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# Human Rights Case Summaries

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## Indian Supreme Court recognises third gender

April 15, 2014

*National Legal Services Authority v Union of India*, Writ Petition No 400 of 2012 with Writ Petition No 604 of 2013, Supreme Court of India (15 April 2014)

### Summary

The Supreme Court of India has ruled that transgender persons have a right to be legally recognised according to their self-identified gender, including a third gender. Failure to provide such legal recognition amounts to a breach of the right to equality before the law, non-discrimination on the basis of sex and the right to life and liberty with dignity.

### Facts



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India is home to a large and diverse transgender population. “Transgender” is used as an umbrella term to include Hijra/Eunuchs, being individuals born biologically male who do not identify as such, transgender persons who have transitioned to the opposite sex and identify as such, intersex persons and transvestites. The Hijra in particular, claim to identify as neither male nor female, but rather as a third sex.

Despite a rich history and tradition of gender diversity in India, transgender persons face multiple forms of discrimination and oppression, especially in the fields of health care, employment and education. They are often marginalised and excluded from society. HIV is also increasingly seen as disproportionately affecting the transgender population.

While a number of state governments have taken some steps to recognise and protect the rights of transgender persons, not all have. There is no legislation in India dealing with the rights of transgender persons. In the majority of cases transgender individuals are unable to obtain legal recognition of their preferred gender and do not have legal protection against discrimination.

The National Legal Services Authority and a Women’s Welfare Society (Applicants) applied to the Supreme Court of India on behalf of transgender persons in India. The Applicants claimed that, under the Constitution of India, they have a right to be recognised as their preferred gender where that gender is different to their assigned sex, including recognition as a third gender.

The relevant rights are contained in Part III of the Constitution of India:

- Article 14, being the right to equal recognition before, and protection of, the law;
- Articles 15 and 16, being the right to be free from discrimination on the grounds of sex;
- Article 19(a), being the right to freedom of speech and expression; and
- Article 21, being the right to life and liberty with dignity.

## Decision



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Under the Indian Constitution, any international conventions, including human rights treaties, which are not inconsistent with the Constitution's fundamental rights and which are in harmony with its spirit must be read into the relevant Constitutional provisions. The question before the Court was: what protections and recognition does international human rights law afford to transgender persons and how should they be read into the relevant Constitutional provisions?

The Court found that international human rights jurisprudence, under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, protects individuals from discrimination and affords equality before the law on the basis of sexual orientation and gender identity. The views of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have also been incorporated into the jurisprudence on the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture. These views have found their way into the laws and case law of a number of countries around the world.

Finding, therefore, that international human rights includes protection for transgender persons, the Court then turned to incorporating these concepts into the various articles of the Constitution. In each case the Court held that the Constitution required the State to protect and recognise the rights of transgender persons in India:

- Article 14: the Court found that the article, in referring to "persons", is not restricted to only males and females. Transgender persons who are neither male nor female fall within the expression "person" and so are entitled to legal protection, including equal civil and citizenship rights. Non-recognition of the identity of transgender persons denies them equal protection of the law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, as well as to extreme discrimination in all spheres of society. The Court therefore held that article 14 outlaws discrimination on the basis of sexual orientation or gender identity.
- Articles 15 and 16: the Court held that discrimination on the grounds of sex includes discrimination on the ground of

gender identity. “Sex” is not limited to biological sex, but rather gender identity, and is intended to include people who consider themselves to be neither male nor female. Articles 15 and 16 also require the State to take affirmative action to assist the more socially and educationally marginalised groups in society. The Court found that transgender persons had systematically been denied their rights and had been discriminated against and that the State has an obligation to take affirmative action to assist them to achieve equality.

- Article 19(1)(a): the court held that freedom of expression includes one’s right to expression of self-identified gender, which could include expression through dress, words, action or behaviour or any other form. No restriction should therefore be placed on a person’s appearance or choice of dressing.
- Article 21: the Court has interpreted the protection of life and personal liberty as including all those aspects of life which make a person’s life meaningful, protecting dignity, personal autonomy and privacy. The Court noted that gender constitutes the core of one’s sense of being as well as forming an integral part of a person’s identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom under the Constitution. In addition, the court noted that self-determination of gender is an integral part of personal autonomy and self-expression and so falls within the realm of personal liberty. As psychological identity is paramount, the State should not require a person to undergo medical procedures, sterilisation or hormonal therapy in order to have their gender identity legally recognised.

In regards to recognising Hijras as belonging to a third gender, the Court noted that under article 21 gender should be self determined. As Hijras have identified as being neither male nor female, they have to be considered as belonging to a third gender, over and above binary concepts of genders. There are currently laws which only recognise a binary understanding of gender and such laws deny those who identify as a third gender equal protection of the law.

The Court made a number of orders and declarations:

- Hijras and Eunuchs should be treated as third gender for the purpose of safeguarding their rights under the Constitution and the laws made by Parliament;
- Transgender persons' right to decide their self identified gender is upheld and Centre and State Governments must grant legal recognition of their gender identity such as male, female or as third gender;
- The Government must afford transgender persons affirmative action and positive discrimination regarding educational admissions and public appointments and provide social welfare schemes.
- The Government must operate separate HIV clinics for Hijra/transgender persons and ensure medical care is provided to transgender persons and ensure separate toilet facilities.
- The Government must take serious action to respond to problems faced by Hijras/transgender persons such as fear, shame, social pressure etc, including public awareness campaigns.
- Any insistence on surgery for declaring one's gender is illegal.

## Commentary

The legal recognition and protection of sex and gender-diverse persons within society has gained significant attention and traction in recent years. The case comes only two weeks after the Australian case of *NSW Births Deaths and Marriages v Norrie* [2014] HCA 11 in which the High Court held that individuals could be legally recognised as neither male nor female. The UN Human Rights Office has also recently launched the Free & Equal campaign for LGBT rights around the world.

This case provides an in depth analysis of how international human rights laws can protect sex and gender-diverse persons on a number of levels, including through life and liberty, non-discrimination and equality before the law.

However, this case appears to go further than the current established jurisprudence in one important respect, and that is in the extent to which the court recognises the primacy of psychological identity over biological identity. The court has effectively stated that the right to life, liberty, dignity and

autonomy require that our legal understanding of sex should be founded solely on a person's self-identification, that is, their own perception of their gender. Biological characteristics are therefore irrelevant. This is fairly new, although Argentina has a similar approach. Most countries still define sex to include some reference to physical characteristics.

Requiring States to recognise self-identified gender had two significant flow-on effects for the Court.

First, if biology is irrelevant then a person cannot be required to undergo surgery to change their gender. While the Court was split on this issue, it was Justice Radhakrishnan's categorical statement that no one should be forced to undergo any medical procedures, sterilization or even hormonal therapy in order to obtain legal recognition that is reflected in the Court's orders.

Second, it meant that the State must provide legal recognition of a third gender. As there is evidence that some people self-identify as a third gender, then logic dictates they must legally be recognised as that third gender.

Such an approach arguably represents the high water mark in the legal recognition of sex and gender diversity. It will be interesting to see whether this approach is followed in the future by other countries seeking to afford legal recognition to sex and gender-diverse individuals.

This decision is available online at:

<http://judis.nic.in/supremecourt/imgs1.aspx?filename=41411>

**Emily Christie** is a Human Rights Lawyer at DLA Piper and is currently on secondment at the Human Rights Law Centre.

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Level 17, 461 Bourke St Melbourne, VIC 3000

Level 5, 175 Liverpool Street, Sydney, NSW 2000

ABN: 31 117 719 267

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