
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

CASE COMMENT: NALSA V UNION OF INDIA- Sainikitha OL¹

Petitioner: National Legal Services Authority

Respondent: Union of India

Name of the case: National Legal Service Authority vs Union of India & Ors[(2014) 5 SCC 438]

Citation: [(2014) 5 SCC 438]

Bench: K.S. Radhakrishnan, A.K. Sikri, JJ.

Year: 2014

INTRODUCTION:

Scarcely ever does our society acknowledge or care to understand the trauma, suffering, and distress experienced by members of the transgender community, nor does it recognize the inherent emotions of those individuals whose identity diverges from their biological sex. The Transgender community is often subjected to ridicule and mistreatment, particularly in public spaces such as railway stations, bus stands, schools, workplaces, malls, theaters, and hospitals. They are marginalized and treated as outcasts, highlighting a societal failure to accept or embrace diverse gender identities and expressions—a mindset that urgently needs transformation. The landmark case of National Legal Services Authority (NALSA) v. Union of India, decided by the Supreme Court of India in 2014, marked a pivotal moment in recognizing and safeguarding the rights of the transgender community in India. The case addressed the non-recognition of gender identity and sought to rectify historical injustices against the Hijra and transgender individuals.

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The focus of the case pertained to concerns raised by members of the Transgender Community (abbreviated as the 'TG community'), who sought a legal affirmation of their gender identity distinct from the male or female assignment given at birth. Their plea asserted that the non-recognition of their gender identity constituted a violation of Articles 14 and 21 of the Constitution of India. The Hijras/Eunuchs, also belonging to this community, advocated for legal recognition as a third gender, encompassing full legal and constitutional protection. The National Legal Services Authority, established under the Legal Services Authority Act of 1997, with the mission to offer free legal services to marginalized sections of society, has taken up their cause by filing Writ Petition No. 400 of 2012. Additionally, Poojaya Mata Nasib Kaur Ji Women Welfare Society, a registered association, has initiated Writ Petition No. 604 of 2013, seeking similar remedies for the Kinnar community, a subgroup within the TG community.

Laxmi Narayan Tripathy, self-identified as a Hijra, has also been included in the proceedings to effectively advocate for the rights of the transgender community. Tripathy's life experiences contribute to the plea for the recognition of their identity as a third gender, distinct from the binary classification of male and female. Tripathy argued that the non-recognition of Hijras, as part of the TG community, as a third gender, denied them the right to equality before the law and equal protection under Article 14 of the Constitution, violating their rights guaranteed by Article 21 of the Constitution of India.

ISSUES RAISED:

Is it imperative to ensure the protection of the rights and interests of those identifying as the third gender?

Historical background of the TG community:

The TG Community encompasses a diverse group, including Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis, and others, all of whom have a rich historical presence in our country, deeply rooted in Hindu mythology and various religious texts. The concept of tritiya prakrti or napunsaka has been an integral part of Vedic and Puranic literature, with the term 'napunsaka' indicating the absence of procreative capability.

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The term "transgender" is commonly used as an umbrella term to encompass individuals whose gender identity, gender expression, or behaviour does not align with their biological sex. Within this broad category, transgender may also include individuals who do not identify with the gender assigned to them at birth. This inclusive definition extends to Hijras/Eunuchs, who, in the context of this writ petition, self-identify as the "third gender" and do not associate themselves exclusively with either the male or female gender categories.

In the epic Ramayana, as Lord Rama departed for the forest following a 14-year banishment, he instructed his followers, both "men and women," to return to the city. However, among his followers, the hijras chose not to adhere to this directive and opted to stay with him. Impressed by their devotion, Rama granted them the authority to bestow blessings on people during significant occasions such as childbirth, marriage, and inaugural functions. This act is believed to have set the foundation for the custom of badhai, where hijras engaged in singing, dancing, and offering blessings. Jain Texts provided a comprehensive reference to the TG community, highlighting the concept of 'psychological sex.'

