommendations. After multiple revisions over the years, the Bill was reintroduced in 2019, with the removal of certain provisions, such as the mandatory district screening committees.⁸⁰ However, it still remains an extremely problematic legislation.

Less than a month after the Government of India announced a nationwide lockdown as a response to the COVID-19 pandemic, the MSJE published the Draft Rules to the Transgender Persons Act on its website, on April 18, 2020. The MSJE invited stakeholder suggestions to the Draft Rules but set the deadline as April 30, 2020, giving the public, merely 12 days to read and comment on the legislation. This was met with fierce opposition from trans activists and transgender-led groups, who challenged the MSJE’s hasty and seemingly apathetic move to make laws during a public health crisis, and without stakeholder consultation.⁸¹ The deadline was eventually extended to May 18, 2020.⁸² The second version of the Draft Rules was published on July 13, 2020, seeking suggestions and objections within 30 days.⁸³ The decision to try and solicit stakeholder input during a global pandemic, at a time when millions were facing loss of livelihoods and

india-others/5-questions-tiruchi-siva-man-behind-rights-of-transgender-persons-bill/ (Last visited on August 25, 2020).

⁷⁸ Gee Imaan Semmalar, *First Apathy, then Farce: Why the Parliamentary Report on Trans Persons’ Rights is a Big Joke*, THE NEWS MINUTE, August 10, 2017, available at <https://www.thenewsminute.com/article/first-apathy-then-farce-why-parliamentary-report-trans-persons-rights-big-joke-66582> (Last visited on August 25, 2020); Jain, *supra* note 25, at 5.

⁷⁹ Lower House of the Parliament of India.

⁸⁰ For a detailed analysis of the legislative process of the Transgender Persons Act, please see Dipika Jain, *Law-Making by and for the People: A Case for Pre-legislative Processes in India*, Vol. 20(20), STATUTE LAW REVIEW, 1-18 (2019).

THE TELEGRAPH, *Provision that Criminalised Beggary by Transgender People Removed from Bill*, July 14, 2019, available at https://www.telegraphindia.com/india/provision-that-criminalised-beggary-by-transgender-people-removed-from-bill/cid/1694472?ref=latest_home-template (Last visited on August 25, 2020).

⁸¹ Geetika Mantri, *Ill-timed, Insensitive: Govt’s Trans Act Rules in the Middle of a Lockdown Draw Flak*, THE NEWS MINUTE, April 22, 2020, available at <https://www.thenewsminute.com/article/ill-timed-insensitive-govts-trans-act-rules-middle-lockdown-draw-flak-123109> (Last visited on August 25, 2020).

⁸² MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, *Comments/Suggestions Invited on Draft “The Transgender Persons (Protection of Rights) Rules, 2020*, April 30, 2020, available at <http://social-justice.nic.in/UserView/index?mid=77866> (Last visited on August 25, 2020).

⁸³ THE LEAFLET, *Centre Publishes Draft ‘Transgender Persons (Protection of Rights) Rules, 2020; Invites Suggestions/Objections From Stakeholders*, July 1, 2020, available at <https://theleaflet.in/>

support systems due to the lockdown, demonstrates an utter disregard for the rights of transgender persons. For many transgender persons, especially those who engaged in sex work or begging, the lockdown has had devastating impact on their livelihoods.⁸⁴ In April, more than 2000 transgender activists wrote to the government seeking special economic packages and for transgender persons who often do not have reliable sources of income and face difficulties in obtaining rations or accessing medical care.⁸⁵ Introducing a legislation at a time like this means that many transgender persons are unable to participate in the consultation processes and, thus, their needs go unaddressed.

Laws in India, are often hastily passed with little discussion, resulting in fierce opposition from the public. The CAA was introduced in the Lok Sabha on December 9, 2019, passed on the same day, and subsequently passed in the Rajya Sabha on December 11, 2019. The CAA amends The Citizenship Act 1955, purportedly to provide a path for fast-track Indian citizenship to undocumented migrants “belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014”.⁸⁶ However, it explicitly excludes Muslims from its purview, and was passed by the Parliament in 2 days. It comes as no surprise then, that protests have erupted throughout the country, against this law. One of us argues elsewhere that it is not possible to enact meaningful laws, without a process of “community consultation, feedback, cross-sectoral negotiation, and consensus”.⁸⁷ This process allows for public participation in law-making, provides an opportunity to gather the views of all stakeholders (including critical ones) and guarantees transparency. The lack of such processes in India results in legislations that undermine the rights of the very groups, they claim to protect. The legislative history of the Transgender Persons Act, serves as a prime example of the consequences of a law-making process that is not mindful of the lived realities of citizens.

centre-publishes-draft-transgender-persons-protection-of-rights-rules-2020-invites-suggestions-objections-from-stakeholders/ (Last visited on August 25, 2020).

⁸⁴ Kenneth Rosario, *COVID-19 Lockdown: Transgender Community Pushed Further to the Margin*, THE HINDU, April 6, 2020, available at <https://www.thehindu.com/news/cities/mumbai/covid-19-lockdown-transgender-community-pushed-further-to-the-margin/article31265535.ece> (Last visited on August 28, 2020).

⁸⁵ Shemin Joy, *Excluded from Govt Schemes During Lockdown, Transgenders Demand Special Package*, DECCAN HERALD, April 28, 2020, available at <https://www.deccanherald.com/national/excluded-from-govt-schemes-during-lockdown-transgenders-demand-special-package-830945.html>; PTI, *Transgender Community Demands Special Package Amid COVID-19 Lockdown*, THE INDIAN EXPRESS, April 28, 2020, available at <https://indianexpress.com/article/india/transgender-community-demands-special-package-amid-covid-19-lockdown-6383015/> (Last visited August 28, 2020).

⁸⁶ The Citizenship (Amendment) Act, 2019, §2.

⁸⁷ Jain, *supra* note 25, at 5.

D. LEGISLATIVE VIOLENCE

This law-making process enacts a form of violence on transgender persons, by ignoring social realities and failing to take their perspectives into consideration. Hannah Arendt argues that violence “always needs *implements*”.⁸⁸ She distinguishes justification from legitimacy, stating that violence, by its nature, is ‘instrumental’, requiring “guidance and justification through the end it pursues”.⁸⁹ The justification of violence, which relates to ‘an end which lies in the future’ “loses in plausibility, the farther away its intended end, recedes into the future” and since legitimacy is claimed through invoking the past, violence can theoretically be justified, but can never be legitimate.⁹⁰ If the State, as Marx pointed out, is an “instrument of oppression in the hands of the ruling class”, then law is (one of) the implements through which the State enacts violence upon its subjects. This is contradictory to the premise that law is meant to be the opposite of violence, and that “legal forms of decision-making are introduced to interrupt the endless sequence of violence and counter-violence”.⁹¹ On the contrary, scholars like Walter Benjamin argue that legal forms of decision-making actually exert violence.

In ‘Critique of Violence’, Benjamin suggests that there is a twofold relationship between violence and law; that of law-making and law-preserving.⁹² Benjamin traces the roots of law-making violence to the sphere of Constitutional law and specifically to the task of establishing ‘peace’ after years of war. Once the State decides what its frontiers must be, it accords equal rights where “for both parties to the treaty, it is the same line that may not be crossed”.⁹³ Benjamin refers to Anatole France’s novel ‘The Red Lily’ and its satirical take on the ‘equality’ of the law: “[i]n its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread”.⁹⁴ In acting ‘equally’, the law enacts a kind of violence upon those who are made unequal in society due to their socio-economic locations.

When law and society are founded on violence, rather than upon a social contract⁹⁵, Benjamin argues that “[l]aw-making is power-making, assump-

⁸⁸ HANNAH ARENDT, ON VIOLENCE, 4 (Harcourt, 1970).

⁸⁹ Hannah Arendt, *Reflections on Violence*, Vol. 23(1), JOURNAL OF INTERNATIONAL AFFAIRS, 1-35 (1969).

⁹⁰ *Id.*

⁹¹ Christoph Menke, *Law and Violence*, Vol. 22(1), LAW & LITERATURE, (2010).

⁹² Signe Larsen, *Notes on the Thought of Walter Benjamin: Critique of Violence*, CRITICAL LEGAL THINKING, October 11, 2013, available at <https://criticallegalthinking.com/2013/10/11/notes-thought-walter-benjamin-critique-violence/> (Last visited on August 25, 2020).

⁹³ Walter Benjamin, *Critique of Violence* in WALTER BENJAMIN: SELECTED WRITINGS, Vol. 1 (249) (Marcus Bullock and Michael W. Jennings eds., 1996).

⁹⁴ *Id.*

⁹⁵ Social contract theory posits that individuals willingly give up some of their freedoms for the maintenance of a certain social order. The social contract dictates people’s moral obligations towards one another. However, there are many critiques of the social contract theory including by feminist scholars. For example, Charles Mills critiques the social contract by proposing that there

tion of power, and to that extent an immediate manifestation of violence”.⁹⁶ These manifestations of violence, of course, cannot easily be named as such because they appear in the guise of ‘law’ (understood in opposition to violence).⁹⁷ They become “legitimate violence” or what Benjamin refers to as “banal, regularized violence that passes for law”.⁹⁸ The material distance between this ‘law-preserving violence’ or ‘legitimate violence’ and its own foundation of violence provides the illusion that the law and violence are separate from each other.⁹⁹ Law-preserving violence is “a violence that appears other than itself”.¹⁰⁰ However, what makes the violence of the law reprehensible is that the law not only threatens and coerces and violates but that it is “effective only for its own sake, for the sake of keeping up its own order, of establishing and enforcing its own categories, perspective, and language—for the sake of its power”.¹⁰¹ As Menke argues, Benjamin’s critique is not of *what* the law does but rather the violence of *how* it operates.¹⁰²

While violence may be manifested through the judiciary; NALSA, as well as the legislature; Transgender Persons Act, we are concerned here with the *legislative violence* exerted by the Transgender Persons Act and the Draft Rules. Law-making processes should reflect the democratic principles of dialogue and deliberation in order to create legislations that are representative as well as effective.¹⁰³ A thorough consultative process, with a bottoms-up approach, and deliberations with all stakeholders brings more legitimacy to the laws, ultimately enacted.¹⁰⁴ According to Cover, “[u]nder the unifying claims of the legal order there exists a variety of different peoples and groups, each constituted by their own beliefs and commitments”.¹⁰⁵ However, the Transgender Persons Act ignores these diverse claims in favour of treating transgender persons as a monolithic entity. Notably, the Bills in their various iterations, failed to incorporate the demands of the transgender persons.

Transgender activists across the country resisted the passing of the Transgender Persons Bill citing the NALSA judgment, which was lauded for its upholding of the self-determination of gender – stating that the provisions of the

exists a ‘racial contract’ which is fundamental (to Western society). This racial contract is what determines who is accorded the right to ‘contract in’ to freedom and equality, and who is not given status as a full person. See CAROLE PATEMAN, *THE SEXUAL CONTRACT* (Stanford University Press, 1988); CHARLES MILLS, *THE RACIAL CONTRACT* (Cornell University Press, 1997).

⁹⁶ *Id.*

⁹⁷ ANUPAMA RAO, *THE CASTE QUESTION: DALITS AND THE POLITICS OF MODERN INDIA*, 166 (University of California Press, 2009).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Menke, *supra* note 91, 11 at 13

¹⁰² *Id.*

¹⁰³ Jain, *supra* note 25, at 5.

¹⁰⁴ *Id.*

¹⁰⁵ Jason A. Beckett, *The Violence of Wording: Robert Cover on Legal Interpretation*, Vol. 8, No FOUNDATIONS (2011).

Bill would violate the rights of transgender persons across the country.¹⁰⁶ They stated that the Bill went against their rights to dignity and bodily autonomy, failed to grant them basic civil rights (such as marriage, adoption and social security benefits), reservations in education and jobs, and served to create “bureaucratic layers and red-tapeism”, that would act as a burden to transgender persons.¹⁰⁷ It has been argued that protests, “mostly challenge the conserving violence of law” and hence, the State is able to accommodate reforms or concessions.¹⁰⁸ Thus, the 2018 draft of the Transgender Persons Bill was introduced and passed in the Lok Sabha with 27 amendments, including a revised definition of ‘transgender’.¹⁰⁹ However, it continued to receive great opposition from transgender activists, who argued that these changes were merely cosmetic.¹¹⁰

The passing of this Act, in spite of the mass protests and appeals against it, lays bare the violence intrinsic in the legislative process. One of the many directives issued by the Court in NALSA, was for Central and State governments to grant legal recognition to individuals’ self-determined gender identity through state-issued identity cards. As research based on filing Right to Information (‘RTI’) applications shows, however, the implementation of this directive on the ground, has been riddled with problems of excessive bureaucratization.¹¹¹ Transgender activists such as Laxmi Narayan Tripathi (who was also one of the original petitioners in the case) have been vocal about the gaps in implementation of the Court’s directives, especially at the State level where effective policies have not yet been developed even six years later.¹¹² As many activists have pointed out, the Transgender Persons Act, is no more than a bureaucratic exercise; a “colonial hangover, giving the bureaucracy too much power over human life.”¹¹³ The

¹⁰⁶ Ajita Banerjee, *Why India’s Transgender People are Protesting Against a Bill that Claims to Protect their Rights*, SCROLL, November 26, 2019, available at <https://scroll.in/article/944882/why-indias-transgender-people-are-protesting-against-a-bill-that-claims-to-protect-their-rights> (Last visited on August 25, 2020).

¹⁰⁷ Sushmita Pathak, *India Just Passed A Trans Rights Bill. Why are Trans Activists Protesting It?*, NPR, December 4, 2019, available at <https://www.npr.org/sections/goatsandsoda/2019/12/04/784398783/india-just-passed-a-trans-rights-bill-why-are-trans-activists-protesting-it> (Last visited on August 25, 2020).

¹⁰⁸ Antiphon, *Power, Violence, Law*, CRITICAL LEGAL THINKING, April 5, 2009, available at <https://criticallegalthinking.com/2009/04/05/power-violence-law/> (Last visited on August 25, 2020).

¹⁰⁹ THE WIRE (PTI), *With 27 Amendments, Lok Sabha Passes Transgender Bill*, December 17, 2018, available at <https://thewire.in/government/with-27-amendments-lok-sabha-passes-transgender-bill> (Last visited on August 25, 2020).

¹¹⁰ Sanyukta Dharmadhikari, *‘Equal to killing us’: Why India’s Transgender Community is Rejecting the Trans Bill*, THE NEWS MINUTE, December 18, 2018, available at <https://www.thenewsminute.com/article/equal-killing-us-why-indias-transgender-community-rejecting-trans-bill-93579> (Last visited on August 25, 2020).

¹¹¹ Dipika Jain et al., *Bureaucratization of Transgender Rights: Perspective from the Ground*, Vol.14, SOCIO-LEGAL REVIEW (2018).

