

THE SUPREME COURT NALSA JUDGEMENT: WHERE NOW? A BRIEF CRITIQUE – MAY 2015

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The purpose of this write-up is to bring to light the various areas of concern that have come to light post-NALSA, especially when it comes to the issue of implementation. The material relied upon are the Supreme Court judgement text, the Ministry of Social Justice & Empowerment's Expert Committee Report and the Union of India Clarification Report. The following five issues have come to light –

1. Who is the 'transgender'?

While the NALSA judgement is worth applauding for recognizing citizenship rights for members of the transgender community in India, there continues to be a lack of clarity when it comes to the issue of who is the 'transgender'.

The issue of identity becomes important because for the law to extend rights and benefits, there is a necessity to state with precision the category of individuals who would be the recipients of the same. The NALSA judgement continues to suffer in this regard. While despite the apparent confusion surrounding the issue of identity, the Court chooses to read the term 'transgender' as comprising of any person whose gender identity is not in conformity with the sex assigned at birth, additionally in various parts of the judgement the Court also acknowledges that Hijras, eunuchs, FTMs, MTFs, inter-sex all fall within the ambit of the term transgender.

However, the problem arises when it comes to the directions. This is important because directions are the legally binding part of a judgement.

Direction 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”.

Direction 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”.

Reading the directions independently, one arrives at the conclusion that Fundamental Rights under Part III of the Constitution are to be extended only to Hijras and eunuchs. As far as the 'other' trans-community members are concerned, the duty on the State is limited to granting legal recognition to their self-identified gender identity.

This issue has also been brought to light in the Clarification Report filed by the Union of India, wherein the Central Government has sought clarity from the Apex Court on whether

Direction 1 and Direction 2 are to be read independently or together. It is only when the Apex Court clarifies this that the NALSA judgement can come to effect with full force given that citizenship rights can only be effectively extended provided the law is clear about 'who' the same are being extended to.

Another important point in this context is the government's suggestions as to the definition of transgender, that is: "All persons whose own sense of gender does not match with the gender assigned to them at birth".

And those who would fall into the category:

- a. Transmen
- b. Transwomen
- c. Gender-queer

The issue that arises here is that the intersex identity is not expressly recognized.

2. Self-identification vs. Board?

Another confusion that arises from the reading of the judgement is with respect to the right to self identify. The judgement in express terms iterates that a trans-person has the right to self-identify as a man, woman or transgender [third gender]. However, at the same time, in direct contrast to this stipulation, the Court also propounds that for a person to be able to exercise their identity rights, the same has to be recognized by a Board (Screening Committee), which has to be set up in every State on the same lines as the Tamil Nadu Aravanis Welfare Board. Such a Board will thereafter carry out a 'psychological test' to determine whether the concerned is a 'real trans-person' or not.

What needs to be noted in this regard is that the judgement does not spell out what exactly would constitute such a test, thus leaving complete discretion with the Board in such matter.

Citing the relevant part of the Expert Committee recommendations may prove useful here since the directions in the judgement have to be read harmoniously with the same –

"It was felt that in the Indian context it would be appropriate to follow a model wherein certification of transgender identity is done by authority, similar to the one adopted by the Tamil Nadu Government, wherein a transgender identity card is issued by the Aravanis Welfare Board on the basis of the clearance given by the District Level Screening Committee headed by District Magistrate/Collector and comprising Deputy Director (HS), District Social Welfare Officer, psychologist/psychiatrist and a representative of transgender community".

The Committee also recommended that the Tamil Nadu model may be adopted by other States, with suitable modifications compatible with their conditions, in respect of the other measures taken by the Aravanis Welfare Board in Tamil Nadu. For example, the addition of a social worker in the Committee may be considered by the State Governments. It is recommended that the Screening Committee should have two members from the transgender community. It is also recommended that in place of the term 'medical exam', 'psychosocial assessment' will be used. Members of this Screening Committee will be required to undergo training/orientation/sensitization on the issue to enable sensitive functioning.

Thus, in light of the above dictate, submitting an affidavit to the concerned Ministry or Department may not prove adequate for one's gender identity to be recognized by the State. The concerned individual will thus have to approach the Board/Screening Committee (as established by the concerned State in light of NALSA directions), which will thereafter carry out a psychological assessment of the individual before issuing a certificate identifying his/her/zer gender identity upon satisfaction that such a person is a 'real trans person'.

Of course, such a conflict in the judgment implies that the right to self-identity is qualified by the condition that the State after applying due procedure must recognize such an exercise in self-identification as valid and legitimate.

Note: In the case of West Bengal, it is most likely that the recently established West Bengal Transgender Development Board is the concerned body.

