



Meeting Report

SYMPOSIUM ON LEGAL SUPPORT FOR ACCESSING TRANSGENDER RIGHTS

New Delhi | February 14, 2018
Human Rights Law Network
576, Masjid Road, Jangpura
New Delhi- 110014



MacArthur
Foundation

ABBREVIATIONS

| | |
|----------------|--|
| F to M/F-M/FTM | Female to Male |
| HIV | Human Immunodeficiency Virus |
| ID | Identity Cards |
| IPC | Indian Penal Code |
| LGBTQ | Lesbian, Gay, Bisexual, Transgender and Queer |
| MA | Master of Arts |
| MBBS | Bachelor of Medicine and Bachelor of Surgery |
| MGNREGA | Mahatma Gandhi National Rural Employment Guarantee Act |
| MHA | Ministry of Home Affairs |
| M to F/M-F/MTF | Male to Female |
| MSJE | Ministry of Social Justice and Empowerment Report |
| NALSA | National Legal Services Authority |
| NGO | Non-Governmental Organisation |
| NLUP | New Land Use Policy |
| NSAP | National Social Assistance Programme |
| OBC | Other Backward Classes |
| PhD | Doctor of Philosophy |
| POCSO | Protection of Children from Sexual Offences Act |
| RSBY | Rashtriya Swasthiya Bima Yojana |
| RTE | Right to Education |
| SC | Schedule Caste |
| SRS | Sexual Reassignment Surgery |
| ST | Scheduled Tribe |
| TG | Transgender |
| Trans | Transgender |
| US/USA | United States of America |

GLOSSARY OF TERMS

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| Gender | Gender is an internal sense of one's self with regards to being "male," "female," both or neither regardless of one's physical sex. Although "gender" is commonly misused to refer to the sexual distinction between males and females, it should not be viewed as a biological condition or confused with a person's attraction to sex partners. |
| Binary Gender System | A culturally defined code of acceptable behaviors and appearance which insists that there only two and only two sexes and two and only two genders that matches them. |
| Butch | Butch is a word commonly used in the lesbian and gay communities to identify masculine females or sometimes masculine gay men. The spectrum of identity within the lesbian community can include "soft butches" who identify masculine women, to transgender butches who often do not identify as "women" and are somewhat bi-gendered in their identity," to those who identify as transmen/FTM's but still retain an identity as "butch." |
| Cisgender | An adjective that means non-transgender. In other words, a cisgender woman is someone who was physiologically female at birth, raised as a girl, and who identifies as a woman. |
| Gender Dysphoria | A medical term used to denote any person who strongly and persistently identifies with the opposite sex. Also called Gender Identity Disorder (GID). |
| Gender Euphoria | Feeling positive about one's cross-gender activities. The term arises in the transgender community as a pun playing on the psychological term "gender dysphoria". |
| Gender Identity | An inner sense that one is or belongs to a particular gender regardless of the actual physical body they inhabit. This is the individual's innermost concept of self as "male or "female." |
| Hijra | A person who is born as a man but identifies with being a woman. In India, the term Hijra is often used as an umbrella term for the entire transgender community. |

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| Gender Reassignment Surgery (GRS)/ SRS Sex Reassignment Surgery | The actual surgery required to change/alter a person's sexual organs and sex determining features such as breasts, what the person is born with. More recently being referred to as "Gender Affirming Surgery". |
| Inter-sex | Persons born with physical or hormonal anomalies that result in variance from standard sexual conformation. There are a wide variety of conditions, some of which may not be discovered until puberty. |
| Sexual Orientation | A term used to refer to a person's emotional, romantic and sexual attraction (or lack thereof) to individuals of a particular sex, i.e. whether one is heterosexual, homosexual or bisexual – amongst other orientations. Although sometimes mistakenly equated with gender identity, sexual orientation is separate and distinct, from one's gender identity. For example, a person who is sexually attracted to men is not necessarily a woman. |
| Transgender | An umbrella term referring to anyone whose behaviour, thoughts, or traits differ from the societal expectations for their sex. While some community members object to the term, it is generally considered politically useful. The term transgender should be used as an adjective, not as a noun – hence a person is a 'transgender person', not 'a transgender'. |
| Transman | A female-to-male transgender person – assigned female at birth but identifies as male. |
| Transperson | A transgender person. |
| Transwoman | A male-to-female transgender person – assigned male at birth but identifies as female. |
| GAT | Gender affirmation therapy. |

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INTRODUCTION

Human Rights Law Network (HRLN) organised a consultation to discuss the legal support needed for accessing transgender rights on 14th of February 2018 at its office in New Delhi. The symposium was a part of HRLN's ongoing initiative to advance rights of LGBTQ persons in the country. The meeting consisted of several activists, lawyers, researchers and NGOs from across India; who came together to discuss and debate various issues facing the community, as well as consult with one another regarding what action may be taken as we proceed with the movement for transgender rights.

The consultation began with activists from various organisations across India presenting the current status of access to transgender rights in their states, the status of implementation of the National Legal Services Authority (NALSA) Judgment, and the most challenging problems that they face in accessing justice. The consultation offered a platform to activists, community workers and human rights experts to have in depth discussions regarding the failures in the implementation of the NALSA Judgment as well as other policies, legislations, programmes and schemes for transgender persons, based on their field work experiences. Key problematic areas brought up were the right to self-identification, name and gender change for identity certification, access to equal employment opportunities, workplace harassment, access to health and life insurance, access to entitlements with regards to Sexual Reassignment Surgery (SRS), and a lack of provision of personal and private laws (such as that for inheritance) within the NALSA judgment.