¹¹² Shreya Ila Anasuya, *Over Two Years After Landmark Judgment, Transgender People are Still Struggling*, THE WIRE, May 15, 2016, available at <https://thewire.in/gender/over-two-years-after-landmark-judgment-transgender-people-are-still-struggling> (Last visited on August 29, 2020).

¹¹³ THE WIRE (G. Ram Mohan), *Halt Implementation of the Trans Act 2019: Activists*, June 5, 2020, available at <https://thewire.in/lgbtqia/trans-act-2019-rules-feedback-activists> (Last visited on

very existence of this Act, then, reverts to the colonial practice of social exclusion and discrimination against gender minorities.

E. CITIZENSHIP UNDER THE TRANSGENDER PERSONS ACT

Niraja Jayal argues that “citizenship is the privilege of the unmarked”. For those who belong to disadvantaged groups, citizenship is conferred, paradoxically, only through being marked as different or even inferior.¹¹⁴ This is the citizenship that transgender persons are granted through the Transgender Persons Act. The Act violates the spirit of the Constitution and the NALSA judgment by stripping away the autonomy of transgender persons to gender self-identification. §7 of the Act, discussed in the part below, is the core of this violation due to the requirement of a surgery certificate to legally recognize an individual as male or female. The Supreme Court has previously ruled that the ‘right to life’ includes the right to live with dignity, which encompasses not only bare necessities but also “facilities for reading writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings”.¹¹⁵ Marginalised groups “cite dignity as a crucial element in determining their relationship with other groups and with the state”.¹¹⁶ Hence, as Ranjita Mohanty argues, “the citizenship experience of many groups depends on whether they are able to live with dignity”.¹¹⁷

Laxmi Narayan Tripathi has stated the NALSA verdict would make no difference if transgender persons are not ‘treated with dignity as humans’.¹¹⁸ As we demonstrate, the Transgender Persons Act violates the right to live with human dignity and the right to self-determination in three ways: (1) by denying transgender persons the right to decisional autonomy over their gender identity, (2) by failing to carry out affirmative action obligations to satisfy the principle of substantive equality, and (3) by treating transgender persons as ‘victims’ in need of rehabilitation.

1. Denial of Decisional Autonomy

The NALSA decision affirms the right of all individuals to self-determination of their identity. Gender self-determination refers to the right of

August 25, 2020).

¹¹⁴ Niraja Jayal, *Reconfiguring Citizenship in Contemporary India*, Vol. 42(1), SOUTH ASIA: JOURNAL OF SOUTH ASIAN STUDIES, 33 (2019).

¹¹⁵ Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597; Francis Coralie Mullin v. UT of Delhi (1981) 1 SCC 608 : AIR 1981 SC 746.

¹¹⁶ Ranjita Mohanty, *Gendered Subjects, Gendered Citizens: Women, Citizenship Rights and the State in the South*, AFRICAN CENTRE FOR CITIZENSHIP AND DEMOCRACY (2012).

¹¹⁷ *Id.*

¹¹⁸ PTI, *Perspective Needs to Change to Accommodate Trans Community: Laxmi Narayan Tripathi*, THE NEW INDIAN EXPRESS, March 24, 2018, available at <https://www.newindianexpress.com/nation/2018/mar/24/perspective-needs-to-change-to-accommodate-trans-community-laxmi-narayan-tripathi-1791966.html> (Last visited on August 29, 2020).

all individuals to determine their gender identity, unrestricted by the gender binary. The Supreme Court in NALSA referred to Principle 3 of the Yogyakarta Principles and stated that:

“Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and *no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity*”.¹¹⁹ (emphasis added)

The Court further stated that “Gender identity as already indicated forms the core of one’s personal self, based on self-identification, not on surgical or medical procedure”. The Court also expressly stated that expression of gender identity and gender presentation is protected under Article 19(1)(a) ‘freedom of speech and expression’. The Court ruled that:

“A transgender’s personality could be expressed by the transgender’s behaviour and presentation. State cannot prohibit, restrict or interfere with a transgender’s expression of such personality, which reflects that inherent personality...We, therefore, hold that values of *privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community* under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights”.¹²⁰ (emphasis added)

Thus, the Supreme Court guaranteed legal recognition to self-determination of gender identity as a part of the fundamental right to freedom of expression under Article 19(1)(a). However, as we demonstrate in the following section, the Transgender Persons Act violates this right by setting this legislation, and through it the District Magistrate, as the final authority on an individual’s gender identity. We further argue that the Act negates the inherent values of the Constitution and the NALSA decision by requiring convoluted bureaucratic interference and expanding the scope for discrimination against transgender persons at the hands of the State.

a. Gender Determination by Bureaucracy

The Act disrespects the autonomy of transgender persons and denies their right to gender self-identification by ‘outsourcing’,¹²¹ the task of gender

¹¹⁹ NALSA *supra* note 61, ¶20 at 10.

¹²⁰ *Id.*, ¶66.

¹²¹ Gautam Bhatia, *Rajya Sabha Must Amend the Transgender Persons Bill*, HINDUSTAN TIMES, January 5, 2019, available at <https://www.hindustantimes.com/analysis/>

determination to the State's bureaucratic machinery. Transgender persons are effectively told that they do not deserve to choose their gender and that the State has the power to 'screen' applicants and decide. §4 of the Act, at first glance, appears to uphold the principle of self-identification by stating that transgender persons have a right to 'self-perceived gender identity'. However, the Act does not embody the true spirit of self-determination, and in fact directly contradicts the NALSA judgment which calls for self-affirmation and identification of gender without the requirement of any gender affirming surgical procedures.¹²² The Transgender Persons Act and the Draft Rules continue to pathologise transgender persons and make legal recognition (and, therefore, citizenship) contingent on the diagnosis of gender dysphoria. It is clear that far from disregarding medical procedures in determining gender identity, as prescribed by the Court, the law actually relies on such medical procedures to dilute the 'self-perceived gender identity' outlined in §4 of the Act.

§§5 and 6 state that any individual who wishes to be legally recognised as 'transgender' is required to obtain a certificate from a District Magistrate. While the original version of the Draft Rules,¹²³ specified that a psychologist's report must be attached with the application for an identity certificate recognizing the applicant as 'transgender', the latest version does away with this requirement. Transgender activists argue that §5 and §6 are transphobic and demeaning,¹²⁴ as they entail a screening or verification process before this governmental authority. The District Magistrate – as a paternalistic and bureaucratic gatekeeper with the authority to determine an applicant's gender identity – is thus positioned at direct odds with the constitutionally protected tenets of autonomy and self-determination. Further, the current Draft Rules require the applicant to have resided within the jurisdiction of the Magistrate for a continuous period of one year.¹²⁵ This is

the-rajya-sabha-must-amend-the-transgender-persons-bill/story-WEyPFztPVA BpfaQyDYBt5I.html (Last visited on August 25, 2020).

¹²² NALSA, *supra* note 61, ¶129 at 10.

¹²³ The Draft Rules that were published on the MSJE website, inviting comments until 18th May, stated in Rule 4(1) that the District Magistrate shall, based on the application, the affidavit and the report of a psychologist of a hospital of appropriate Government attached therewith, verify the correctness of the said report of psychologist and the place of residence of the applicant, but without any medical examination, except for issue of certificate of identity under Section 7 of the Act, the procedure for which is prescribed in rule 6. To access the Rules see MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, *Transgender Persons (Protection of Rights) Rules, 2020*, available at <http://socialjustice.nic.in/writereaddata/UploadFile/draftrule1604.pdf> (Last visited on August 25, 2020).

¹²⁴ THE CITIZEN (Harshita Chhatlani & Tanya Ranjan), *'A Dangerous Piece of Legislation': Protesters Demand that President Return 'Humiliating' Trans Bill to Parliament*, November 28, 2019, available at <https://www.thecitizen.in/index.php/en/NewsDetail/index/7/17922/A-Dangerous-Piece-of-Legislation-Protesters-Demand-that-President-Return-Humiliating-Trans-Bill-to-Parliament> (Last visited on August 25, 2020).

¹²⁵ Rule 4(2) of the latest version of the Draft Rules reads as follows (2) For the purpose of determination of the place of residence, the applicant shall be a resident of the area under the jurisdiction of District Magistrate for a continuous period of past twelve months as on the date of application and an affidavit to this effect shall be submitted in Form-2 and no additional evidence shall be called for. To access the Rules see <http://egazette.nic.in/WriteReadData/2020/220497.pdf>

a problematic provision, given that many transgender persons, especially *hijras*, frequently migrate across cities and states. The Expert Committee on the Issues Relating to Transgender Persons constituted by the Ministry of Social Justice and Empowerment, wrote in their Report that transgender persons faced “ostracisation from family, unemployment and homelessness”,¹²⁶ which could make it challenging for them to prove one year’s continued residence in one place.¹²⁷

§7 of the legislation, covering gender change, lies at the core of how this legislation “undoes the capacity of the trans subject to be citizen”.¹²⁸ §7 requires transgender persons to submit a certificate issued by the Medical Superintendent or Chief Medical Officer, stating that they have undergone medical intervention to change gender, in order for the District Magistrate to issue a revised certificate of identity with their gender marked as ‘male’ or ‘female’.¹²⁹ The District Magistrate, must verify the correctness of the certificate before issuing a revised identity certificate. This provision continues to violate both the Constitutional spirit of the NALSA judgment as well the principle of self-identification laid out in the Transgender Persons Act itself. It provides that a transgender individual can, only after medical intervention (in the first set of Draft Rules, the term ‘surgery’ was used and thereafter replaced with the term ‘medical intervention’ upon receipt of suggestions from transgender movements and other civil society activists), make an application to a state authority for ‘change in gender’.¹³⁰ This process again betrays the cis-heteronormative framework within which gender identity is

¹²⁶ MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, *Report of the Expert Committee on the Issues Relating to Transgender Persons*, January 27, 2014, available at <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf> (Last visited on August 25, 2020).

¹²⁷ PRS, *Draft Transgender Persons (Protection of Rights) Rules, 2020*, available at https://www.prs-india.org/billtrack/draft-transgender-persons-protection-rights-rules-2020#_edn7 (Last visited on August 25, 2020).

¹²⁸ Vikramaditya Sahai, *The Sexual is Political: Consent and the Transgender Persons (Protection of Rights) Act, 2019*, CENTRE FOR LAW AND POLICY RESEARCH, February 3, 2020, available at <https://clpr.org.in/blog/the-sexual-is-political-consent-and-the-transgender-persons-protection-of-rights-act-2019/> (Last visited on August 25, 2020).

¹²⁹ §7 of the Transgender Persons (Protection of Rights) Act, 2019 reads as follows:

- (1) After the issue of a certificate under sub-section (1) of section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed.
- (2) The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.
- (3) The person who has been issued a certificate of identity under section 6 or a revised certificate under sub-section (2) shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person:

Provided that such change in gender and the issue of revised certificate under sub-section (2) shall not affect the rights and entitlements of such person under this Act.

¹³⁰ Although the latest Draft Rules require proof of ‘medical intervention’ in place of surgery, the requirement to undergo any medical process at all, in order to get recognition in one’s gender identity, violates the right to self-determination.

perceived by the state, which requires proof (medical certificates) and recording of ‘sex change’ solely by transgender and intersex persons.

We argue that the §7 fails to meet the constitutionality test on several levels. Mandatorily requiring persons who choose to identify either as male or female to undergo surgery creates additional hurdles in the path towards obtaining accurate gender identification. The Transgender Persons Act also fails to supplement the mandatory requirement of Gender Affirming Surgery with adequate healthcare infrastructure, free or subsidised gender affirming procedures, and gender sensitisation in the medical (and mental) healthcare professions. As Gee Semmalar, a transgender activist and scholar writes, transgender persons are forced to seek expensive private healthcare due to the absence of sensitive public healthcare facilities, and the dismal quality of healthcare in the country.¹³¹ Widespread discrimination, stigma and ignorance of medical professionals with respect to the transition process, such as hormone replacement therapy and gender affirming surgery, have led to many transgender persons undergoing gender affirming procedures outside healthcare facilities.¹³² Costs of such procedures in hospitals can often be prohibitive, as well, pushing transgender persons to back-alley procedures.

The insistence on a medical certificate to confirm Gender Affirming Surgery has also been called out by activists for failing to account for persons who had gone through surgery years ago and cannot produce documentation now. It has been pointed out that Gender Affirming Surgery “is not a monolithic, single surgery”, which thus leaves significant legal ambiguity and unbridled discretion at the hands of government authorities to approve or reject applications.¹³³ The latest version of the Draft Rules, allows for a certificate noting that the applicant has undergone ‘medical intervention’ instead of ‘surgery’.¹³⁴ While the term may be read broadly, there is no clarity on what kind of ‘medical intervention’ would be accepted as proof of gender change, and this provision largely leaves it up to the bureaucracy to determine transgender persons’ identity. Medical procedures cannot be a requirement for legal recognition of one’s gender, especially since

¹³¹ Semmalar, *supra* note 32, at 6.

¹³² Many procedures to change gender from male to female are carried out by unqualified medics in smaller towns such as Palamaner and Kadapa in Andhra Pradesh, as well as Dindigul in Tamil Nadu. See Elizabeth Soumya, *Indian Transgender Health Challenges*, AL JAZEERA, June 18, 2014, available at <https://www.aljazeera.com/indepth/features/2014/06/healthcare-distant-india-transgenders-201461882414495902.html> (Last visited on August 25, 2020).

¹³³ Mohan, *supra* note 113, at 15.

¹³⁴ Rules 6(1) and 6(2) of the Draft Transgender Persons (Protection of Rights) Rules 2020 reads:

- (1) If a transgender person undergoes medical intervention to change sex either as a male or female, such person may apply in the Form – 1, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone the said medical intervention, to the District Magistrate for the issue of a revised certificate of identity under Section 7; (2) The District Magistrate shall, on receipt of an application referred to in sub-rule (1) shall verify the correctness of the said medical certificate.

many people may not want to medically transition, but should still be entitled to identity documents with their chosen name and gender. The NALSA judgement clearly stated that insistence on surgery for legal recognition of gender identity is “immoral and illegal”.¹³⁵ Kanmani, an activist and a law student, writes that “from self-identification of gender identity post-NALSA, we went to a newer form of medicalisation of gender identity with institutionalised hierarchy”.¹³⁶ Kanmani further argues that the Transgender Persons Act assumes, in a show of ‘cis voyeuristic curiosity’ that personhood for transgender people resides in their bodies and genitalia, and not in them.¹³⁷ Not all transgender persons want gender affirming surgery, or hormone therapy or other ‘medical interventions’. The Act, however, compels transgender persons to “reduce their trans identity to that of the body” in order to obtain legal recognition.

