

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)

I.A. NO. _____ OF 2014

IN

Writ Petition (civil) No. 400 of 2012

IN THE MATTER OF:

National Legal Services Authority

..Petitioners

Versus

Union of India & Ors.

Respondents

APPLICATION FOR CLARIFICATION
/MODIFICATION OF JUDGMENT AND
ORDER DATED 15.04.2014 PASSED BY
THIS HON'BLE COURT AND TO PASS
APPROPRIATE DIRECTIONS ON BEHALF OF
UNION OF INDIA

(PAPER BOOK)

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ADVOCATE FOR THE RESPONDENT:- D.S. MAHRA

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TO

THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUSTICES OF THE
HON'BLE SUPREME COURT OF INDIA.

THE HUMBLE PETITION OF THE
APPLICANT/ RESPONDENT ABOVE NAMED

MOST RESPECTFULLY SHOWETH:-

1. That the Hon'ble Supreme Court in the landmark judgment delivered in the matter of National Legal Services Authority vs. Union of India & Ors dated 15th April 2014 [Writ Petition (C) No. 400/2012 with Writ Petition (C) No.604/2013] declared Hijras, Eunuchs, apart from binary gender, to be treated as "third gender" for the purpose of safeguarding their rights under Part III of the Constitution of India and the laws made by the Parliament and State Legislature. It is possibly for the first time globally that transgenders have been granted the status of a third gender by judicial engineering thereby alleviating the sufferings of the said marginalised community for several centuries.

2. That the Hon'ble Supreme Court vide para 129 of the said judgment passed following directions:-

"(1) Hijras, Eunuchs, apart from binary gender, be treated as "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.

(2) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

(3) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

(4) Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/ Transgenders (TGs) face several sexual health issues.

(5) Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression,

suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

(6) Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

(7) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

(8) Centre and State Governments should take steps to create public awareness so that TGs feel that they are also part and

parcel of the social life and be not treated as untouchables.

(9) Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life." A true copy of the judgment dated 15.4.14 is annexed herewith as **Annexed A-I.**

3. That the Ministry of Social Justice and Empowerment, Government of India seeks clarification upon certain issues of interpretation which have arisen in the light of the said judgment dated 15.04.2014 passed in the above mentioned writ petitions: Following are the issues which need to be brought to the notice of this Hon'ble Court in order to

seek clarification/modification of the judgment:-

(i) Whether as per Hon'ble Supreme Court's direction Number 1, only Hijras, Eunuchs have to be declared/ treated as "third gender" or in joint reading with direction Number 2, all transgender persons have to be treated/ declared as "third gender"?

(ii). The term 'Eunuch' is considered derogatory by the transgender community and there is no separate community called 'eunuchs'. The term 'eunuch' has been erroneously used by various people as English equivalent of 'Hijras', which is not correct. The meaning of 'Eunuch' is "A man who has been castrated, especially (in the past) one employed to guard the women's living areas at

an oriental court" (Oxford dictionary, as per which the origin is Old English, via Latin from Greek eunoukhos, literally 'bedroom guard-', from eune 'bed'+ a second element related to ekhein 'to hold'). So it is clear that the term 'Eunuch' is not an equivalent of TG or a variant of TG. It is a different concept altogether. *mf*

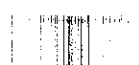
Many members of Hijra community consider 'Eunuch' as a derogatory term and do not wish them to be described by this word. This is also mentioned in the UNDP report titled "Legal Recognition of Gender Identity of Transgender People India: Current situation and potential options" at page 7 where it says in the foot-note 8 "Most trans people consider the term 'eunuch' to be derogatory and plain wrong to be applied to trans

people. It is submitted that even if the term 'Eunuch' is not included, no community will be left out, if the definition of transgender person is adopted as per the recommendation of the Expert Committee. The definition is broad and includes all transgender women, transgender men and even genderqueers. An extract of the recommendation of Expert Committee is annexed as **Annexure-II** alongwith this application.