Additionally, the proposed bill on transgender rights and its failure in effecting a strong legal framework representing the voices of the community, was discussed in detail. The consultation concluded with a coordinated plan of action that the national movement for transgender rights can adopt going forward to ensure that persons of the community are afforded their rights under the Constitution of India.

BACKGROUND

In 2013, the Supreme Court set aside the Delhi High Court's 2009 order decriminalising consensual homosexual activity. This sparked nationwide LGBTQ activism as a whole by organisations as well as individuals. This particular incident might have taken the Indian media and society by storm and brought the movement to the forefront.

But presence of the transgender community in the Indian context has always been recognized. Though taunted, discriminated and disrespected but somewhere they have been part of our culture. The Hijra community for many centuries were respected and accepted as blessed people. This is a predominant tradition of north India. Even today when a child is born, they come to offer their blessings and receive alms in return. As said, while travelling if a group of hijra passes it refers to as 'subho-yatra'. So this tradition of the hijra community: their way of earning livelihood, their behaviour, existed for centuries and so they are way more visible in a way.

The transgender community is one of the most deprived and vulnerable groups in India as they are constantly subject to hostility of both society and the State, arising from their perceived 'non-conforming' behaviour as per societal norms. There is a lack of appropriate understanding regarding the complexities of biological sex, sexual orientation and gender identity when it comes to the transgender community.

On 15 April 2014, the Supreme Court passed a landmark judgment in the case of National Legal Services Authority vs. Union of India (hereafter referred to as the NALSA Judgment) in relation to transgender rights. The judgment was profound in that it provided legal recognition to transgender people by accepting them as a third category of gender and thus forgoing the binary gender system of male and female. The order laid down the principle of the right to self-determination of gender, by giving preference to psychological test over biological test, and thereof recognition in the law. It also placed obligations on the Central and State Government with the aim of creating a political and legal environment that would allow transgender persons and 'sexual minorities' access to their rights and to reach their full potential. It would provide them with education, healthcare, housing, livelihood and in effect, their dignity.

After four years since passing of this judgment, little has been done to uphold its spirit on the part of State and Central Governments. Moreover, in practice, this judgment has proved to be extremely confusing and lacking in many areas. In the 130-page judgment, there was no mention of the following words: FTM (Female to Male), MTF (Male to Female), Transwoman, Transman, Intergender, Bhaiya, Babu, Kotha, FTK (Female to Kotha), Thirunambi, Genderqueer, Gandabasaka. In some parts of the judgment, it even seems to conflate transgender people with inter sex people. The judgment calls on the transgender community to be considered ‘socially and economically backward’ so that the transgender persons can avail the few benefits provided to other backward communities. This clubbing of caste based discrimination (considering the similarities to legislation surrounding Scheduled Castes and Tribes) and gender based discrimination excludes the deep rooted problems faced by both communities. The issue of sexual intercourse, though given a perfunctory glance, was not looked deep into. This judgment did not talk about the importance of sexual relations for persons in enjoying a dignified and meaningful life. The language also deems transgender people to be “not normal” in the very first line, thus compounding the social stigma and subsequent psychological problems faced by them.

The judgment has in many ways failed in its implementation. Though it recommended SRS services for free in public hospitals, there have been instances where the hospital authorities do not even give the documentation as they fear to claim that they have facilitated the transition process of transgender people. There has been no significant effort to sensitise the people in authority over the issues and problems faced by the transgender people. Recommendation of separate toilets for the transgender has also not been fulfilled.

The Rights of the Transgender Persons Bills was introduced as a private member’s bill by Tiruchi Siva in December 2014 following the NALSA judgment. This bill was unanimously passed in the Rajya Sabha, but never debated in Lok Sabha. The Bill passed in the Rajya Sabha had many progressive clauses including the creation of institutions like the national and State commissions for transgender people, as well as transgender rights courts. However, the version of the bill presented to Lok Sabha in August 2016 had undergone considerable revisions. Some key problematic areas that the bill presents are:

- a) The legislation identifies transgender people as being ‘partly female or male; or a combination of female and male; or neither female nor male’. This definition is a

considerable departure from the original bill's intention to cleanse society of the stigma it placed on transgender people.

- b) Moreover, it eliminates the option of identifying as either male or female, thus undermining the right self determination of gender.
- c) The bill creates a burdensome process for the recognition of identity of sexual minorities. Individuals have to submit themselves to a medical examination by a District Screening Committee consisting of a Chief Medical Officer, a psychiatrist, a social worker, and a member of the transgender community. Hence, this hampers the right of individuals to self identification of their sex. The government is allowed to act as gate keeper in deciding who can and cannot identify as a transgender.
- d) The bill does not provide a clear definition of what constitutes as discrimination. It does not provide enforcement mechanism for invoking criminal sanctions when discriminatory behaviour occurs. Also, it has done away with remedial measures to prevent sexual discrimination that were provided in the draft of the original bill.
- e) The bill does not address crucial issues of inheritance, property, adoption, marriage rights, reservations or anti-discriminatory provisions, which are critical to enable transgender persons and persons belonging to sexual minorities to live a life with dignity. Key issues that transgender persons face - like that of harassment in schools and workplaces, rendering them unable to function within such hostile societies and dropping out - remain unaddressed.

This reflects the callous attitude of the legislature towards the transgender community and their ignorance of previous research, reports, consultations and judicial orders pertaining to the transgender community.

