

The Supreme Court judgement on Transgender Rights (NALSA vs Union of India)

A summary of the 15th April 2014 judgement, by Danish Sheikh

The Scope of the Judgment

This judgement covers persons who want to identify with the third gender as well as persons who want to transition from one identity to another, i.e. to male to female or vice versa. The Court has directed Centre and State Governments to grant legal recognition of gender identity whether it be male, female or third gender.

- **Legal Recognition for Third Gender :** In recognizing the third gender category, the Court recognizes that fundamental rights are available to the third gender in the same manner as they are to males and females. Further, non-recognition of third gender in both criminal and civil statutes such as those relating to marriage, adoption, divorce, etc is discriminatory to the third gender.
- **Legal Recognition for Persons transitioning within male/female binary :** As for how the actual procedure of recognition will happen, the Court merely states that they prefer to follow the psyche of the person and use the "Psychological Test" as opposed to the "Biological Test". They also declare that insisting on Sex Reassignment Surgery (SRS) as a condition for changing one's gender is illegal.

It is yet to be determined exactly as to what procedures will be followed by the government for actually recognizing gender identity. But a useful indicator might lie in the Ministry of Social Justice and Empowerment's (MSJE) Expert Committee Report on Issues Relating to Transgender Persons. The Supreme Court states that its legal declarations will be given effect based on the recommendations of this report, and the report itself states that persons shall have the right to choose any of the options - male, female or third gender - independent of surgery or hormone treatment, along with providing a distinct procedure for such recognition. The judgment gives the government six months to implement its findings.

Specific and general declarations

- **Public Health and Sanitation :** Centre and State Governments have been directed to take proper measures to provide medical care to Transgender people in the hospitals and also provide them separate public toilets and other facilities. Further, they have been directed to operate separate HIV/ Sero-surveillance measures for Transgenders.
- **Socio-Economic Rights :** Centre and State Governments have been asked to provide the community various social welfare schemes and to treat the community as socially and economically backward classes. They have also been asked to extend reservation in educational institutions and for public appointments.
- **Stigma and Public Awareness :** These are the broadest directions - Centre and State

Governments are asked to take steps to create public awareness so that Transgender people will feel that they are also part and parcel of the social life and not be treated as untouchables; take measures to regain their respect and place in society; and seriously address the problems such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies and social stigma.

Again, these declarations are to be coupled with the MSJE Expert Committee Report. Since the report is quite broad in scope, this paves the way for incorporating many of its recommendations that aren't explicitly mentioned in the judgment. For example, recommendations like setting up of crisis centres, and gender sensitization in institutional settings, can be easily worked into legally enforceable mandates or rules.

Future possibilities

- **For the LGBT community**

The Court maintains at several points that discrimination on the basis of sexual orientation and gender identity is violative of fundamental rights. While it maintains at different points that its analysis is limited to the transgender community, statements like these have the potential to be used for pushing for non-discrimination and relationship recognition provisions for the LGBT community as a whole. Even within the category of gender identity as a ground for discrimination, the Court notes that the right against sex discrimination stands *"to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders."* This reasoning can be used to contend against discriminatory workplace behaviour against men and women who don't conform to gender stereotypes of being attracted to persons of the opposite sex, amongst other applications.

- **For other vulnerable groups:**

The Court notes that any international conventions that are not inconsistent with fundamental rights must be read into those provisions of the Constitution, which greatly enlarges the scope of fundamental rights. The Court has a broad understanding of international conventions here, including the Yogyakarta principles relating to sexual orientation and gender identity within its understanding. This has the potential to open the doors of Indian Courts to a range of international commitments, as long as there is no contradicting legislation already in place in the country.

- **For challenging 377**

The judgment contradicts the findings of the Supreme Court in Suresh Kumar Koushal in various ways. The main points include:

1. The judgement notes that Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras. It also recognises that sec 377 has been used as an instrument of harassment and physical abuse against

Hijras and transgender persons. The judgment only says that this amounts to a *misuse* of the Section as opposed to what it actually dictates, thus refusing to meaningfully apply a fundamental rights analysis to it. Now we have a clearly contradictory finding.

2. It argues against Koushal's infamous "miniscule minority" argument noting that Transgenderers, *even though insignificant in numbers*, are still human beings and therefore they have every right to enjoy their human rights.
3. The Court finds that discrimination on grounds of sexual orientation and gender identity violates Article 14, and that transgenders are extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. If we are to read this with their finding that 377 is used to harass and physically abuse transgender persons, we can clearly make the link that 377 fails the test of equality under the Constitution.