

NALSA V. UNION OF INDIA

COURT: The Supreme Court of India

CITATION: Writ petition No.400 of 2012 with Writ petition number 604 of 2013.

DELIVERED ON: 15th April 2014

FACTS OF THE CASE:

1. National Legal Services Authority was formed on 9th November 1995 under the authority of the Legal Services Authorities Act, 1987. The motivation behind the inception of this authority was that the eligible candidates could be made accessible to free services bestowed upon by this national authority and a pace to decrease the delay of justice and hence, trying that nothing is denied in the court of law as the proverb itself says, “JUSTICE DELAYED IS JUSTICE DENIED”.
2. The authority filed a writ petition concerned about the legal recognition of the transgender community people with a non-governmental organization representing the legality of the Kinnar Transgender community people and the individuals who identified themselves as hijra/eunuchs.
3. The precedent showed that the Indian laws are only for the binary gender people i.e. for male and female and a dearth in the laws for the transgender people which is been observed since ancient times. The transgender people also been represented as the third gender by the advocated and the society.
4. The person’s gender has been assigned at birth and would determine his or her rights in relation to marriage, adoption, inheritance, succession, taxation, education, employment and welfare. The lack of laws protecting the transgender community people made them face discrimination in numerous spheres of life.
5. The non- recognition of their gender identity violated the articles 14 and 21 of the Indian Constitution. Therefore, the transgender community urged their inability to express themselves in terms of a legal gender identity denies them the equal protection of law.
6. They also requested for the legal assistance and protection as a differentiated community in the society and as a citizen of the nation to express their self- identified gender in government forms.

ISSUES RAISED:

The main issue is the patriarchy and the boundary-based mentality of the people questioning everything and anything. The identity which is assigned at birth is being questioned just because it doesn’t fall under the societal welfare norms of the binary gender that is male and female and the identity is the transgender community. The community which doesn’t even have the right to prove their individual selves and hence, no protection under was provided to them. Though the Articles 14, 15 and 21 of the Constitution of India clearly defines, equality before

law, prohibition of discrimination on the basis of religion, race, caste, sex or place of birth and protection of life and personal liberty respectively but no application of such laws was observed and lastly, the transgender people were forced to face discrimination which they ought not.

Moreover, the transgender community in South Asia is used to delineate a wide range of gender non-conformity. It serves as an umbrella term that includes people who do not identify with the biological gender they were born with, furthermore as people who may identify as neither gender. This includes hermaphrodites, post-operative transsexuals and transversity people.

RULE OF LAW:

The Indian Laws, Rule and Law of various Countries, International Laws, Human Rights Laws (Universal Declaration of Human Rights) are well taken into consideration in this historic judgment. While, in this serious and global issue, the apex court took the Yogyakarta Principles into great importance. The Yogyakarta Principles are the bundle of the principles on the solicitation of human rights law in relation to sexual orientation and gender identity. The motive behind the initiation of these principles was to incorporate different future where all people born free and equal in dignity and rights could fulfill that precious birthright.

The Yogyakarta Rules or Principles stated in the historic judgment are as follows:

The first principle deals with the right to the Universal Enjoyment of Human Rights which reads as that all human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the enjoyment of all Human Rights.

Therefore, the state shall embody this principle of interdependence and indivisibility of all human rights; amend the legislations in addition to criminal law ensuring the consistency with the universal enjoyment of all human rights.

The second principles deals with the rights to equality and non-discrimination which reads as every individual is entitled to enjoy all human rights without discrimination and are equal before law. The state embodies the principle of equality irrespective of any form of discrimination.

The third principle deals with the right of the individual to recognition before the law which reads that everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacities in all aspects of life and the state shall take all necessary legislative, administrative and other measures to respect and recognize each person's self-defined gender identity.

The fourth principle states the right to life and so therefore, no one should be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity and the state shall cease any state- sponsored or state- condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual groups, are strenuously investigated.

The sixth principle amongst all the Yogyakarta principles states the right to privacy states that everyone irrespective of all discriminations is entitled to enjoyment of privacy without arbitrary or unlawful interference and the state shall take all the necessary legislative, administrative and other measures to ensure the right of each person, regardless of the identification of the gender.

The ninth principle states the right to treatment with humanity while in detention stating that everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The eighteenth principle deals with the protection from medical abuses where, no person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility and the state shall look over the application of the principle.

The nineteenth principle lastly talks about the right to freedom of opinion and expression which states that every individual has the right to demonstrate their emotions and expressions as they are entitled to this right.

The Indian Constitutional Rule and Laws are as follows:

Part III of the constitution of India comprises of fundamental rights - Article 14 stating equality before law, Article 15 dealing with the non-discrimination on any basis, Article 16 defining equality of opportunity in matters of public employment, Article 19 explaining freedom of expression and Article 21 stating Right to Life with dignity and respect.

STATING THE APPLICATION OF RULE AND LAW:

The petitioners were consolidated by a number of interveners in the case. The argument was made that the recognition of only the binary gender i.e. for the male and female under the Indian law and no protection of law and legal assistance for the transgender community made a historic judgment.