The provisions regarding the issuance of identity certificates as well as certificates for change in gender, show a reliance on local or state bureaucracy for the ‘implementation’ of the law. Nayanika Mathur, in her formative work on Indian bureaucracy ‘examines the ‘vexedness of implementation’ of laws by local bureaucrats, for whom the “law and the operational guidelines that govern its implementation were products of a crazed imagination and of an elite disconnection from the labours of real implementation”.¹³⁸ The cynicism around the centrally-dictated law that had come from people who “worked out of air-conditioned offices in Delhi” was found to be connected with a larger narrative of disillusionment regarding the state’s agenda for ‘development’.¹³⁹ Dispelling the prevailing middle and upper-class narratives that discrepancies in implementation of the law were due to lower-level bureaucratic corruption, laziness or lack of understanding, Mathur sheds light on the challenges of implementing plans that are ‘utopian’ in nature and that take the form of “deeply desired reforms” due to various complexities as well as the “layered entanglements” between the State and the actual officials tasked with concrete responsibilities.¹⁴⁰ The Transgender Act and pursuant Rules, which put the entire onus of verifying gender identities on lower-level bureaucrats is a law that will experience the same ‘vexedness’ in implementation and subaltern disconnect as seen in the implementation of the National Rural Employment Guarantee Act, in Uttarakhand.¹⁴¹

¹³⁵ NALSA *supra* note 61, ¶129(5) at 10.

¹³⁶ Kanmani, *Look Up, At Us, Not Just Down!*, MEDIUM, July 14, 2020, available at <https://medium.com/@kanmaniwrites/look-up-at-us-not-just-down-7f2bd9b546be> (Last visited on August 25, 2020).

¹³⁷ *Id.*

¹³⁸ NAYANIKA MATHUR, *PAPER TIGER: LAW, BUREAUCRACY AND THE DEVELOPMENTAL STATE IN HIMALAYAN INDIA*, 7 (Cambridge University Press, 2015).

¹³⁹ *Id.*, 8.

¹⁴⁰ *Id.*, 176.

¹⁴¹ Nayanika Mathur uses the National Rural Employment Guarantee Act as a case study, extensively researching the barriers to implementation in the context of the Indian developmental State in Himalayan India.

The Act and Rules' emphasis on identity documentation corresponding with gender identity also gives rise to a new form of citizenship beyond notions of civil citizenship, with biological presumptions lying at its core – or 'biological citizenship'.¹⁴² The concept of biological citizenship has historically been linked with racialised national politics, eugenics and ableist narratives and in current times, increased scientific and technological literacy is a strategy used by the state and private actors for "making up the biological citizen", where "making up citizens" is the "reshaping" of how such citizens are perceived and understood by various authorities.¹⁴³ The 'biological citizen' created by the Transgender Persons Act and the Draft Rules thereunder rests on the medicalisation of transgender and gender-variant bodies and visibilising them before State authorities. Such visibilising of marginalised groups and persons before legislatively and materially cis-heteronormative institutions is likely to only exacerbate their marginalisation and the power imbalance between them and the State.

Further, the Transgender Persons Act and Draft Rules only recognize familial structures by blood or marriage or (legal) adoption,¹⁴⁴ and do not recognize families of choice or traditional joint living systems such as the *hijragharana* system. As Abhina Aher says, "a family is not only blood relations".¹⁴⁵ Familial structures that do not rely on blood or marriage, find no place in the law. Grace Banu similarly states, "[w]e have our own culture. Our trans forefathers and foremothers formed it; we respect these and don't want to erase our history".¹⁴⁶ The restrictive definition of 'family' in the Act that has only includes people related by blood, marriage or legal adoption has been critiqued for being 'banal' in nature, ignoring the fact that many transgender persons face severe discrimination and violence at the hands of their biological families and immediate community.¹⁴⁷ The control over marriage and reproduction is central to the construction of the nation-state.¹⁴⁸ As Mary Daly argues, when citizenship included the right to have a family, a home etc., this was a right exclusively of men, and not of women.¹⁴⁹ It is clear, therefore, that the conceptualisation of citizenship itself is a graded one, where only certain groups of people are given citizenship rights contingent on their ability to conform to cis-heteronormative ideals. The definition in the Transgender

¹⁴² Nikolas Rose, *Biological Citizens* in *THE POLITICS OF LIFE ITSELF: BIOMEDICINE, POWER, AND SUBJECTIVITY IN THE TWENTY-FIRST CENTURY* 132 (2006).

¹⁴³ *Id.*, 140.

¹⁴⁴ The definition of family under the Act is a narrow one: §2(c) – "family" means a group of people related by blood or marriage or by adoption made in accordance with law;

¹⁴⁵ Chinki Sinha, *We can't Erase our Hijra Culture*, INDIA TODAY, August 16, 2019, available at <https://www.indiatoday.in/india-today-insight/story/cant-erase-hijra-culture-transgender-persons-bill-1581247-2019-08-16> (Last visited on August 25, 2020).

¹⁴⁶ *Id.*

¹⁴⁷ Rachana Mudraboyina, *A Critique of Transgender Persons (Protection of Rights) Bill, 2019*, FEMINISM IN INDIA, August 5, 2019, available at <https://feminisminindia.com/2019/08/05/critique-transgender-persons-protection-of-rights-bill-2019/> (Last visited on August 25, 2020).

¹⁴⁸ Mary E. Daly, *Wives, Mothers, and Citizens: The Treatment of Women in the 1935 Nationality and Citizenship Act*, Vol. 38(3-4), ÉIRE-IRELAND, 244-263 (2003).

¹⁴⁹ *Id.*

Persons Act clearly imposes a cis-heteronormative, biologically assumptive construction of ‘family’ and kinship structures, which in turn inform the nature of the Act and the Rules. Thus, the law denies equal citizenship to transgender persons by deliberately excluding alternative structures of family and kinship.

Thus, the Transgender Persons Act’s requirement of a certificate proving that an individual has undergone any form of ‘medical intervention’ to change gender clearly violates transgender persons’ rights to autonomy and self-determination. In *Anuj Garg v. Hotel Association of India*¹⁵⁰, the Supreme Court established a strong jurisprudence of gender equality and expressly stated that legislations which reflect “majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy”.¹⁵¹ The Court invoked an ‘anti-stereotyping principle’ to hold that provisions which rely on culturally-defined notions of gender roles would need to be “tested on the touchstone of constitutional values”.¹⁵² The provisions of the Transgender Persons Act discussed in this section clearly violate these values by stripping away bodily and decisional autonomy from transgender persons. However, it is not merely the abnegation of this fundamental right of gender self-identification that denies transgender persons equal citizenship, but also the failure of this legislation to fulfil the right to substantive equality guaranteed by the Constitution.

2. Empty Promise of Substantive Equality

Formal equality policies typically preserve status quo inequalities, as they are often steadfast and uniform despite the variation of the social context in which they apply.¹⁵³ However, Article 14 of the Constitution encapsulates substantive and not formal equality. Moreover, the Constitution read wholly, and particularly in light of Article 15, espouses substantive equality by extending not only a preventive covenant for the State from engaging in discriminatory actions, but further including a positive covenant encouraging the State to strive towards equality.¹⁵⁴ As one of us has argued elsewhere, “realizing substantive gender equality requires addressing the historical roots of gender discrimination, gender stereotypes, and traditional understandings of gender roles that perpetuate discrimination and inequality”.¹⁵⁵ Recent Supreme Court jurisprudence in India

¹⁵⁰ *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1 : AIR 2008 SC 663.

¹⁵¹ *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1 : AIR 2008 SC 663, at para 39.

¹⁵² Gautam Bhatia, *Grounding a Progressive Jurisprudence of Sex Equality: Anuj Garg v. Hotel Association*, Indian Constitutional Law and Philosophy, February 20, 2014, available at <https://indconlawphil.wordpress.com/2014/02/20/grounding-a-progressive-jurisprudence-of-sex-equality-anuj-garg-v-hotel-association/> (Last visited August 29, 2020).

¹⁵³ Helen Fenwick, *From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex Equality Law*, Vol. 4(4), EUROPEAN PUBLIC LAW, 507-516 (1998).

¹⁵⁴ Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, Vol. 2, CHICAGO JOURNAL OF INTERNATIONAL LAW (2001).

¹⁵⁵ Dipika Jain & Payal K. Shah, *Reimagining Reproductive Rights Jurisprudence in India: Reflections of the Recent Decisions on Privacy and Gender Equality from the Supreme Court of India*, Vol. 39(2), COLUMBIA JOURNAL OF GENDER AND LAW (2020).

has also articulated a robust vision of sexual and decisional autonomy within the framework of equality. The *Navtej Singh Johar v. Union of India*,¹⁵⁶ and *Joseph Shine v. Union of India*,¹⁵⁷ decisions of 2018 read together create a strong framework to understand the manner in which the rights to equality, and non-discrimination on the basis of sex and gender intersect.¹⁵⁸

To secure equality of status and opportunity for all citizens, the Constitution via Article 15(4) empowers the State to make special provisions ‘for the advancement of’ oppressed groups, as a form of positive discrimination.¹⁵⁹ As Anand Teltumbde states, “reservations were envisioned as a ‘countervailing force’ to deal with the incapacity of Indian society to treat all its constituents with equity”.¹⁶⁰ This principle has also been articulated in a plethora of Supreme Court jurisprudence,¹⁶¹ including the NALSA judgment which mandated the State to provide transgender persons with reservations in educational institutions and public employment.¹⁶² Shreya Atrey notes that Article 15(4) does not confer a right but is, instead, a “discretionary [tool] for the government to be pursued towards the broader goal of promoting substantive equality.”¹⁶³ However, the State’s loud silence on affirmative action reflects a blatant disregard for substantive equality as a constitutional value. Reservations are not an exception to the right to equality enshrined in the Constitution but are a means of fulfilling substantive equality which “imposes a duty on states to provide it for those groups who are disadvantaged in different terms”.¹⁶⁴ The Transgender Persons Act lacks affirmative measures

¹⁵⁶ (2018) 10 SCC 1.

¹⁵⁷ (2019) 3 SCC 39.

¹⁵⁸ Jain, *supra* note 155.

¹⁵⁹ The Constitution of India, 1950, Art. 15(4) (Art. 15(4) of the Constitution reads

Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.);

The Constitution of India, 1950, Art. 16(4) (Article 16(4) similarly reads

Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State).

¹⁶⁰ Anand Teltumbde, *Reverting to the Original Vision of Reservations*, 42 ECONOMIC AND POLITICAL WEEKLY 25, 2383-2385 (2007).

¹⁶¹ M.R. Balaji v. State of Mysore, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; Indira Sawhney v. Union of India 1992 Supp (3) SCC 217 : AIR 1993 SC 477; M. Nagaraj v. Union of India (2006) 8 SCC 212.

¹⁶² (2014) 5 SCC 238 : AIR 2014 SC 1863, (‘NALSA’), ¶129(3).

¹⁶³ Shreya Atrey, *Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15*, Vol. 16, THE EQUAL RIGHTS REVIEW (2016).

¹⁶⁴ Jeba Mondal, *Reservation Fulfills Demand of Substantive Equality Under Article 16(1) of Constitution; States Duty-bound to Offer it to Disadvantaged Groups*, FIRSTPOST, February 15, 2020, available at [https://www.firstpost.com/india/reservation-fulfills-demand-of-substantive-equality-under-article-16\(1\)-of-constitution-states-duty-bound-to-offer-it-to-disadvantaged-groups-8044911.html#:~:text=The%20Constitution%20of%20India%20is%20the%20end%20product%20of%20both%20these%20struggles.&text=Hence%2C%20reservation%20under%20Constitution%20is,are%20disadvantaged%20in%20different%20terms](https://www.firstpost.com/india/reservation-fulfills-demand-of-substantive-equality-under-article-16(1)-of-constitution-states-duty-bound-to-offer-it-to-disadvantaged-groups-8044911.html#:~:text=The%20Constitution%20of%20India%20is%20the%20end%20product%20of%20both%20these%20struggles.&text=Hence%2C%20reservation%20under%20Constitution%20is,are%20disadvantaged%20in%20different%20terms) (Last visited August 29, 2020).

despite repeated requests from transgender-led groups to include reservations.¹⁶⁵ A consolidated response from transgender groups explicitly notes the lack of a provision for reservations as a big lacuna in the 2016 Bill.¹⁶⁶ This affects transgender persons' access to education and employment, increasing their vulnerability.

Furthermore, the Act constructs a difference between transgender sexual assault survivors in comparison to cisgender female survivors: it provides a maximum sentence of only two years for anyone convicted of sexually abusing a transgender person.¹⁶⁷ This is in stark contrast to the minimum sentence of ten years for sexually assaulting a cisgender women.¹⁶⁸ When questioned about the provision, the Minister for Social Justice and Empowerment, Thawar Chand Gehlot, dismissed concerns by stating that “*sexual abuse is chotimotiched-chad*” (sexual abuse is trivial harassment).¹⁶⁹ Activists and advocacy groups have argued that there must be proportional punishments for crimes committed against transgender persons if the Act is to uphold the right to equality, dignity and life.¹⁷⁰ The disproportionality in punishments underscores the discriminatory nature of the Act.¹⁷¹

¹⁶⁵ Johana Deeksha, *We Will Not Stop Fighting: TN Transgender Activist, Grace Banu on Recently Passed Transgender Bill, 2019*, Edex Live, November 28, 2019, available at <https://www.edexlive.com/news/2019/nov/28/we-will-not-stop-fighting-tn-transgender-activist-grace-banu-on-recently-passed-transgender-bill-9314.html> (Last visited on August 25, 2020).

¹⁶⁶ Orinam, *Responses From the Trans & Intersex Communities* (2016), available at http://orinam.net/content/wp-content/uploads/2016/08/Community-Response-to-TG-Bill-20161212pm_Monday_Aug81.pdf (Last visited on August 25, 2020).

¹⁶⁷ The Transgender Persons (Protection of Rights) Act, 2019, §18.

¹⁶⁸ Indian Penal Code, 1860, §376.

¹⁶⁹ MUMBAI MIRROR, *Why I am Unhappy with the Transgender Persons Bill*, MUMBAI MIRROR, November 28, 2019, available at <https://mumbaimirror.indiatimes.com/opinion/city-columns/why-i-am-unhappy-with-the-transgender-persons-bill/articleshow/72269124.cms> (Last visited on August 25, 2020).

¹⁷⁰ SAMPOORNA WORKING GROUP, *Statement on Transgender Persons (Protection of Rights) Bill 2019*, July 19, 2019, available at <https://sampoornaindiablog.wordpress.com/2019/07/19/spwg-statement-on-transgender-persons-protection-of-rights-bill-2019/> (Last visited on August 25, 2020).

