

CASE COMMENTARY

National Legal Services Authority vs. Union of India (2014)

Citation(s): Writ Petition (Civil) No.604 of 2013

Bench: Justice K. S. Panicker Radhakrishnan, Justice Arjan Kumar Sikri

Court: Supreme Court of India

Petitioner: National Legal Services Authority

Respondent: Union of India

Place and Date of Judgement: New Delhi, April 15, 2014

Introduction -

Pre-existing Indian laws have only recognised the binary genders of male and female, and lacked any provision with regard to the rights of transgender people. The gender of a person has been assigned at birth and would determine his or her rights in relation to marriage, adoption, inheritance, succession, taxation and welfare but due to the absence of any legislature protecting transgender people, the community has faced discrimination related to all these rights and even in various areas of life. The above given case was a milestone in Recognition of The Third Gender in India decided by the Supreme Court of India, which declared transgender people to be a 'third gender'. The fundamental rights granted under the Constitution of India will be equally applicable to transgender people, and gave them the right to self-identification to their gender. This judgement is an important step towards gender equality in India.

Background -

For long the transgender community in which term Transgender is umbrella for all terms that have been side-lined by the community and have been tormented and discriminated. They uninterruptedly face abuse and violence just because they don't come under the universally recognized genders i.e. male and female. They are shunned and defamed by society and are considered as untouchables and even considered as liability and pain for the nation.

Back to the history, it seems that the transgender community was accorded a special and important status. Supreme Court takes into consideration Indian Scriptures and sought to

identify the status of transgender during ancient period. The presence of hijaras, Eunchs, Kothis, Aravanis, jogappas in Hindu mythology and concept of tritiya, parkati or napunsakain the Vedic and Puranic literature has recognized them as the third gender and bestowed them with great respect.

- In the epic of Ramayana, Lord Rama was leaving for the forest upon being banished for 14 years turns around to his followers and ask all men and women to return to the city and alone hijras are not bound by this direction and decide to stay with him. Impressed with their devotion, Rama sanctions them the power to confer blessing on the auspicious occasions such marriage, childbirth and other inaugural functions.
- In Mahabharata Aravan, the son of Arjun offers to be sacrificed to the goddess Kali to ensure the victory of the Pandavas in Kurukshetra War. The only condition made is that to spend the last night of his life in matrimony. Since no women was willing to marry one who was doomed to be killed, then Krishna assumes the form of women called Mohini and marries him. The Hijaras of Tamil Nadu considered being Aravan.
- Jain Texts also make reference of transgender and they played an important role in royal court of Islamic world, especially in the Ottoman Empire and the Mughal rule. But it is very sad to see the discrimination exist even in the 21st century.

So, in 2012 a petition was filed by the National Legal Services Authority who in this case was the primary petition which provides free legal aid to the disadvantaged and unprivileged sections of the society and resorts to resolving their damage. Poojayan Mata Nasib Kaur Ji of Women Welfare Society and Laxmi Narayan Tripathy who is a renowned Hijra activist also filed a petition. The petition was filed so that Transgender can be recognized as a third gender in the eyes of law. Non-recognition of the transgender community as a separate sexual and gender identity is violation of many Fundamental and human Right, which are protected by Indian Constitution and other international Human Right document. Transgender also have the right to enjoy the same right and freedoms which the binary gender male and female enjoy-

Issues Raised-

As it is clear, these petitions essentially raise an issue of “Gender Identity”, which is the core issue. They are-

1. 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?

2. Whether transgender (TG), who are neither males nor females, have a right to be identified and categorized as a “third gender”?