OBJECTIVES OF THE SYMPOSIUM

Human Rights Law Network, Delhi, organised a meeting to deliberate on the above mentioned issues, with the following objectives:

- a) To review the loopholes of the NALSA v. Union of India (2014) judgment of the Supreme Court. (Exclusion of various categories of Transgender, language of the judgment, categorisation of transgender persons as socially and economically backward community, sexual rights of the transgender persons.)
- b) To discuss and identify the immediate services those are necessary for the transgender persons. (Mental and physical health services i.e. health cards, separate toilets, reservation for the transgender persons in public and private spheres.)
- c) To discuss the few breakthrough initiatives were taken up by some states, in the midst of all the judgments and introduction of the bills, giving more power to the struggle.
- d) To recognise the oscillating nature of the judiciary and the government who have not provided a significant response to the demands of the community. (Provisions to be included in the review petition of NALSA judgment, services that should be mandated for the transgender persons.)
- e) Involvement of HRLN in filing petitions in Both High Courts and Supreme Court
- f) Prepare a plan of action for 2018

SESSION 1: FIELD EXPERIENCES OF NALSA IMPLEMENTATION AT STATE-LEVEL

Chairs – Sutanuka Bhattacharya and Rachana Mudraboyina



Speaker: Santa Khurai

(Santa Khurai is one of the most noteworthy activists from Manipur working for the transgender community. Santa is working for the greater good of people of her community with the help of All Manipuri Nupi Maanbi Association (AMANA). Her work has been an inspiration and has shaped variations for people of that region.)

Manipur based Activist, *Santa Khurai*, started the conversation by highlighting the status of implementation of the NALSA judgment in the state of Manipur and other northeastern states. Although there have been some minor developments with regards to transgender rights in the state, they are not in accordance with the NALSA judgment. For instance, even though a board had been established for welfare of the transgender community, in reality, it was not functional. Similarly, although the social welfare department had announced that the training would



be provided to people of the transgender community. Consequently, money was raised for this purpose, however no amount has been allotted to the transgender people.

The major challenges which persons of sexual minority face in the state of Manipur are that there are no pro-bono advocates who can support the transgender community in legal matters or for filing of Public Interest Litigations (PILs). NGOs and activist groups had taken up the mantle and began working for social inclusion of people belonging to sexual minorities through advocacy. They hope that achievements through such small initiatives could eventually lead to larger movement and attain rights afforded to transgender persons under the NALSA judgment.

Santa further added that the key issue they frequently face is the portrayal of incorrect names and genders on identity proofs like passports, AADHAR, PAN cards and birth certificates. The process of changing these is extremely difficult.

Speaker: Namita Parida

(Namita Parida, an activist from Odisha, who identifies as transgender and president of the Shanti Suraksha Kinnar Sangh, shared the situation in the state of Odisha).

Ms Parida stated that in the year 2014, when the NALSA judgment came out, the transgender community was very happy and expecting change that could truly change the situation for their community in India. However, it is a sad fact that nothing has been done in the state of Odisha to implement the NALSA judgment. In spite of what has been laid out in the NALSA pronouncement, the transgender community of Odisha continues living under the same situation and facing problems in all aspects of life.

One of the *challenges* which we are facing is that, although transgender persons in Odisha do have identity proofs like PAN Card, ADHAAR and RATION Card, many do not have access to social benefits. At community level, activist groups and NGOs have been working tirelessly for transgender rights, but there has been no effort on part of the State



government to take measures in the spirit of the NALSA judgment and safeguard the rights of sexual minorities.

Speaker: Rituparna Borah

(Rituparna Borah, an activist from Delhi, who has been actively participating in feminist movements for the last 12 years, is the Co-founder and Co-director of Nazariya, an activist organisation working on issues of education, gender-based violence and livelihood with the LGBT community. Their work involves sensitizing the public to issues faced by LGBTQ persons through research, evaluation, capacity building and advocacy.)



She shared the challenges which transgender people are facing in Delhi, particularly in terms of Name and Gender change. As rumours began about the new transgender policy which allowed individuals the right to self-determination, many people approached Nazariya, which stepped up to assist them in facilitating the process of changing their names and genders on official documents.

They visited the concerned departments and completed the process of changing names with relative ease. They were not required to furnish any affidavits and only asked to submit a newspaper notice and an undertaking as to changing the name. However, an affidavit is required from those people who have migrated to Delhi from another state solely for the purpose of changing their names on their ID proofs. They were required to pay Rs. 2700/- to Rs. 3000/- for change of name while many other people were only asked to pay Rs 1400/- for this process. Therefore, there are no set norms as to what is the proper procedure that should be followed and also with regards to the payment of a fee in the gazette notification.

The process of changing name is all the more difficult when it comes to ADHAAR. The process is extremely difficult because the department requires that the gazette notification include a photograph. Change in name cannot occur without a photo ID proof, only complicating the process. Moreover, they have to get a signed letter from the MLA of the area, or any other gazette officer, with the gazette notification in order to proceed with the

process. Rituparna Borah added that in case of PAN card, the process was not as complex and frustrating because it did not mention gender. Reports have suggested that many people are facing problems while filing ITR.

She further stated that many universities allow transgender students to be admitted to their programs but the process of application has been unnecessarily complicated due to a lack of proper documents. Many do not possess AADHAR cards, birth certificates, passports or PAN cards reflecting the change in their name and gender. They are thus rejected for these reasons. Hence, people face immense difficulties which take away their fundamental right of access to education.

Speaker: Neel Ghosh

(Mr. Neel from West Bengal, identifies as a transman and is a representative of the West Bengal Transgender Welfare Development Board).