¹⁷¹ Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-color Feminism and Alternatives to Incarceration*, 27 JOURNAL OF ETHNIC & CULTURAL DIVERSITY IN SOCIAL WORK 3, 219-233 (2018) (We believe that criminalisation by itself is not a solution and collaboration with the carceral state will only result in more harm. The majority of prisoners in India are Dalits, Muslims and Adivasis, which demonstrates that rather than following the ‘rule of law’, the system is one of ‘rule by law’, where statutes are used as tools to oppress minority and marginalised communities by the elite. Therefore, expanding the penal framework applicable to transgender persons, opening additional avenues for incarceration, can become highly problematic and harmful for these communities. Further, penal institutions “make use of normative binary gender to control individuals under carceral supervision” and, thus, advocating for greater imprisonment may reproduce a trans exclusionary vision of feminism. Nevertheless, it is important to note that many trans activists and groups have made demands for a stronger and more equal criminal provisions against sexual assault of transgender persons. This is because perpetrators of violence against transgender persons often act with impunity.); Jennifer Musto, *Transing Critical Criminology: A Critical Unsettling and Transformative Anti-Carceral Feminist Reframing*, CRIT. CRIM. 27, 37-54 (2019); THE PRINT, *By Mostly Jailing Dalits, Muslims & Tribals, India is Making the Same Mistakes as the US*, January 5, 2018, available at <https://theprint.in/opinion/a-tale-of-indian-and-american-prisoners/26637/> (Last visited on August 25, 2020).

Prima facie, the disproportionate and unequal punishments are violative of Article 14 of the Constitution which provides the right to equality and equal protection of the laws, and effectively marries the English ‘rule of law’ doctrine with the ‘equal protection’ clause of the Fourteenth Amendment to the U.S. Constitution, but in reality, the rule of law itself lives in the shadow of other social inequalities, leading to continued marginalisation of disenfranchised groups, in spite of such legal ‘protections’.¹⁷² This is illustrated in India’s “legal affirmation of Dalits” through constitutional provisions, protective legislations and affirmative action programmes, which has still not diminished the endemic discriminatory treatment and societal norms, “reinforced by government and private structures, often through violent means”.¹⁷³ The rights enshrined in the Constitution are “not meant to serve them” and Dalit communities are seen to be victims of both under-enforcement and over-enforcement of laws, the former with respect to protective legislation and the latter with respect to violent state machinery, like law enforcement, which targets and subjects Dalits to extensive brutality.¹⁷⁴

The already differential and discriminatory treatment between cis-gender and transgender persons is reinforced by the disparity between penal provisions for cisgender and transgender survivors of sexual assault and is telling of the inequitable approach of law makers towards transgender persons. This Act has supposedly been enacted as an acknowledgement and recognition of transgender persons in law, but instead serves to monitor and police them, on a different standing from the recognition and treatment of cisgender citizens of the country. A perusal of the Act shows the gendered and graded citizenship that transgenders persons are begrudgingly given and strongly planted in a cis-heteronormative framework. §4 of the Act which grants ‘recognition rights’ to transgender persons and the right to ‘self-perceived gender identity’ is sharply contradicted by §5 and §6, which mandate that trans persons go to a District Magistrate to apply for ‘certificates of identity’ as “proof of recognition of his identity as a transgender person”. The contradictions between self-affirmation or self-recognition of gender and the administrative process for ‘formal proof of recognition’ shows the differential nature of citizenship granted to the ‘third-gender’ individual, where they have to provide verification to the state of their gender identity.

Citizenship’s promise of equality by the law remains “elusive and fettered” and the differential penal provisions in the law indicate that transgender persons fall within, as Anupama Roy writes, “a range of graded and differential categories and corresponding lived experiences of citizenship”, which shall not grant ‘full’ citizenship, but peripheral membership under strict monitoring, reporting, documentation and surveillance.¹⁷⁵ If citizenship can be considered a set

¹⁷² Smita Narula, *Equal by Law, Unequal by Caste: The “Untouchable” Condition in Critical Race Perspective*, 26 WISCONSIN INTERNATIONAL LAW JOURNAL Vol. 2, 255-343 (2008).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ ANUPAMA ROY, MAPPING CITIZENSHIP IN INDIA (2010).

of civil, political and social rights, then queer persons are only ‘partial citizens’ due to their exclusion from several of these rights.¹⁷⁶

In postcolonial India, the “transition from colonial subjects to citizens of an independent nation” has come with its own set of gradations.¹⁷⁷ While Baxi speaks of a hierarchical citizenship with *gendered citizens* (including gender and sexual minorities) as the recipients of state violence, gender itself is unstable and graded. Gender is not an innate, unchangeable entity; it is socially constructed and “individually imposed through socially recognized performances and acts”.¹⁷⁸ Surya Monro, through writings, highlights the ‘gender-blindness’ of conventional approaches to citizenship.¹⁷⁹ Monro’s critique also highlights how feminist analyses of citizenship often exclude transgender persons, and largely ignore the “troubling of gender and sexual orientation categories” that transgender and intersex persons provoke.¹⁸⁰ Gee Semmalar states that “gender is a public concept” and that the very presence of transgender persons disrupts the “heteropatriarchal boxes of acceptable gender categories”.¹⁸¹

In order to acquire legal citizenship, transgender persons must make themselves legible to the legal system which demands that bodies be either ‘male’ or ‘female’.¹⁸² This bureaucratic division renders those who do not identify as either culturally unintelligible and, thus, unequal citizens. When this binary is challenged by transgender persons, through the NALSA case for example, the courts “inevitably rely on classifications to understand and define legitimate identities.”¹⁸³ In these circumstances, inclusion (in the full spectrum of citizenship rights) can often just mean seeking legitimacy from the state and society.¹⁸⁴ However, due to the cis-heteronormative State and the resulting legislative violence, the ‘legitimacy’ that the Transgender Persons Act offers to transgender persons is illusory. As we demonstrate in the next section, the inclusion of transgender persons in the fold of citizenship is done through a protectionist and paternalistic lens. The ‘legitimate’ transgender citizen, then, is one that the State can protect and ‘rehabilitate’, and not a person with autonomy.

¹⁷⁶ Ditilekha Sharma, *Determination of Citizenship through Lineage in the Assam NRC Is Inherently Exclusionary*, EPW, April 6, 2019, available at <https://www.epw.in/engage/article/determination-citizenship-through-lineage-assam-nrc-exclusionary> (Last visited on August 25, 2020).

Id.

¹⁷⁷ Bishnupriya Dutt, Janelle Reinelt and Shrinkhla Sahai, *Introduction* in *GENDERED CITIZENSHIP, MANIFESTATIONS AND PERFORMANCE*, Dutt, Reinelt, and Sahai ed., 1-18 (2017).

¹⁷⁸ Dipika Jain and Kimberly M. Rhoten, *Epistemic Injustice and Judicial Discourse on Transgender Rights in India: Uncovering Temporal Pluralism*, 26 *JOURNAL OF HUMAN VALUES* 1, 30-49 (2020).

¹⁷⁹ Surya Monro, *Transgender Politics in the UK*, 23 *Critical Social Policy* 4, 433-452 (2003).

¹⁸⁰ *Id.*

¹⁸¹ Semmalar, *supra* note 78.

¹⁸² Jain and Rhoten, *supra* note 178.

¹⁸³ *Id.*

¹⁸⁴ Ranjita Mohanty, *Gendered Subjects, Gendered Citizens: Women, Citizenship Rights and the State in the South*, African Centre for Citizenship and Democracy (2012).

3. Paternalistic Approach of Transgender Persons Act

In retaining the language of ‘rehabilitation’, the Transgender Persons Act and the Draft Rules both treat transgender persons as victims in need of protections, as opposed to rights-bearing agents in civil society. §8(4) of the Act calls on the government to take welfare measures for “rescue, protection and rehabilitation”. Similarly Rule 10(5) mentions *inter alia* the construction of ‘rehabilitation centres’ for transgender persons. While rehabilitation centres may act as shelters for transgender persons whose families are unable to take care of them, this is not unlike the paternalistic rehabilitation framework of policies related to sex work in India; the state and NGOs conduct raids to ‘rescue’ sex workers and place them in rehabilitation facilities.¹⁸⁵ This is seemingly for vocational training, but sex workers often live in unsanitary conditions and experience abuse in these facilities.¹⁸⁶ Rehabilitation facilities can replicate jail-like conditions, and sex workers who are forced into these facilities experience high rates of violence in them.¹⁸⁷ Collectives such as the National Network of Sex Workers have advocated for sex work to be recognised as any other work, and have argued against forced rescue-and-rehabilitation models. As NNSW highlights in a statement to the Committee on the Elimination of Discrimination Against Women, voluntary sex work is a “a contractual arrangement where sexual services are negotiated between consenting adults”.¹⁸⁸ In trying to deal with concerns around trafficking, the government conflates it with sex work and erases the agency of sex workers.¹⁸⁹ The inclusion of a rehabilitation framework into the Transgender Persons Act has raised concerns of abuse of these provisions by law enforcement, to crack down not only on transgender sex workers, but on other individuals under anti-beggary laws where the language is vague enough to allow for unchecked violence, and for transgender persons to be detained indefinitely in beggar’s homes set up under these laws.¹⁹⁰

Thus, the law sets itself as the final authority in determining an individual’s gender identity, making it arduously bureaucratic and against the principle of self-determination. By stripping transgender persons of their autonomy and

¹⁸⁵ Aziza Ahmed and Meena Seshu, *We have the Right not to be ‘Rescued’...:When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers*, 1 ANTI-TRAFFICKING REVIEW, 149-168 (2012).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ National Network of Sex Workers (NNSW), Alternative Law Forum (ALF), Institute for Public Policy, National Law School of India University (NLSIU) India, *Response to Concept Note prepared for the Committee on the Elimination of Discrimination Against Women on its elaboration of a General Recommendation on Trafficking in Women and Girls in the Context of Global Migration*, available at <http://nnswindia.org/upload/resources/2019/response-concept-note-on-gr-trafficking-migration.pdf> (Last visited August 29, 2020).

¹⁸⁹ Dipika Jain and Kimberly Rhoten, *Sex Work and the Law in India: Perspectives, Voices and Narratives from the Margins*, Vol. 40, HARV. WOMEN’S L.J. (2017).

¹⁹⁰ Ajita Banerjee, *Transgender Persons Bill has Let Down the Community’s Long Struggle for Self-respect*, THE INDIAN EXPRESS (Dec 2, 2019), available at <https://indianexpress.com/article/opinion/columns/transgenders-rights-bill-parliament-winter-session-6145980/> (Last visited on August 25, 2020).

treating them merely as passive recipients of state welfare, the Act violates their right to live with dignity and their right to freedom of speech and expression guaranteed under Articles 19(1)(a) and 21 of the Constitution of India. Vikramaditya Sahai, an activist and independent researcher writes that the Transgender Persons Act withdraws the ability to consent from transgender persons, thus making them “unequal in the response-abilities between them and the state”.¹⁹¹ By robbing transgender persons of the right to gender self-identification, the law turns the “trans person into just a trans body”.¹⁹² This reductive treatment of trans identities by the State clearly shows the cis-heteronormative regulatory basis upon which citizenship is granted to individuals and communities.

Thus, the citizenship imagined in the Transgender Persons Act is not a ‘full’ citizenship or membership in Indian society, but the relegation of transgender persons into a space where they are ‘passive citizens’ as opposed to ‘active’ citizens. Bhargava argues that passive citizens are entitled to the minimum of material well-being, physical security, and non-interference in a ‘sphere of one’s own’.¹⁹³ Active citizens, by contrast, are recognised as ‘equal participants in the public domain’. The provisions of the Transgender Persons Act allow for access to certain basic protections, necessities and liberties, but leave no space for negotiation and active engagement with the state.¹⁹⁴ Although the Act does, in a way, concretise citizenship entitlements, transgender persons’ location within social structures (marked by discrimination, violence and oppression) and the lack of legal provisions results in them obtaining “differentiated” citizenship rights.¹⁹⁵ Such differential citizenship rights between populations and communities indicate that certain sections’ rights are undermined, perhaps by the absence of a proactive state and/or the absence of social conditions that would enable those persons to effectively exercise their citizenship.¹⁹⁶

There is an aspect of differential citizenship that is constructed through bureaucratic systems and the process of ‘waiting’ for the State to address claims.¹⁹⁷ In the Draft Rules to the Transgender Persons Act, Rule 9 provides that an individual will have 60 days to appeal the rejection of their application to obtain a gender identity certificate.¹⁹⁸ However, the right to enforce fundamental rights is guaranteed under Articles 32 and 226 of the Constitution. Since legal recognition

¹⁹¹ Sahai, *supra* note 178.

¹⁹² *Id.*

¹⁹³ Rajeev Bhargava, *The Distinctiveness of Indian Secularism* in *THE FUTURE OF SECULARISM* (T.N. Srinivasan ed., 2006).

¹⁹⁴ Anurekha Chari, *Gendered Citizenship and Women’s Movement*, 44 *ECONOMIC & POLITICAL WEEKLY* 17, 47-57 (2009).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Grace Carswell, Thomas Chambers, and Geert De Neve, *Waiting for the State: Gender, Citizenship and Everyday Encounters with Bureaucracy in India*, 37 *POLITICS AND SPACE* 4, 597-616 (2019).

¹⁹⁸ Rule 9 reads: The applicant shall have a right to appeal, within sixty days from the date of intimation of the rejection of the application, to the appellate authority as designated by the appropriate Government for a final order.

of one's gender identity is a fundamental right held by NALSA, setting a time limit on the appeal process forecloses the possibility of legal recourse and thus violates the fundamental rights of transgender persons. By including provisions like these in the legislation, the State permits limited citizenship to transgender persons.

Additionally, bureaucratic practices in India are a form of structural violence that excludes certain groups from material entitlements or citizenship rights. The Indian bureaucracy is so notorious for its waiting process and 'red-tapeism' that it is the subject of much humour both within and outside the country.¹⁹⁹ Research in Tamil Nadu villages highlights the tediousness of waiting to obtain documents such as ration cards, voter IDs, and other certificates for welfare benefits. The application process requires numerous visits to government offices, and paperwork often gets stuck at some level of the bureaucracy, without the person receiving any information about the status of their application. However, contrary to the argument that these bureaucratic actions are arbitrary, research shows that the outcomes of these actions are actually the systemic products of discrimination based on gender, caste and religion. Waiting produces "hierarchies which segregate people and places into those that matter, and those that do not" and the consequences of not waiting include the denial of citizenship.²⁰⁰

As we have explained, the Transgender Persons Act sets out a complicated web of barriers to legal recognition of one's gender. Transgender persons must navigate this web in order to obtain documents that reflect the changes in their name and/or gender identity. The ability to change one's name to reflect gender identity can be fundamental to notions of belonging and recognition.²⁰¹ Names can become active sites of contested citizenship, as changing the "elements of identity believed to be stable and fixed, such as names and sex/gender, challenges the normative construct of citizen".²⁰² With the enactment of the CAA, and the proposed NRC, transgender persons are likely to face additional hurdles in legal recognition.

