



**CASE COMMENT ON NATIONAL
LEGAL SERVICE AUTHORITY Vs.
UNION OF INDIA: A BATTLE FOR
EQUALITY**

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SCC 438

DECIDED ON: 15 April, 2014

BENCH: Justices K.S. Radhakrishnan, A.K.
Sikri

PETITIONER: NATIONAL LEGAL
SERVICES AUTHORITY

RESPONDENT : UNION OF INDIA

PROVISIONS INVOLVED: Articles 21,
19(1) (a), 14, 15 and 16 of the Constitution

**“No person should suffer injustice on the
basis of their gender”
- Laxmi Narayan Tripathi, the first
transgender rights activist to represent
Asia Pacific at the UN**

INTRODUCTION

The moral constraints and judgments prevailing in the society frequently shape an individual's identity. Individuals who attempt to challenge these with their personalities, sexual orientations and inclinations, on the other hand, are frequently ostracized, abandoned, and labelled as the "other." Human lives are complicated, but transsexual individuals are subjected to far more trauma

than the general population. Despite their vulnerability to harassment and assault, their suffering goes mostly ignored. In general, Indian law acknowledges only the binary genders of male and female, as determined by a person's sex at birth until the Apex Court's decision of recognition of the transgender community in National Legal Service Authority vs. Union of India which was the first triumph for their long-standing concerns. With the Supreme Court's proactive approach in this case, transgender rights have received a significant momentum.

BACKGROUND

The Supreme Court of India examined Indian classics in order to determine the position of the transgender people in ancient times. Gender-variant men now referred to as "transgender women," have existed in Asian cultures for millennia. India is no different. The Kama Sutra describes the sexual lives of those with a "third nature" in graphic detail (tritiya prakriti).¹ The prominence of the third gender identity in Hindu mythology, Vedic and Puranic literature, and the significant role they played in the royal courts of the Islamic world, among other things, are all part of the historical context of the third gender identity in India. Hijras, Kothis, Aravanis, Jogappas, and Shiv-Shakthis are members of the transgender community, and they have a long history in Hindu mythology and religious writings in India.²

Epics of Ramayana and Mahabharata -
Lord Rama, who had been banished from the kingdom for 14 years and was about to leave for the wilderness, turns back to his

¹ UNDP (United Nations Development Programme), India, A Report on "Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion" (Dec. 2010).

² A Brief History of Transgenders in India, Indian Institute of Legal Studies,
<https://www.iilsindia.com/blogs/brief-history-transgenders-india/>



supporters and urges all the "men and women" to return to the city. The hijras are the only ones among his followers who do not feel constrained by this path and want to remain with him. Rama grants them the authority to bestow blessings on people on auspicious occasions like as births and marriage. In the Mahabharata, Aravan, the son of Arjuna and Nagakanya, agrees to be sacrificed to the Goddess Kali in order for the Pandavas to win the Kurukshetra War. Aravan is the progenitor of the Hijras of Tamil Nadu, who refer to themselves as Aravanis.

Criminal Tribes Act, 1871 - An unscrupulous piece of law

At the time of British rule in India, the colonialists treated them inhumanely. Consequently, transgender community's respectful status was changed. The Criminal Tribes Act, 1871, was enacted to oversee the conduct of the hijras/transgender community, deeming the whole community of hijras individuals as intrinsically "criminal" and "addicted to the systematic commission of non-bailable offences. The Act made, keeping a boy under the age of sixteen in the charge of a registered eunuch, a crime punishable by up to two years in prison or a fine, and it stripped registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, making a gift deed or a will, and adopting a son. Finally, this act was abolished in 1949.

International and Regional Conventions

There are numerous conventions that exhaustively describe the rights of the transgender community, such as articles 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, and the Yogyakarta Principles. Article 6 of the Universal Declaration of Human Rights, adopted in 1948, and Article 16 of the International Covenant on Civil and Political Rights, adopted in 1966 (ICCPR), recognise that every human being has an inherent right to life, which must be protected by law and denied to no one arbitrarily. According to Article 17 of the ICCPR, no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, or correspondence, or to unlawful attacks on his or her honour or reputation, and everyone has the right to legal protection from such interference or attacks. The Yogyakarta Principles is a declaration addressing human rights in the domains of sexual orientation and gender identity have been endorsed by United Nations bodies and others and are seen as an important tool for identifying states' obligations to respect, protect, and fulfill the human rights of all people, regardless of gender identity.

