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The NALSA Judgement- A legal Standpoint of the Transgender Community with regard to Current Societal Framework

P. S. ARYA ABARANJI¹ AND K. AISHWARYA²

ABSTRACT

Colloquially known as the 'NALSA judgement', on April 15, 2014, a two judge bench of the Supreme Court of India accorded an ironclad judgement which settled an extensively debated and what was considered to be a very precarious legal dispute in India. This judgement has its own compelling value because it engaged in the area of law that was still vague and ambiguous in almost all countries around the globe. The word "transgender" – or trans – is an umbrella term for people whose gender identity is different from the sex assigned at birth. Being extremely diverse, certain Transgender people identify themselves as male or female where some identify themselves as genderqueer, non-binary or agender. While pondering over the question of the state of Transgender people, it is conclusively visible that they are constantly prone to chronic discrimination, social stigma and prejudiced inequality.

I. INTRODUCTION

For centuries, Transgender people were constantly oppressed in terms of education, job opportunities, politics at the tyrannical hands of patriarchy. In India, Transgender people are subjected to inhumane and harsh treatments because of the years long of discrimination. The revolutionary judgement of this case brought light to this matter, subsequently, recognised Transgender persons as a legal gender and that they are entitled to the same set of constitutionally promised fundamental rights that any person belonging to a binary genders of male or female would enjoy.

II. FACTS

- National Legal Services Authority, a government body formed under the authority of Legal Services authorities Act, 1987, was the primary petitioner of the case whose

¹ Author is a Student at School of Law, Sathyabama Institute of Science and Technology (Deemed to be University), India.

² Author is a Student at School of Law, Sathyabama Institute of Science and Technology (Deemed to be University), India.

main purpose is delivering legal aid services to unfortunate sections of India and minimising the pressure upon the judiciary.

- Along with NALSA, Pooja Mata Nasib Kaur Ji Women Welfare Society, a registered society, NGO, and Laxmi Narayan Tripathi, a renowned Hijra activist were the other petitioners.
- Laxmi Narayan Tripathi, the first transgender person to attend Asia Pacific Islanders and spoke about Transgender issues, suggested for endowment of a Commission on Transgender and protection of Transgender culture in order to normalise their presence in the society with the coordination of all State Governments.³
- This petition primarily sought a legal declaration of freedom for Transgender community of their gender identity other than what was assigned to them at the time of birth and such restriction and discrimination should be deemed to be violative of Article 14 and Article 21 of the Constitution of India.

III. ISSUES

Based on the facts, it is evident that these petitions potentially raise issues gyrating around “Gender Identity”. It has two dimensions to it, viz.:

1. Whether a person has a right to identify oneself as a female in spite of being born as a male with abundant female orientation when such a person has undergone sex altering operational procedure as well?
2. Whether a Transgender person who is neither a male or a female hold the right to identify and classify themselves as a “Third Gender”?⁴

IV. JUDGEMENT

The Supreme Court of India held that,

- *“For the purpose of safeguarding the fundamental rights under Part III of our Constitution and the laws enacted by the Parliament and state Legislature.”*
- *“The Transgender persons have the right to self-identify themselves and they must be legally recognized as a male, female or a third gender by the Central and State government.”*

³ *Transgender Presons* – MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT (Dec 20, 2020, 11:25 PM), <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf>

⁴ Lavina Bhargava, *Supreme Court Case Analysis: NALSA v. Union of India and Ors. (Transgenders Rights Case)*, LATESTLAWS, <https://www.latestlaws.com/case-analysis/supreme-court-case-analysis-nalsa-v-union-of-india-and-ors-transgenders-rights-case-by-lavina-bhargava/>

- *“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
- *“The Central and State Governments must take adequate measures to provide them medical care and social welfare schemes for their betterment. Further, proper steps must be taken to redeem their dignity and place in the society where they can enjoy a free cultural and social life.”*⁶

V. COMMENT

The 113 page verdict elucidated the struggles and trauma that the Transgender community has been facing from historic times. The judgement necessitated the Central and State Governments to take steps not to legally recognise them but also to treat them respectfully so that they feel they are also a part and parcel of our society. The main acumen so as to why this case is of enormous significance is because of the fact that it adopted plethora of authorities such as the Indian culture, mythology, holy transcripts and international components which had given legal recognition to the Transgender persons. The NALSA judgement was built by many foreign judgements. In a law suit the validity of a marriage was questioned upon the transition of the Husband to a female, the Court held that *“the law should adopt the chromosomal, gonadal and genital tests and if all three are congruent, that should determine a person’s sex for the purpose of marriage.”*⁷ The Esteemed Judge asserted that the biological sexual identity of a person at birth is fixed and any further developments of organs by medical or surgical aids does not change the gender of the person. This case clearly exposes the level of antagonism and intolerance that was exhibited few decades ago. Nonetheless, this judgement was heavily criticised by various other countries around the world like Australia and New Zealand. In opposition to the Corbett principle, Learned Judge Ellis of New Zealand acclaimed that once a person has undergone surgery to alter sex, he or she can no longer operate in his or her sex at the time of birth.⁸ The Courts in New Zealand believed that gender identity must be liberal and not imposed. Hence, in a similar case, the New Zealand Court propounded that *“as of the opinion that gender determination is a purely psychological question, one of self-perception and partly a social question, how society*

