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# REVISITING THE JUDGEMENT OF NALSA V. UNION OF INDIA: A CASE ANALYSIS

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## ABSTRACT

This paper revisits the landmark case of National Legal Services Authority (NALSA) v. Union of India, decided by the division bench of the Supreme Court comprising K.S. Radhakrishnan & A.K. Sikri on April 15, 2014. This judgment was progressive in many ways as it recognised the transgender community as the ‘third gender’ and became the first judgment to recognise and uphold the right of transgender persons in India, after years of discrimination and ostracization faced by them. This paper analyses this judgment more than a decade after it was decided, with a critical analysis of the post-NALSA era and by looking at various judgments and acts that came after it, as well as the real-life experiences of the transgender community after the pronouncement of this landmark judgment.

## INTRODUCTION

Transgender rights have long been seen through a binary or heteronormative lens in the context of Indian laws and frameworks. While the laws say something, India's own history and mythologies, passed down for generations, tell a different story. In the Mahabharata, the character of Shikhandi was born as the daughter of King Drupada and the reincarnation of Amba, and then later became a male and was instrumental in the fall of Bhishma. Further in the Mahabharata, Arjuna's son Aravan was to be sacrificed to Goddess Kali, and his only wish was to be married before his death, but knowing his impending doom, no woman was willing to marry him, so Lord Krishna assumes the form of Mohini and marries him.<sup>1</sup> In Ramayana, it is stated that when Lord Rama was leaving for his exile he orders all men and women following him to go back, but the Hijras were not bound by them and hence stayed there, impressed by this Lord Ram granted them a boon that they can confer blessings on auspicious days like someone's birth or a wedding, which is believed to be the custom of badhai. Last but not least, if one ever goes to see the role of the Transgender community in Mughal India, one would get to know that transgender individuals were trusted to guard the royal harems and held positions in state administration.

This is just a fraction of examples of what this community has been a part of in our history, yet they have been ostracised for ages, made to face social exclusion and were often abused in public spaces despite their historical and cultural presence.

Judgements in the past decade have aimed to rectify this very mistake by giving these communities legal rights and recognition, and acknowledging the history of these communities, and one such judgement is NALSA v. Union of India, which recognised the rights of transgender individuals in India. This article further discusses the case summary relating to the judgment.

## FACTS

The National Legal Services Authority (NALSA) filed a Writ Petition seeking a legal declaration of the gender identity of individuals who were assigned neither male nor female at birth, and that non-recognition of the gender identity violated the Fundamental Rights of such individuals who fall under the scope of Transgender community under Articles 14 and 21. In

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<sup>1</sup> National Legal Services Authority vs. Union of India (UOI) and Ors. (2014)5SCC438

this petition, Hijras and Eunuchs also claimed legal status as a third gender with all legal and constitutional protections. Various Petitions filed by Lakshi Narayan Tripathy and Poojaya Mata Nasib Kaur Ji had approached the courts asking for similar recognition with respect to Hijras and the Kinnar Communities, which are counted in the transgender community.<sup>2</sup>

## **ISSUES**

- 1) Whether the transgender community need to be identified and categorised as a “third gender”?
- 2) Whether the person who is neither male nor female has a right to choose their gender?

## **RELEVANT LAWS AND PROVISIONS**

### **Indian Law**

1. The Constitution of India,1950: Articles 14,15,16,19 and 21

### **International Law**

1. Universal Declaration of Human Rights(UDHR)
2. The International Covenant on Civil and Political Rights(ICCPR): Articles 6,16 and 17
3. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

## **APPLICATION OF THE LAW AND THE COURT’S DECISION**

### **Petitioner’s Arguments**

The petitioners argued that the existing legal system’s binary gender classification violated the fundamental rights of transgender people and that failing to recognise their identity led them to face extensive discrimination, social exclusion and also violated their basic right to live a life with basic dignity, which has been provided under Article 21. They further continued their argument by stating that since these people are not identified as male or female nor given the

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<sup>2</sup> National Legal Services Authority vs. Union of India (UOI) and Ors. (2014)5SCC438

recognition of the third gender, their fundamental human rights are violated, leading to their marginalisation and being compelled to exist on the margins of society without their consent<sup>3</sup>. Additionally, they also argued that they were effectively deprived of many rights and privileges, including social and cultural participation, access to education, healthcare and public spaces, in violation of their rights under Article 14.<sup>4</sup>

### **Respondent's Arguments**

The Respondents highlighted the issues faced by the community and acknowledged it as a sensitive issue that had been taken into consideration by the Ministry of Social Justice and Empowerment(MOSJE). The petitioners highlighted that the government had established a committee, called the "Expert Committee on Issues relating to Transgender", which had been constituted to conduct an in-depth study of the problems faced by the transgender community to make appropriate recommendations to MOSJE. Even the States and the Union Territories claimed they had taken steps to improve the lives of the transgender population.