Neel reported that since the celebrated NALSA judgment, there had been no progress in the State in terms of policies targeted at the betterment of the transgender community and sexual minorities.

The Transgender Welfare Development Board was established in 2015, in the aftermath of the NALSA judgment. However, Mr. Ghosh reported that as a member of the board he could attest to the fact that it was essentially not functional. The Board is currently debating whether reservation for sexual minorities should continue under the OBC category.

The Board had taken no action with regards to some key issues that the transgender community continued to face. For instance, there had been no work done with regards to establishment of separate toilets in schools and universities - which is one of the chief reasons for persons of transgender community to drop out from school, thus hindering their education..



Mr Ghosh stated that transgender persons in West Bengal were facing similar issues at other states when it came to change of name and gender identity in ADHAAR card, PAN card and Passports. He emphasised that change in Passport details does not follow the procedure laid out by NALSA. It requires submission of medical surgery certificates in order to proceed with changing the gender. Moreover, the process of change can be truly frustrating since change in any ID proof requires a photo ID containing the changed name and gender. However, since gazette notifications and affidavits do not contain photographs of the individual, they are often not accepted as proof of change in name or gender. Furthermore, Mr Ghosh pointed out that NALSA is lacking in that it does not talk about process of change in name and gender for persons under the age of majority or addressed their rights. Mr Ghosh highlighted that transgender persons found it extremely difficult to appear for government examinations like that of UPSC, Railways or that for teachers, on account of there being no third column for transgendered persons.

Lastly, Mr Ghosh talked about Sex Reassignment Surgery (SRS) and the confusion surrounding it. For instance, there had been announcements that state-run hospitals would provide free SRS; however, no further details were provided and activists had no information regarding if this was true and what the procedure was.

Speaker: Biswa Bhusan Pattanayak

(Biswa Bhusan Pattanayak, who is currently associated with SAATHI and working with the sexual minority community to help them access socio-legal services including health care, talked about the situation for transgender in the state of Odisha. He has also been working with community groups and government departments of Tamil Nadu, Manipur, Nagaland, Meghalaya and other northeastern states for the effective implementation of the NALSA judgment).



Mr Pattanayak analysed the status of implementation of NALSA through institutional mechanisms, social welfare measures, legal measures and health provisions. In terms of institutional measures: independent departments were set up for better implementation of the judgment but no necessary actions were taken by them. The government had released a notification regarding the process for change of name and gender and made available an online form for this purpose. However, the online application form became inaccessible soon thereafter.

In terms of social welfare measures taken in the spirit of the NALSA judgment, Mr Pattanayak talked about the introduction of schemes and guidelines issued for skill development, counselling and helplines for persons of sexual minorities. although guidelines for these schemes and programmes had been circulated, the programmes were not yet accessible to persons of these communities. For instance, the District Collector of Odisha had announced schemes for loans to transgender persons as well as a scheme titled skruti, but, none had been implemented yet. Hence, although steps seemed to have been taken in many areas, they remained on paper and little had been done to make their benefits available to people.

One of the key achievements in terms of legal measures was the amendment of Section 12 (h) of the Legal Services Act to include a provision of free legal aid services for transgender persons. It provided a two law limit for transgender persons and persons living with HIV/AIDS. A sensitising program had also been introduced with the help of state legal services authority to spread awareness in the society regarding related issues. In terms of health provisions, discussions had been conducted regarding making free SRS procedures available in three of the state's premier medical colleges, although no concrete steps have been taken as of yet. Conversion therapy and mental health editorials have also brought about some change.

However, Mr Pattanayak emphasised that there remained much to be done. Current policy does not talk about mental health initiatives; there is no initiative to bring the process of changing name and gender to the ground level and assisting individuals in it; lack of proper implementation of kind enumeration programs; lack of visibility of legal aid programs and provisions; and a lack of synchronisation of different wings of the government causing issues in the provision of social entitlements. The disappearance of the online form for change of name and gender is only one example of poor implementation of government schemes and policies meant to support and uplift the sexual minorities.

Lastly, Mr Pattanayak made key recommendations to ensure better implementation of the judgment which includes,

- a) Policy addressing all aspects of issues faced by transgender people should be finalised as expeditiously as possible.

- b) A steering committee must be formed to enable collective decision between government bodies and communities of sexual minorities.
- c) A progressively increasing budget must be allotted for initiatives undertaken to benefit transgender communities and sexual minorities. Current trend shows that the budget allotted for these activities has been reduced from four crores in 2015-16 to 1.2 crores in 2016-17.
- d) An IEC campaign¹ (Information - Education - Communication) should be undertaken to sensitise the public regarding issues faced by the third gender, with the ultimate aim of reducing existing bias against sexual minorities.
- e) There is a dire need for a discussion of the existing education setup in terms of policy in order to come up with a comprehensive plan to make school life easier for transgender children so that they may have equal access to education.
- f) Although there are provisions for free legal aid services available for the transgender people, much needs to be done to make these provisions visible to the public and easily available.
- g) There is a need for creation and implementation of proper SRS guidelines in order to ensure that the sexual minorities receive adequate care for such essential procedures in government hospitals.
- h) Accessible gender-neutral toilets should be made available at all public institutions.

