

Supreme Court Case Analysis:

NALSA V. UNION OF INDIA AND ORS.¹

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INTRODUCTION

National Legal Services Authority v. Union of India was a Supreme Court Landmark Judgement decided on 15 April, 2014 by a bench comprising of Justice K. S. Radhakrishnan and Justice A. K. Sikri.

This Judgement is concerned of seeking redressal for grievances of the transgender community who seek a legal declaration for their identity and rights in the country and says that non recognition of their identities violate Article 14,15,16 and 21 of the constitution of India.

TG community comprises of Hijras, Eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. and they as a group have to face a lot of problems, abuses regarding their gender, they are treated as untouchables. So there is a need to change the mentality of the people and to accept this group as citizens of our country with equal protection of rights guaranteed by the constitution same as of other genders like male and female.

FACTS

There were two writ petitions filed to protect the rights and identity of the transgender community:

1. NALSA constituted under the Legal Services Authority Act, 1997, filed a writ petition No. 400 of 2012.
2. Poojaya Mata Nasib Kaur Ji Women Welfare Society, a registered association, has also preferred Writ Petition No. 604 of 2013, seeking similar reliefs in respect of Kinnar community, a TG community.
3. Laxmi Narayan Tripathy, claimed to be a Hijra, has also got impleaded so as to effectively put across the cause of the members of the transgender community and Tripathy's life experiences also for recognition of their identity as a third gender, over and above male and female. Tripathy says that non-recognition of the identity of Hijras,

¹ (2014) 5 SCC 438

a TG community, as a third gender, denies them the right of equality before the law and equal protection of law guaranteed under Article 14 of the Constitution and violates the rights guaranteed to them under Article 21 of the Constitution of India.

ISSUES

As it is clear, these petitions essentially raise an issue of “Gender Identity”, which is the core issue. It has two facets, viz.:

- (a) Whether a person who is born as a male with predominantly female orientation (or vice-versa), has a right to get himself to be recognized as a female as per his choice more so, when such a person after having undergone operational procedure, changes his/her sex as well?
- (b) Whether transgender (TG), who are neither males nor females, have a right to be identified and categorized as a “third gender”?

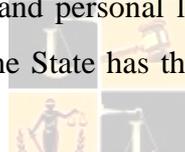
ANALYSIS

1. **Article 14** of the Constitution of India states that the State shall not deny to “any person” equality before the law or the equal protection of the laws within the territory of India. It also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. It does not restrict the word ‘person’ and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression ‘person’ and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.
2. **Articles 15 and 16** prohibit discrimination against any citizen on certain enumerated grounds, including the ground of ‘sex’. In fact, both the Articles prohibit all forms of gender bias and gender based discrimination. Constitution makers, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical

generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity.

The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female. Articles 15(2) to (4) and Article 16(4) read with the Directive Principles of State Policy and various international instruments to which Indian is a party, call for social equality, which the TGs could realize, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

3. **Article 21** of the Constitution of India reads as follows: Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law.” Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right.



Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

4. **Section 377** of the IPC found a place in the Indian Penal Code, 1860, prior to the enactment of Criminal Tribes Act that criminalized all penile- non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices.
5. While talking about gender identity and sexual orientation, Justice K.S. Radhakrishnan said that these both are different concepts.

Gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress,

speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexuals, bisexuals, heterosexuals, asexual etc.

The judge also considered United Nations and other human rights bodies and Yogyakarta principles.

The Supreme Court took into consideration different foreign judgements like:

In **Corbett v. Corbett**², the Court in England was concerned with the gender of a male to female transsexual in the context of the validity of a marriage. In this case, the court said that the law should adopt the chromosomal, gonadal and genital tests and if all three are congruent, that should determine a person's sex for the purpose of marriage. Learned Judge expressed the view that any operative intervention should be ignored and the biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means.

Various other countries like New Zealand, Australia etc. did not favour this principle and also attracted much criticism, from the medical profession.

In New Zealand in **Attorney-General v. Otahuhu Family Court**³, Justice Ellis noted that once a transsexual person has undergone surgery, he or she is no longer able to operate in his or her original sex.

In **Christine Goodwin v. United Kingdom** (Application No.28957/95 - Judgment dated 11th July, 2002), the European Court of Human Rights examined an application alleging violation of Articles 8, 12, 13 and 14 of the Convention for Protection of Human Rights and Fundamental Freedoms, 1997 in respect of the legal status of transsexuals in UK and

² (1970) 2 All ER 33

³ (1995) 1 NZLR 603

particularly their treatment in the sphere of employment, social security, pensions and marriage. Applicant in that case had a tendency to dress as a woman from early childhood and underwent aversion therapy in 1963-64. In the mid- 1960s she was diagnosed as a transsexual. Though she married a woman and they had four children, her inclination was that her “brain sex” did not fit her body. From that time until 1984 she dressed as a man for work but as a woman in her free time. In January, 1985, the applicant began treatment at the Gender Identity Clinic. In October, 1986, she underwent surgery to shorten her vocal chords. In August, 1987, she was accepted on the waiting list for gender re-assignment surgery and later underwent that surgery at a National Health Service hospital.