Historically, Hijras and transgender persons played significant roles; however, with the advent of colonial rule from the 18th century onwards, the situation underwent drastic changes. During British rule, the enactment of the **Criminal Tribes Act, 1871**, marked a turning point. This legislation classified the entire Hijra/TG community as inherently 'criminal' and 'addicted to the systematic commission of non-bailable offences.' The Act mandated the registration, surveillance, and control of certain criminal tribes and eunuchs. It penalized registered eunuchs who appeared dressed or ornamented like a woman in public spaces or engaged in dancing or playing music in a public place. Individuals falling under these categories could be arrested without a warrant and faced imprisonment of up to two years, a fine, or both.

The Act required local governments to register the names and residences of all eunuchs reasonably suspected of crimes such as kidnapping or castrating children, or offenses under **Section 377** of the IPC, or abetting the commission of any of these offenses. It also criminalized keeping a boy under 16 years in the charge of a registered eunuch, punishable with imprisonment or a fine. Additionally, the Act stripped registered eunuchs of their civil rights, prohibiting them from acting as guardians to minors, making gift deeds or wills, or adopting a son. The Criminal Tribes Act was later repealed in August 1949.

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Petitioner argument:

The petitioners have not only asserted but also substantiated their claims with facts and figures, supported by relevant materials, establishing that despite the constitutional guarantee of equality, Hijras/transgender persons encounter severe discrimination across all aspects of society. The non-recognition of the identity of Hijras/transgender persons deprives them of equal protection under the law, exposing them to heightened vulnerability to harassment, violence, and sexual assault, both in public spaces and private settings, including encounters with law enforcement. Sexual offenses such as molestation, rape, forced anal and oral sex, gang rape, and public stripping are perpetrated with impunity, and credible statistics and evidence support these claims.

Moreover, the lack of recognition of the identity of Hijras/transgender persons leads to pervasive discrimination in various spheres, notably in employment, education, and healthcare. Access to public spaces, including restaurants, cinemas, shops, and malls, is marred by significant discrimination. Public toilets pose a serious challenge, as the absence of dedicated facilities forces Hijras/transgender persons to use male toilets, exposing them to the risk of sexual assault and harassment. Discrimination based on sexual orientation or gender identity not only undermines the principles of equality before the law but also violates Article 14 of the Constitution of India, impairing equal protection under the law.

Respondent's argument:

In contrast, the respondents asserted that the state has established an "Expert Committee on Issues Relating to Transgender," dedicated to exploring diverse perspectives aimed at improving the prosperity and dignity of transgender individuals. They argued that the Committee would also incorporate the viewpoints of the petitioners, contributing to the formulation of a more comprehensive policy on this matter. Numerous states and union territories put forth that they have implemented a considerable number of initiatives to enhance the well-being of the transgender community.

Reasoning:

Article 14 of the Indian Constitution stipulates that the State must not deny equality before the law or equal protection of laws to any person within the territory of India. Equality

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encompasses the full and equal enjoyment of all rights and freedoms. Article 14 also imposes a positive obligation on the State to ensure equal protection of laws by instigating necessary social and economic changes, ensuring that everyone, including transgender individuals, can enjoy equal protection of laws without denial. Article 14 does not confine the term 'person' to males or females. Hijras/transgender persons, who do not identify strictly as male or female, fall under the term 'person' and are entitled to legal protection in all aspects of State activity, including employment, healthcare, education, and civil and citizenship rights.

[In National Human Rights Commission vs. State of Arunachal Pradesh](#) (AIR 1996 SC 1234), The Apex Court observed that,

“We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws.”

Articles 15 and 16 prohibit discrimination against any citizen on specified grounds, including 'sex.' These articles forbid all forms of gender bias and gender-based discrimination. Article 15 asserts that the State shall not discriminate against any citizen, including on the ground of sex, regarding access to public places and facilities maintained by the State. Article 16 guarantees equality of opportunities in matters of employment or appointment under the State. Discrimination on the ground of 'sex' under Articles 15 and 16 is understood to include discrimination based on gender identity. The term 'sex' in these articles is not limited to biological sex but is intended to encompass individuals who identify as neither male nor female.