While the State may appear to recognise and protect the rights of transgender persons through the enactment of this legislation, the realisation of these rights through a complicated bureaucratic process completely strips away the autonomy of transgender persons. 'Full' citizenship for transgender persons is contingent on their capacity to navigate this process and successfully negotiate with the State to gain recognition of their gender identity. In this section, we have analysed in detail the Constitutional violations of the Act. In Part III, we look at the CAA-NRIC and how the connection between these laws and the Transgender Persons Act is likely to have a disproportionate impact on transgender persons. We

¹⁹⁹ Laura Mallonee, *Capturing Humor in a Sea of Red Tape*, WIRED, May 22, 2018, available at <https://www.wired.com/story/photography-india-red-tape/> (Last visited on August 25, 2020).

²⁰⁰ Carswell, Chambers and De Neve, *supra* note 197.

²⁰¹ Tre Wentling, *Contested Citizenship: Renaming Processes among People of Transgender Experience*, JOURNAL OF HOMOSEXUALITY, 1–22 (2019).

²⁰² *Id.*

also explore the history of resistance by transgender movements to the legislative violence of the State, and examine how these moments of resistance envision an alternative politics.

III. “IDENTITY” FICATION CITIZENSHIP

There has long been a contested relationship between identity documents and citizenship in postcolonial South Asia.²⁰³ Identity documents are central to the bureaucratic state, especially in India, where welfare policies have elaborate documentary requirements which “lend an aura of transparency, while perversely obfuscating the actual goings on”.²⁰⁴ The relationship between identity documents and citizenship has also come up periodically in postcolonial India, with the rise of right wing political ideals creating uncertainty for people “deemed to be on the ‘margins’ of the state”.²⁰⁵ Citizenship through an examination of these identity documents shows “dangerous erraticism” where identity documents can be used as “political currency” to be traded, verified, devalued and even cast as null and void.²⁰⁶ Anupama Roy aptly describes the iterative character of bureaucracy as “back-and-forth movements of files across various departments in the process of executive decision making” which reveals the processes through which the State designs systems of classifications for its citizens.²⁰⁷ Nayanika Mathur highlights the ‘illegibility’ of the law as an inherent part of the way in which laws are made real. Mathur describes it as the ‘paper state’ where the primary means through which laws and policies are implemented is “by the production, circulation, reading, and filing of the correct documents”.²⁰⁸ Shirin Rai also notes that documents “form a critical materiality of citizenship”; for example, BPL (below poverty line) cards in India allow people to access welfare benefits but also mark them as dependent on the state, whereas PAN cards reflect their status as taxpayers who also contribute to the state.²⁰⁹

The significance of documents is evident in the proposed NRIC, which would require transgender persons to prove their citizenship status even as they struggle to obtain the appropriate documents reflecting their self-determined gender identity. As we show in the following sections, the challenges transgender persons are likely to face in obtaining identity documents through the process set

²⁰³ Vasudha Chhotray and Fiona McConnell, *Certifications of Citizenship: the History, Politics and Materiality of Identity Documents in South Asian States and Diasporas*, 26 CONTEMPORARY SOUTH ASIA 2, 111-126 (2018).

²⁰⁴ *Id.*, at 114.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Anupama Roy, *Making Citizenship Familiar: ‘Truth’ Tales and the Partition Archive(s)*, in GENDERED CITIZENSHIP MANIFESTATIONS AND PERFORMANCE, 45-61 (Bishnupriya Dutt, Janelle Reinelt, Shrinkhla Sahai, 2017).

²⁰⁸ MATHUR, *supra* note 138, at 18.

²⁰⁹ Shirin M. Rai, *The Dilemmas of Performative Citizenship*, in GENDERED CITIZENSHIP MANIFESTATIONS AND PERFORMANCE, 25-43 (Bishnupriya Dutt, Janelle Reinelt, Shrinkhla Sahai, 2017).

out by the Transgender Persons Act will only add to the challenges that the CAA and NRIC will subject them to.

A. THE EVIDENTIARY BURDEN OF CITIZENSHIP

1. CAA- NRIC Nexus

One week after the President assented to the Transgender Persons Act, another moment of unconstitutional law-making was marked when he assented to the CAA, 2019.²¹⁰ The government had justified this amendment to the Citizenship Act by stating that the CAA will protect those fleeing religious persecution in Pakistan, Afghanistan and Bangladesh.²¹¹ However, the CAA explicitly excludes Muslim minority groups facing persecution.

The NRIC emerged from §14A of the Citizenship Act,²¹² as amended in 2003, which mandates the government to register every citizen of India. The execution of the NRIC would be prescribed by Rules under the Act, and the Citizenship Rules 2003 had provided that the Central Government should start compilation of a ‘National Population Register’ (NPR) for the purpose of the NRIC – making the creation of the NPR the first step for operationalisation of the NRC

²¹⁰ HINDUSTAN TIMES, *Citizenship (Amendment) Bill gets President Kovind’s Assent, Becomes an Act*, August 4, 2020, available at <https://www.hindustantimes.com/india-news/citizenship-amendment-bill-gets-president-kovind-s-approval-becomes-act/story-3871l0dGY7N7YljqPXtxI.html> (Last visited on August 25, 2020).

²¹¹ INDIA TODAY, *Indian Muslims have Nothing to Fear, Says Amit Shah as Lok Sabha Passes Citizenship Amendment Bill*, (December 10, 2019), available at <https://www.indiatoday.in/india/story/citizenship-amendment-bill-passed-debate-lok-sabha-amit-shah-1626854-2019-12-10v> (Last visited on August 25, 2020) (Home Minister Amit Shah stated that Indian Muslims had nothing to fear because the Citizenship Amendment Bill “only intends to provide protection to the persecuted minorities in Pakistan, Afghanistan and Bangladesh”); Human Rights Watch, *India: Citizenship Bill Discriminates Against Muslims: Draft Law Favors Hindus, Other Non-Muslim Immigrants*, December 11, 2019, available at <https://www.hrw.org/news/2019/12/11/india-citizenship-bill-discriminates-against-muslims> (Last visited on August 25, 2020).

²¹² The Citizenship Act, 1955, §14A (Section 14A of the Citizenship Act, 1955 reads as follows:

14A. Issue of national identity cards.—

- (1) The Central Government may compulsorily register every citizen of India and issue national identity card to him.
- (2) The Central Government may maintain a National Register of Indian Citizens and for that purpose establish a National Registration Authority.
- (3) On and from the date of commencement of the Citizenship (Amendment) Act, 2003, the Registrar General, India, appointed under sub-section (1) of section 3 of the Registration of Births and Deaths Act, 1969 (18 of 1969) shall act as the National Registration Authority and he shall function as the Registrar General of Citizen Registration.
- (4) The Central Government may appoint such other officers and staff as may be required to assist the Registrar General of Citizen Registration in discharging his functions and responsibilities.
- (5) The procedure to be followed in compulsory registration of the citizens of India shall be such as may be prescribed.)

on a pan-India level.²¹³ Upon compilation of the NPR, local government officials are allowed to identify persons with ‘doubtful’ citizenship with full discretion, and are given the power to demand information and documents from such persons.²¹⁴ Local government functionaries granted this power shall be at a tahsildar level and above, with unguided and unmonitored discretion to carry out functions under the NPR. This exercise requires residents to provide documents such as land records, birth certificates and educational records amongst others, which many people may not possess.²¹⁵ The entire burden of proving one’s citizenship lies on the individual and not the State. The lack of documentation has characterised exclusion by Foreigners Tribunals in Assam, where even small errors in documents (such as misspelling of names) has resulted in people being declared ‘foreigners’ and deprived of their citizenship.²¹⁶ Millions of people also found their citizenship status in jeopardy due to being unable to trace legacy data, to prove residence in Assam prior to 1971.²¹⁷

Once a register of citizens is created, non-Muslims whose citizenship is challenged may still be able to appeal for citizenship. Muslims, however, are in danger of being detained as ‘illegal migrants’ as they are afforded no protection under the CAA. With the CAA, the Government has aligned Hindutva exclusion with Western Islamophobia, using strategies prescribed under the law for detention and deportation of people considered to be ‘not of the land’, and casting Muslims as ‘illegal immigrants’.²¹⁸ Negotiating racial and cultural boundaries, in such cases with the state and claiming citizenship “depends on how one is constituted as a subject who exercises or submits to power relations; one must develop what Foucault calls “the modern attitude,” an attitude of self-making in shifting fields of power that include the nation-state and the wider world”.²¹⁹

²¹³ Harsh Mander & Mohsin Alam Bhat, *Why the National Population Register is More Dangerous than the Assam NRC*, SCROLL, January 12, 2020, available at <https://scroll.in/article/949097/why-the-national-population-register-is-more-dangerous-than-the-assam-nrc> (Last visited on August 25, 2020).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* (While the Foreigners Tribunals are not part of the NRC process, the evidentiary burden on individuals and the exclusions that result are similar).

²¹⁷ THE QUINT, *How Do I Prove to Assam NRC That My Wife Is an Indian?*, December 27, 2017, available at <https://www.thequint.com/voices/blogs/assam-nrc-indian-citizenship> (Last visited on August 25, 2020); News 18, *Paper Trails: How People in Assam Clung Onto 6.6 Crore Documents for Decades to Prove Citizenship*, August 31, 2019, available at <https://www.news18.com/news/india/paper-trails-how-people-in-assam-preserved-6-6-cr-documents-for-decades-to-prove-their-citizenship-2291453.html> (Last visited on August 25, 2020); THE HINDU, *The Problem with NRC is People Lack Documentation*, December 22, 2019, available at <https://www.thehindu.com/news/cities/mumbai/the-problem-with-nrc-is-people-lack-documentation/article30369697.ece> (Last visited on August 25, 2020).

²¹⁸ THE WIRE, *‘Invaders’, ‘Terrorists’ and Now ‘Illegal Immigrants’: Hindutva’s Reframing of Exclusion*, February 7, 2020, available at <https://thewire.in/rights/hindutva-cao-nrc-immigrants> (Last visited on August 25, 2020).

²¹⁹ Aihwa Ong, *Cultural Citizenship as Subject-Making*, 37 CURRENT ANTHROPOLOGY 5 (1996).

As Niraja Jayal argues, “[t]he construction of Hindus as the natural and normal citizens of India, and of Muslims as somehow lesser citizens, is not just a debasement of the idea of India that joined 14 million people together in their struggle against imperial rule, it is also a transgression of the universalist and inclusive conception of citizenship contained in the Indian Constitution, especially in the chapter on Fundamental Rights”.²²⁰ In the following section, we examine the combined effect of the CAA, NRIC and Transgender Persons Act and argue that these laws, applied together, result in the denial of equal citizenship for transgender.

2. Effects of CAA-NRIC Nexus on Transgender Persons

The CAA-NRIC nexus not only discriminates based on religion,²²¹ it also has adverse consequences for transgender persons. Many transgender people do not have documents aligned with the name and gender of their choice and have limited connection to their natal families. Additionally, the Transgender Persons Act requires them to navigate a series of convoluted and medicalised processes as outlined in this article, to even be considered for a change to their legally approved gender. This makes it extremely difficult for transgender persons to produce the necessary documents to prove their citizenship. Since §7 of the Transgender Persons Act requires the submission of a certificate attesting to the applicant having undergone ‘medical intervention’ to change gender, this poses a major challenge to transgender persons who may not have the financial resources to get Gender Affirming procedure or do not wish to get one, or may undergo gender affirming procedures outside formal medical institutions.²²²

Karthik Bittu Kondaiah argues that the CAA-NRIC nexus (with the NPR) will end up casting a wide net that targets all marginalised persons without legacy documents, including transgender persons, many of whom do not maintain connections with their birth families.²²³ The absence of documents with self-determined gender marker and/or name means that transgender persons may be forced to use their old identity documents for enrolment in the NRIC, or may be left out of

²²⁰ THE WIRE, *The 2016 Citizenship Amendment Bill Consolidates a Trend Towards a Majoritarian and Exclusionary Concept of Indian Citizenship*, February 20, 2017, available at <https://caravan-magazine.in/vantage/2016-citizenship-amendment-bill-majoritarian-exclusionary> (Last visited on August 25, 2020).

²²¹ The Indian Express, *Citizenship Amendment Act: ‘Principle of Discrimination Based on Faith will be Difficult to Limit’*, December 24, 2019, available at <https://indianexpress.com/article/explained/indian-constitution-citizenship-amendment-act-modi-govt-6181761/> (Last visited on August 25, 2020).

²²² Although the Transgender Persons Act 2019 refers to ‘sex reassignment surgery’, this article uses the term ‘gender affirming surgery’ or ‘gender affirming procedure’ which encompasses a range of procedures, other than surgery, that an individual might undergo during the transition process.

²²³ Bittu K.R., *India’s Transgender Community Must Gear Up For A Long Fight*, HUFFINGTON POST, February 6, 2020, available at https://www.huffingtonpost.in/entry/transgender-citizenship-amendment-act_in_5e340c60c5b69a19a4ad9e15 (Last visited on August 29, 2020).

enrolment altogether. The inclusion of transgender persons in the NRIC depends largely “on the trans sensitivity and awareness of the local responsible official”.²²⁴

3. Identity Documentation and the Dismantling of Citizenship

The post colonial Indian subcontinent indicates a “fraught relationship” between identity documents and citizenship, where governments of newly independent and partitioned India and Pakistan had to deal with issues of citizenship in the midst of mass migrations across borders.²²⁵ This historical relationship between identity documentation and citizenship shows that identity papers play “a vital part in certifying and authenticating claims to citizenship”.²²⁶ A perusal of various kinds of identity papers serves to largely dismantle citizenship as a universal or absolute notion, instead revealing hierarchies and degrees of citizenship amongst different peoples.²²⁷

While the NRIC’s exact documentation requirements are yet to be confirmed, if the Assam process is any indication, women and transgender persons will be among the worst affected in a nationwide NRC exercise. Out of almost 2 million people in Assam without requisite documents to confirm citizenship, about 69% were women.²²⁸ Women and transgender persons were forced to go back to their paternal homes to find documentation, as the NRC only took into account patrilineal documentation, even if matrilineal documentation was available.²²⁹ Documentation for the NRC included proof of having voted in a past election, and tenancy records, government-issued license or certificate, bank or post office accounts, birth certificate, state or university educational certificate, passport or a life insurance policy, requiring individuals to “have agency over their functioning in Indian society – a privilege that has never been accorded to many groups in the country”.²³⁰ The evidentiary burden of proof of citizenship, as demanded for by the NRIC exercise, is not one that many transgender people can meet, especially those who face compounded effects of marginalisation on the basis of their caste, class, or religion.

The NRC process in Assam was also exceedingly exclusionary to those people outside the norms of the heteronormative familial structure,

²²⁴ *Id.*

²²⁵ Chhotray and McConnell, *supra* note 203.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ FOREIGN POLICY, *India’s New Laws Hurt Women Most of All*, February 4, 2020, available at <https://foreignpolicy.com/2020/02/04/india-citizenship-law-women/> After the implementation of the, percent of them were women. (Last visited on August 25, 2020).