⁵ National Legal Ser. Auth vs Union of India & Ors, WRIT PETITION (CIVIL) NO.400 OF 2012

⁶ *Supra*

⁷ Corbett v. Corbett 2 All ER 33 (1970)

⁸ Attorney-General v. Otahuhu Family Court 1 NZLR 603 (1995)

perceives the individual.”⁹ The High Court of Kuala Lumpur held in a case¹⁰ concerning the gender status of a person who was born as a male and later, with the help of gender reassignment surgery, transitioned to a female because she felt more inclined to a woman *in re* National Registration Identity Card that “*she feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her “psychological thinking” is that of a woman.*”

Shri Anand Grover, the learned senior counsel appearing on behalf of the petitioner, drew the historical importance of the Transgender community from Vedic and Puranic literatures to their outstanding role in the royal courts of the Islamic world, etc. The Transgender community constitutes of *Hijras, Eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis* etc. A reference was made to the repealed Criminal Tribes Act, 1871 where members of the Transgender community were considered to criminals and were subjected to very cruel and barbarous acts during the British Colonial rule. Part II of the said act was titled ‘Eunuchs’¹¹ where it mainly focused on monitoring them. Transgender persons were massively associated with crimes related to sexual practices, especially Section 377 IPC¹², 1860. In 1884, a Transgender person was arrested and prosecuted under Section 377 under the mere suspicion that he was a ‘*habitual sodomite*’ and was later acquitted on appeal.¹³ Despite being acquitted, this case is enough to demonstrate how their identities was used as an instrument to belittle and humiliate the Transgender community.

Now turning towards India’s Constitutional assurance, the Court understood that all problems and oppression that the Transgender community face is in contravention to Article 14 (equality before law), Article 15 and 16 (prohibition of discrimination based on race, religion, caste, sex and place of birth), Article 19 (freedom of speech and expression) and most importantly, article 21 (protection of life and personal liberty). For the Transgender community to enjoy these constitutionally promised fundamental rights, the Court held that they must be recognised as a male, female or a third gender of their own choice and they must be safeguarded by the State. Shri Sanjeev Bhatnagar, learned counsel appearing for the petitioner in Writ Petition No.604 of 2013 argued about the obstacles that the *Kinnar*

⁹ Secretary Department of Social Security v. “SRA” (1993) 43 FCR 299. Also see Mathews, J. in R v. Harris & McGuinness 17 NSWLR 158 (1988)

¹⁰ Re JG, JG v. Pengarah Jabatan Pendaftaran Negara 1 MLJ 90 (2006)

¹¹ Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth, but this is discovered the child previously assigned to the male sex, would be recategorized as intersexed.

¹² Unnatural offences.— Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

¹³ Queen Empress v. Khairati ILR 6 All 204 (1884)

*Community*¹⁴ endure and how they are deprived of all the constitutional rights as well as legal protection which is available to all the people belonging to binary genders such as a male or a female. Right to equality is considered as the basic feature of the Constitution. Treating equals unequally is violative of the basic structure. According to Justice PN Bhagwati, “*Rule of law permeated the entire fabric of the Indian Constitution and it excludes arbitrariness. Whenever there is arbitrariness, there is a denial of Rule of Law.*”¹⁵ Non-recognition of the Transgender community is itself denies equality before law and therefore, any sort of discrimination based on sexual orientation of a person violates Article 14 of the Indian Constitution. Article 15 and 16 prohibit discrimination on the basis of sex because sex discrimination still exists in our society. The Constitution makers gave key emphasis to this right to prevent any sort of deplorable attitude towards both binary as well as non-binary gender. Article 19 (1) guarantees that all the citizens shall have the freedom of speech and expression. The word ‘expression’ includes the freedom of the person to express through words, dress, action or behaviour.¹⁶ Article 21 cover all those aspects of life which makes a person’s life dignified and meaningful. It is a basic right vested upon all the citizens and even the State has absolutely no authority to violate it. The Supreme Court of India held in a case that “*Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.*”¹⁷ This judgement is extremely appreciable because the Court acknowledges all the possible violations of fundamental rights.

VI. CONCLUSION

Gender identity is one of the most indispensable facets of life. The reasoning of this judgement was very well justified in this case because it is incontestable that Transgender community go through unspeakable troubles and trauma every day. However, the attitude of people have been indifferent towards the Transgender community. Even in this present moment, many trans people are subjected harsh and cruel treatment. Only on November 25, 2019, the Rajya Sabha passed the Transgender Persons’ (Protection of Rights) Bill which is still objected due to the lack of recognition of the right to identify one’s gender. Trans people in India have lived enslaved lives for centuries. It took a long dreadful battle to gain legal recognition. It’s high time we render our support to the Indian Transgender community in their struggle for recognition, dignity and equality.*****

¹⁴ Another term used for ‘Transgender’.

¹⁵ Bacchan Singh v. State of Punjab, AIR 1980 SC 898

¹⁶ Ibid

¹⁷ Anuj Garg v. Hotel Association of India 3 SCC 1(2008)