Speaker: Rachna

¹ IEC campaign involves a communication strategy focused exclusively for the conforming people. The campaign must be developed in close consultation with the community to increase understanding and respect for transgender and gender non-conforming people, to increase instances of reporting of discrimination. The communication strategy should be rolled out to the public as well as employ rebranding tactics like advertising, social media, producing and distributing educational materials to bring about behavioural



(Rachana Mudraboyina is a transgender activist from Telengana. Over many years, she has been fighting against misconceptions and wrong information about the transgender in the society. Her relentless struggle towards a proper gender sensitization program led her to come up with a recent YouTube series - TransVision, which was launched in Telugu, Kannada and Urdu. Her active participation in establishing dialogues with society in regard to transgender issues stands one of a kind and is truly commendable.)

Rachna shared the status of implementation of NALSA judgment in the state of Telangana. She stated that the transgender community of the state was very pragmatic after the NALSA Judgment. They had borne witness to Telangana's struggle for the formation of a separate state, without a single utterance of a word on the judgment.

Rachna added that in 2015, the Hijra Samiti started protests to demand rights of the sexual minorities. However, the more they protested, the more they faced resistance from the State. Consequently, they had to file a case challenging the name and gender change policy; income tax guidelines which do not include a column for transgender people, a being against the NALSA judgment.

She concluded by saying that there was a need to file a petition with regards to the lack of implementation of the NALSA judgment so that an effective recourse could be taken to provide relief to the transgender community.

Speaker: Sutanuka

(Sutanuka Bhattacharya is an activist-researcher and a member of Sappho for Equality. At present, Sutanuka is pursuing her PhD from Ambedkar University, Delhi. Sutanuka also happens to be a member of the West Bengal Transgender Development Board since 2015).

Sutanuka, from West Bengal, stated that even though we have a law in place to safeguard the basic rights of sexual minorities and provide them with the support needed to live a life with dignity, to its full potential, persons of the community remained vulnerable. They constantly faced discrimination from all level of the society and the Hijra community remained marginalised. She highlighted the example of the government's sudden announcement that those who beg for money would face imprisonment. In this case, police started making arrests of transgender persons involved in traditional trades like that of



hijras - in spite of it not being categorised as begging. This shows that there is little understanding of transgender communities and sexual minorities amongst the public, as well as amongst persons of law and order who are charged with the safe-guarding of transgender rights.

It is acceptable that the few changes have been made in every state due to this pronouncement which has given us right to fight back with a support but the scene after years is still heartbreaking. Adding to the position in the state of West Bengal, the situation is similar to that of the other states because even though the judiciary has given us a stand in the society but there is still a lack of awareness amongst the society as well as lack of implementation at the grassroots level.

Session 2:

Field challenges and successes for getting name and gender change done and access to benefits

Speaker: Grace Banu

(Grace Banu from the state of Tamil Nadu is a Dalit and transgender activist. She was the first transgender person to be admitted to an engineering college in Tamil Nadu. Soon after the NALSA verdict came up in 2014, she was able to change her name and gender and get admitted to college under her changed gender. She is now working as a project technologist in Project Mukti, which focuses on education and employment for gender non-conforming and trans people.)



Contrary to the principle to self-identification as put forward in NALSA, Tamil Nadu continues to have district level committees for gender determination. They screen the full body of a human, often intrusively, in order to determine gender identification. Name and gender change is often available only at the whims and fancies of the staff part of the district screening board.

Many other issues affect the transgender community. For instance, national entrance exam for medical college admissions are a requirement. However, marginalised communities are unequipped for these tests since they do not have access to equal opportunities for education. Ms Banu shared her experience of when she was arrested for protesting medical entrance tests, talking about how her body was intrusively examined in the prison. She tried seeking help from lawyers but received no support. Many were in fact completely unaware of transgender rights provided under the law. The transgender community continues to face issues at the field level. Some are listed below:

- a) That NALSA judgment says that the transgender will get reservation under the OBC Category. However, the ground reality is that the OBC category does not accept them

as under the OBC category due to which they face many difficulties in getting benefits of this reservation. Hence, it is important that they be given reservation under a separate category.

- b) Tamil Nadu continues to see a high rate of drop outs from education and employment. Much of Grace Manu's work is focused on studying the root causes behind these drop outs, which includes the violence and harassment they face on a regular basis. Recently, they have filed a case against the government of Tamil Nadu on behalf of a transgender medical student. Although she had all the necessary documents and relevant certificates, she was not allowed to continue her studies.
- c) Shahnabi, the first trans woman who applied for a job with Air India was rejected on basis of being a transgender. Moreover, she was unable to get any legal support as she belonged to a poor background and no lawyers were willing to take up the case on pro bono basis.

Therefore, although the LGBTQ community has been afforded rights on paper, in reality they do not enjoy them and live a life devoid of dignity. LGBTQ persons and persons of sexual minorities are citizens of the country and pay taxes. The LGBTQ community is ready to move away from the stigma associated with it and be a full part of the society. For this, they require access to education, employment and benefits which can uplift them. She concluded herself with the words, "we do not want equality, we want equity."

Speaker: Reshma Prasad

(Reshma Prasad is a research scholar in sociology and also a member of the Bihar transgender welfare board. She is the founder member and secretary of community-level organisations for transgender.)

The key points that she brought up are listed as follows:

- a) When the NALSA judgment was announced in 2014, all states were asked to call a meeting to discuss the points laid down in the NALSA judgment so as to ensure their implementation. However, few states followed this notice and conducted a meeting as required. In June, Bihar finally conducted the meeting to discuss the implementation of the judgment, after coming under pressure from activist organisations.

