

LEGALFOXES LAW TIMES

CASE COMMENT

NATIONAL LEGAL SERVICES AUTHORITY vs UNION OF INDIA & ORS.

“A RAY OF HOPE FOR LGBT COMMUNITY”

by Divanshi Gupta,

COURT: THE SUPREME COURT OF INDIA

BENCH: J. K S RADHAKRISHNAN, J. A K SIKRI

PETITIONER: NATIONAL LEGAL SERVICE AUTHORITY

RESPONDENT(s): UNION OF INIDA

DECIDED ON: 15TH APRIL, 2014

CITATION: AIR 2014 SC 1863, WP (Civil) No. 40 of 2012

INTRODUCTION

Gender identity is the crux of “self-determination” and “personal autonomy” and also is integral to the dignity of an individual which is enshrined under Article 21 of the Constitution. Equality and right to live with dignity is a dynamic concept and cannot be restricted to any doctrinal limitations.¹ The LGBT community battles for absolute identification and the recognition of the same rights as the other citizens of the country. The Supreme Court in its land mark judgment granted legal recognition to transgender persons and has directed the center and state governments to entitle them as socially and educationally backward classes, the bench

¹E. P. Royappa v. State of Tamil Nadu, AIR 1974 SC555

administered the self- identification of transgender persons and pronounced that the government should come up with provisions for the upliftment of TGs in education, employment, health etc. The judgment also stressed on affirmative action.

FACTS

In 2012, the National Legal Services Authority, an Indian statutory body constituted under the Legal Services Authority Act, 1997 filed a writ petition to give legal representation to the marginalized sections of society. The petition was joined by a non-governmental organization 'Poojaya Mata Nasib Kaur Ji Women Welfare Society'; a registered association, seeking reliefs in respect of Kinnar community and an individual "Laxmi Narayan Tripathi" who is a Hijra. The term 'Hijra' serves as an umbrella term that includes people who do not identify themselves with the biological gender they were born with, as well as people who may identify as neither gender. This comprises of hermaphrodites, pre-operative and post-operative transsexuals, as well as transvestites. The two writ petitions were filed to protect the rights and identity of the transgender community.

The petition sought a legal declaration of their gender identity than one designated at the time of birth and that non-acceptance of their gender identity violates the Constitutional provisions. The transgender community contended that their incapacity to articulate themselves in terms of a binary gender negates them the equal protection of law and social welfare schemes. It was submitted that TG community is being deprived of many of the rights and privileges which other people enjoy as citizens of India, in turn, is a violation of their many fundamental rights

HISTORICAL BACKGROUND OF TRANSGENDERS IN INDIA

Recollecting the history of the country, it can be observed that the TG Community was conferred with a special and important status. The Hindu mythology, Vedic and Puranic literatures pinpointed them as the third gender and accorded them great respect. They played a crucial role in the imperial courts and were scrutinized to have the power to give blessings. Also, the Jain

texts make a detailed reference to the TG community which mentions the concept of 'psychological sex'.²

However, with the onset of colonial rule from 18th century, the situation had changed drastically. The legislation was enacted to supervise the deeds of Hijras/TG community, called the Criminal Tribes Act, 1871. As a direct consequence, there was an attrition of the status of the TG community as the legislation was enacted with the assumption that the entire TG community as inborn criminal. Though there has been minimal enhancement in the condition of the TGs, especially after the revocation of the said Act in August, 1949, but their condition is not far from dismal.

Prior to the Criminal Tribes Act, Section 377 of the IPC, 1860 illegalized all penile- non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also generally affiliated with the sexual practices.³ On September 6, 2018⁴, a landmark judgment was pronounced by the Supreme Court of India which decriminalized Section 377 of Indian Penal Code. Prior to this judgment, the majority of the LGBT Indians continued to live double lives, bringing on a false front to be heterosexual because of the enormous fear of facing detriment or discrimination and intolerance.

LAW

DOMESTIC LAW

- Article 14 (equality before the law), Article 15 (prohibits discrimination), Article 16 (equal opportunity in matters relating to public employment), Article 19 (freedom of expression), Article 21 (protection of life) of the Constitution of India.

INTERNATIONAL LAW

²Chatterjee Subhrajit, Problems Faced by LGBT People in the Mainstream Society: Some Recommendations, 1(5) Int'l J. of Interdisciplinary and Multidisciplinary Stud. 317–331 (2014).

³ Queen Express vs. Khairati, (1884) ILR 6 All 204.

⁴Navej Singh Johar v. Union of India, WP (C) 572/2016.

- (ICCPR) International Covenant on Civil and Political Rights; Article 6 (inherent right to life), Article 7 (forbidding cruel or torture, inhuman or humiliating treatment), Article 16 (identification before the law), and also Article 17 (right to family & privacy).
- Articles 31, 32 of Vienna Convention on the Law of Treaties.
- Article 6 of Universal Declaration of Human Rights (UDHR).
- Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Yogyakarta Principles.
- Article 8 and 14 of the Convention for Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights).

ISSUES RAISED

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 discretion, in case when such an individual have undergone operational procedure, alters his/her gender as well?
2. Whether transgender (TG) have the right to be identified and categorized as a “third gender”?

