

ICJ Briefing Paper Implementation of the *NALSA* Decision

*We just want our space in this society, we want our dignity.*¹

On 15 April 2014, the Indian Supreme Court delivered its decision in the case of *National Legal Services Authority v Union of India and others* ["NALSA"]. In this landmark decision, the Court affirmed that transgender individuals have the right to decide their self-identified gender, and directed the Centre and state governments to grant legal recognition of this gender identity such as male, female or as third gender, and take specific steps to address the discrimination faced by transgender persons in India.

It has now been two years since the *NALSA* decision. But the Indian Central and state governments have still not implemented some of the core directions set out in the judgment. India has ratified several international instruments that require the government to respect, protect and fulfill the right to equality and non-discrimination for transgender people. A critically important way in which the Indian authorities can fulfill India's international law obligations towards transgender people is by fully implementing the *NALSA* ruling.

This briefing paper analyses the efforts made thus far to implement it. Specifically, it addresses questions regarding the scope of the *NALSA* decision, what responsibilities it placed on Indian authorities, developments since the decision, what steps have been taken so far to implement it, what the significant gaps in implementation have been, and India's relevant international law obligations.

This briefing is based on information sourced from ICJ interviews, publically available data and media reports. In January 2016, ICJ representatives filed a Right to Information petition with the Ministry of Social Justice and Empowerment, asking for detailed information regarding the implementation of the *NALSA* judgment, including what specific steps were being taken to do so. At the time this briefing was released, the ICJ had not received this information.

¹ ICJ Interview with Sonam, member of a *hijra* community in Delhi.

The NALSA case: The National Legal Services Authority filed this case on behalf of transgender persons, and other transgender groups and individuals also became parties to the proceedings. It was decided in 2014 by a two-judge bench of the Supreme Court.

1. Whom did the Judgment cover?

The NALSA judgment was “concerned with the grievances of the members of Transgender Community”. The Court defined the term ‘transgender’ in an inclusive manner: it noted that it was an umbrella term that could be used to describe a wide range of identities and experiences, “including but not limited to pre-operative, post-operative and non-operative transsexual people” who did not identify with the sex assigned to them at birth.

It affirmed the right of transgender people to decide and express their one’s self-identified gender such as male, female or as third gender, and directed the central and state governments to grant legal recognition of this gender identity, and take specific steps to address the discrimination faced by transgender persons in India, including in particular in access to education, health services and social welfare.

2. What were the constitutional principles on which the NALSA ruling was based on?

The Court grounded its reasoning on the fundamental rights of equality, non-discrimination, freedom of expression and dignity.

- **Equality:** The Court held that non-recognition of their gender identity denied transgender persons equal protection of the law. There was a constitutional obligation upon the State to ensure such equal protection proactively.
- **Non-Discrimination:** Discrimination is prohibited under the Indian Constitution on a number of specified grounds, which includes “sex”. The Court read the term “sex” to include “gender identity”.
- **Freedom of Speech and Expression:** The Court interpreted the right to freedom of speech and expression as including the right to expression of one’s self-identified gender, which could be expressed through dress, words, action, behavior or any other form.
- **Dignity:** The Court found that since gender constituted the core of one’s sense of being, as well as an integral part of a person’s identity, recognition of one’s gender identity lies at the heart of one’s fundamental right to dignity.

3. What did the Supreme Court direct Indian authorities to do in the NALSA case?

In the NALSA case, the Supreme Court declared that "Hijras, Eunuchs, apart from binary gender" should be treated as the third gender by the government, and that state governments and the Central government must uphold transgender persons' right to decide their self-identified gender, and grant legal recognition of the same.

Specifically, the Court directed the Central and state governments to: (1) establish affirmative action measures (e.g. quotas) with a view to increasing the presence of transgender persons in educational institutions and public appointments; (2) operate separate HIV Sero-surveillance Centres for transgender persons; (3) make it illegal to require sex reassignment surgery and akin medical procedures as necessary to assert one's gender identity; (4) address the problems transgender persons face, such as "fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma"; (5) provide medical care for transgender persons in hospitals, and separate toilets; (6) frame social welfare schemes for their benefit; (7) implement public awareness schemes so transgender persons feel "that they are also part and parcel of the social life and be not treated as untouchables", and take measures to "regain their respect and place in the society".

4. What is the MSJE Report and what is its significance?

The penultimate paragraph of the NALSA judgment noted that the directions the Court addressed to the authorities must be read in conjunction with the recommendations made by the Ministry of Social Justice and Empowerment's (MSJE) Expert Committee Report on Issues Relating to Transgender Persons. The Court ordered that the Expert Committee's recommendations be implemented within 6 months.