### **Court's Decision**

The two-judge bench held a concurring opinion in the case. It held that the non-recognition of the third gender and continued discrimination violated their fundamental rights under Articles 14, 15 and 16. The Court also held that such gender related discrimination also violated the transgender individual's right to live a dignified life. Further, Universal Declaration of Human Rights(UDHR) and the International Covenant on Civil and Political Rights(ICCPR) and the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity deals with universal principle of human rights i.e "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 full enjoyment of all human rights".<sup>5</sup> The Supreme Court applied these principles as they aligned with the fundamental rights enshrined in the Indian Constitution.

The Supreme Court, in its judgment, also looked at the decisions of various countries on the

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<sup>3</sup> Yashvardhan Singh, An Analysis of National Legal Services Authority (NALSA) vs. Union of India, 4 Indian J.L. & Legal Rsch. 1,2 (2022).

<sup>4</sup> National Legal Services Authority vs. Union of India (UOI) and Ors. (2014)5SCC438

<sup>5</sup> Jigyasha Singh, NALSA Judgement: A Legal Recognition of Third Gender, 4 Int'l J.L. Mgmt. & Human. 5552,5554 (2021)

matter, such as *Corbett v. Corbett*<sup>6</sup> from England, which was concerned with a male-to-female transgender individual in the validity of the marriage, while the Corbett principle was not favoured in other Commonwealth Nations like New Zealand and Australia. With respect to Australia, the Court looked at judgments like that of *Re Kevin( Validity of Marriage of Transsexual)*<sup>7</sup>, where it held, there is no formulaic solution and that 'man' and woman should be used in their contemporary ideas, recognising transgender individuals.

With this judgement the Supreme Court moved beyond the idea of sex which is often seen as physical connotation to a wider spectrum including mental and emotional definition as well to include the people who don't fall under the the binary system of male and female and get legal recognition as well as protection, this judgement exemplified the dynamic and progressive nature of the Supreme Court which is aimed at social welfare.<sup>8</sup>

Justice Radhakrishnan's decision presented a detailed analysis of the legal and cultural history of transgender people, taking into account both international and Indian law. The judgment emphasised the social discrimination faced by Hijras and transgender people, including societal pressure, despair, suicidal thoughts, fear, embarrassment, gender dysphoria, and social stigma. Justice Sikri also took into account further issues faced by the transgender population, emphasising the lack of essential human rights access for transgender people, such as education, medical care, voting rights, property ownership, marital rights, and formal identification.<sup>9</sup> The Supreme Court distinguished between the two sorts of sex: mental and physical. The Court emphasised mental sexuality above physical sex when determining sexual identity. According to the Court, all articles of different agreements, such as the Yogyakarta Guidelines, should be followed as long as they align with the fundamental rights guaranteed by Part III of the Indian Constitution. The Court ruled that transgender people had rights under the Indian Constitution. Hijras and Eunuchs, apart from binary gender, should be treated as a "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.

The Court also issued additional guidelines for the state to follow for the welfare and legal protection of transgender individuals: The Centre and State Governments are required to

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<sup>6</sup> Corbett v. Corbett [1970] 2 WLR 1306

<sup>7</sup> Re Kevin( Validity of Marriage of Transsexual) [2001] FamCA 1074

<sup>8</sup> Enakshi Jha, NALSA v. Union of India - The Metamorphosis of Gender Recognition in India, 2 CALJ 48,51 (2015).

<sup>9</sup> Mythri Raj, Case Comment on NALSA v. UOI, 7 Int'l J.L. Mgmt. & Human. 2487,2491 (2024).

provide legal recognition of transgender people's gender identity, including male, female, or third gender, and to respect their right to choose their self-identified gender. The federal government and state governments are provided with instructions to treat transgender individuals as members of socially and educationally disadvantaged groups and to grant them various forms of reservations when it comes to public appointments and admission to educational institutions. The sexual orientation and gender identity of each individual is one of the fundamental aspects of their personality and is one of the most basic elements of self-determination, dignity and freedom, and no one can be forced to undergo medical procedures, like SRS, sterilisation or hormonal therapy, as a fundamental requirement for the legal recognition of their gender identity.

## CRITICAL ANALYSIS AND AFTERMATH

The judgment was a landmark case when it came to the rights of the transgender community and was a step forward in the rights of the LGBTQIA+ community. This judgment became a turning point because it started making people aware of the discrimination and challenges faced by the community. While the judgment recognised the concept of gender identity, it failed to broaden the scope into a much wider range by not recognising the intersectionality of sexuality and gender identity and the legal hurdles and challenges faced by transgender individuals regarding marital and adoption rights at that time.

