

Case summary

National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)

1. Reference Details

Jurisdiction: The Supreme Court of India.

Date of Decision: 15 of April 2014

Link to the Full Judgment:

http://orinam.net/377/wp-content/uploads/2014/04/Judgement_Nalsa_Transgenderrights.pdf

2. Facts of the Case

The case concerns legal gender recognition of transgender people, and whether the lack of legal measures to cater for the needs of persons not identifying clearly as male or female contradicts the Constitution. Pre-existing Indian law only recognised the binary genders of male and female, and lacked any provision with regard to the rights of transgender people, which advocates in India have also defined as “third gender”. 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. Due to the absence of legislation protecting transgender people, the community faced discrimination in various areas of life.

3. Law

Domestic Law

- The Constitution of India: Article 14 (equality before law), Article 15 (non-discrimination), Article 16 (equality of opportunity in matters of public employment), Article 19 (freedom of expression), Article 21 (right to life)

International Law

- International Covenant on Civil and Political Rights (ICCPR) Article 6 (right to life), Article 7 (prohibition of torture or cruel, inhuman or degrading treatment), Article 16 (recognition before the law), Article 17 (right to private and family life)
- Universal Declaration of Human Rights (UDHR) Article 6 (right to life)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) Article 2, Yogyakarta Principles, Principles 1 (universal enjoyment of human rights), 2 (rights to equality and non-discrimination), 3 (right to recognition before the law), 4 (right to life), 6 (right to privacy), 9 (right to treatment with humanity while in detention), 18 (protection from medical abuses)

Also referred to (albeit not directly)

- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Articles 11 (discrimination in employment) and 24 (commitment of State parties)
- Convention for Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights), Article 8 (right to respect for private and family life) and 14 (non-discrimination)
- Vienna Convention on the Law of Treaties Articles 31, 32 (Interpretation of International Conventions)

4. Legal Arguments

The petitioners were joined by a number of interveners in the case. The argument was made that the recognition of only the binary genders of male and female under Indian law and the lack of legal measures to cater for the needs of the represented groups contradicted a number of constitutional rights including the rights to a dignified life, equality before the law, non-discrimination and freedom of expression.

The state government pointed out that an “Expert Committee on Issues Relating to Transgender” had been set up and the petitioners’ views would be sought as part of that process. Various states and union territories were also represented and argued that they had taken steps to improve the conditions and status of members of the transgender community.

5. Decision

NB. The court was constituted of two judges. The leading judgment was given by Judge K.S. Radhakrishnan, whose judgment was endorsed by Judge A.K. Sikri. However, the latter also gave a separate opinion providing some additional comments. We summarise below the leading judgment.

The Court noted that the transgender community (broadly defined by the Court to include *Hijras*, eunuchs, *Kothis*, *Aravanis* and numerous others) has faced prejudice and disadvantage since the eighteenth century in India. It acknowledged the discrimination that transgender people face in areas of life including health care, employment and education, which often leads to social exclusion. The Court declared that numerous steps were necessary in order for centre and state governments to comply with the constitutional rights to life, equality before the law, non-discrimination and freedom of expression.

In reaching its decision, the Court stated that gender identity is an integral part of the personality and one of the most basic aspects of self-determination, dignity and freedom. Thus, no one can be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy as a requirement for legal recognition of their gender identity. Psychological gender is to be given priority over biological sex. Rights have to be protected irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role.

The Court considered international human rights Conventions and norms to be significant for the purpose of interpreting gender identity equality, and used them to shed light on the interpretation of the Constitution. It stated that the wide discrimination faced by the transgender community creates a “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” and that any international convention not inconsistent with the fundamental rights of the Constitution must be read into the national provisions. Accordingly, it stated that it would recognise and follow the principles in the international covenants and the Yogyakarta principles.

The Court held that the right to choose one’s gender identity is integral to the right to lead a life with dignity and therefore falls within the scope of the right to life (Article 21). In this regard, the Court emphasised the need to read the provisions of the Constitution in line with present day conditions, based on a factual and social reality that is constantly changing. Safeguarding the rights of transgender people was especially called for due to the increasing universal recognition and acceptance of transgender issues. The Court noted that Article 21 has been broadly interpreted to include all aspects that make a person’s life meaningful. It protects the dignity of human life, personal autonomy and privacy. As recognition of one’s gender identity lies at the heart of the right to dignity and freedom, it must be protected under Article 21 of the Constitution.

With regard to the right to equality before the law (Article 14), the Court recalled that the state shall not deny “any person” equality before the law or equal protection of the laws. Article 14, in ensuring equal protection, imposes a positive obligation on the state “to ensure equal protection of laws by bringing in necessary social and economic changes”.

Article 14 is a right enjoyed by “any person” (similarly, the reference to “citizen” in Article 15 is gender-neutral) and so applies equally to men, women and transgender people, who do not identify clearly as male or female. Hence, transgender people are entitled to equal legal protection of the law in all spheres, including employment, health care, education and civil rights. Discrimination on the grounds of sexual orientation and gender identity impairs equality before the law and equal protection of the law and violates Article 14.

Articles 15 and 16 prohibit discrimination in certain areas based on a list of grounds, including sex. The reference to “sex” is to be understood as prohibiting all forms of gender bias and gender based discrimination, including discrimination against transgender people. The emphasis put on tackling sex-based discrimination in the Constitution means that people have a “fundamental right to not be treated differently for the reason of not being in conformity with stereotypical generalisations of the binary genders”.

Furthermore, Article 15 includes a requirement to take affirmative action for the advancement of socially and educationally disadvantaged groups. The Court notes that transgender persons have not been afforded special provisions as envisaged under Article 15(4) for the advancement of the socially and educationally backward. They constitute such a group and the state is bound to take some affirmative action to remedy the injustice done to them for centuries.

In addition, the Court stated that expressing one’s gender identity through words, dress, action or behaviour is included in the right to freedom of expression (Article 19). Privacy, self-identity, autonomy and personal integrity are fundamental rights protected by Article 19. As gender identity lies at the core of one’s personal identity, gender expression and presentation, it has to be protected under Article 19(1)(a) of the Constitution. Often the state and its authorities, either due to ignorance or otherwise, fail to digest the innate character and identity of transgender persons, which it must do in order to realise their Article 19 rights.

On these bases, the Court upheld transgender persons’ right to self-identify their gender. The Constitution requires equal treatment of all people regardless of their gender identity or expression. The Court declared that the Centre and State governments must grant legal recognition of gender identity as male, female or third gender. A full recognition is to be given even in the absence of any existing statutory regime. Additionally, the Court declared that educational, social and health care issues faced by transgender people must be addressed both at the centre and state government levels.