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Case Comment: National Legal Services Authority vs Union of India - Position of Concept in other Countries

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INTRODUCTION

Citation: AIR 2014 SC 1863

Bench: K.S. Radhakrishnan, A.K. Sikri

Petitioner: National Legal Services Authority

Respondent: Union of India and others

Part III of the Indian Constitution mentions Fundamental Rights guaranteed to the people of India. These rights are the impediments upon all the competence of Government, legislative besides executive, requisite for the endurance of both public and private rights. Article 14- 18 embodies the right to equality prohibiting unreasonable discrimination between persons, guarantees equality before the law in consonance with equal protection of laws inside the protectorate of India. Article 15¹ prohibits discrimination on the grounds of religion, race, caste,

¹ Constitution of India, art 15

sex, or place of birth, or any of them. Article 16² confers equality in opportunity in matters related to public employment or appointment. Article 19 talks about the right to freedom including freedom of speech and expression whereas Article 21 induces the *right to life and personal liberty except by the procedure established by law*. Fundamental Rights are sole of the Indian Constitution. The leitmotif backing the insertion of Fundamental Rights in the Indian Constitution is to establish a Government of law and not of man. All these aspects of Fundamental Rights were discussed in the leading case of the National Legal Services Authority (NALSA). The case came up centering the legal and Fundamental rights of persons other than male or female their social position in Society and recognition.

FACTS OF THE CASE

In the year 2012 the statutory body of India, the National Legal Services Authority considered and rose for legal representation of marginalized sections of society. The body in addition to non-governmental organizations, representing the Kinnar transgender community filed a writ petition to the apex Court of India concerning the fundamental and legal rights of transgender in society. The individual who recognized themselves as Hijra also joined the petition.

ISSUES RAISED

The petition was coined for the legal declaration of gender identification of the transgender community than the one embarked during the birth. It was debated that the obscurity of their gender specification violates Articles 14 and 21 of the Indian Constitution. The community claimed, their impotency to intimate their identities in terms of gender declining their equal protection of laws and wellbeing in society. The petition urged for legal protection and to recognize this community as a backward community and to grant rights to be able to manifest their self-identified gender in government owned institutions and forms.

² Constitution of India, art 16

JUDGEMENT

The Apex Court stated that Article 14 to be nonrestrictive to the word 'person' and applicable to both male and female and Hijras/transgender persons who are not either male or female lay under the ambit of 'person' under the Constitution. They are authorised for lawful protection of rights in each and every discipline of State ventures undertaking employment, health-care, education, and uniform civil citizenship rights. The expression of the term 'sex' in Articles 15 and 16, however, upholds prejudice based on the grounds of gender specification but unregulated to biotic sex of an individual rather deliberated to include individuals who part their selves from male and female. Transgender has been refused rights as per Article 16(2) and discriminates against them with reference to employment or office undergoing the state on grounds of sex. It is the duty of the State to take affirmative action to grant them participation in public services.

Article 14³ uses the expression "person", Article 15 and 16 uses "citizen" and "sex" and Article 21 mentions "persons", these all expressions are "gender neutral" and distinctly refers to "human beings". And hence take into consideration Hijras/ transgender within its ambit and not limited to only male or female. The court also contended that the dignity under Article 21 includes the diversity of self expression allowing a person to live a dignified life; the article provides life and personal liberty to an individual. Remembrance of one's gender is the core and essence of the Fundamental Rights, pledging to preserve dignity.

In addition to this the court made the following declarations to be considered:

- Hijras, Eunuchs, distant from binary gender, should be managed as "third gender", in order to shelter their rights as listed in part III of the Constitution.
- Directed Centre and the State Governments to serve them as socially and educationally deprived classes, extending all kinds of reservations subject to admission and appointments.

³ Constitution of India, art 14

- Centre and State Government to wield separate HIV surveillance centres for Hijras/transgender.
- Centre and State to take measures for the formulation of social welfare schemes pivoting their betterment in society
- Centre and State to take measures to retain their esteem and position society.