²²⁹ THE CITIZEN, *Women ‘Worst Victims’ of NRC: Gendered and Discriminatory Nature of the Register Revealed*, November 29, 2020, available at (Last visited on August 25, 2020).

²³⁰ THE SWADDLE, *How the NRC-CAA Will Affect Women, Transgender People and People with Disabilities*, THE SWADDLE, December 26 2019, available at <https://theswaddle.com/how-the-nrc-cao-will-affect-women-transgender-people-and-people-with-disabilities/> (Last visited on August 25, 2020).

particularly impacting the lives of marginalised communities.²³¹ Assam, being a flood-prone area, sees millions of people annually losing their homes and possessions, including documents – making retention of paperwork the primary domain of the privileged.²³² Further, the legal structures mandating paperwork are colonial constructs, which, till this day, have not been understood or adopted by peasant or tribal communities.²³³ Exclusion based on caste and migration, such as the case of people of the *Namashudras* (a Scheduled Caste who originally inhabited East Bengal) has been rampant, resulting in wide NRC exclusion and the exclusion of women, who may not have requisite documentation due to child marriage or other considerations, as well as Muslim and Bengali Hindu women who were arbitrarily exposed to strict verification procedures.²³⁴ The NRIC and the CAA together have been said to “protect and validate the heteronormative upper-caste Hindu family in the name of giving protection to marginalised groups”, which can be seen in proposed laws like the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2019,²³⁵ and the Surrogacy (Regulation) Bill, 2016,²³⁶ which formally state that they wish to protect trafficked persons and women, but operationally push them into more vulnerable positions.²³⁷

The CAA has been described as an ‘attack on Muslims’ and its contextual premise is Islamophobia.²³⁸ As Sharjeel Usmani argues, the NRIC-CAA was introduced to “eliminate the enemy” of the State who is Muslim.²³⁹ Since the CAA provides an “escape hatch for non-Muslims to appeal for citizenship”,²⁴⁰ Muslim transgender persons would be additionally negatively impacted by this law. However, in the NRIC exercise, the eligibility for inclusion into the nation for

²³¹ Sharma, *supra* note 70.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ This Bill makes sex-workers more vulnerable to law enforcement and non-state agencies under the ‘raid-rescue-rehabilitation’ model that ends up with many of them being detained in shelter homes for years at a time, under the guise of protection and rehabilitation.

²³⁶ This Bill pushes surrogacy underground under the guise of empowering women, and promotes heteronormative assumptions of familial relationships by mandating only “close relatives” as being eligible to be surrogate mothers and prohibiting same-sex and unmarried couples from engaging surrogates.

²³⁷ Sharma, *supra* note 70.

²³⁸ Sharjeel Usmani, *A Muslim Affair: Anti-CAA Protests are against Islamophobia, can't be Turned into BJP vs Opposition Slugfest*, FIRSTPOST, January 12, 2020, available at <https://www.firstpost.com/india/a-muslim-affair-anti-caa-protests-are-against-states-islamophobia-cant-be-appropriated-into-bjp-opposition-or-hindu-india-vs-secular-india-match-7895191.html> (Last visited August 29, 2020).

²³⁹ *Id.*

²⁴⁰ SCROLL.IN, *The NRC is a Bureaucratic Paper-monster that will Devour and Divide India*, January 14, 2020, available at https://scroll.in/article/948969/the-nrc-is-a-bureaucratic-paper-monster-that-will-devour-and-divide-india?fbclid=IwARl_SpWGqmvJd1DnGQH62MT5pzBxjBwryffvBQyN7cjiUSG0sP_XC67ptEo (Last visited on August 25, 2020).

migrants was tied not only to their religion but also to their caste.²⁴¹ The NRC in Assam, excluded many oppressed caste Hindus along with Muslims.²⁴² Thus, the CAA, NRIC and the Transgender Persons Act together place transgender persons in an extremely vulnerable position. The combination of the Transgender Persons Act with the CAA-NRIC will have an adverse and disproportionate impact on transgender persons, who risk being excluded from citizenship due to absence of or discrepancies in their documentation.

It is imperative to recognize the power dynamic in articulating claims for rights and conferring of citizenship by the State. For ‘active citizens’, engagement with the state involves the receipt of rights, active participation in determining the distribution of rights, obligations, benefits and burdens on a collective level and negotiating with the state in the “vibrant public sphere”.²⁴³ For ‘passive citizens’, however, the nature of engagement is completely different, with the state granting private spaces (if at all) as the domain of such a citizen, and there being no affirmative engagement between the citizen and the state in the public domain.²⁴⁴ Power dynamics when negotiating with the state, whose ideologies have been seen, in recent times, to move towards right wing, neoliberal, Hindutva, nationalistic rhetoric, stem straight from identities who are ‘valued’ by such rhetoric (i.e. Hindu, male, cisgender, heterosexual etc.). Differentiated citizenship rests on the disenfranchisement of different peoples, the majority of whom experience the effects of economic disparity and inherited social inequalities.²⁴⁵

The CAA and the Transgender Persons Act are linked to each other through the underlying Brahminism and Islamophobia.²⁴⁶ The nexus between the CAA-NRIC and the Act brings up the question of whether claiming citizenship in India is possible only through a performance of Hindu nationalism. However, as Sayan Bhattacharya argues, a meta-narrative around non-citizens who cannot perform such nationalism, and thus are excluded from citizenship, “risks the danger of missing out on the micro-narratives of resistance and protests” emerging from transgender movements.²⁴⁷

B. NARRATIVES OF RESISTANCE

Satya Rai Nagpaul, founder of Sampoorna, A Network of Trans* & Intersex Indians, argues that the limits of a ‘trans utopia’ will be drawn and firmly

²⁴¹ Praskanya Sinharay, *To be a Hindu Citizen: Politics of Dalit Migrants in Contemporary West Bengal*, SOUTH ASIA: JOURNAL OF SOUTH ASIAN STUDIES 1–16 (2019).

²⁴² Praskanya Sinharay (2019).

²⁴³ Anurekha Chari (2009).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Bittu K.R., *India’s Transgender Community Must Gear Up for a Long Fight*, HUFFINGTON POST, February 6, 2020, available at https://www.huffingtonpost.in/entry/transgender-citizenship-amendment-act_in_5e340c60c5b69a19a4ad9e15 (Last visited on August 29, 2020).

²⁴⁷ Sayan Bhattacharya (2019).

maintained by the neoliberal, capitalist State.²⁴⁸ Marginalised groups have always resisted and negotiated with the State, either in the legal arena (through litigation, for example) or through powerful social and political movements that challenge hegemonic power. Dalit and Adivasi communities, for example, have brought to our attention “powerful indigenous interpretations of political participation that challenge their social exclusion, political subjection, and economic exploitation under the present regime”.²⁴⁹ After the massacre of a Dalit family in Khairlanji, Maharashtra a Dalit women’s organisation in in Bhandara was the first to mobilise for a public protest – not just against the perpetrators but against “the criminality of the state machinery in protecting them”.²⁵⁰ Over the next few weeks, Dalit women took the lead in organising protests and rallies, calling for the State to take action against the perpetrators. As Anand Teltumbde states, it is Dalit women who have often “taken vanguard positions whenever the struggle has demanded militancy”.²⁵¹

Sara Ahmed’s work on complaints – which institutions often push aside and take no action with – “reimagines a new mode of resistance to the complainers” that brings back their agency.²⁵² Ratna Kapur has also highlighted the resistances of marginalised women, which serve to disrupt a “totalizing narrative” of victimhood and uniform oppression.²⁵³ The rhetoric that projects Third World Women as “victim subjects” both conflates them into a “monolithic victim group” and denies their capability for self-determination is sharply contrasted by instances of powerful uprising and resistance, demonstrating agency, autonomy and the struggle to negotiate for rights in the face of a cis heteronormative patriarchal State.²⁵⁴ Ahmed states that we need to survive the institutions we are trying to transform²⁵⁵, and that with each complaint “you leave a piece of yourself behind”. These pieces eventually add up to form a resistance that cannot be ignored.²⁵⁶ “If we don’t complain”, says Ahmed, “some of us won’t be here”.²⁵⁷ The emancipatory

²⁴⁸ Satya Rai Nagpaul, *Promised Empowerment of Trans People and the New Dealers of a False Liberty*, THE INDIAN EXPRESS, November 30, 2017, available at <https://indianexpress.com/article/lifestyle/life-style/promised-empowerment-of-trans-people-and-the-new-dealers-of-a-false-liberty-4783844/> (Last visited on August 29, 2020).

²⁴⁹ Jaoul, *supra* note 14.

²⁵⁰ ANAND TELTUMBDE, THE PERSISTENCE OF CASTE: INDIA’S HIDDEN APARTHEID AND THE KHAIRLANJI MURDERS 120 (2010).

²⁵¹ *Id.*

²⁵² Nelly Wat and Michaela Keil, *Complaint as Queer Method*, THE MCGILL DAILY, October 21, 2019, available at <https://www.mcgilldaily.com/2019/10/complaint-as-queer-method/> (Last visited on August 29, 2020).

²⁵³ RATNA KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* (2013).

²⁵⁴ *Id.*

²⁵⁵ Sara Ahmed, *Slammed Doors*, Feministkilljoys, March 17, 2020, available at <https://feministkilljoys.com/2020/03/17/slammed-doors/> (Last visited on August 29, 2020).

²⁵⁶ Nelly Wat and Michaela Keil, *Complaint as Queer Method*, THE MCGILL DAILY, October 21, 2019, available at <https://www.mcgilldaily.com/2019/10/complaint-as-queer-method/> (Last visited on August 29, 2020).

²⁵⁷ Sara Ahmed, *Feminist Complaint*, feministkilljoys, December 4, 2014, available at <https://feministkilljoys.com/2014/12/05/complaint/> (Last visited on August 29, 2020).

politics of movements led by marginalised persons do not rest on the categories of the liberal State but instead envision alternative ways of politics and imaginations of citizenship.²⁵⁸

As we detailed in Part II of the article, the legislative history of the Transgender Persons Act is marked by widespread resistance.²⁵⁹ While the Transgender Persons Act should have addressed these issues, the government's approach to drafting the Bills was instead one that did not take the concerns of transgender persons seriously.

The 2016 Bill was instantly met with backlash from transgender persons for many reasons, including the introduction of mandatory 'district screening committees' that would be empowered to decide on a person's gender identity.²⁶⁰ In sharp contrast to the earlier drafts, the 2016 Bill contained a transphobic definition of 'transgender person' as a person who is "neither wholly female nor wholly male, or a combination of female or male, or neither female nor male" and further "whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers".²⁶¹ A consolidated statement with responses from 'Trans and Intersex communities' as well allies, published on the Orinam website after the introduction of the Bill in the Lok Sabha, calls the definition a "gross violation of human rights" as well as pathologising and scientifically incorrect.²⁶² The Bill's inclusion of intersex persons within the definition of transgender – which has carried on over to the current Act – was also criticized in the statement, as not all intersex persons identify as transgender.

Due to the protests and calls to stop the Bill from passing, the Lok Sabha set up a Standing Committee and invited trans-led groups and activists to depose before it. Sampoorana Working Group ('SPWG') states that it had been in touch with MPs and members of the Committee and was invited to depose in December 2016. The SPWG website documents all the statements issued and the

²⁵⁸ *Id.*

²⁵⁹ THE INDIAN EXPRESS, *Transgender Persons Bill: In Rajya Sabha, Opposition Likely to Demand Scrutiny by Select Committee*, December 19, 2018, available at www.indianexpress.com/article/india/transgender-persons-bill-in-rajya-sabha-opposition-likely-to-demand-scrutiny-by-select-committee-5499534/ (Last visited on August 25, 2020); THE WIRE, *Why the Transgender Community is Angry over a Bill Meant to Protect their Rights*, December 19, 2018, available at <https://thewire.in/lgbtqia/why-the-transgender-community-is-angry-over-a-bill-meant-to-protect-their-rights> (Last visited on August 25, 2020).

²⁶⁰ THE WIRE, *Why We Should Pay Urgent Attention to a Campaign to Stop the Trans Bill 2016*, December 2, 2017, available at <https://thewire.in/gender/pay-urgent-attention-campaign-stop-trans-bill-2016> (Last visited on August 25, 2020).

²⁶¹ The Transgender Persons (Protection of Rights) Bill, 2016, §2(i).

²⁶² Orinam, *The Transgender Persons (Protection of Rights) Bill, 2016, Responses From the Trans & Intersex Communities*, available at http://orinam.net/content/wp-content/uploads/2016/08/Trans-led_CommunityResponse_to-StandComm_TGBill_2016.pdf (Last visited on August 25, 2020).

demands by transgender and intersex groups for revisions to the Bill.²⁶³ In July 2017, the Standing Committee released its report documenting the suggestions made all stakeholders and making some recommendations to modify provisions of the Bill.²⁶⁴ However, instead of deliberating on any of the suggestions, the MSJE rejected all recommendations. The statement by Sampoorna in response to this notes that “India will be stepping backwards in immeasurable ways, if this bill is passed”.²⁶⁵ Many transgender persons engaged with the consultation process in good faith, but the unwillingness to deliberate on any of their suggestions betrays the State’s apathy towards protecting the rights of transgender persons.²⁶⁶

Although the MSJE initially rejected all the recommendations, in 2018, the Lok Sabha passed a revised version of the Bill with 27 amendments, including an improvement in the definition of ‘transgender person’. The Minister for Social Justice and Empowerment, Gehlot, stated that a “long discussion” had taken place on the issue and that the MSJE had included several suggestions made by the Committee in this draft of the Bill.²⁶⁷ Transgender activists and collectives once again issued statements condemning the legislation and asking for a complete overhaul in order to “incorporate the community feedback given to the Standing Committee”.²⁶⁸ Significantly, these statements pointed out the violation of the right to self-determination of gender identity through the establishment of District Screening Committees which would be empowered to determine a person’s gender identity. This constant engagement with the law-making process is exhausting, but it also demonstrates the ability of transgender persons to negotiate with the State, even if it only results in incremental changes. After the backlash to the 2018

²⁶³ Sampoorna, *SPWG Deposition to Parliamentary Standing Committee on Social Justice & Empowerment, on TG Bill 2016: Part 1*, April 30, 2017, available at <https://sampoornaindiablog.wordpress.com/2017/04/30/spwg-deposition-to-parliamentary-standing-committee-on-social-justice-empowerment-on-tg-bill-2016/> (Last visited on August 25, 2020).