- (iii) In para 130, this Hon'ble Court has observed that an Expert Committee has been constituted to make an in-depth study of the problems faced by the transgender community and suggest measures that can be taken by the Government to ameliorate those problems and to submit its



report with recommendations within three months of its constitution. In this context, the Hon'ble Court has directed that the recommendations be examined based on the legal declaration made in the judgment and implemented within six months. It is hereby submitted that the Hon'ble Court was not aware of the fact that the Expert Committee had already submitted its report on 27th January 2014 and it was already available on the Ministry's website (<http://socialjustice.nic.in/transgenderpersons.php>). The Expert Committee has suggested a number of measures which are of short term, medium term and long term nature. All recommendations of the Expert Committee cannot be implemented within six months, and the



(modification of this Hon'ble Court's order to implement the recommendations within six months is necessary.

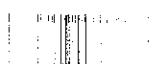
(iv) In para 107, this Hon'ble Court has observed that even gay, lesbian, bisexual are included by the descriptor 'transgender'. In this regard, it may be submitted that the concept of gay, lesbian, bisexual is based on the 'sexual orientation' of the person, while the term 'transgender' has to do with the person's own deep sense of gender identity. Worldwide, the term used is LGBT, the full expansion is Lesbian, Gay, Bisexual and Transgender. It is possible that some of the transgender persons may also be gay lesbian or bisexual because of their sexual orientation, but per se, gay, lesbian

and bisexual are not transgender persons.

- (v) The Hon'ble Supreme Court has also directed the Centre and the State Governments to take steps to treat them (transgender persons) as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments (Direction No. 3).

In this regard it is hereby submitted that pursuance of the directions of the Hon'ble Supreme Court in Indra Sawhney v. UOI, the Government of India enacted the National Commission for Backward Classes (NCBC) Act, 1993 (Act No. 27 of 1993) dated 1.2.1993 for setting up a

National Commission for Backward Classes. Under Section 9(1) of the Act, the Commission shall "examine requests for inclusion of any class of citizens as a backward class in such lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate". Section 9(2) of the Act states that the advice of the Commission shall ordinarily be binding upon the Central Government. The question is does this direction amount to directing the Centre and State Governments to include all transgender persons in the list of Other Backward Classes suo-moto or this be carried out as per the procedure established. It may also not be out of place to mention that



while generally it is assumed that transgender persons do not maintain caste/community identities, it may be quite possible that some of them may belong to Scheduled Caste, Scheduled Tribe or OBC. Thus, clubbing all of them and putting them into one category of OBC might not appear prudent and practical. It is therefore, felt that more clarity on this issue is required, by this Hon'ble Court.

4. That from the plain reading of the judgment it appears that all transgender persons have been treated and declared as third gender. However, for that purpose, it will still be essential to properly define who transgender persons are and the applicant seeks appropriate clarifications from this Hon'ble Court after so defining the class of transgender persons in a proper and adequate manner. "Transgender persons"

is an umbrella term which includes all persons falling within the following description including Hijras. The applicant Ministry of Government of India has attempted to define the expression in a proper manner as under:

"Transgender persons: All persons whose own sense of gender does not match with the gender assigned to them at birth. They will include transmen and trans-women (whether or not they have undergone sex reassignment surgery or hormonal treatment or laser therapy, etc), gender queers and a number of socio-cultural identities, such as kinnars, hijras, aravanis, jogtas, etc. The term 'transgender' shall be construed accordingly."

The categories of transgender include:

Trans-man: A person who is assigned female at birth, but identifies with the male. The person may or may not have undergone sex reassignment surgery procedures. Another term used for them is Male to Female Trans person (M to F /MtF).

Trans-woman: A person who is assigned male at birth, but identifies with the female. The person may or may not have undergone sex reassignment surgery/procedures. Another term used for them is Female to Male Trans person (F to M /FtM).

Genderqueer: The term Transgender may mean for some people a 'sense of transition' from one gender to the other as is implied in terms such as M

→ (G) → Transgender



to F or F to M transgender (male to female or female to male transition) and this description may work for some, while some others may be more comfortable choosing terms that do not adhere to the notion of gender binaries of male and female. They may see gender as less rigid and may prefer to use the term Genderqueer to refer to their gender identity.