JUDGEMENT

The bench acknowledged that gender identity is one of the foundational aspects of life which attributes to a person’s intrinsic feeling of being male, female or transgender person. The counsel for petitioners contended that guarantee to equality and non-discrimination on the deck of gender identity is developing and gaining acceptance globally and that it can also be practiced in India. The concurring opinion pronounced by J. Sikri, is almost as detailed as the main judgment and construes the rights of the TG community in a jurisprudential light. The detailed analysis was made by the learned judge regarding Kantian standard of justice that’s Aristotle’s equalitarian. Taking reference from *In Apparel Export Promotion Council v. A. K. Chopra*, the court acknowledged the necessity to follow international conventions because of the absence of proper legislation⁵.

⁵In *Apparel Export Promotion Council v. A. K. Chopra* (1999) 1 SCC 759.

The Court pronounced that TGs are authorized to affirmative action which is guaranteed under Article 15(4) and also to reservation in the matter of appointment. State has the obligation to take affirmative measures to give them due representation in public services. Further, the court highlighted on the requirement for legal recognition of third or transgender identity and also mentioned that they belong to a distinct socio-religious and cultural group and must recognize them as a “third gender”, apart from male and female. Also, to safeguard and protect the rights of the transgender guaranteed in the constitution of India, it was declared that Hijras, Eunuchs, apart from binary gender, must be treated as “third gender” and right of transgender persons to decide their self-identified gender was also upheld.

The judges relied upon the Yogyakarta principles. The considerable factor of the judgment was its recognition of the TG community as a socially and educationally backward community.⁶ Such categorization, which leads as a positive distinction, is a much-needed measure for the upliftment of such section of society. Another remarkable aspect is the special medical attention that is sought to be given to this community. In addition, the measures to provide them a sense of belonging in the society by educating the society as well as the community is a laudable solution put forth by the judgment. The judgment provided that the state can't discriminate them on the ground of gender, violating Article 14, 16 and 21 of the Constitution of India.

Certain directions were given by Supreme Court to Centre and State Government:

- Grant legal recognition of their gender identity like male, female or as third gender.
- Crucial steps need to be taken to treat them as socially and educationally backward classes of the society and extend all advantages of reservation in cases of admission in educational institutions and for appointments.
- Operate separate HIV Sero-surveillance Centers since Hijras/ Transgender face several sexual health issues.

⁶Mark E. Wojcik, *Male. Female. Other. India Requires Legal Recognition of a Third Gender*, 43:4 International Law News 1 (American Bar Association Section of International Law) (2014).

- Consider the issues seriously being faced by TG community for instance social pressure, fear, depression, gender dysphoria, social stigma, etc. and any instance for portraying other's gender as immoral and not standing the test of legality.
- Take proper measures to supply medical aid to TGs within the hospitals and also provide them with separate public toilets and other facilities.
- Take steps for formulating various social welfare schemes for their advancement.
- Take steps to make public aware to make sure that TGs will sense that they are also part and parcel of the social life and be not treated as untouchables.
- Take measures to regain respect and dignity in the society which once they enjoyed in our cultural and social life.

COMMENTS

This is a landmark decision because it's the initial step to legally recognize non-binary gender identities and stands by the fundamental rights of transgender persons in India. The homosexuals and third gender people like other men and women are also human beings. Thus, the people including men, women and transgender cannot be discriminated under the ambit of Article 14.⁷The judgment doesn't provide an extensive solution for the problems faced by Transgenders. It merely gives a cursory glance at these issues. The judges provide no descriptive or comprehensive guidelines. This judgment brings a ray of hope for not only the transgender community but also for human rights workers. After a long battle, the TG community is legally recognized as a separate identity and also given equal rights. No longer are they considered as untouchables and with passage of time cruelties against them have decreased. This was an initial step to the betterment of a community. Once again the fundamental rights have been given the utmost respect.

CONCLUSION

However, six years since the judgment, while some things have changed on the ground for the TG community, a lot more have simply remained the same. DMK MP Tiruchi Siva in 2015 passed a Private Member's Bill in the Rajya Sabha taking into consideration the rights of

⁷Sunil Babu Pant &Ors. v. Nepal Government (Writ Petition No.917 of 2007)

transgender persons. According to transgender activists this bill follows the spirit of NALSA judgment. But the Centre decided to bring in their own version of the bill in the Lok Sabha which is much more watered down version and had several problematic inclusions. The bill was passed in Lok Sabha in 2018, but once the house dissolved this bill stands lapsed. The latest development regarding the bill has led to the ripening of the efforts of the judiciary and the human right activists as the parliament, in July 2019 has passed The Transgender Persons (Protection of Rights) Bill identifying the third gender via legislations.

After the judgment has been passed the most important changes is that the most of the High Courts have used the above judgment as a reference and granted rights to several Trans and intersex individuals who have approached them. There are several states that have implemented or atleast passed Trans policies like state of Karnataka and Kerala. Changing the perception of people is a slow and gradual process and one cannot expect it to happen overnight, but what's important is the acceptance.