The Committee provided a detailed study of the problems faced by transgender individuals and suggested various governmental measures and mechanisms that may be set in place. For instance, it provided a detailed process/mechanism/system/procedure for certifying gender identity, through the establishment of district and state-level screening committees.

5. What is the 'clarification petition' regarding the NALSA judgment, and what is its status?

In September 2014, the Ministry of Social Justice and Empowerment filed an application at the Supreme Court to clarify certain aspects of the NALSA ruling, including:

- Which groups fall within the ambit of 'transgender' persons for the purposes of implementing the NALSA judgment;
- What classification and procedure, given existing frameworks, should be followed while designing affirmative action policies for transgender persons in public institutions;
- Whether the time limit of six months for implementation can be extended, since the MSJE (Expert Committee) recommendations were so wide-ranging as to require more time to be implemented.

The matter is still pending at the Supreme Court.

6. What steps has the Central government taken to implement the NALSA decision?

Illustrative examples of actions by the Central government include:

Following the judgment, the Ministry of Social Justice and Empowerment constituted an Inter-ministry Coordination Committee, which was primarily responsible for coordinating actions on the recommendation of the Expert Committee on Transgenders. The Committee comprised senior officials from the ministries of health and family welfare, human resources, education, labour and employment. The Ministry also set up a media committee for the purpose of initiating sensitization drives.

The Ministry of Information and Broadcasting advised their media units to publicize transgender issues while disseminating their support programmes.

The Ministry of Labour and Employment directed all states in the country to provide vocational training to transgender individuals under a Skill Development Initiative Scheme.

6. What steps have State governments taken to implement the NALSA decision?

Illustrative examples of actions by state governments include:

In February 2015, the state of *Chhattisgarh* announced a 2% housing quota for transgender persons. It also has plans to set up a Transgender Welfare Board.

In March 2015, the state of *West Bengal* announced the setting up of a Transgender Development Board. West Bengal is also in the process of registering transgender voters as “other gender” for the upcoming elections, which increases the visibility and representation of the transgender community.

In November 2015, the state of *Kerala* released its ‘State Policy for Transgenders in Kerala’. The policy reaffirms the right to self-identification, and seeks to ensure equal access to social and educational policies, to legal institutions, and freedom from violence to transgender persons. It also envisages the setting up of a Transgender Justice Board.

In August 2014, the state of *Maharashtra* also announced a Transgender Welfare Board to, amongst other things, provide access to education, employment, health and legal aid for the transgender community. However, plans for setting up the Board were in place even prior to the NALSA decision.

7. What have other government agencies done to implement NALSA?

Illustrative examples of actions by other government agencies include:

The National Commission for Backward Classes recommended the inclusion of transgender persons within the category of “other backward classes” in May 2014, thus paving the way for them to access a range of affirmative action policies.

The University Grants Commission issued a notification in July 2014 directing educational institutions to specifically provide for admissions to transgender students, along with their inclusion in various scholarship schemes and programmes. Universities were also directed to create transgender friendly infrastructures, to integrate transgender issues into the curriculum, and to provide for sensitization programmes.

The Reserve Bank of India directed all banks to include the “third gender” across all forms and applications in April 2015.

8. What is the Rights of Transgender Persons Bill, and why is it important?

In April 2015, the Rajya Sabha, the Upper House of Parliament, unanimously passed a private members Bill introduced by MP Tiruchi Siva. The "[Rights of Transgender Persons Bill](#)" articulated a range of rights for the community. The structure and substance of the Bill draws heavily from the NALSA judgment. The Bill's broad definition of the term transgender relies on the judgment's call for inclusiveness. The different rights recognized and given protection under the Bill include the right to equality, life, free speech, community, integrity, family, along with the right to be free from torture and other abuse. One clause specifically provides for the right to equality of transgender children. Education, employment, social security and health are then covered in successive chapters.

The Bill also provided for the establishment of National and State Commissions for Transgender Persons, their mandate largely focusing on inquiring into inconsistencies in the application of the law or violations of the rights of transgender persons and on making relevant recommendations to address the same. Another enforcement apparatus proposed was an exclusive transgender rights court within each district that would adjudicate suits filed on behalf of a transgender person under any law.

Later in 2015, the MSJE made available another draft of a union (central government) Bill on the same subject on its website, with a number of crucial amendments. It put in place a structure for legal gender identity recognition. It deleted, both, the provisions establishing National and State Commissions for Transgender Persons and those designating exclusive transgender courts. The most recent draft of the Bill, as of 2016, provides for the establishment of a National Council for Transgender Persons to play an advisory role regarding transgender issues.