3. The reservation issue – Who? How?

The NALSA judgement directs that the members of the trans-community are to be treated as Socially and Economically Backward Classes (SEBC) and extended reservation in matters of public employment and education.

The Clarification Report brings to light the first concern in this regard, that is, what process has to be followed for such recognition?

The National Commission for Backward Classes Act, 1993 becomes relevant in this regard. S 9(1) of the Act propounds that 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."

The clarification sought by the Court in this regard is whether members of the trans-community are to be recognized as SEBCs *suo moto* or after compliance with the process envisaged in the Backward Classes Act.

The second issue arises with respect to the pragmatics of reservation:

- a. The clarification report in itself brings to light the first one, that is, whether it would be wise to club all trans-community members as SEBCs since many of them may have other caste identities such as SC or ST.
- b. The second concerns the right to self-identify. Whether a trans-woman who identifies as a woman will be able to claim reservations envisaged for women or contest elections from a seat reserved for women and so on and so forth (judgements prior to NALSA have dismissed the right of a trans-woman to contest elections from the seat of a woman).
- c. The third concern is with respect to reservation in educational institutes. At which level are these reservations to take affect? Given that consciousness concerning ones gender identity is usually around the stage of puberty, would such reservations be feasible at primary and secondary levels?

- d. Finally, the numbers game becomes a challenge. Are reservations to be accommodated within the existing designated spaces or are new reservations to be extended?

4. Implementing the Expert Committee Report

The NALSA judgement propounds that the directions issued by the Court have to be read harmoniously with the Expert Committee Report. Additionally, the Court stipulates that the directions are to be complied with within a span of six months.

The Expert Committee Report in itself provides for recommendations under numerous heads including but not limited to identity, education, health, employment, social welfare etc.

The Clarification Report iterates that given the nature of recommendations it is impossible for the State to comply with all of them within a period of six months. It further goes on to propound that the judgement be modified to accommodate the timeline that is in the process of being framed by the Ministry of Social Justice & Empowerment. Thus, till such a timeline becomes available on a public portal, none of the recommendations incorporated in the Report can be claimed as a matter of right by members of the trans-community.

5. Impact on laws that criminalize members of the trans-community

An illustration of this is the anti-vagrancy laws, which allow the police to pick up members of the trans-community found to be engaged in 'begging' in public spaces. In reality, these laws are used as a pass to harass members of the trans-community who are visible in public spaces.

With the recognition of citizenship rights for members of the trans-community one wonders what scope there is to challenge the constitutionality of such laws.

6. The inevitable NAZ (Koushal) question

There is no exploring NALSA without going into NAZ. What needs to be realized is that NAZ and NALSA deal with two different things, that is, sexual orientation and gender identity, respectively. Thus NALSA does not by any means overrule NAZ.

First, in the context of NALSA confusion arises especially given that Para 77 of the judgement stipulates –

“Discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community.”

However, there is a need to read this statement in context of NALSA judgement, that is, extension of citizenship rights to members of the trans-community. This can be illustrated using an example –

Illustration #1: A transman who does not undergo sexual reassignment surgery (SRS) and continues to retain the biological body of a woman cannot be criminalized for engaging in

sexual activity with a cisgender (or trans) woman because by the virtue of his gender identity such an act would be viewed as being heterosexual sex.

However a conflict may arise in the following case: Could a transman who does not undergo SRS and continues to retain the biological body of a woman be criminalized under Section 377 of the Indian Penal Code if he has consensual sex with a cisgender man, because in such event because of his gender identity such an act would be viewed as homosexual sex.

Thus in spite of dealing with a different issue as compared from NAZ, the shadow of NAZ continues to extend over NALSA. As argued by Danish Sheikh, one cannot overlook historical reality wherein the transgender community has always been identified with sexual acts committed under Section 377.¹ He goes on to argue – “The full moral citizenship that NALSA grants can only be rendered such when it is accompanied by the sexual citizenship that the Koushal Court has taken away.”²

Second, though the right to gender identity is recognized in law, the issue that arises is how far will a society, including legal authorities, which continues to remain in the dark as far as issues of gender and sexuality are concerned, view what in law is legitimate (*Illustration #1*) as normative and thus acceptable sexual expression?

The underlying conflict between the two judgements in terms of the intrinsic nexus between gender identity and sexual orientation and society’s ignorance and hetero-normative outlook leaves the members of the trans-community in a flummoxed state when it comes to determining which sexual expressions are legitimate or illegitimate.

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¹ Danish Sheikh, *Transgender rights: One year of NALSA*, Daily O, April 18, 2015: <http://www.dailyo.in/politics/transgender-rights-bill-NALSA-tiruchi-siva-section-377/story/1/3236.html>, accessed March 29, 2015

² Id