The Court after referring to various provisions and Conventions held as follows:-

‘Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post- operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.’



Legislations in other countries have also been analysed

In the international human rights law, many countries have enacted laws for recognizing rights of transsexual persons, who have undergone either partial/complete SRS, including United Kingdom, Netherlands, Germany, Australia, Canada, Argentina, etc.

- United Kingdom has passed the Gender Recognition Act, 2004. The Act is all encompassing as not only does it provide legal recognition to the acquired gender of a person, but it also lays down provisions highlighting the consequences of the newly acquired gender status on their legal rights and entitlements in various aspects such as marriage, parentage, succession, social security and pensions etc. One of the notable features of the Act is that it is not necessary that a person needs to have undergone or in the process of undergoing a SRS to apply under the Act.
- In Australia, there are two Acts dealing with the gender identity, (1) Sex Discrimination Act, 1984; and (ii) Sex Discrimination Amendment (Sexual

Orientation, Gender Identity and Intersex Status) Act, 2013 (Act 2013). Act 2013 amends the Sex Discrimination Act, 1984. Act 2013 defines gender identity as the appearance or mannerisms or other gender- related characteristics of a person (whether by way of medical intervention or not) with or without regard to the person's designated sex at birth.

LEGAL RECOGNITION OF THIRD/TRANSGENDER IDENTITY

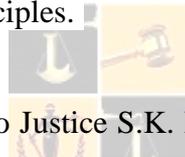
Social exclusion and discrimination on the ground of gender stating that one does not conform to the binary gender (male/female) does prevail in India. Historical background of transgenders in India have been analysed, they were treated with respect in the past, though not in present. Court has perceived a wide range of transgender related identities:

- Hijras: Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women, or "not- men", or "in-between man and woman", or "neither man nor woman".
- Eunuch: Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth, but this is discovered the child previously assigned to the male sex, would be recategorized as intersexed – as a Hijra.
- Kothi – Kothis are a heterogeneous group. 'Kothis' can be described as biological males who show varying degrees of 'femininity' – which may be situational. Some proportion of Kothis have bisexual behavior and get married to a woman.
- Jogtas/Jogappas: Jogtas or Jogappas are those persons who are dedicated to and serve as a servant of goddess Renukha Devi (Yellamma) whose temples are present in Maharashtra and Karnataka. 'Jogta' refers to male servant of that Goddess and 'Jogti' refers to female servant (who is also sometimes referred to as 'Devadasi').
- Shiv-Shakthis: Shiv-Shakthis are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression. Usually, Shiv-Shakthis are inducted into the Shiv- Shakti community by senior gurus, who teach them the norms, customs, and rituals to be observed by them.

Transgender people, as a whole, face multiple forms of oppression in this country. Many of them, however, do experience violence and discrimination because of their sexual orientation or gender identity.

International Conventions and norms are significant for the purpose of interpretation of gender equality which are being followed by various countries in the world.

Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person's sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations. Judges have exhaustively referred to various articles contained in the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966 as well as the Yogyakarta principles. Reference was also made to legislations enacted in other countries dealing with rights of persons of transgender community. Unfortunately our country has no legislation dealing with the rights of transgender community. Due to the absence of suitable legislation members of the transgender community are facing discrimination in various areas and hence the necessity to follow the International Conventions to which India is a party and to give due respect to other non-binding International Conventions and principles.



Justice A.K. Sikri while agreeing to Justice S.K. Radhakrishnan said that in international human rights law, equality is found upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of the TGs, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.

JUDGEMENT

To safeguard and protect the rights of the transgenders guaranteed in the constitution of India, it was declared that:

1. Hijras, Eunuchs, apart from binary gender, must be treated as “third gender”.
2. Transgender persons’ right to decide their self-identified gender is also upheld.

Supreme Court directed Centre and State Government to :

- Grant legal recognition of their gender identity such as male, female or as third gender.
- Take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
- Operate separate HIV Sero-surveillance Centres since Hijras/ Transgenders face several sexual health issues.
- Seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one’s gender is immoral and illegal.
- Take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.
- Take steps for framing various social welfare schemes for their betterment.
- Take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.
- Take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.