

CASES COMMENTS

CASE COMMENT ON NATIONAL LEGAL SERVICES AUTHORITY V. UNION OF INDIA & OTHERS (AIR 2014 SC 1863): A RAY OF HOPE FOR THE LGBT COMMUNITY

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DOI: 10.21684/2412-2343-2016-3-2-164-175

The lives of human beings are full of complexities, but LGBT face much more trauma compared to other people. What is necessary is to understand the sentiments of the LGBT community and also to grant them common human rights. But the world lowers its eyes and refuses a discussion over the granting of basic human rights to the LGBT community. And it is so sad to see that such discrimination exists even in the 21st century. Indian law, on the whole, only recognizes the paradigm of the binary genders of male and female, based on a person's sex assigned at birth, which permits a gender system, including the laws relating to marriage, adoption, inheritance, succession and taxation, and welfare legislation. The most pertinent question with respect to the LGBT community is whether LGBT are to be discriminated against by other human beings. Merely being different does not give others the authority to ostracize one from society. In fact, in July 2009 the Delhi High Court ruled that consensual same-sex relations between adults in private could not be criminalized. Then in a recent judgment, the Supreme Court of India expressed its concerns over the mental trauma, emotional agony and pain of the members of the transgender community: all forms of mental suffering of the LGBT community, as well as ignorance and isolation of the community, were brought to an end by the Court's decision in National Legal Services Authority v. Union of India & Others.¹

Keywords: LGBT; human rights; identity; discrimination; judgment.

¹ Writ Petition (Civil) No. 400 of 2012, Judgment dated 15 April 2014.

Recommended citation: Manjeet Kumar Sahu, *Case Comment on National Legal Services Authority v. Union of India & Others (Air 2014 Sc 1863): a Ray of Hope for the Lgbt Community*, 3(2) BRICS Law Journal 164–175 (2016).

Introduction

*Gay rights are human rights,
and human rights are gay rights, once and for all.*

Hillary Clinton, 2011

LGBT has become a widely accepted designation for sexual minorities and gender orientation. All members of this community are subject to similar prejudices rooted in beliefs and traditions about sexuality and gender. The LGBT community, as a social minority group, suffers from various forms of social, political, economic and cultural injustice. The lack of social recognition has an effect on the capacity of the LGBT community to fully access and enjoy their inherent rights as citizens within their own territory. They are often exposed to intolerance, discrimination, harassment and the threat of violence owing to their sexual orientation, differently from those who identify themselves as heterosexual.

Democracy has played a vital role in identifying the rights of the LGBT community. It is noteworthy that gay rights have progressed farthest in the very parts of the world where democracy has been most successful, and that gay rights have struggled the most in the very places where democracy has faced difficulties in advancing or has not advanced at all.² Democracy also facilitates gay rights by making possible a vibrant and robust civil society that can exist only within a political framework allowing for freedom of association.³

Hence, the most sensible approach for the LGBT community would be to fortify existing programmes to promote democracy, civil society and the rule of law. It is due to democratization that today lesbian, bisexual, gay, transgender and 'hijra' (a Hindi word, meaning eunuch, that today is used in South Asia for a person whose sex at birth is male but who self-identifies as female or as neither of the male nor of the female sex) communities in India are asserting their right to freedom from discrimination on the basis of sexual preference. Voicing their concerns in social, legal and political contexts, they are building alliances with other peoples' struggles. This has resulted in a vibrant political movement. While their strength is gaining on one level, the movement's voices are often in conflict with each other, which has fractured the movement's collective strength. Many women's groups, lawyers and human rights activists have articulated

² Omar G. Encarnación, *Gay Rights: Why Democracy Matters*, 25(3) J. of Democracy (2014).

³ *Id.*

concern and joined in solidarity to establish dialogue between movement factions to unite for sexual freedom. Together they and, most importantly, the LGBT and hijra individuals themselves work to overcome these obstacles in pursuit of a society that celebrates and protects the rights of sexual minorities.

