

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

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NALSA Judgement: A Legal Recognition of Third Gender

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ABSTRACT

Purpose of study: *This case comment aims to contribute to a historical judgement in the Indian legal system. This judgement not only legally declare LGBTQ community as third gender but also redress the injustice of the transgender community who endured since years. It is observed that the basic human rights entitled since birth bestowed under the constitution are equally applicable to all the citizens including the transgender people and gave them the right of gender identity which was not given to them earlier. To analyse and examine the case, main issues arise are: Whether the Transgender community need to be identified and categorized as “third gender”.*

Implications: *This case comment will through a light upon the struggles faced by the LGBT community since ages. But now situations have been changing through judicial pronouncement in the welfare and development of transgender people. The court has given decision to treat transgender people as equal as men and women. This case has indeed created a history, by giving the identity to transgender people as third gender. This judgement is just beginning of new path of justice and equality in India.*

I. INTRODUCTION

Indian legal system remains antagonistic and bigoted towards the LGBT community over the past many years. They face certain social and legal predicaments for their survival in the society. Recently, on 15th April, 2014 a landmark judgement was passed in the case of National Legal Services Authority V. Union of India² which created a history in the Indian legal system. NALSA judgment is a monumental step in the right direction. It has unclipped the wings of an egalitarian society; and the apostles of gender-binary heresy are not so much beaten as overawed.³ This judgement not only legally declare LGBTQ community as third gender but also redress the injustice of the transgender community who endured since years. This made

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² National Legal Service Authority v. Union of India (2014) 5 SCC 438

³ Aastha Khanna and Divesh Sawhney, NALSA JUDGMENT: CRITIQUE OF THE INDIAN PERSPECTIVE BEYOND THE ADAMS-AND-EVES WORLDVIEW, Global Freedom Of Expression Columbia University <https://globalfreedomofexpression.columbia.edu/publications/nalsa-judgment-critique-of-the-indian-perspective-beyond-the-adams-and-eves-worldview/> (June 14, 2021, 10:00)

India's first step in the way of recognising Transgenders as "third gender". It is observed that the basic human rights entitled since birth bestowed under the constitution are equally applicable to all the citizens including the transgender people and gave them the right of gender identity which was not given to them earlier. 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 legislations⁴.

According to Ipsos LGBT + pride 2021 global survey-

The same survey found that 17% of the Indians have a relative, friend or work colleague who is homosexual (Including Gay and Lesbian), 21% have a relative, friend or work colleague who is bisexual, 10% have a relative, friend or work colleague who is transgender, 12% have a relative, friend or work colleague who is non-binary, non-conforming or gender-fluid⁵.

II. HISTORICAL BACKGROUND

"History owes an apology to these people and their families. Homosexuality is part of human sexuality. They have the right of dignity and free of discrimination". – Justice Indu Malhotra

Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex⁶. Transgender community comprises of Hijras, Eunuchs, Kothis, Aravanis, Jogappas etc. and they as a group has a strong historical presence in India but never been considered as a part of society, they often been exploited, abused, humiliated by the society since then. In the British era Codification of criminalization of homosexual activity was enacted by of Section 377 by the British, which stood for more than 70 years after Indian independence⁷. After Independence LGBT rights has recently evolved in India. In 2010 the Indian legal system stood up for the Transgender community for the first time by judicial pronouncement in the case of *Naz Foundation v. Government of NCT Delhi*⁸ which declared Section 377 of Indian Penal Code unconstitutional which violates Article 14, 15 and 16 of Indian Constitution. NALSA judgement 2014 gives a new ray of hope for the transgender community. This judgement provides them a new life with dignity and respect. Apart from that International bodies is also working for the welfare of LGBTQ community.

⁴ National Legal Service Authority v. Union of India (2014) 5 SCC 438

⁵ LGBT rights in India - Wikipedia (June 17,2021, 05:53) <https://en.wikipedia.org/wiki/>

⁶ National Legal Service Authority v. Union of India (2014) 5 SCC 438

⁷ LGBT rights in India - Wikipedia (June 17,2021, 05:53) <https://en.wikipedia.org/wiki/>

⁸ Naz Foundation v. Government of NCT Delhi, 2009 SCC OnLine Del1762

III. UNITED NATION AND OTHER HUMAN RIGHTS BODIES ON GENDER IDENTITY

“United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks”⁹.

According to International Human Right International law in relation to gender Identity there is Yogyakarta Principles which deals with universal principle of human rights i.e “All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights”.

IV. RELEVANT FACTS AND ISSUE INVOLVED IN THE CASE

In the present case the writ petition was filled by National legal service authority for the protection of rights and identity of transgender community in 2012. Laxmi Narayan Tripathy often called as Hijra pleaded the difficulties and suffering of the Transgender community for the recognition of their identity and rights before the Hon’ble court. He further pleaded that their right to equality (Article 14), right against discrimination (Article 15) and Right to live with dignity (Article 21) is being violated.