- b) Ms Prasad highlighted that although there are many welfare schemes and programs announced at the national level with regards to security of the transgender community, nothing has reached the people. Reservation for transgender is under the OBC category, but transgender people have never benefited from it. It is important to preserve the employment rights of transgender people so that they could have a strong legal support.
- c) Therefore, even after the NALSA judgment, we do not have any sources to look into the implementation of this judgment at the field level as well as no source to assess various welfare schemes which benefit transgender people. Bihar has never recorded an incident where a transgender was appointed as a Doctor, Counsellor or any other professional post.
- d) The ICDS scheme, which reserves the rights of women, does not benefit transwomen. When activists went to state authorities with this concern, they were told that if trans persons were given benefits under this scheme, persons of cis gender would object and create problems for the authorities.
- e) The SC judgment lays down 55 points of social justice. However, in Bihar, only the initial 3 point were implemented; no further steps were taken. Another scheme launched in 2015 provided full employment, however, transgender persons were excluded from its benefits as well.
- f) As Ms Prasad was involved with the state transgender welfare board, it became difficult for her to connect with cisgender persons who avoided her and refused to work with her. She had to figure out how to get along with these persons and work with them. Gender discrimination was thus a major issue at ground level.
- g) Bihar still does not have the inclusion of a third gender column in government documents. When this issues was raised by activists, they were merely informed that this was not possible because it would cost the state close to 70 crores.
- h) Transgender persons often do not have proper identification cards like AADHAR or PAN since the process of changing name and gender on these documents is a

monumental challenge. This hampers their business interests since it disqualifies them from registering their organisations, entering into partnerships, getting jobs as well as setting up of bank accounts.

Speaker: Amrita Sarkar

(Amrita Sarkar from Delhi is actively associated with trans activism since almost two decades and has been involved in various capacity building initiatives for the transgender community at the national and international level. She is one of the founder members of the IRGD, a global network of trans women with HIV working with solidarity, taking action against the HIV Infection in India. She is also associated with SATHI.)



Ms Sarkar raised the following key points in relation to NALSA:

- a) NALSA was a remarkable judgment and a victory for the transgender community. It had considerable impact on the people of the community and was inspiring in that it generated hope that transgender rights would be widely recognised. However, at present, the situation has declined with no concrete steps being taken and the community still struggling for their dignity and place in the society.
- b) A key challenge for the transgender community was that of lack of acceptance of the principle self-identification and the role of screening committees. She argued that a committee set up by the state had not right to judge whether she was a man or a woman. The screening committee used utterly inappropriate methods to make their decisions: such as touching the genitals of a trans woman to check if their male organ becomes excited. If it did, the committee did not accept the individual as a transgender. This shows that the screening committee lacked basic understanding of the LGBTQ community and had qualms in violating fundamental rights and dignity of an individual

of the community. The method used by screening committees amounts to harassment and has no place in determining the gender identity of individuals.

- c) Furthermore, the process of changing the name and gender identities is not uniform in all states. Consequently, people face many hurdles during such processes as they are asked to furnish each and every certificate related to their medical surgeries, blood test reports, HIV test reports, and so on. At times, this becomes difficult, particularly for people who are unaware of the requirement or do not have the required medical documents. Introduction of AADHAR and the mandate of its linking to all bank accounts and IDs have made the process all the more complex. There is urgent need for clear, concise and uniform guidelines at state level to help people in the process of changing their names and genders.
- d) Lastly, Ms Sarkar highlighted the need for more elaborative SRS guidelines to make this essential procedure easily accessible to people.

Hence, steps must be taken in terms of capacity building, sensitisation of the society towards issues facing the LGBTQ community and mass awareness regarding government programs, schemes and implementation guidelines.

Speaker: Meera Parida

(Meera Parida is the Chairperson of All Odisha Third Gender Welfare Trust, Bhubaneswar. Meera is also the treasurer & Co-Founder, SAKHA- the first LGBT Community based organization in Odisha since 2007. The focus of SAKHA is on access to health, livelihood and stigma-free services by gender- and sexuality- minority individuals and now has more than 1000 members. Meera was conferred the Best Transgender Leader in India 2016 by UNDP, NACO and HIV Alliance for her work in protecting the rights of marginalized groups who are vulnerable to HIV and AIDS in India.)

She stated that the situation in Odisha is different from the other states in



terms of the implementation of the NALSA judgment - some changes have been observed. But at the grassroots level, people are still compromising with the situation and continue to face issues related to their gender identity and rights. One issue Ms Parida highlighted is that whenever people of the community applied for loans to buy vehicles, the bank did not approve them. There existed preconceived notions that transgender persons would not repay loans and thus could not be trusted. In another instance, some transgender persons work in trains (train begging) and are often arrested by police and thrown into jail. Even if they possess all relevant identity proofs, police officials force them to talk about their male identities and harass them with filthy comments. Furthermore, there are no separate lockups for the trans man and trans women. This forces them to encounter instances of serious misbehaviour; which includes cutting their hair and shaving their bodies. Lack of separate jails often leads to transgender persons being locked up in solitary confinement - which is extremely traumatic for them.

A panel discussion brought up the vast number of policies and schemes relating to transgender persons, such as those for health insurance, housing, building of free public toilets, and SRS procedures. The panel underscored the need to challenge these policies in order to synchronise the system and ensure that their benefits are made accessible to the masses.

Speaker: Neeraj

(Neeraj (from Delhi) is a social worker with more than two years experience in LGBTQ rights, working for HIV/AIDS persons and human rights in general. He identifies as a queer human and has been very active in sexual reproductive health and rights programs and campaigns).