Equality is a dynamic concept and cannot be restricted to any doctrinal limitation.⁴ The battle of the LGBT community for the recognition of similar rights as other human beings is at its peak in every part of the world. A large section of the international human rights community has reacted strongly against the violence, discrimination and persecution that LGBT people openly face in the world, calling for their protection through the application of international human rights law.⁵ There are also non-state actors such as NGOs that for the last three decades have incessantly raised the concerns of the LGBT community. It should be considered shameful then that today some citizens are still fighting for honour in their own countries.⁶ The LGBT community is made up of people of all racial, socio-economic, religious and non-religious, and age backgrounds.⁷ In India, their struggle for absolute identity in the Constitution has recently been recognized by the courts, and the Indian courts have also given prominence to the human rights concerns of the LGBT community.

Transgender Rights Case

The case under comment is *National Legal Services Authority v. Union of India & Others*⁸ which was brought before the Supreme Court of India and concerned the grievances of the members of the transgender community, who sought a legal declaration of their gender identity different from the one assigned to them, male or female, at the time of their birth, and who stated that non-recognition of their gender identity violated Articles 14⁹ and 21¹⁰ of the Constitution of India.

The petitioner highlighted the traumatic experiences of the members of the transgender community and submitted that every person of that community has a legal right to decide their sex orientation and to espouse and determine their

⁴ *E. P. Royappa v. State of Tamil Nadu*, AIR 1974 SC555.

⁵ Jayesh Needham, *After the Arab Spring: A New Opportunity for LGBT Human Rights Advocacy?* 20(87) *Duke J. of Gender L. & Pol'y* (2013).

⁶ *Assam Sanmilita Mahasangha & Others v. Union of India*, Writ Petition (Civil) No. 562/2012, Judgment dated 17 December 2014.

⁷ Who and what is LGBT?, available at <<http://tnlr.org/wp-content/uploads/2011/04/Who-and-what-is-LGBT.english.pdf>> (accessed Dec. 14, 2015).

⁸ Writ Petition (Civil) No. 400 of 2012, Judgment dated 15 April 2014.

⁹ Constitution of India, Art. 14 – “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

¹⁰ Constitution of India, Art. 21 – “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

identity. It was submitted that since transgender people are treated neither as male or female, nor given the status of a third gender, they are being deprived of many of the rights and privileges which other people enjoy as citizens of India. Transgender people are deprived of social and cultural participation and hence are restricted from access to education, healthcare and public places which deprives them of the constitutional guarantee of equality before the law and equal protection of the laws. Furthermore, it was also pointed out that members of the community also face discrimination with regard to candidacy for election, the right to vote, employment, obtaining licences, etc. and, in effect, are treated as outcasts and untouchables.

Historical Background of Transgenders in India

The Supreme Court of India took into consideration Indian scriptures and sought to identify the status of the transgender community during ancient periods. Asian countries have centuries-old histories of the existence of gender-variant males, who in present times would be labelled 'transgender women'. India is no exception. The Kama Sutra provides vivid descriptions of the sexual life of people with a 'third nature' (*tritiya prakriti*).¹¹

The historical background of the third gender identity in India signifies the position accorded to them in Hindu mythology, Vedic and Puranic literature, and the prominent role played by them in the royal courts of the Islamic world, among others. The transgender community includes *Hijras*, *Kothis*, *Aravanis*, *Jogappas* and *Shiv-Shakthis*, and they, as a group, have a strong historical presence in India in Hindu mythology and religious texts. The concept of *tritiya prakriti* or *napunsaka* has also been an integral part of Vedic and Puranic literature. The word *napunsaka* has been used to denote the absence of procreative capability.¹²

Ramayana

Lord Rama, in the epic poem *Ramayana*, leaving for the forest upon being banished from the kingdom for fourteen years, turns to his followers and asks all the 'men and women' to return to the city. Among his followers, the hijras alone do not feel bound by this direction and decide to stay with him. Impressed with their devotion, Rama sanctions them the power to confer blessings on people on auspicious occasions such as childbirth and marriage, and also at inaugural functions which, it is believed, set the stage for the custom of *badhai* in which hijras sing, dance and confer blessings.¹³

¹¹ UNDP (United Nations Development Programme), India, A Report on "Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion" (Dec. 2010).

¹² *Supra*, note 1 at ¶ 12.

¹³ *Id.*, at ¶ 13.