As a matter of parliamentary procedure, both houses of Parliament must pass bills of this nature. The Tiruchi Siva Bill has been passed by the Upper House. The MSJE Bill needs to be passed by both houses of parliament, and recent reports indicate that the government will be introducing the Bill soon.

9. How has the NALSA judgment been used in judicial proceedings?

Courts in India have begun to use the NALSA judgment to expand legal protections for transgender persons and affirm an inclusive and substantive notion of gender equality.

For example, in the case of *Jackuline Mary* (2014) at the Madras High Court, the petitioner (a transgender person) was dismissed from her position as a woman police constable on a number of grounds, including the fact that she had not disclosed her transgender identity, and had applied under the 'woman' quota. The court upheld her right to self-identify her gender, and ordered that she be reinstated.

In *Ram Singh* (2015), the Supreme Court was considering who would fall within the notion of "backward classes" for the purposes of affirmative action policies, and held that the *NALSA* case was "an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness".

Similarly, in the case of *Shivani Bhat* (2015) the Delhi High Court recognized the plight of a 19-year old transgender person who identified as male, and who was facing violence and harassment from his family in India. The Court cited *NALSA* while ordering that he be given police protection until he left India.

The 2015 *Vimla Srivastava* case at the Allahabad High Court also cited the *NALSA* decision while making a more general point about gender equality.

The *NALSA* decision also noted that section 377 of the Indian Penal Code (which criminalizes consensual same-sex conduct) discriminated against certain identities, and "was used as an instrument of harassment and physical abuse against Hijras and transgender persons". The constitutionality of section 377 is currently being challenged at the Supreme Court through a [curative petition](#).

10. What are the gaps in implementing NALSA?

Even as both versions of the Transgender Bill hold the promise of enforcing many of the directions laid down in *NALSA*, the fact remains that two years have gone past since the judgment with some of its core promises left unrealized. Notably, there has been little effort at establishing a process to bring into effect the principle of self-identification: transgender persons continue to have to navigate a myriad of unclear administrative barriers to achieve basic legal recognition of their gender.

ICJ interviews and media reports indicate that violence and abuse by police, law enforcement and private actors continue to be prevalent and are often perpetrated with complete impunity, along with the perpetuation of social stigma and discrimination. Individuals continue to be vulnerable through criminalization under various laws, including Section 377 of the Indian Penal Code and laws criminalizing beggary

and sex work. Notwithstanding the *NALSA* ruling, in the State of Karnataka, for example, the police continue to be allowed to record the names of “eunuchs” in the jurisdiction suspected of committing crimes, effectively legitimating harassment.

To make matters more difficult, there is a lack of data to understand the experience of transgender persons within the criminal justice system.

11. What are India’s relevant international obligations?

It is crucial that the Indian government implements the *NALSA* decision, and enforces the international legal norms that the judgment reflects.

The Supreme Court referenced the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity in the *NALSA* decision, affirming that they were not “inconsistent with the various fundamental rights guaranteed under the Indian Constitution”.

As the Yogyakarta Principles underscore, the rights to equality and non-discrimination entail states’ obligations to “adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres” and “take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities”.

India has ratified several human rights treaties – including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – both of which guarantee the rights to equality and non-discrimination. Under international human rights law, including the Covenants, discrimination on the grounds of sexual orientation and/or gender identity is prohibited.²

In this context, the Committee on Economic, Social and Cultural Rights has clarified in its General Comment 20 that

“Other status” as recognized in article 2, paragraph 2 [of the International Covenant on Economic, Social and Cultural Rights],

² See for example, article 2 (1) of the ICCPR: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; and article 2 (2) of the ICESCR: 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.

In 2012, the Office of the High Commissioner of Human Rights emphasized that ensuring non-discrimination was an immediate and cross-cutting obligation on all states, and laid down five "core legal obligations of states with respect to protecting the human rights of LGBT persons" which included (1) protect individuals from homophobic and trans-phobic violence (2) prevent torture and cruel, inhuman, and degrading treatment of LGBT persons (3) decriminalize homosexuality (4) prohibit discrimination based on sexual orientation and gender identity and (5) respect the freedom of expression, association, and peaceful assembly.

In 2015, 12 UN agencies issued a joint statement calling on states to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex adults, adolescents and children, saying such abuses "constitute serious violations of international human rights law and have a far-reaching impact on society".