From a young person's perspective, Neeraj shared the kind of challenges they faced in navigating their way through life, especially when it comes to educational institutions. Neeraj is a student at the TATA Institute of Social Sciences, which he reports is a relatively progressive institution. Nevertheless, it has taken time to bring about changes for the LGBTQ community with a big struggle ahead for the marginalised intersexual minority. With the declaration of the NALSA judgment, Neeraj and some other queer students at the institute began raising issues for the community. They found that they were in fact the first to ever bring up problems faced by the LGBTQ community at the group to

the administration. One of the LGBTQ student community's demand was the addition of a third gender to application forms, which they achieved even though it took some time.

Furthermore, students of the sexual minority faced many instances of sexual harassment and homophobia. Transgender persons at the university faced their own set of problems. Gender discrimination and stigma towards LGBTQ persons remain persistent problems. One key issue was that related to infrastructure - for instance, hostels - of the institute. Another issue is the prefix attached to names of students displayed on their degree certificates. This prefix ultimately refers to the identity of a person which makes it vital that it is displayed in accordance to the gender they identify it. Identity proof documents can also be problematic since authorities do not accept self identification as sufficient proof of change in gender, often requiring multiple other forms of documentation to proceed with the process. When a fellow student attempted to change her ID certificate, she was outright refused by the concerned authorities.

Neeraj emphasised that all the above stated issues can be extremely trying for youngsters. Young people face multiple layers of stigma which ultimately harms their mental health. They have grown up in a world where they believe it is easy to come out and live in accordance with their gender identity. However, the barriers presented by the society and existing institutions create an atmosphere of fear and uncertainty. This is even more exacerbated by the anxiety and apprehension that they go through on a personal level.

Speaker: Randhoni Lairikyengbam

(Randhoni Rynthiang is the Senior Program Manager at SAATHII and has been actively involved with the movement).

Randhoni Lairikyengbam stated that the movement for rights of sexual minorities in Manipur had faced immense struggles, even after the NALSA judgment. He highlighted that the little change the state had seen had been as a result of the efforts of activist groups and NGOs working at the grassroots level. The government had not taken any initiatives to effect change, leaving it entirely upon the civil society.

She added that after the NALSA judgment, it took two years for the establishment of a transgender welfare board. This delay was experienced largely due to existing bureaucratic red tape. she further added that government officials and bureaucrats working in governmental departments were frequently found to be completely unaware of existing laws regarding transgender persons and persons of sexual minority. During their field experiences, they had found officials to be utterly unaware of even the much talked about NALSA judgment, highlighting the need to reach out to chief secretaries of the state to ensure that this issue was rectified with great urgency. In one case, a trans man who had run away from home with a girl was arrested by the law enforcement authorities of the state due to a complaint filed against him by the concerned girls parents. This was despite the fact that both had affidavits stating that they were leaving of their own accord and had not been pressurised to do so. Such cases occur with alarming frequency across India. Rights of the minorities can be only be guarded if those responsible for them at ground level are adequately informed. He drew the symposium's attention to a case where the school authority had allowed a transgender person to wear pants instead of the mandatory skirt required for girls, thereby stressing the need to focus attention on such cases in order to encourage and influence positive change in the society.



Speaker: Dona Marwein

(Dona Marwein is a Trans activist and working with SAATHII as a community resource person for implementation of NALSA judgment in the state of Meghalaya. Only under the leadership of Dona, in Meghalaya despite of unawareness amongst the people regarding their rights a successful implementation of the judgment was possible. But there are still many transgender people left who have not been able to change their identity cards and documents.)



Dona Marwein, began by talking about how foreign the concept of third gender was for persons of the state as they were completely unaware of terms like hijra, homosexual etc. Additionally, they were not aware of the procedure of gender identification. In 2013, a non-formal community-based organisation started a gender sensitising program where they imparted information regarding the existence of a pluralistic gender system and educated the public of gender identification. Dona Marwein applied for change in gender identity in July 2017 and completed the process of change in name and gender without any hassle after the submission of the required documents. However, as a community worker, it is evident that there are cases where people are unaware of the NALSA judgment and their rights under the law, and hence do not undergo the process.

Speaker: Lucky Neog

(Lucky Neog is a budding film maker (more into Documentaries) and a YouTube Vlogger. Lucky is engaged with an eclectic north east magazine. Lucky has helped Trans people regarding advising, guiding about legal process (NALSA, name and gender change process). Lucky is one of the first who changed the name and gender in the affidavit in the state of Assam and also approached All Assam State Legal Authorities for the legal process but it got denied.)



Lucky Neog from Assam, stated that in 2016, there were merely three or four people in the state who had successfully completed the process of changing their names and genders to reflect their gender identity. He acknowledged that they had received some support from the state regarding their grievances. However, many people were simply unaware of the NALSA judgment and the rights that they were entitled to under it. Awareness campaigns and gender sensitisation programs have been implemented to rectify this situation and change had come about, albeit slowly. The community has been working tirelessly to overcome barriers in this process and spread awareness regarding transgender rights and gender identification.

