

Statement from Lawyers Collective

Supreme Court recognises the right to determine and express one's gender; grants legal status to 'third gender'

In a path-breaking judgment, the Supreme Court has affirmed the constitutional rights and freedoms of transgender persons, including those who identify as third gender and those who identify in a gender opposite to their biological sex, i.e., persons, assigned female sex at birth, identifying as male and vice-versa. By recognising diverse gender identities, the Court has broken the binary gender construct of 'man' and 'woman' that has pervaded Indian law. The judgment was pronounced in *National Legal Services Authority v. Union of India & Ors.* [Writ Petition (Civil) No. 400 of 2012 ('*NALSA*')] by a division bench of Justices K.S. Radhakrishnan and A.K. Sikri.

Filed in September, 2012 by National Legal Services Authority, the writ petition had sought several directions from the Supreme Court, including granting of equal rights and protection to transgender persons; inclusion of a third category in recording one's sex/gender in identity documents like the election card, passport, driving license and ration card; and for admission in educational institutions, hospitals, amongst others. The Lawyers Collective had filed an intervention, on behalf of Ms. Laxmi Narayan Tripathy, a Hijra/transgender activist, seeking recognition of self-identified gender of persons, either as male/female/third gender, based on their choice.

NALSA's reasoning rests on two broad strands of human rights: freedom and equality. Underscoring the right to personal autonomy and self-determination under Article 21, the Court observed that "*the gender to which a person belongs is to be determined by the person concerned*". The decision recognises the right of a person to identify in the gender that they relate to, that is, male, female or third gender,

irrespective of medical/surgical intervention. The Court also protected one's gender expression by invoking the freedom of speech and expression under Article 19(1)(a) and held that "*no restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.*"

The Supreme Court also firmly secured the right to equality and equal protection for transgender persons under Articles 14, 15 and 16 by prohibiting discrimination on the ground of gender identity. It has broadened the scope of the term 'sex' in Articles 15 and 16, which till recently meant biological sex of male and female, to include 'psychological sex' or 'gender identity'. Significantly, the Court also declared that no one can be discriminated against on the ground of sexual orientation.

Freedom and equality are further strengthened by the Court's observations on dignity, privacy, personhood and the free spirit of the human being, which are necessary for the human '*personality to flower to its fullest*'. The Court emphatically noted that dignity cannot be realized if a person is forced to grow up and live in a gender, which they do not identify with or relate to.

In discussing the fundamental rights of the transgender persons, *NALSA* relies on principles of international human rights law, especially on sexual orientation and gender identity, by stating that these must inform and provide content to the rights guaranteed under the Constitution. The Court also referred to foreign legislations and judgments on gender identity and expression.

The implications of *NALSA* are far-reaching. With legal status accorded to third gender, transgender persons will be able to enjoy 'full moral citizenship'. A person's sense of gender will now match their official identity, without any certificate from a doctor or proof of having undergone sex re-assignment surgery ('SRS'), as the Court clarified that "*any insistence for SRS for declaring one's gender is immoral and illegal*". The decision will go a long way in stopping egregious police practices of stripping, feeling up breasts and genitals

and subjecting transgender persons to intrusive body searches or medical examination to ascertain their gender. Discrimination in the areas of public employment, health care, education and access to services will be open to challenge and redress. Transgender women may be able to seek protection under gender-specific laws for women. Affirmation of gender identity by the highest Court may also lead families to embrace gender non-conforming members, as was seen after the *Naz Foundation* decision in 2009 for homosexual persons.

By way of granting reliefs sought in the petition, the Court issued a series of directions to the Central and the State governments, including granting legal recognition to persons' self-identified gender, as male/female/third gender; treating transgender persons as socially and educationally backward classes of citizens and extending reservations in public education and employment; providing separate HIV *sero*-surveillance for transgender persons and appropriate health facilities, amongst others. *NALSA* marks a break from the erstwhile paternalistic and charitable approach towards the transgender community by framing their concerns as a matter of rights.

Most importantly, *NALSA* draws forth from the ethos and philosophy of the Indian Constitution, by emphasizing that a “*truly liberal and democratic society would only progress when each individual has realized their full potential*” and that the “*rule of law demands protection of individual human rights.*” The Court's observation that “*the true measure of development of a nation is not economic growth; it is human dignity*”, makes *NALSA* seem like an extension of the Delhi High Court's much cherished decision in *Naz Foundation* that was built on constitutional values of plurality and inclusiveness. *NALSA*'s clear and strong articulation of autonomy and self-determination is particularly remarkable and has the potential of advancing rights of other marginalised groups like sex workers.

Notwithstanding the confusion in terms/expressions around gender and sexuality apparent in some parts of the judgment, *NALSA* is, on the whole, a historic decision that has both strengthened and advanced fundamental rights. It strikes a fine balance between

philosophical, legal and practical considerations that surround the area of gender identity and recognition. The *Koushal* decision will require a relook, in light of the specific findings and broader principles laid down in this judgment.

Lawyers Collective

For written submissions filed in the case, please visit www.lawyerscollective.org