Analysis of the Case -

- Article 14 of the Indian Constitution declares equality before law or the equal protection of law within the territory of India to “any person”. The application of the word “person” is restricted only to male and female, but also include the TG community and hence entitled legal protection of law in all the areas of state activities including healthcare, education, employment as well as citizenship and civil rights. Non-recognition of the identity of TG community results in their discrimination and harassment based on sexual orientation in all spheres of society. This impairs equality before law and equal protection of law and violets article 14 of the Constitution. Hence, there shall be a positive obligation on the state so that everyone including TGs may enjoy equal protection.
- Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds, including the ground of ‘sex’.Indeed, both articles prohibit all forms of gender bias and gender-based discrimination. The expression ‘sex’ used in Articles 15 and 16 is not limited to the biological sex of a man or woman, but to the inclusion of people who consider they to be men or women. Article 15 (2) to (4) and Article 16 (4) of the Directive Principles of State Policy and the various international instruments in which the Indian is a party, induce social equality, which TG understands, and opportunities only extend to them if they are comfortable, so that they respect the other gender And live in equality.
- Article 19 (1) (a) of the Indian Constitution declares that all citizens have the right to freedom of speech and expression, which includes right to live a dignified life with one’s self-identified gender. Self-identified gender can be expressed through dress, words, action or behaviour, one’s personal appearance or choice of manner of dressing. The Supreme Court therefore, held that values of self-identity, autonomy and privacy, autonomy are fundamental rights shall be guaranteed to members of the transgender community and the state is bound to protect and recognize those rights.
- It is noted by the Supreme Court that Article 21is the heart and soul of the Indian constitution and also known as seminal clause because right to life is the basic right and not even states has the right to take away or violate that. It 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.”¹
Recognition of one’s gender identity lies in the soul of the fundamental right to dignity. Therefore, legal recognition of gender identity is a part of right to dignity and freedom.

¹Constitution of India, 1947, art.21

- Section 377 of the IPC- Justice K.S. Radhakrishnan said that these both, gender identity and sexual orientation are different concepts in the case of Navtej Singh Johar vs. Union Of India Ministry Of Law and Justice Secretary²

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.³

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-sexual, bisexuals, heterosexuals, asexual etc.⁴

Judgement and Orders to Central and State Government -

This case resulted in the recognition of transgender person as a third gender. The Court has directed Central and State Government to grant social and legal recognition of gender identity whether it may be male, female or Transgender.

- Legal Recognition for the Third Gender:

The Court recognizes that fundamental rights should be available to third gender in the same manner as they are to males and females. Further, non-recognition of third gender in both criminal and civil statutes is discriminatory to the transgender.

- Legal Recognition for Person transitioning within male/female binary:

On the issue that how the actual procedure of recognition will be placed, the Court merely states that they prefer to follow the psyche of the person and use the "Psychological Test". "Biological Test" was opposed by the court and communicated that insisting on Sex Reassignment Surgery (SRS) as a condition for changing one's gender will be illegal.⁵

- Public Health and Sanitation:

Central and State Government have been directed to take proper measures to provide medical care to Transgender people in the hospitals and also provide them separate public toilets and

² Writ Petition(s)(Criminal) No(s).76/2016

³ Navtej Singh Johar vs. Union Of India Ministry Of Law and Justice Secretary, WP(Crl.)No.76/2016

⁴Ibid

⁵ Diary Number 30488 / 2012, Case Number W.P.(C) No.-000400-000400 / 2012, Supreme Court Of India, <https://main.sci.gov.in/judgment/judis/41411.pdf>

other facilities. Further, they have directed to operate separate HIV/Sero-surveillance measures for transgender people.⁶

▪ Socio-economic Rights:

Central and State Governments have been asked to provide the community various social welfare schemes and to treat the community as socially and economically backward classes. They have also been asked to extend reservations in educational institutional and for public appointments.

▪ Stigma and public Awareness:

There are the broadest direction- Central and State Government are asked to take steps to create public awareness so that Transgender people will feel that they are also part and parcel of the social life and not be treated as untouchables; take measures to regain their respect and place in society; and seriously address the problems such as fear, shame, gender dysphonia, social pressure, depression, suicidal tendencies and stigma.⁷

Conclusion

The LGBT people face ostracism from participation in society with opportunity and dignity is an important human right issue. As the natural feeling of Transgender people is created by God, neither it's a disease nor they are accountable for this personality but the world lowers its eyes and decline to grant basic human rights and accept them. Such discrimination prevails even in the 21st century. In case of National Legal Service Authority v. Union of India, Courts of Indian has legally recognized the fundamental rights of the LGBT community and after Sixty Seven years of the republic of India,

On 15th April, 2014 is marked down as a "Red letter day" for the LGBT Community. It is the responsibility of every citizen to bestow them love and respect with all the opportunity and rights available to any other person.

⁶Niyati Acharya, Law Times Journal, NLSA vs. Union of India, (July 3, 2020, 4:35PM), <https://lawtimesjournal.in/nlsa-vs-union-of-india/>

⁷Diary Number 30488 / 2012, Case Number W.P.(C) No.-000400-000400 / 2012, Supreme Court Of India, <https://main.sci.gov.in/judgment/judis/41411.pdf>