²⁶⁴ STANDING COMMITTEE ON SOCIAL JUSTICE AND EMPOWERMENT (2016-2017), *Sixteenth Lok Sabha, Report on the Transgender Persons (Protection of Rights) Bill, 2016*, Forty Third Report (July 2017) repeated use of the derogatory term ‘eunuch’. See Imaan Semmalar, *First as Apathy, Then as Farce: The Transgender Persons (Protection of Rights) Bill, 2016*, August 14, 2017, available at <http://orinam.net/apathy-farce-trans-rights-bill-standing-committee-report/> (Last visited on August 25, 2020) (See Semmalar has highlighted the problematic aspects of the report, such as its reliance on Hindu mythological characters and repeated use of the derogatory term ‘eunuch’).

²⁶⁵ Sampoorna, *SPWG Response to the BJP Government’s En-masse Rejection of the Parliamentary Standing Committee’s Recommendations on TG Bill 2016*, November 23, 2017, available at <https://sampoornaindiablog.wordpress.com/2017/11/23/spwg-response-to-the-bjp-governments-en-masse-rejection-of-the-parliamentary-standing-committees-recommendations-on-tg-bill-2016/> (Last visited on August 25, 2020).

²⁶⁶ For a more detailed explanation of these developments, please see Dipika Jain, *Law-Making by and for the People: A Case for Pre-legislative Processes in India*, Vol. 20(20), *STATUTE LAW REVIEW*, 1-18 (2019).

²⁶⁷ THE WIRE (PTI), *With 27 Amendments, Lok Sabha Passes Transgender Bill*, December 17, 2018, available at <https://thewire.in/government/with-27-amendments-lok-sabha-passes-transgender-bill> (Last visited on August 25, 2020).

²⁶⁸ Orinam, *The Transgender Persons (Protection of Rights) Bill, 2018*, available at <http://orinam.net/resources-for-law-and-enforcement/trans-persons-protection-rights-bill-2018/> (Last visited on August 25, 2020).

Bill, the MSJE reworked the draft and removed the Screening Committees. It also removed the provision that criminalised begging.²⁶⁹

However, the Bill that was finally introduced in the Lok Sabha in July 2019 still contained provisions that violated the fundamental rights of transgender persons, as we have demonstrated in Part II of the article. There have been numerous nationwide protests over the 2019 Bill, with transgender and gender rights activists staging marches and speaking out against it, including at Delhi's 12th Queer Pride Parade on November 24, 2019.²⁷⁰ People marched in the Parade not just to celebrate sexual diversity, but to protest against the regressive legislation and to urge lawmakers to reconsider passing the Bill.²⁷¹ Transgender collectives, individuals and groups have also been vocal about their opposition to the 2019 Bill through writing open letters, releasing statements, and holding press conferences. Transgender activist and one of the founding members of Telangana Hijra Intersex Transgender Samiti Rachna Mudraboyina, writing with two others, penned an extensive critique of the Bill which expressly highlights the resistance of Transgender movements:²⁷²

“We resisted, through every means available. Social media pages of transpersons saw an outpouring of personal struggles. The trans community took over public spaces by pouring out in thousands. A clearer voice opposing the law about to be foisted on the community couldn't be imagined.

[...]

²⁶⁹ THE ECONOMIC TIMES, *Government Makes Two Major Changes in Transgender Bill; May Introduce in Parliament Next Week*, July 18, 2019, available at <https://economictimes.indiatimes.com/news/politics-and-nation/government-makes-two-major-changes-in-transgender-bill-may-introduce-in-parliament-next-week/articleshow/70269765.cms> (Last visited on August 25, 2020).

²⁷⁰ Banerjee, *supra* note 106; The Hindu, *We Demand a Complete Rollback of the Bill, Says Trans Community*, December 1, 2019, available at <https://www.thehindu.com/news/cities/mumbai/we-demand-a-complete-rollback-of-the-bill-says-trans-community/article30127198.ece> (Transgender persons also held protests in Mumbai, Bengaluru, Chennai, Dehradun, Guwahati and other cities across the country) (Last visited on August 25, 2020); The News Minute, *'Will go to Court if we have to': Hundreds Protest Regressive Trans Bill in Bengaluru*, November 28, 2019, available at <https://www.thenewsminute.com/article/will-go-court-if-we-have-hundreds-protest-regressive-trans-bill-bengaluru-113077> (Last visited on August 25, 2020); G. Plus News, *Transgender Community Opposes Transgender Persons Bill 2019*, GUWAHATI PLUS August 10, 2019, available at <https://www.guwahatiplus.com/article-detail/transgender-community-opposes-transgender-persons-bill-2019> (Last visited on August 25, 2020).

²⁷¹ Sushmita Pathak, *India Just Passed a Trans Rights Bill. Why are Trans Activists Protesting it?* NPR, December 4, 2019, available at <https://www.npr.org/sections/goatsandsoda/2019/12/04/784398783/india-just-passed-a-trans-rights-bill-why-are-trans-activists-protesting-it> (Last visited on August 25, 2020).

²⁷² FEMINISM IN INDIA, *A Critique of Transgender Persons (Protection of Rights) Bill, 2019*, August 5, 2019, available at <https://feminisminindia.com/2019/08/05/critique-transgender-persons-protection-of-rights-bill-2019/> (Last visited on August 25, 2020).

We will continue to oppose this. Our throats cracked ages ago, hands bled and bodies tired. None of it has put a halt to our demand for what is rightfully ours.”

Transgender persons have also been at the forefront of speaking out against the CAA and NRIC/NRC. In December 2019, 15 transgender persons from Kerala staged a play with an all-black theme, as a protest against the CAA and NRIC.²⁷³ One of the actors stated that although it was originally conceived as a play about the types of discrimination transgender persons face, it was altered to include dialogues about the CAA and NRIC, with a black theme to protest the “politics of religion”.²⁷⁴ Similarly, on January 3, 2020, the birth anniversary of educator and reformer Savitribai Phule, transgender, queer and women activists marched against the Transgender Persons Act, the CAA and the NRIC.²⁷⁵ The nexus between these laws and their combined impact on marginalised communities is evident in one of the slogans that activists chanted at the march: “*Muslim, Dalit, Trans, Mahilavirodhi ye Sarkar, Nahichalegiabkibaar* (We reject this government that is against people from Muslim, Dalit, women and transgender communities)”.²⁷⁶

Chandra Mohanty argues that Western feminist discourse treats women as “an already constituted, coherent with identical interests and desires, regardless of class, ethnic or racial location or contradictions”.²⁷⁷ In 1977, when the Combahee River Collective issued its statement, Black feminists wrote²⁷⁸:

“The inclusiveness of our politics makes us concerned with any situation that impinges upon the lives of women, Third World and working people. We are of course particularly committed to working on those struggles in which race, sex, and class are simultaneous factors in oppression.”

It is useful to reflect here on Audre Lorde’s oft-quoted statement: “There is no such thing as a single-issue struggle because we do not live single-issue

²⁷³ THE NEWS MINUTE, *Play by Trans People in Kerala Uses Black Theme to Protest CAA, NRC*, THE NEWS MINUTE December 21, 2019, available at <https://www.thenewsminute.com/article/play-trans-people-kerala-uses-black-theme-protest-caa-nrc-114549> (Last visited on August 25, 2020).

²⁷⁴ *Id.*

²⁷⁵ *Id.*; THE WEEK (PTI), *On Savitribhai Phule’s Birthday, Women, Trans and Queer Persons march against CAA*, January 3, 2020, available at <https://www.theweek.in/news/india/2020/01/03/on-savitribhai-phules-birthday-women-trans-and-queer-persons-march-against-cao.html> (Last visited on August 25, 2020).

²⁷⁶ CITIZEN, *supra* note 252.

²⁷⁷ Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 12 BOUNDARY 2, 336-337 (1984).

²⁷⁸ Combahee River Collective, *The Combahee River Collective Statement*, available at https://americanstudies.yale.edu/sites/default/files/files/Keyword%20Coalition_Readings.pdf (Last visited on August 25, 2020).

lives”.²⁷⁹ While the politics of transgender activists recognise cis-heteronormativity as the main system of power structuring their lives, many are cognisant that heteronormativity interacts with structures of institutional casteism, Brahminical patriarchy and class. For example, Kanaga V, a transgender activist, states that caste privilege does not go away even when a person is a member of a marginalised group, such as if one is a woman, queer, or transgender person.²⁸⁰ She points to differences between some transgender persons fighting for social justice and reservation, and others calling for Sanatan Dharma to be brought back.²⁸¹ Similar critiques of the NALSA decision have been advanced; although it was widely celebrated, transgender activists have critiqued its reliance on Hindu mythological texts, making claims of “a golden Hindu period where there was no discrimination” thus ignoring not only the significance of Islam within trans communities, but also caste and class-based structures of oppression.²⁸² In 2018, the *Kinnar Akhara* chief Laxmi Narayan Tripathi – a Brahmin *hijra* identified transgender activist – expressed support for the Ram temple and stated that the Akhara would launch a *satyagraha* if steps were not taken towards the construction.²⁸³ Many transgender, intersex and gender non-conforming persons and groups issued a statement condemning the Akhara’s support for the construction of Ram temple.²⁸⁴ The statement points to Tripathi’s appeal to Hindutva ideology and claims that her stance “idealises a mythical past of the Sanatan Dharam and supports the right-wing politics of communal hatred in the guise of ‘we were always accepted’”.²⁸⁵

Liberal constitutional scholars have generally argued that India is a secular state, with some scholars like Rajeev Bhargava noting that Indian secularism is unique in its “principled distance between religion and the state”.²⁸⁶ However, other scholars have critiqued this, asserting that the Constitution of India has a significant ‘Hindu bias’.²⁸⁷ From the time of independence, India has seen

²⁷⁹ Lorde said this in an address at Harvard University, as part of the celebration of the Malcolm X weekend in 1982. The entire text of her address is available at <https://www.blackpast.org/african-american-history/1982-audre-lorde-learning-60s/> (Last visited on August 25, 2020).

²⁸⁰ Kanaga V, *Queering mothers, Queering Daughters: Realities from India and Abroad!!*, MEDIUM, July 17, 2019, available at <https://medium.com/@kartsara51/queering-mothers-queering-daughters-realities-from-india-and-abroad-617c3b6bb542> (Last visited August 29, 2020).

²⁸¹ *Id.*

²⁸² Semmalar, *supra* note 78.

²⁸³ THE TIMES OF INDIA, *Akhara Committed to Ram Temple: Tripathi*, February 2, 2019, available at <https://timesofindia.indiatimes.com/city/allahabad/kinnar-akhara-committed-to-ram-temple-tripathi/articleshow/67800287.cms> (Last visited on August 25, 2020).

²⁸⁴ Orinam, *Trans, Gender Nonconforming & Intersex Collectives Strongly Condemn Kinnar Akhara’s Support for Ram Temple at Ayodhya, India*, November 24, 2018, available at http://orinam.net/content/wp-content/uploads/2018/11/Trans-GNC-Intersex_Statement_Kinnar-Akhara_Ram-Temple.pdf (Last visited on August 25, 2020).

²⁸⁵ *Id.*

²⁸⁶ Rehan A. Abeyratne, *Privileging the Powerful: Religion and Constitutional Law in India*, 13 *ASIAN JOURNAL OF COMPARATIVE LAW*, 308 (2018); Rajeev Bhargava, *India’s Secular Constitution in India’s LIVING CONSTITUTION* (Zoya Hasan, E. Sridharan and R. Sudarshan, 2002).

²⁸⁷ Pritam Singh, *Hindu Bias in India’s ‘Secular’ Constitution: Probing Flaws in the Instruments of Governance*, 26 *THIRD WORLD QUARTERLY* 6 (2005).

tensions play out between ethno-nationalist and liberal citizenship discourses.²⁸⁸ In the Constituent Assembly discussions on citizenship, some members demanded that Indian citizens be defined as people who were ‘Hindu or Sikh by religion’, regardless of where they were born.²⁸⁹ P.S. Deshmukh, for example, insisted that the universal definition proposed by Ambedkar was too “easy” and that secularism was going too far.²⁹⁰ While the liberal argument on citizenship eventually won out, it is clear now that the conceptualisation of the Indian State, since its inception, has been based on certain exclusions.

Pritam Singh argues that the word ‘Bharat’ in Article 1 of the Constitution reflects “the power of the Hindutva-minded sections in the Constituent Assembly who wanted the name to reflect the ancient pre-British and pre-Muslim era of a ‘glorious’ Hindu past”.²⁹¹ Singh goes on to demonstrate how even the fundamental rights chapter, with Articles such as Article 25(2)(b) reflects a “Hindu assimilationist perspective” towards minority religions, namely Sikhs, Jains and Buddhists who are forcibly brought into the Hindu fold.²⁹² Suryakant Waghmore also highlights how the Constitution protects the ‘sacred Hindu cow’ through Article 48 which tasks the State with taking measures to prohibit the slaughter of cows and calves.²⁹³ Through an examination of the Hindu Code Bill of 1955 and the cultural policy of the Indian State, Anwar Alam demonstrates how the “Brahmanical features of Hinduism were deliberately selected, promoted and projected at the national level” in an attempt to construct a homogenous Hindu identity.²⁹⁴ In the last few decades, many other scholars have highlighted the rise of Hindutva politics in the country and its impact on marginalised groups. Thus, ideological hierarchies and reforms exist prior to any law making or legal reforms. Thus, the State that transgender persons must negotiate with is a Brahminical cis-heteronormative State at its core.

Beyond protests and resistance politics, many transgender persons have taken recourse to the Constitution and Judiciary to challenge the Transgender Persons Act, as well as the Assam NRC process. Although pursuing reforms through legal institutions within a liberal capitalism framework has its limits, these Constitutional challenges are also a form of resistance and negotiation with

²⁸⁸ Ornit Sahni, *Conceptions of Citizenship in India and the ‘Muslim Question’*, 44 MODERN ASIAN STUDIES 1, 145-173 (2010).

²⁸⁹ THE WIRE, *How the Constituent Assembly Debated (and Rejected) Citizenship by Religion*, February 10, 2020, available at <https://thewire.in/religion/caa-citizenship-religion-constituent-assembly> (Last visited on August 25, 2020).

²⁹⁰ SCROLL.IN, *Contested citizenship: What Constituent Assembly Debates From 70 Years Ago Reveal About India Today*, February 26, 2020, available at <https://scroll.in/article/953877/contested-citizenship-what-constituent-assembly-debates-from-70-years-ago-reveal-about-india-today> (Last visited on August 25, 2020).

²⁹¹ Singh, *supra* note at 287.

²⁹² *Id.*

²⁹³ SURYAKANT WAGHMORE, CIVILITY AGAINST CASTE: DALIT POLITICS AND CITIZENSHIP IN WESTERN INDIA 18 (2013).