Mahabharata

Aravan, the son of Arjuna and Nagakanya in *Mahabharata*, offers to be sacrificed to the Goddess Kali to ensure the victory of the Pandavas in the Kurukshetra War. The only condition that he makes is to spend the last night of his life in matrimony. Since no woman was willing to marry one who was doomed to be killed, Krishna assumes the form of a beautiful woman called Mohini and marries him. The Hijras of Tamil Nadu consider Aravan their progenitor and call themselves Aravanis.¹⁴

Jain Texts

Jain texts also make a detailed reference to transgender that mentions the concept of '*psychological sex*.'

Hijras also played a prominent role in the royal courts of the Islamic world, especially in the Ottoman Empire and the Mughal rule in Medieval India. A detailed analysis of the historical background of the same finds a place in the book *With Respect to Sex: Negotiating Hijra Identity in South India* by Gayatri Reddy.¹⁵

Criminal Tribes Act, 1871: the Darkest Legislation

During British rule, legislation was enacted to supervise the actions of the hijras/transgender community, titled the Criminal Tribes Act, 1871, which deemed the entire community of hijras persons as innately 'criminal' and "addicted to the systematic commission of non-bailable offences". The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs, and it penalized eunuchs (who were registered) who appeared dressed or ornamented like women in a public street or place, as well as those who danced or played music in a public place. Such persons could also be arrested without warrant and sentenced to imprisonment up to two years or fined, or both. These communities and tribes were perceived to be criminal by birth, with criminality being passed on from generation to generation. In 1897, the Criminal Tribes Act of 1871 was amended, and under the provisions of the statute "a eunuch was deemed to include all members of the male sex who admit themselves, or on medical inspection clearly appear, to be impotent".¹⁶ Under the Act, the local government was required to register the name and residence of all eunuchs residing in the area, as well as their property, who were reasonably suspected of kidnapping or castrating children, or of committing offences

¹⁴ *Id.*, at ¶ 14.

¹⁵ *Id.*, at ¶ 15.

¹⁶ UNDP (United Nations Development Programme), India, A Report on "Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion" (Dec. 2010).

under Section 377¹⁷ of the Indian Penal Code (IPC), or of abetting the commission of any of the said offences.

Under the Act, the act of keeping a boy under sixteen years of age in the charge of a registered eunuch was made an offence punishable with imprisonment up to two years or fine, and the Act also stripped the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, and from adopting a son. The Act was repealed in August 1949.

III Treatment of the Transgender Community: Judicial Precedent

In *Queen Empress v. Khairati*¹⁸ a transgender person was arrested and prosecuted under Section 377 IPC on the suspicion that he was a “habitual sodomite”. He was later acquitted on appeal. This case demonstrated that Section 377, though associated with specific sexual acts, highlighted certain identities, including hijras, and was used as an instrument of harassment and physical abuse against hijras and transgender people.

International and Regional Conventions

The Supreme Court of India seriously deliberated over international conventions¹⁹ and reports while deciding the matter over the rights of the transgender community and it exhaustively referred to various articles contained in the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966 as well as on the Yogyakarta Principles. International forums and U.N. bodies have also recognized the gender identity of transgender people and referred to the Yogyakarta Principles,²⁰ and have pointed out that those principles have been recognized by

¹⁷ Indian Penal Code: § 377 – “Whoever voluntarily has carnal intercourse 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.

Explanation. Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

¹⁸ (1884) ILR 6 All 204.

¹⁹ Constitution of India, Art. 253 – “Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.” See also Art. 51 of the Constitution of India.

²⁰ A distinguished group of human rights experts drafted, developed, discussed and reformed the principles during a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006. The Introduction to the Yogyakarta Principles (Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity) begins:

various countries around the world. The Supreme Court also made reference to a number of statutes giving recognition to transsexual persons in other countries.

The United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender people. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and that this right shall be protected by law and that no one shall be arbitrarily denied that right. Everyone shall have a right to recognition everywhere as a person before the law. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation, and that everyone has the right to the protection of the law against such interference or attacks.²¹

The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, took up a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity so as to bring greater clarity and coherence to the human rights obligations of states.

U.N. bodies, regional human rights bodies, national courts, government commissions and commissions for human rights, the Council of Europe, etc. have endorsed the Yogyakarta Principles and consider them an important tool for identifying the obligations of states to respect, protect and fulfil the human rights of all persons, regardless of their gender identity. Moreover, the United Nations Committee on Economic, Social and Cultural Rights in its Report of 2009 speaks of gender orientation and gender identity.²²

Observations by the Supreme Court of India

The Supreme Court admitted that transgender people, as a whole, face multiple forms of oppression in India. Discrimination is so widespread and pronounced, especially in the fields of healthcare, employment and education, that it results in social exclusion. The Court held that Article 21 was incorporated to safeguard those rights and that a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights, as it takes the pulse and comprehends the feelings of that community, though a minority, especially when their rights have gained universal recognition and acceptance.²³

"All human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible and interrelated. Sexual orientation and gender identity are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse."