While delivering the judgment the Supreme Court took into following judgments:

Corbett vs Corbett - The case concerned the validity of a marriage between a male and a transsexuals female. The court mentions adopting chromosomal, gonadal, and genital tests to determine a person's sex for the purpose of marriage. The learned judge constituted that the biological sexual orientation of an individual is fixed at the time of birth and cannot be changed either by natural development or organs of the opposite sex or by medical incision means

Christine Goodwin vs United Kingdom - Violations of Article 8, 12, 13, and 14 of the Convention, Protection of Human Rights and Fundamental Freedoms, 1951 was considered by Human Rights European Court. The court held personal and moral security to be enjoyed equally by transsexuals same as any other in the society and not to be estimated as a matter of controversy.

Attorney General vs Otahuhu Family Court - The high court of New Zealand observed, in case of transsexual undergoing surgery, no longer to operate his or her initial sex.

POSITION IN OTHER COUNTRIES

As per the International Human Rights Law, several countries have formulated codes for recognizing the rights and welfare of transgender individuals in society. To put them at equal footings and advantages as availed by any other person of the country.

UK -The United Kingdom, in the year 2004, enacted Gender Recognition Act, 2004. Besides providing legal status to the acquired gender the act highlight the provisions for repercussions of a newly obtained gender status on their rights and aspects with those relating

to marriage, paternity, accession, social security, and many more. The provision does not make it necessary for a person to undergo SRS.

Canada - On June 15, 2017, Canada passed the Transgender Rights Bill C-16 to prevent violence and prejudice against individuals on subjecting to their individuality or gender orientation. The act carried the provisions for the welfare and rights of transgender in society.

Australia - Sex Discrimination Act, 1984 and Sex Discrimination Amendment (sexual orientation, gender identity, and intersex status) Act, 2013 mentions gender identity as a source of appearance and mannerisms or other gender associated traits of a person whether regard to the person's ordained sex at birth.

ANALYSIS

The case of Legal Services Authority v Union of India came to be a historical statement in the history of the Transgender community. The case for the first time concerned the legal position and rights of the transgender community in society. It made this community to be recognized as "third gender", providing equal protection of laws in matters of admission and employment in the public sectors. The case sought the recognition of the transgender community at equal footings. The decision by Supreme Court plays a persuasive value in common law jurisprudence. The case tackled the area that has mostly been untouched or underrated by society and sometimes by law also. The case rose to a historic judgment in the Constitutional history of law.

Following the verdict in the case of Legal Services Authority v Union of India certain remarkable cases came up with the issues subjecting to recognition, rights, welfare, and position of transgender in the society. The case was quoted in *Muhammad Juzaili Bin Monday Khamis v State Government of Nigeria Sembilan*, *Puttuswamy v Union of India*⁴, *Navtej Singh Johar v Union of India*⁵, *Shiri R K v State of Kerala*. The Naz Foundation Case played a significant role in the sexual rights of transgender concerning consensual homosexual sex. Section 377, Indian Penal Code,

⁴ *KS Puttuswamy v Union of India* (2017) 10 SCC 1

⁵ *Navtej Singh Johar v Union of India* AIR 2018 SC 4321

1860 covers Unnatural sex and criminalizes it but in the light of the Naz Foundation case, section 377 no more criminalizes unnatural sex.

As a result of these continuous efforts and cases Transgender Persons (Protection of Rights) Bill, 2019 came, defining the definition of a transgender person. The bill involves trans- men and trans- women, individuals with intersex variations, and genderqueers. Also, the act concerned the welfare and identity associated with transgender in society. The act prohibits discrimination against transgender in matters of employment, education, health care, etc. The act sought for establishing National Council for transgender persons NCT focused on framing welfare schemes and suggestions for the uplifting transgender community in the society.