It is respectfully submitted that the Ministry of Social Justice and Empowerment proposes to issue an order as per draft subject to Hon'ble Court's approval. A true copy of the draft order is annexed herewith this application as **Annexure-A-III**.

5. That on the issue of recommendations of the Expert Committee it is hereby submitted that the Expert Committee

which had been constituted had already submitted a report even prior to the judgment of the Hon'ble Supreme Court i.e. on 27th January 2014 and only owing to some communication gap this fact was not mentioned to the Hon'ble Supreme Court. As a number of measures have been suggested by the Committee which would require time and it will not be possible to implement the recommendations within six months as directed by this Hon'ble Court. The Expert Committee's report can only be implemented in phases. The Government of India, Ministry of Social Justice is in the process of drawing a definitive timelines for implementation of Expert Committee's Report in respect of the various recommendations. In this background it is hereby prayed that this Hon'ble Court may modify the direction as contained in para

130 of the judgment according to which the Expert Committee's report is to be implemented within six months and instead may direct its implementation as per schedule drawn by the applicant.

6. That it is hereby submitted that gay, lesbian and bisexual cannot obviously be included in the category of a gender or transgender. The concept of gay, lesbian, bisexual is based on the sexual orientation of a person, while the term 'transgender' has to do with the person's own deep sense of gender identity. Universally, the term LGBT is used to indicate Lesbian, Gay, Bisexual and Transgender. It may be possible that some of the transgender persons could also be gay, lesbian or bisexual but that only is an individual's sexual orientation and that would not result in a lesbian, gay or a bisexual by themselves per se becoming a

transgender. Para 107 of the judgment seeks to create an ambiguity between a transgender and lesbian, gay and bisexual persons, and in this background an appropriate modification of this paragraph or clarification is necessary and the applicant herein prays this Hon'ble Court to pass appropriate orders in this regard.

7. That it will not be proper to classify all transgender persons and group them as 'Other Backward Classes' suo moto. Even if that is to be done, it has to be in accordance with the procedure as prescribed under the National Commission for Backward Classes which has been set up pursuant to the judgment of the Hon'ble Supreme Court in Indra Sawhney v. Union of India, which empowers the Commission to examine requests for inclusion of any class of citizen as a backward class in such lists and hear

complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate. Any advice given by the said Commission shall ordinarily be binding upon the Central Government. The Central Government can however only for valid reasons record in writing and can reject the recommendation of the Commission. Therefore, for inclusion of transgender as OBCs, the matter has to be first referred to the National Commission for Backward Classes. However there can be transgenders who may by birth belong to Scheduled Castes and Scheduled Tribes. They may have been separated from their family and they may have been living in their own groups but that does not mean that they have converted themselves to other castes. Caste is determined by birth. Therefore,

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this is an intricate question and clubbing all of them as one category of OBC may pose problems both practically and politically. Classifying transgender who are not SCs/STs as OBCs may not pose problems and that can be done through the NCBC. But in so far as transgenders who by birth had belonged to SCs/STs, if they are classified as OBCs, it may result in problems and in this regard the applicant herein prays this Hon'ble Court for clarification and modification of the judgment/order dated 15.04.2014 to avoid any practical or sensitive problems which may arise in future on the issue of classifications.

PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court be pleased to:

- a) clarify and modify the judgment/order dated 15.04.2014 passed in the Writ Petition No. 400 of 2012 and W.P. No. 604 of 2013 on the issues as highlighted in the body of the application; and
- b) pass any other and further order as may be deemed fit and proper and in the interest of justice.

DRAFTED BY

FILED BY

(REKHA PANDEY)

(D.S. MAHRA)

ADVOCATE

Advocate for the Respondent/

Applicant

Settled by

Sh. Mukul Rohatgi, Ld. AG

New Delhi

Dated: 30.07.2014