²¹ Supra, note 1 at ¶ 21.

²² *Id.*, at ¶ 24.

²³ *Id.*, at ¶ 49.

Opinion on Article 14 of the Constitution and Transgender Rights

Article 14 of the Constitution of India declares that the state shall not deny to 'any person' equality before the law or the equal protection of the laws within the territory of India. Article 14 does not restrict the word 'person' and its application only to male or female. Hijras/transgender people who are neither male nor female fall within the meaning of 'person' and, hence, are entitled to legal protection of the laws in all areas of state activity, including employment, healthcare and education as well as to equal civil and citizenship rights, as enjoyed by any other citizen of the country.²⁴ Non-recognition of the identity of hijras/transgender people results in their facing severe discrimination in all spheres of society including access to public spaces like restaurants, cinemas, shops, malls, etc. Furthermore, access to public toilets is also a serious problem they often face: since there are no separate toilet facilities for hijras/transgender people, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination based on sexual orientation or gender identity, therefore, impairs equality before the law and equal protection of the laws and violates Article 14 of the Constitution of India.²⁵

Opinion on Articles 15 and 16 of the Constitution and Transgender Rights

Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. In the Constitution lawmakers gave emphasis to the fundamental right against sex discrimination so as to prevent direct or indirect acts by some people to treat other people differently, for the reason of their not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Discrimination based on 'sex' under Articles 15 and 16, therefore, includes discrimination on the basis of gender identity. The meaning of 'sex' in Articles 15 and 16 is not just limited to biological sex as male or female, but is intended to include people who consider themselves to be neither male nor female.²⁶

Opinion on Article 19(1)(A) of the Constitution and Transgender Rights

Article 19(1)(a) of the Constitution of India declares that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression

²⁴ *Id.*, at ¶ 54.

²⁵ *Id.*, at ¶ 55.

²⁶ *Id.*, at ¶ 59.

of one's self-identified gender. Self-identified gender can be expressed through dress, words, actions or behaviour or any other form. No restriction can be placed on one's personal appearance or choice of manner of dressing, subject to the restrictions contained in Article 19(2)²⁷ of the Constitution. A transgender person's personality could be expressed by that person's behaviour and presentation. The state cannot prohibit, restrict or interfere with that person's expression of such personality, which reflects that person's own inherent personality. The Supreme Court therefore, held that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community²⁸ under Article 19(1)(a) of the Constitution of India and the state is bound to protect and recognize those rights.²⁹

Opinion on Article 21 of the Constitution and Transgender Rights

It was noted by the Supreme Court that Article 21 is the heart and soul of the Indian Constitution. This article is also known as the Seminal Clause, because the right to life is one of the basic fundamental rights, and not even the state has the authority to violate or take away that right. It also protects the dignity of human life, one's personal autonomy and one's right to privacy. Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender constitutes the core of one's sense of being and is an integral part of a person's identity. The legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under the Constitution of India.³⁰

Sex/Gender Determination on the Basis of the 'Psychological Test' and Not the 'Biological Test'

The Supreme Court observed that Articles 14, 15, 16, 19 and 21 "do not exclude Hijras/Transgenders from its ambit, but Indian law on the whole recognize[s] the paradigm of binary genders of male and female, based on one's biological sex."³¹

The Court, then taking a bold step, succinctly stated that they could not accept the Corbett principle of the 'biological test'; rather, the Court preferred to follow the

²⁷ Constitution of India, Art. 19(2) – "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

²⁸ The Supreme Court of India relied upon a number of U.S. judgments (*City of Chicago v. Wilson et al.*, 75 Ill.2d 525(1978) and *Doe v. Yunits et al.*, 2000 WL33162199).

²⁹ *Id.*, at ¶ 66.

³⁰ *Id.*, at ¶¶ 67, 68.