Following this judgement in 2018, *Navtej Singh Johar v. Union of India*<sup>10</sup> decriminalised homosexuality and held section 377 of the Indian Penal Code, 1860 as unconstitutional. In 2019, the Madras High Court delivered a pathbreaking decision in the judgement of *Arun Kumar v. Inspector General of Registration and others*<sup>11</sup>, where, under the Hindu Marriage Act, 1955, the marriage between a male and a transwoman was held valid and included the transwomen in the definition of brides within the meaning of HMA, 1955.

While the government introduced the *Transgender Persons (Protection of Rights) Act, 2019* a law that provides protection and welfare of transgender people, the act also prohibits discrimination against the community and also outlines the procedure for obtaining a transgender certificate and identity card, but the problem with this act, that even though there is a whole procedure outlined, some of the people who are incharge of registering such

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<sup>10</sup> Navtej Singh Johar v. Union of India AIR 2018 SC 4321

<sup>11</sup> Arun Kumar v. Inspector General of Registration and others AIR 2019 MADRAS 265

certificates, don't try to consider that people don't identify as male or female and rather than being sensitive to these people and helping them out they think these people are under bad influence.

In 2023, a lack of understanding and ignorance by a certain group of police officers about transgender identities and associated socio-cultural realities led to the arrest of 19 people in Hyderabad, who were accused of being “fake transgender women”, and they were further charged with extortion for begging on the streets of the city.<sup>12</sup> Furthermore, to their dismay, the Act is not even implemented properly in many regions, leading to transgender individuals facing a lot of problems in matters of public employment. Don Hasar, a trans/queer rights activist and community organiser from Himachal Pradesh, said in an interview that since he lives in a mountainous terrain, even to ask the government to enact the provisions of Transgender Act has been an ordeal, which consumes a lot of time due to daily travel to furnish representation to entertain his queries. He has further added that this is not feasible for a lot of the members of the transgender community who might not have the resources to do so due to unemployment or being a working-class individual.<sup>13</sup>

It is important to note that systemic discrimination against transgender individuals still happen till this day, as highlighted in the case of *Jane Kaushik v. Union of India*,<sup>14</sup> where the court had to award compensation to transgender woman, i.e. the petitioner, who was a qualified teacher and was fired due to her gender identity. The court also highlighted the improper implementation of the Transgender Act in various states. These recent cases still show that judgments, no matter how effective and progressive, still take time to make sure they make an actual change in mind of society at large.

Further, in *Supriyo v. Union of India*<sup>15</sup> the court denied legal recognition of same sex marriages in India, which might have been another landmark judgment for the LGBTQIA+ community, denied them basic marital rights, and, when asked about adoption rights, CAA came up with a conservative view and held up the heteronormative views and binary views of gender. The

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<sup>12</sup> Lakshmi Priya RK, “‘Begging Racket Crackdown’ Sheds Light on Hyd Police’s Ignorance about Trans Persons”, The News Minute, Aug 26, 2023, <https://www.thenewsminute.com/telangana/begging-racket-crackdown-sheds-light-hyd-police-s-ignorance-about-trans-persons-181583>

<sup>13</sup> Vaivab Das, ‘The Reality of India’s Transgender Welfare Boards: What an RTI Investigation Reveals’ *The Wire*, Oct 20, 2024, <https://thewire.in/rights/the-reality-of-indias-transgender-welfare-boards-what-an-rti-investigation-reveals>

<sup>14</sup> *Jane Kaushik v. Union of India* 2025 INSC 1248

<sup>15</sup> *Supriyo v. Union of India* 2023 INSC 920

reflection of CARRA's views is also reflected in its legislation and rules. While this judgment could have given same-sex marriage recognition and adoption rights to non-cisgender and homosexual couples, both were denied. To this date, the transgender community have not received legal recognition with respect to a valid marital status and still can't adopt children due to such rules and regulations.

While this judgment has given legal recognition to transgender individuals and has given hope to a more progressive state of affairs in the future, the judgment can't change the societal mindset, but it can help trans people legally as much as possible. Societal change will come with time. The older generations may have a conservative mindset, but the newer generations understand their struggle and work hard with trans people and other LGBTQIA+ communities in their fight for their rights and will bring about a change in the mindset of the people. Kalki Subramaniam rightly said in his article that in the future, the youth will read how the trans and gay people were stigmatised and discriminated against and make sure that the same mistakes never happen again. That in the future things will get better for trans people so that trans people never have to beg again, and that the future will belong to those who contribute to the intellectual and spiritual consciousness of humanity and that the LGBTQIA+ community will help in making a more meaningful and harmonious place.<sup>16</sup>

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<sup>16</sup> Kalki Subramaniam, 'We Are Not The Others: Reflections of a Transgender Activist' 68 Ind Lit 28,29 (2024)



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