Judicial Background - Discrimination is so prevalent and omnipresent, particularly in the areas of healthcare, job, and education that it leads to social exclusion. Article 14 guarantees that everyone's rights are protected equally³. As a result, transgender/Hijras must be afforded equal protection of their rights. Articles 15 and 16 attempted to ban discrimination based on gender, acknowledging that sex discrimination is a historical issue that must be addressed.⁴ The definition of 'sex' in Articles 15 and 16 is not confined to biological sex as male or female, but also

³ INDIA CONST. art. 14.

⁴ INDIA CONST. art. 15 & art.16



includes persons who do not identify as male or female. Article 19(1)(a) of the Constitution of India declares that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of one's self-identified gender. The state cannot prohibit, restrict or interfere with that person's expression of such personality, which reflects that person's own inherent personality.

BRIEF FACTS OF THE CASE

The primary petitioner was National Legal Service Authority (NALSA). It was established with the primary goal of giving free legal assistance to the disadvantaged sections of Indian society. Pooja Mata Nasib Kaur Ji Women Welfare Society, a recognised society and non-governmental organisation, and Laxmi Narayan Tripathi, a well-known Hijra activist, were among the other Petitioners. Transgender people have filed a petition before the Supreme Court to acknowledge their gender. The gender of a person is decided at birth, and subsequent events such as adoption, marriage, inheritance, succession, taxation, and welfare are based on that gender. However, because the gender of Transgenders has yet to be defined, a petition has been filed demanding gender recognition for Transgenders.

ISSUES

- i) Whether non-recognition of various gender identities breaches Articles 14 and 21 of the Indian Constitution?
- ii) Whether transgender people, who are neither men nor females, have the right to be labelled as a "third gender"?

KEY CONTENTIONS

ARGUMENTS OF THE PETITIONER

- The petitioner argued that every member of the transgender community has a legal right to choose their sexual orientation as well as to affirm and define their identity. It was also argued that because Transgender People are neither regarded as males or females, nor are they granted the status of a third gender, they are denied many of the rights and advantages that other citizens enjoy.

- It was also said that the community confronts prejudice when it comes to contesting elections, exercising their right to vote, finding work, obtaining permits, and so on, and is effectively viewed as an outcast and untouchable. The State cannot discriminate against people on the basis of gender, according to learned senior counsel, breaching Articles 14 to 16 and 21 of the Indian Constitution.

- Transgender people must be designated a socially and educationally backward class of individuals, and they must be given all of the advantages that are available to that class of people, including those that are accessible to both male and female genders. Expert counsel further argued that the freedom to determine one's gender identity is inextricably linked to the right to live a dignified life, which is unquestionably protected by Article 21 of the Indian Constitution. As a result, learned counsel argued that, subject to such rules/regulations/protocols, transgender people should be allowed to choose whether to be classified as male, female, or transgender.

ARGUMENTS OF THE RESPONDENT



• Shri Rakesh Khanna, learned Additional Solicitor General for the Union of India, said that the transgender community's concerns are a sensitive human issue that requires significant consideration. He said that a committee dubbed the "Expert Committee on Issues Relating to Transgender" has been established within the Ministry of Social Justice and Empowerment to undertake an in-depth examination of transgender issues and offer suitable recommendations to MOSJE. It was also proposed that the petitioners, who came before this Court in the Committee, be provided adequate representation so that their opinions may be heard.

JUDGMENT

After going over the history of transgender people in India, the Supreme Court declared that gender identity and sexual orientation include transgender people, and 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 gender transition. In addition, the Court went through in depth the progressive jurisprudence of other nations, including the United Kingdom, Australia, New Zealand, and the United States, in recognising transsexual people's basic rights.