Article 19(1)(a) declares that all citizens have the right to freedom of speech and expression, encompassing the right to express one's self-identified gender. This includes the freedom to express one's chosen gender identity through various forms of expression, speech, mannerism, and clothing. The self-determination of gender is an integral aspect of personal autonomy and self-expression, falling within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

While Article 14 uses the term "person," Articles 15 and 16 use the terms "citizen" and "sex." Article 19 uses the term "citizen," and Article 21 uses the term "person." These gender-

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neutral expressions unequivocally refer to human beings, encompassing Hijras/Transgenders and are not limited solely to the male or female. The judges also considered the range of human rights outlined in documents such as the **Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Yogyakarta Principles**, and others to assess the scope of transgender rights. Section 377 of the Indian Penal Code was misused during the British period, leading to the unjust arrest and prosecution of transgender individuals merely on suspicion. Rectifying this historical injustice requires persistent and spirited efforts.

Judgement:

In a groundbreaking legal development, the court took a significant stride towards recognizing and safeguarding the rights of Hijras and Eunuchs. Going beyond traditional gender norms, the court unequivocally declared Hijras and Eunuchs as the "third gender," ensuring their protection under Part III of the Constitution and relevant legislative provisions.

A key aspect of this judgment was the affirmation of transgender persons' right to self-identify their gender. The court made a clear directive to the Central and State Governments to officially recognize their gender identity as male, female, or the third gender.

Of notable importance were the directives urging the consideration of Hijras and Transgenders as socially and educationally backward classes. This move aimed to redress historical disparities, ensuring eligibility for reservations in educational institutions and public appointments, fostering a more inclusive approach.

The judgment also addressed specific health challenges faced by Hijras/Transgenders, leading to the establishment of separate HIV Sero-surveillance Centres. The court firmly rejected any insistence on Sex Reassignment Surgery (SRS) for gender declaration, deeming it both immoral and illegal.

Recognizing the diverse challenges faced by Hijras/Transgenders, such as fear, shame, gender dysphoria, and societal pressure, the court's focus on addressing these issues reflected a nuanced understanding of their unique struggles.

To ensure comprehensive healthcare and facilities, the court directed the provision of medical care in hospitals and the establishment of separate public toilets. Additionally, the court

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called upon the government to formulate social welfare schemes tailored to the specific needs of Hijras/Transgenders.

Acknowledging the importance of public awareness, the court emphasized its role in dismantling prejudices and fostering a more inclusive society. The judgment also recognized an Expert Committee already in place, tasked with studying the challenges faced by the Transgender community. The court looked forward to the committee's recommendations, which were to be scrutinized based on the legal principles articulated in this judgment and implemented within a stipulated timeframe of six months. This proactive approach underscored a commitment to prompt and effective measures to address the longstanding issues faced by the Transgender community.

The Apex court has observed that, Social justice extends beyond mere legal equality on paper; it involves embodying the spirit of the Constitution, as outlined in the Preamble, Fundamental Rights, and Directive Principles of State Policy. Its influence should reach far and wide, ensuring the rightful acknowledgment of the transgender community and embracing the rights that rightfully belong to them.

Legal Milestone: Supreme Court's Landmark Judgment for Transgender

Rights:

On April 15, 2014, the Supreme Court of India achieved a historic milestone by issuing a judgment that marked a turning point for the Transgender Community, granting them access to equal rights and opportunities. This significant recognition is further enshrined in the Transgender Persons Bill, 2016, emphasizing protection and welfare for this community. Notably, Section 4 of the bill focuses on the formal recognition of the identity of transgender individuals.

The Transgender Persons Bill, 2016:

The preamble of the Transgender Persons Bill, 2016, outlines its purpose — "A bill to provide for the protection of transgender persons and their welfare and for matters concerned therewith and incidental thereto." The legislative framework aims to secure the rights and well-being of the transgender community.

Challenges and Societal Mindset: The Road Ahead

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While many states and the Central Government have enacted laws and measures to uplift the transgender community, the effectiveness of these initiatives hinges on a broader societal transformation. Overcoming a narrow mindset and fostering acceptance within society are crucial for the successful implementation of legal measures and ensuring the inclusion of transgender individuals.

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