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COURTS AND THE MAKING OF TRANSGENDER RIGHTS



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It is inspiring to recall that seven decades ago, Hansa Mehta, a member of the Constituent Assembly, ensured that the phrase “*All men are born free and equal*” in the first Article of the Universal Declaration of Human Rights was changed to “*All human beings are born free and equal*”.

In Hindu mythology, there is an ancient cultural acknowledgment of gender fluidity. Yet, for decades, transgender people simply did not exist in the eyes of the law. They lived, struggled, raised families, danced at births, mourned at funerals, and were part of India’s social and spiritual fabric for centuries.

Still, they remained on the margins, shunned from society, denied basic rights and targeted for their gender identities. And legally — on school forms, ration cards, voter IDs, and census sheets — they were invisible.

Until the late 1990s, voter registration forms did not provide an option beyond male or female, effectively disenfranchising transgender citizens. Public hospitals, welfare schemes, and official forms, all designed around a strict male-female binary, left them without access to essential services. Lacking legal recognition, many were unable to obtain basic identity documents, apply for jobs, or claim protections under existing laws — leaving them vulnerable to poverty, exploitation, and violence.

Until April 15, 2014.

There are some judicial decisions in India that fundamentally changed the complex calculus of sexuality, power, religion, caste, masculinity, patriarchy, and gender. The Supreme Court’s decision in *National Legal Services Authority (NALSA) v. Union of India*, 2014 stands as one such example.

The legal battle began with separate petitions filed in 2012 and 2013 by the National Legal Services Authority (NALSA), the Poojya Mata Nasib Kaur Ji Women Welfare Society, and Laxmi Narayan Tripathi, a leading voice from the *hijra* (transgender) community — all seeking legal recognition of a third gender.

The petitioners argued that limiting legal recognition to binary genders is violative of the Right to Equality, Right to be Free from Discrimination, Equality of Opportunity, Freedom of Expression, and Right to Life or Personal Liberty (Articles 14, 15, 16, 19, 21 of the Indian Constitution, respectively). The Supreme Court responded with clarity and conviction. In a landmark judgment, the two-judge bench recognised transgender individuals as the third gender, who are fully entitled to all legal rights bestowed upon citizens by the Constitution. The Court ordered states to grant legal recognition to transgender people, reservations in education and employment, and offer welfare — an ambitious list of affirmative actions that acknowledged historical harm.

Crucially, *NALSA*'s true breakthrough lay as much in recognizing a third gender as in affirming the right to self-identify — a radical move even by international standards.

The Court asserted that one's gender does not need to be authenticated by surgery, paperwork, or state verification — and that identity is an inherent aspect of personal dignity and autonomy. Justice KS Radhakrishnan (who was to retire in a month) said, “(...) *the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.*”

Lauded globally as one of the most progressive interpretations of gender rights, the judgment also laid the groundwork for later verdicts like *Puttaswamy, 2017* (the right to privacy), and *Navtej Singh Johar, 2018* (decriminalisation of homosexuality).

With one stroke of the pen, the Court had rejected the dehumanisation of those who do not fit neatly in gender boxes. But reality tells a different story. The Transgender Persons (Protection of Rights) Act, 2019, ostensibly passed in response to the judgment has been widely criticised for requiring certification of gender by district authorities — a clear contradiction of the right to self-identification upheld in *NALSA*.

Critics argue that the Act undermines the principles of autonomy, dignity, and equality established by the Court. Many trans-persons still face barriers to education, health care, and housing. Violence against them remains disturbingly common. Lack of livelihood opportunities means they are frequently forced into prostitution.

But *NALSA* stands out not just for what it changed in the law, but for changing the conversation from control and classification to recognition and autonomy.

It reminds us that the Constitution is not a cold document, it is a living promise. And it begins the work of drawing those beyond the binary into the fold of citizenship — not as exceptions, but as equals. Courts have done their part. Now we must do ours.

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