²⁹⁴ Singh, *supra* note 287, at 916.

the State. Subaltern studies scholars have shed light on the various acts of resistance, as well as modes of political organization and strategies of protest and defiance of marginalised persons.²⁹⁵ Others have also drawn attention to popular struggles over the law, and specifically shown how this resistance “can meaningfully negotiate and re-work power structures from below even as it is deeply shaped by the languages and logics of modern state-making”.²⁹⁶ If resistance is located in the process of negotiating the modern State, then it is “not extrinsic but intrinsic to everyday power relations within which the state is embedded as a multi-layered leviathan”.²⁹⁷ As James Scott describes it, these negotiations with the State are like “a kind of struggle or contest constrained within some rough limits” where the antagonists know each other’s moves and there is a “kind of larger social contract that gives some order and limits to the conflict”.²⁹⁸ Moreover, the idea of resistance is also one of solidarity and of “withstanding or enduring domination as a subaltern ‘community’ and developing collective strategies to rework power structures in a more favourable direction”.²⁹⁹

However, transgender movements do not constitute a monolithic entity, using a single consciousness to organise themselves. Transgender persons are able to negotiate with the State in different ways, from their locations based on caste, class, religion, disability and other identities. Although the solidarities between marginalised groups are powerful, they can still be fraught with tension. Gee Semmalar challenges cis feminists who exclude trans persons from their meetings organizing spaces, and political demands, asking what solidarity can exist between cis women and trans persons, or *savarna* and Dalit persons.³⁰⁰ Dalit transgender persons have also been vocal about the lack of affirmative measures in the legislation,³⁰¹ highlighting the hierarchies that exist within transgender movements.

Since the passing of the Transgender Persons Act in 2019, at least three petitions have been filed in the Supreme Court by transgender persons, challenging the constitutional validity of the legislation. In December 2019, just a couple weeks after the Act passed in Parliament, trans activist and the first transgender

²⁹⁵ DIPESH CHAKRABARTY, *RETHINKING WORKING-CLASS HISTORY: BENGAL, 1890–1940* (1989); Partha Chatterjee, *Peasant, Politics and Historiography*, 11 *Social Scientist* 5, 58–65 (1983); RANAJIT GUHA, *ELEMENTARY ASPECTS OF PEASANT INSURGENCE IN COLONIAL INDIA* (1983); RANAJIT GUHA AND GAYATRI SPIVAK, *SELECTED SUBALTERN STUDIES* (1988).

²⁹⁶ Uday Chandra, *Rethinking Subaltern Resistance*, 45 *JOURNAL OF CONTEMPORARY ASIA* 4, 566 (2015).

²⁹⁷ *Id.* at 568.

²⁹⁸ James Scott, *Afterword to “Moral Economies, State Spaces, and Categorical Violence”*, 107 *AMERICAN ANTHROPOLOGIST* 3, 398 (2005).

²⁹⁹ Chandra, *supra* note 271 at 569.

³⁰⁰ Semmalar, *supra* note 78.

³⁰¹ THE PRINT, *Where are the Archives of our Dalit Trans Foremothers and Forefathers?*, April 29, 2018, available at <https://theprint.in/opinion/dalit-history-month/dalit-trans-resilience-is-a-fight-against-caste-and-patriarchy-though-we-are-missing-from-written-archives/53509/> (Last visited on August 25, 2020).

judge in Assam, Swati Baruah, filed a petition challenging various provisions of the Act.³⁰² Swati Baruah had also previously filed a petition challenging the exclusion of almost 2,000 transgender persons from the NRC process in Assam.³⁰³ The petition alleged that the process forced transgender persons to accept either male or female as their gender.³⁰⁴ Those who made it to the list stated that their old identity was included, and they feared that without producing matching documents, the State may declare them as ‘foreigners’.³⁰⁵ In February 2020, five transgender activists including Grace Banu filed a petition contending that several sections of the Act violate the fundamental rights guaranteed under Part III of the Constitution.³⁰⁶ A third petition was filed in and tagged along with the earlier petitions.³⁰⁷ These petitions are currently pending before the Court, and argue that the Act violates transgender persons’ rights to equality, life and liberty, and non-discrimination.³⁰⁸

The equality approach is not without critique. Equality-based claims, as many have argued, only respond to the needs of certain groups (within groups).³⁰⁹ For example, when women make gender equality claims, what vision of equality is being advanced and is it a shared one regardless of race, class and other factors? Is it possible to state that transgender persons must be ‘equal’ to cisgender persons, when cisgender persons themselves do not constitute a homogenous community? As bell hooks argues, men are not equals in a white supremacist, capitalist and patriarchal society.³¹⁰ Similarly, cisgender persons are not all placed equally, especially in India where caste permeates every aspect of an individual’s daily life. Indigenous Mapuche women in Chile consider gender to be inseparable from other parts of their identity and are thus reluctant to make the same

³⁰² Supreme Court Observer, *Challenge to Transgender Persons Act, Swati Bidhan Baruah v. Union of India*, available at <https://www.scobserver.in/court-case/challenge-to-transgender-act> (Last visited on August 25, 2020); THE WIRE, *Assam’s First Transgender Judge Awaits Centre’s Response to SC Plea Against ‘Humiliating’ Act*, February 3, 2020, available at <https://thewire.in/lgbtqia/swati-bidhan-baruah-transgender-act> (Last visited on August 25, 2020).

³⁰³ Scroll Staff, *Assam: Petition Filed in Supreme Court against Exclusion of 2,000 Transgenders from NRC Final List*, September 18, 2019, available at <https://scroll.in/latest/937681/assam-petition-filed-in-supreme-court-against-exclusion-of-2000-transgenders-from-nrc-final-list#:~:text=The%20state’s%20first%20transgender%20judge,was%20not%20an%20inclusive%20exercise.&text=A%20petition%20has%20been%20filed,Register%20of%20Citizens%2C%20ANI%20reported> (Last visited on August 25, 2020).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ SCC Observer, *Challenge to Transgender Persons Act*, available at <https://www.scobserver.in/court-case/challenge-to-transgender-act/trans-act-petition-in-plain-english-grace-banu> (Last visited on August 25, 2020).

³⁰⁷ BAR AND BENCH, *Transgender Persons Act, 2019 Violates the Fundamental Rights it Seeks to Protect: Another Challenge Mounted in Supreme Court*, June 13, 2020, available at <https://www.barandbench.com/news/litigation/transgender-persons-act-2019-violates-the-fundamental-rights-another-challenge-in-sc> (Last visited on August 25, 2020).

³⁰⁸ BAR AND BENCH, *supra* note 307.

³⁰⁹ Dipika Jain and Payal K. Shah (2020).

³¹⁰ Bell Hooks, *Feminism: A Movement to End Sexist Oppression*, in *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984). See also Dipika Jain and Payal K. Shah (2020).

kind of gender equality claims as non-indigenous women.³¹¹ Transgender persons, in India and globally, are not a monolith and have vastly different social experiences based on their caste, region, or religion. Thus, an equality-based approach may end up privileging one identity (transgender) at the expense of another (Dalit, Adivasi etc.). Grace Banu discusses this in an interview with Dalit Camera where she states that when reservations are made for transgender persons “only the upper class [transgender person] benefit” and adds that there is a need for a subcategory within the reservation scheme that takes caste hierarchies into account.³¹²

It is also worth noting that while transgender movements in South Asia and other jurisdictions have taken recourse to the law in making rights claims, the law has its limits. The imagination of the law is binary and, therefore, transgender persons must align themselves with the binary if they wish to be seen and heard by legal institutions.³¹³ For example, although many judicial decisions have relied on the Yogyakarta Principles to uphold the rights of queer persons, the Principles are built on certain “assumptions about sexuality located in a dualist heteronormative framework”.³¹⁴ Diane Otto examines the definition of ‘gender identity’ in the Yogyakarta Principles and argues that it relies on biological essentialism at the cost of social constructivism.³¹⁵ These assumptions are also evident in the *NALSA* decision and the Transgender Persons Act and Draft Rules.

Nevertheless, an equality-based approach to rights is one possibility to address “the historical roots of gender discrimination, gender stereotypes, and traditional understandings of gender roles that perpetuate discrimination and inequality”.³¹⁶ In *Navtej Johar*, the Court expressly ruled that “individuals have sovereignty over their bodies” and that they could only exercise their right to self-determination if they had the ability to make decisions about their lives and bodies.³¹⁷ In the *Joseph Shine* decision which decriminalised adultery, the Supreme Court ruled that autonomy and dignity are integral to achieving substantive equality.³¹⁸ These cases establish that “the Constitution can be interpreted to challenge hegemonic power structures and safeguard equal citizenship rights”.³¹⁹ As Grace

³¹¹ Patricia Richards, *The Politics of Gender, Human Rights, and Being Indigenous in Chile*, 19 GENDER & SOCIETY (2005).

³¹² Dalit Camera, *Grace Banu on Challenges of a Dalit Transperson in Education* (July 24, 2016), available at <https://www.dalitcamera.com/grace-banu-challenges-dalit-transperson-education/> (Last visited on August 30, 2020).

³¹³ Jain, *supra* note 178.

³¹⁴ Ratna Kapur, *The (Im)possibility of Queering International Human Rights Law* in QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS (Dianne Otto, 2017).

³¹⁵ Dianne Otto, *Queering Gender [Identity] in International Law*, 33 NORDIC JOURNAL OF HUMAN RIGHTS 4, 299-318 (2015).

³¹⁶ Dipika Jain and Payal K. Shah (2020)

³¹⁷ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, at para 121 (Chandrachud, J., concurring).

³¹⁸ Joseph Shine v. Union of India, (2019) 3 SCC 39 at para 48 (Chandrachud J., concurring).

³¹⁹ Dipika Jain and Payal K. Shah (2020).

Banu stated after the passing of the Transgender Persons Bill, “[o]ur only hope is the Constitution”.³²⁰

As transgender-led groups have submitted, the Act is not reflective of the fundamental rights to self-determination, autonomy, and bodily integrity, nor the equality jurisprudence that the *NALSA* judgment developed. While courts can indeed act as a check against laws that do not uphold the values extolled in the Constitution, the Legislature, as a valued governmental body, should do so as well. *NALSA* embodied the Constitutional principles of equality, dignity and self-determination that have been neglected in the Act. Article 141 of the Constitution provides that Supreme Court decisions will be binding on all other Courts in India.³²¹ The precedential value of *NALSA* is uncontested; it has been upheld by a nine-judge bench of the Supreme Court in *Puttaswamy v. Union of India*,³²² and subsequently by a five-judge bench in *Navej Johar* and *Joseph Shine*. The government cannot ignore this landmark decision when drafting laws.

The Supreme Court’s jurisprudence has guided law-making processes in the past, as in the case of the Vishaka Guidelines which became the basis for a legislation on sexual harassment.³²³ The purpose of a social welfare legislation like the Transgender Persons Act should be to protect the rights of the communities it is meant to benefit. It is incumbent upon the State, in the interest of facilitating democratic processes, to adopt a consultation and deliberation process in the making of laws.³²⁴ For the State to disregard recommendations made by interested communities initially, incrementally add some minor recommendations, release multiple drafts of Rules (only in English and Hindi) during a pandemic, and carry out selective consultation with persons having access to technology is, therefore, nothing short of *legislative violence*.

IV. CONCLUSION

While the liberal conceptualisation of citizenship makes claims of universality, it has become increasingly clear that citizenship is construed through

³²⁰ Vijayta Lalwani, *What Next for Transgender People, as India Clears a Bill that Activists Call “Murder of Gender Justice?”*, QUARTZ INDIA, November 27, 2019, available at <https://qz.com/india/1756897/indias-transgender-rights-bill-disappoints-the-lgbtq-community/> (Last visited on August 25, 2020).

³²¹ The Constitution of India, 1950, Art. 141.

³²² *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

³²³ SCROLL, *Dalit Woman’s Rape in ‘92 Led to India’s First Sexual Harassment Law – But Justice Still Eludes Her*”, October 22, 2018, available at <https://scroll.in/article/899044/dalit-womans-rape-in-92-led-to-indias-first-sexual-harassment-law-but-justice-still-eludes-her> (Last visited on August 25, 2020).

(The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act was enacted in 2013 to supersede the Vishaka Guidelines for Prevention of Sexual Harassment laid down by the Supreme Court in the landmark *Vishaka v. State of Rajasthan* (1997) 6 SCC 241 judgment of 1997).

³²⁴ Jain, *supra* note 25, at 5.

a hegemonic, heteronormative lens, resulting in graded and differential levels of citizenship. Grace Banu wrote in her open letter that the Transgender Persons Bill made transgender persons refugees in their own land. The Transgender Persons Act, 2019 and the Draft Rules launch a brutal assault on transgender persons and put them at risk of violence and even statelessness. These legislations violate the Constitutional guarantees of Articles 14, 15, 19 and 21 by denying transgender persons the right to self-determine their gender, by not providing for any affirmative action measures.

The legal framework enacted for the ‘protection of rights’ of transgender persons is oppressively protectionist in nature, treating transgender persons as victims to be ‘protected’ and ‘rehabilitated’, rather than agents with the rights to self-determination and autonomy. As Banu says “[t]he government keeps saying that this Bill has been put together for the upliftment of the transgender community. But it does nothing but hold us back in every way possible and take away all opportunities from future generations too. They didn’t make the amends we recommended as well”.³²⁵ Furthermore, the likelihood of erasure of transgender identities from the NRIC, which bears a close link to the CAA, resulting in the rejection of citizenship to those who are unable to ‘prove’ their citizenship through their lineage, will leave transgender persons in an especially vulnerable state. Transgender persons would have limited avenues for recourse in the face of such Brahminical cis-heteronormatively reinforced challenges to their citizenship.

Transgender persons have resisted State violence in a number of ways, including judicial challenges to unconstitutional laws and engagement with the Parliament through depositions and drafting policy recommendations. The transgender-led movements led by transgender persons and groups engage inactive negotiation with the State through alternative means of protests and resistance. Their negotiations with the State are seen through nationwide protests that take on different forms, including social media campaigns around the Transgender Persons Bill. This mobilisation by transgender persons, since the early iterations of the Bill, leading to concessions and reforms (albeit limited ones) demonstrates the power of collective struggle. Transgender persons are not a monolith, the different forms of negotiation, through judicial challenges or protests on the street, allow for engagement with the State on multiple fronts and thus speak to the power of resistance.

These moments of resistance demonstrate that transgender persons are active rights-bearing agents who constantly respond to and negotiate (sometimes successfully) with the cis-heteronormative State. The changes eventually made by the MSJE in the Transgender Persons Act and the Draft Rules, while incremental, speak to the immense capacity of marginalised groups to organise and demand equal citizenship rights. The law undoubtedly has its limits, as it operates within a binary framework and requires transgender persons to ‘fit’ themselves

³²⁵ Deeksha, *supra* note 165.

into that mould if they want recognition. In spite of these limitations, transgender persons have created counter-discourses that challenge cis-heteronormative domination. The State may try to ignore these movements, but such a politics of resistance offers more emancipatory possibilities to the struggle for equal citizenship.