

The Court's Second Chance

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On January 17, 2016, Rohith Vemula killed himself in Hyderabad. He identified with his Dalit mother's caste. Two weeks earlier, a 15-year-old boy set himself on fire in Agra after being teased for being gay. In May 2015, Misbah Qadri was refused a flat in Mumbai because she was Muslim. On May 29, 2014, Nido Tania, from Arunachal Pradesh, was murdered in Delhi in an apparently racist attack. Countless female foetuses continue to be disposed of before they are born. Manabi Bandopadhyay's unusual appointment as a college principal in Nadia district in June 2015 only underscored the meagre employment opportunities normally available to transpersons. These victims of discrimination amount to more than the labels Dalit, gay, Muslim, Northerner, female or transgender. Discrimination refuses to recognise the diversity of the lives of its victims. As Rohith poignantly noted in his final letter, "The value of a man was reduced to his immediate identity and nearest possibility."

The Supreme Court has an opportunity this week to kickstart the process of serious judicial engagement with discrimination, as it hears the curative petition against its judgment in *Koushal vs Naz*, which recriminalised homosexuality. It's imperative that the court affirm the Delhi High Court's 2009 finding that Section 377 is unconstitutional. It must recognise the criticisms its under-reasoned and constitutionally unsound ruling in *Koushal* has attracted from academics, activists, jurists and politicians. But that outcome will not be enough. Following the Delhi HC, the SC must recognise what's at stake is not merely "gay rights" but our constitutional values of liberty, equality, dignity, pluralism and inclusiveness. The court

must emphasise the continuity between various guises of discrimination and resolve to develop our jurisprudence to tackle all of them. As guardian of the Constitution, the SC must not fail this time.

Even if the court accomplishes all of this, politicians will still need to do their bit. India remains among the few countries with a constitutional commitment to a liberal democracy that nevertheless lacks comprehensive anti-discrimination legislation. The Bhopal Declaration of 2002, seeking to chart a new course for Dalits, welcomed “winds of change the world over” towards inclusion and diversity and against discrimination. A conversation on the need and shape of an anti-discrimination law began after the Sachar Committee recommended it in 2006.

While the UPA government did briefly consider setting up an equal opportunity commission (EOC), the idea was quietly buried after the poorly drafted EOC bill attracted criticism. Anti-discrimination law remains a key demand of groups representing women, gays, lesbians, transgendered persons, and persons living with disability. The debate on an anti-discrimination law has been going on for over a decade. In an effort to move the debate from broader policy to nuts-and-bolts, the Centre for Policy Research hosted a discussion on a civil society draft equality bill in December 2015.

The bill, currently under consideration of the Delhi government, seeks to create a civil (rather than criminal) liability for discrimination on grounds such as caste, sex, disability, race, sexual orientation, religion and so on. It protects everyone from discrimination symmetrically: Dalits as well as Brahmins, Hindus as well as Muslims, men as well as women (while recognising that groups that usually face discrimination will be its main beneficiaries). It outlaws discrimination not only by public bodies, but also by private employers, landlords, service providers and traders. And it recognises the diversity of ways in which discrimination manifests itself.

Rohith wanted to be a popular science writer, like Carl Sagan. Section 377 may well have cost India several Alan Turings, the British code-breaker who helped the Allies win World War II, and subsequently killed himself after being prosecuted for his homosexuality. Jewish scientists who fled Nazi persecution revolutionised American science — the loss was Germany's. We can never account for the number of Ambedkars, Abdul Kalams and Kalpana Chawlas India must have lost to discrimination. Discrimination denies what ultimately makes us all human: In Rohith's eloquent words, “a glorious thing made up of star dust”.