In *Corbett v. Corbett*⁵, the English court considered the gender of a male to female transsexual in the context of a marriage's legality. The case of *A.B. v. Western Australia*⁶ addressed the Gender Assignment

Act of 2000. The court has also cited numerous judicial pronouncements such as *Van Kuck v. Germany*⁷, *Christine Goodwin v. United Kingdom*⁸, *Bellinger v. Bellinger*⁹ and relevant international legislations. "Transgender persons who are neither male nor female fall within the expression 'person' and, thus, 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," the Court concluded. Further, concluded that the prohibitions on discrimination against any citizen including on the basis of sex, in Articles 15 and 16 apply equally to transsexual people.

The SC ruled that the right to freedom of expression guaranteed by Article 19(1) (a) of the Constitution "includes one's right to express his self-identified gender," and that "no restriction can be placed on one's personal appearance or choice of dressing," notwithstanding legitimate exceptions under Article 19(2) of the Constitution. Moreover, it was understood as meaning that article 21 safeguards "those parts of life that go to make a person's life meaningful," including a person's right to self-determination of gender. As a result, the Court decided that "Hijras/Eunuchs, over and beyond binary genders, must be recognised as third Gender under our Constitution and laws."

POST JUDGMENT IMPLICATIONS

⁵ *Corbett v Corbett* [1970] 2 All ER 33

⁶ *AB v Western Australia* [2011] HCA 42

⁷ *Van Kuck v. Germany* (Application No.35968/97 – Judgment dated 12.9.2003)

⁸ *Christine Goodwin v. United Kingdom* (Application No.28957/95 - Judgment dated 11th July, 2002)

⁹ *Bellinger v. Bellinger* (2003) 2 All ER 593



Constitutionality of Section 377 IPC - A five-judge bench unanimously threw down Section 377 of the Indian Penal Code, which criminalised same-sex encounters between consenting adults on September 6, 2018. Individuals who identify as LGBT are now legally permitted to engage in consensual intercourse. The Court affirmed Section 377 provisions that make non-consensual activities or sexual acts on animals illegal.¹⁰

Transgender Persons (Protection of Rights) Act, 2019

The parliament presented a number of legislation addressing transgender people's rights in July 2019, and was given the name Transgender Persons (Protection of Rights) Act, 2019. The transgender community has reacted negatively to the Act since it, in their opinion, nullifies the NALSA decision. They say that the new law is not only insufficient, but that it will also undo advances achieved in securing transgender people's rights.

CRITICAL ANALYSIS: LACUNAE IN THE JUDGMENT

The decision is without a doubt a significant stride forward in Indian law and part of our common constitutional legacy. The court has given ambiguous interpretations of the word and has made no attempt to extend its reach. Hijra, is a cultural group that falls under the umbrella word "transgender," although not all transgender people are hijras. In the court decision, it is unclear if hijras have the choice of choosing women or third gender status according on their preferences. Would it be necessary for Trans women to get third gender identities in order to receive privileges such as OBC reservations in jobs

and education? The procedure is unclear, as is whether or not they have a choice.

The decision has caused a great deal of consternation. Even though the ubiquitous media and civic society praised the decision, many transgender individuals pointed out its inherent flaws and contradictions. The decision swings back and forth between broad and limited meanings of the word "transgender," as well as self-determination of identity and biological criteria. The boundary between sexual orientation and gender identity is briefly mentioned in the ruling, but Indian society lacks the mentality to talk about sex at home. All types of hormonal shifts and confusion occur throughout a child's formative years, and a free and safe atmosphere is essential for the youngster to breathe, thus parents should be urged to take gender sensitization training. There's also the problem of the transgender community's lack of representation in parliament. It's also critical that the gender laws' application guidelines, techniques, and processes are plain and straightforward. With these contrasting inclinations, the explication and implementation of the judgment might be unpredictable and irregular, limiting its affirmative influence.

CONCLUSION

This case created history and represents a watershed moment in the lives of transgender people, since it was a huge legal step toward ending the suffering endured by a group of people who were no different and had been discriminated against for years. In India, social exclusion and discrimination based on gender, defined as not conforming to the binary gender, are not rare. Because of their

¹⁰ Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 (India)



sexual orientation or gender identity, they are subjected to violence and prejudice. This is a significant precedent since it has stepped into stopping such violations and addresses an issue that has yet to be definitely resolved in most areas of the world.

“Justice will not be served until those who are unaffected are as outraged as those who are.” – Benjamin Franklin