As per the above stated the primary issue involved in the case is

- i. ***Whether the Transgender community need to be identified and categorized as “third gender”.***?
- ii. Whether the person who is not male or female have right to choose their gender?

V. COURT’S - A BEST FOOT FORWARD

In my opinion this judgement indeed has created history in the Indian legal system. For the very first time in India they were given the identity of third gender and all the rights extended to them. The Court has made a set of rules for the welfare, development of transgender community in the society. India has been a country of preconceived notion about the transgenders. Their community often treat them as untouchables and never considered as the

⁹ National Legal Service Authority v. Union of India (2014) 5 SCC 438

citizens of the country. Indian laws are substantially binary in nature, considers only male and female genders. But this judgment recognised and acknowledged them the right to choose their self-identified gender under the name of “third gender”

The Judgement was given by the bench comprising of Justice K.S Radhakrishnan and Justice A.K Sikri

The Court observed :

- 1) “Hijras, Eunuchs, apart from binary gender, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
- 2) Transgender persons’ right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.
- 3) We direct the Centre and the State Governments to 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.
- 4) Centre and State Governments should 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.
- 5) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.
- 6) Centre and State Governments should 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”¹⁰.

VI. CONSTITUTIONAL RECOGNITION BY THE COURT

Justice Radhakrishnan magniloquently reflected the interaction between Article 14, 15 ,16 and 21 of the Indian constitution:

Article 14: The court majorly observed that under article 14 the word person not include male and female, although include non-binary i.e transgenders. Therefore, according to this article the transgenders enjoy equality before law and equal protection of laws.

¹⁰¹⁰ National I Legal Service Authority v. Union of India (2014) 5 SCC 438

Article 15 and 16: The court lays emphasis on the word 'sex' and said that transgender community will be protected against discrimination on the basis of gender. It further recognized that transgender persons are legally entitled safe access to public places under Article 15(2); and benefits of reservation in educational institutions and public appointments as socially and educationally backward classes under Article 15(4), and for that matter under Article 16(4) as backward classes¹¹.

Article 21: The court said article 21 entitles every person including male, female and transgenders to live with dignity and respect.

VII. THE CONCLUSION: UPSHOTS OF ONGOING STRUGGLE OF THE LGBTQ COMMUNITY SINCE AGES

“Look for a rainbow in every crowd, Equality and liberty and this freedom can only be fulfilled when each one of us realizes LGBT community has same right as other citizen” - Justice Deepak Mishra.

NALSA Judgement 2014 has created as history in the Indian legal system. It declares that our constitution is a living document which can be amended with the changing socio-legal situations. Every citizen since birth is born with rights, but for the transgender community it almost took many years for their identity recognition and acknowledgements of rights. these people have struggled throughout their lives just to live with dignity and pride of who they are. Our society has never accepted them because of their gender.

But After 2010, situations have starting changing, people are more aware about the LGBTQ community. They are fighting for their identity and rights. NALSA judgement has created a change in the society. There are many judgements followed by this one. In *Navtej Singh Johar v. Union of India*¹² the court struck down Article 377 of Indian Constitution and decriminalised homosexuality in India. In 2019 the court delivered a pathbreaking judgement in *Arun Kumar v. Inspector General of Registration and others*¹³, where under Hindu Marriage Act not only men and women but also transgender people can have a formalized and a valid marriage. This judgement has broken all the taboo persisting since ages. The personal laws describe marriages as sacrament between men and women, but now same sex marriages are permitted and legalised. In *Obergefell v. Hodge*, “It is demeaning to lock same-sex couples out of a central institution of the Nation’s society, for they too may aspire to the transcendent purposes of

¹¹ Ibid

¹² Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

¹³ Arun Kumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019

marriage,”- Justice Kennedy”¹⁴

On 24 April 2015, the Rajya Sabha unanimously passed the Rights of Transgender Persons Bill, 2014 guaranteeing rights and entitlements, reservations in education and jobs (2% reservation in government jobs), legal aid, pensions, unemployment allowances and skill development for transgender people. It also contained provisions to prohibit discrimination in employment as well as prevent abuse, violence and exploitation of transgender people¹⁵.

“The purpose of law is the establishment of the welfare of society “and a society whose members enjoy welfare and happiness may be described as a just society. It is a negation of justice to say that some members, some groups, some minorities, some individuals do not have welfare: on the other hand they suffer from ill-fare. So it is axiomatic that law, if it is to fulfil itself, must produce a contented, dynamic society which is at once meting out justice to its members”¹⁶.”

- Justice Iyer.

¹⁴ Obergefell v. Hodges, 576 U.S. 644 (2015)

¹⁵ LGBT rights in India - Wikipedia (June 17,2021, 05:53) <https://en.wikipedia.org/wiki/>

¹⁶ National Legal Service Authority v. Union of India (2014) 5 SCC 438