³¹ *Id.*, at ¶ 75.

psyche of the person in determining sex and gender and prefer[red] the 'Psychological Test' instead of [the] 'Biological Test'. Binary notion of gender reflects in the Indian Penal Code, for example, Section[s] 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislation ... [such as the National Rural Employment Guarantee Act] ..., 2005 ... Non-recognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination.³²

Jurisprudential Approach on Transgender Rights

In *National Legal Services Authority v. Union of India & Others*, Justice Sikri, signifying the organic character of the Constitution of India, brought forward the jurisprudence on the theory of justice to human existence. He explained the rights of transgender people after summarizing the understanding of various philosophers. As per paragraph 127 of the judgment:

Aristotle opined that treating all equal things equal and all unequal things unequal amounts to justice. Kant was of the view that at the basis of all conceptions of justice, no matter which culture or religion has inspired them, lies the golden rule that you should treat others as you would want everybody to treat everybody else, including yourself. When Locke conceived of individual liberties, the individuals he had in mind were independently rich males. Similarly, Kant thought of economically self-sufficient males as the only possible citizens of a liberal democratic state. These theories may not be relevant in today's context as it is perceived that the bias of their perspective is all too obvious to us. In post-traditional liberal democratic theories of justice, the background assumption is that humans have equal value and should, therefore, be treated as equal, as well as by equal laws. This can be described as 'Reflective Equilibrium'. The method of Reflective Equilibrium was first introduced by Nelson Goodman in 'Fact, Fiction and Forecast' (1955). However, it is John Rawls who elaborated this method of Reflective Equilibrium by introducing the conception of 'Justice as Fairness'.

In his 'Theory of Justice' Rawls has proposed a model of just institutions for democratic societies. Herein he draws on certain pre-theoretical elementary moral beliefs ('considered judgments'), which he assumes most members of democratic societies would accept. ... [Justice as fairness ...] tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretations. Justice as fairness is a political conception in part because it starts from within a certain political tradition.

Based on this preliminary understanding of just institutions in a democratic society, Rawls aims at a set of universalistic rules with the help of which the justice of present formal and informal institutions can be assessed. The ensuing conception

³² *Id.*, at ¶ 75.

of justice is called 'justice as fairness'. When we combine Rawls's notion of Justice as Fairness with the notions of Distributive Justice, to which Noble Laureate Prof. Amartya Sen has also subscribed, we get jurisprudential basis for doing justice to the Vulnerable Groups which definitely include TGs. Once it is accepted that the TGs are also part of vulnerable groups and marginalized section of the society.

The Court further stated that they are only bringing them within the fold of aforesaid rights recognized in respect of other classes falling in the marginalized group. This is the minimum riposte in an attempt to assuage the insult and injury suffered by them so far as to pave [the] way for fast[-]tracking the realization of their human rights.

Conclusion

The exclusion of LGBT people from full participation in society with equal opportunity and dignity is an important human rights issue.³³ The Yogyakarta Principles can be said to be the Magna Carta for the modern LGBT community, providing the new wave of freedom of gender identity.

India follows a democratic model of governance. The Indian courts have recognized democracy as the basic structure underpinning the Constitution of India.³⁴ This democracy facilitates that gay rights are to provide gay people with the most socially tolerant environment in which to live their sexuality openly and honestly. In *National Legal Services Authority v. Union of India & Others*, India became one of the first nations to legally identify the rights of the LGBT community and accept them as a third gender. The whole world widely acclaimed the humanistic approach taken by the Supreme Court of India. The Court granted third gender status to transgender citizens, noting that "*recognition of transgenders as a third gender is not a social or medical issue but a human rights issue*", thereby granting rights to those who identify themselves as neither male nor female.

There is no denying the fact that such an inception is a welcome step forward for the LGBT community in India – but this judicial pronouncement has also been applauded by the United Nations, and soon it will set its benchmark in identifying the rights of the LGBT community in all nations. After sixty-seven years of independence of the Republic of India the fifteenth of April 2014 is now marked down as the red-letter day for the LGBT community. This long-awaited judgment on the human rights of the transgender community has made a respectable statement in identifying transgender as a third gender, not only in India, but in the whole world.

³³ M.V. Lee Badgett, Sheila Nezhad, Keez Waaldijk and Yana van der Meulen Rodgers, *The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies* (The William Institute, November 2014).

³⁴ *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

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