Justice Radhakrishnan delivered the majority opinion of the Supreme Court of India.

The golden triangle articles were taken into account and were implemented.

After the discussion of the historical background of transgender, the court noted that the transgender community (broadly defined by the court to include *Hijras*, eunuchs, *Kothis*, Aravanis and numerous others) had faced prejudice and disadvantage since eighteenth century in India. The fact of discrimination in various spheres of life such as education, employment, health care leading to social exclusion was too acknowledged. The supreme court affirmably recognized in the paragraph number 20 of the judgment that the gender identity and sexual orientation including trans-genders and that “each person’s self-defined sexual orientation and gender identity is integral to their identity and is most important aspects of self- determination, dignity and freedom and no one shall be forced to undergo medical procedures such as sex reassignment surgery, sterilization or hormonal therapy as a requirement for legal recognition

of their gender identity. Psychological gender is to be given priority than biological sex. Therefore, the rights have to be protected irrespective of chromosomal sex, genitals, assigned birth sex or implied gender role.

Additionally, the court discussed a detailed progressive jurisprudence of various countries likely, United Kingdom, New Zealand, Australia and The United States in order to recognize the basic rights of the transsexual persons. Furthermore, court considered the international human rights conventions and norms to be consequential purposed with the gender identity equality and used it to out-house the light on the interpretation of the constitution as the country lacks the suitable legislation protecting the rights of the transsexual people of the transgender community. The court stated that the wide discrimination faced by the individuals 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 if any international convention isn’t to be found consistent with the fundamental rights of the constitution must be read to the national provisions. Therefore, in addition to the international conventions the Yogyakarta principles would be followed as discussed earlier under the rule of law.

With regard to the right of life (Article 21), the court held that every individual has the right to choose one’s gender identity is intrinsic to lead a life with dignity. The court in the paragraph number 54 of the legal document held that the article affords protection of laws in all spheres of state activity to all persons “transgender persons who are neither male nor female, fall within the expression “person” and not the other disported sections of the society including that they should be given equal opportunity in public employment sector, healthcare, education as well as equal civil and citizenship rights as enjoyed by any other citizen in the country”. The court in paragraph number 59 of the legal document held that article 15 and article 16 which deals with the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth and the equality of opportunity in matters of public employment should be taken into account by the state as well as central legislatures.

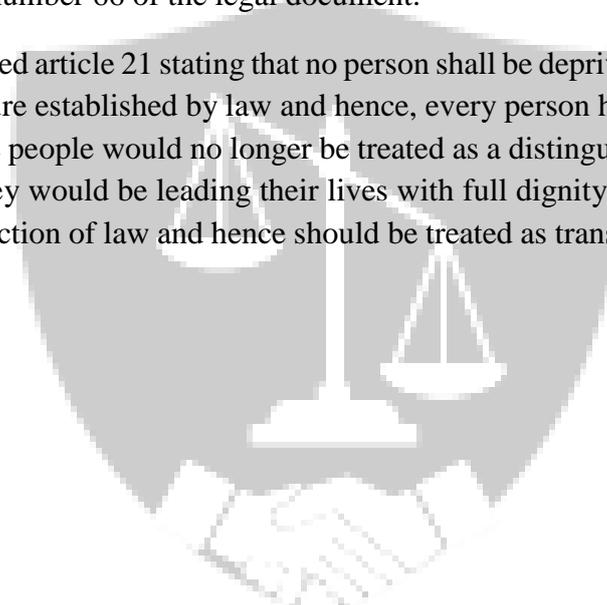
Besides, Article 15 includes a requirement to take affirmative actions for the advancement of socially and educationally disadvantaged groups. The court observes that the transgender have not been granted special provisions envisaged under article 15(4) for the advancement of the socially and educationally backward sections of the society.

With regard to the right of freedom of expression guaranteed under article 19(1) (a) of the constitution, the apex court ruled that,” it includes one’s fundamental right to expression of his or her self-identified gender”, and notwithstanding legitimate exceptions pursuant to article 19(2) of the Constitution”. No restrictions to be made on one’s personal choice of dressing and so the appearance as well stated in paragraph number 62 of the judgment.

CONCLUSION:

The court on the bases of the facts stated, issues presented, considering rules of law of various countries and international organizations and implementing those rules resulting in the justice for the transgender community upheld transgender persons' right to self-identify their gender. The Constitution requires equal treatment of all irrespective of their gender identity, expression or physical appearance. Furthermore, the Court declared that the State and the Centre governments must grant legal recognition of gender identity as male, female or third gender. A full concession is to be given even in the absence of the existing statutory regime. It also concluded that the transgender personality would be expressed by the transgender behavior and presentation of themselves and the government cannot prohibit, restrict or interfere with the transgender expression of such personality which reflects that intrinsic personality, by stating this in the paragraph number 66 of the legal document.

Lastly, the court referred article 21 stating that no person shall be deprived of his life or personal liberty except procedure established by law and hence, every person has the right to lead a life of dignity. Hence, the people would no longer be treated as a distinguished part of the societal welfare norms and they would be leading their lives with full dignity not deprived of any law instead with full protection of law and hence should be treated as transgender as a third gender to the society.



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