Speaker: L Ramakrishnan

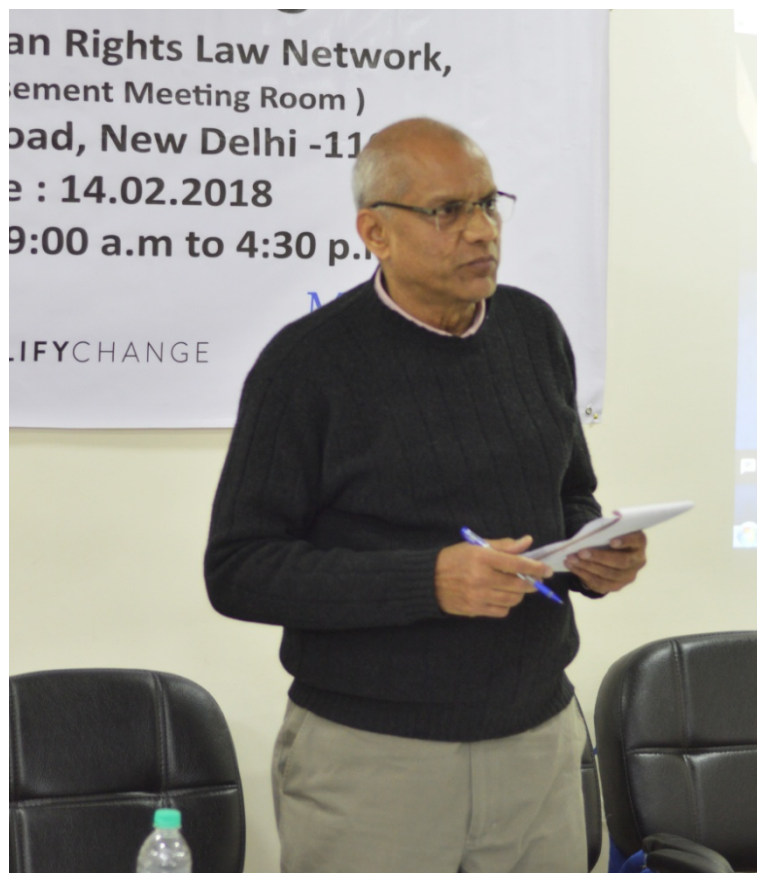
(L. Ramakrishnan is a public health professional and vice president of the non-governmental organization SAATHI, based out of its headquarters in Chennai. For the past 15 years he has been leading programs that promote access to health, legal and social services for populations marginalized on account of HIV, gender and sexuality. These programs are being implemented by teams in 15 offices and cover 25+ states. He was part of the Transgender Committee appointed by the Ministry of Social Justice and Empowerment in 2013-2014 to develop recommendations for transgender inclusion. These recommendations were referenced by the Honorable Supreme Court of India in the NALSA judgment of 2014)

L Ramakrishnan has been a member of the transgender community and an activist in Chennai since 2014. Tamil Nadu had established a transgender welfare board 10 years ago - even before the NALSA judgment. However, it was only accessible to a subset of the diverse transgender population and only allowed them to apply for and obtain identity proof reflecting name and gender in accordance with the individual's gender identity. A study of 16 districts of the state showed that each district level committee has one transgender person as a specialist. However, they had multiple rules and regulations - such as that requiring persons to wear female attire for 24 hours before an appropriate identity card could be issued - thereby invalidating the principle of self identification and creating unnecessary barriers for individuals wishing to change their name and gender. There was hope amongst the community that with the gradual implementation of the NALSA judgment, there would be a change in this procedure, however, no such thing has come to pass. The transgender community is campaigning to ensure that the transgender welfare board follows the dictate of the NALSA judgment. Another issue that L Ramakrishnan highlighted is that the state seemed to have locked in on the 'third gender' verdict of the

NALSA judgment, ignoring all other subsets under the transgender category. Moreover, the only people who could easily identify in the binary were those who had undergone an SRS procedure. L Ramakrishnan added that the changing of gender in passports was an extremely difficult process unless one was applying for a passport for the first time.

SESSION 3: PUBLIC INTEREST LITIGATION

Colin Gonsalves is a designated Senior Advocate of the Supreme Court of India and the founder of Human Rights Law Network (HRLN). He specializes in human rights protection, labor law and public interest law. He has been awarded Right Livelihood Award for the year 2017. Considered a pioneer in the field of public interest litigation in India, he has brought several cases dealing with economic, social and cultural rights. Most of these cases, decided by the Supreme Court, have been set as precedents.



He addressed the symposium regarding Public Interest Litigation (PIL) which could be taken up to combat issues that had been brought up by activists during the panel discussions. Mr Gonsalves recommended that a plan of action be formed for litigation of these issues in a strategic manner to attain and safeguard the rights of the transgender community.

Firstly, Mr Gonsalves advised that a network of lawyers be created across all states of India, specifically to litigate issues related to the sexual minority. This network should include both lawyers and paralegals, working in sync with activists and leaders amongst the transgender community to carefully and strategically take up issues to the state judiciary in order to effect real change at ground level. One issue brought up was the unwillingness of LGBTQ persons to get involved with the legal system of the nation due to fear of being repercussions and the hassle of being tied up in a severely backlogged, and thus often immensely time consuming system.

Mr Gonsalves highlighted that PILs could be filed by any individual on behalf of the injured party and thus did not require members to be personally involved with the case. Activists and lawyers could thus file PILs under their names. He emphasised the need for a dedicated network of lawyers who were passionate about the issues and willing to go the extra mile to get favourable judgments. These lawyers and paralegals would be provided with necessary support, whether financial or logistical. With such resources, there was a high probability that favourable judgments could be obtained and implementation of NALSA judgment (as well as other government schemes) be ensured.

Mr Gonsalves recommended that PILs regarding key issues be carried out as soon as possible, and issues with greater complexity are being taken up after significant research. Issues which could be litigated immediately (within the time frame of ~~one to~~ two months) include:

- a) Dropouts from schools
- b) Separate toilets
- c) Pan card, Adhaar card problems
- d) Organisations having no gender policy
- e) Treatment in jail solitary confinement
- f) And legal aid for our community

Mr Gonsalves highlighted the necessity of moving forward in a collective manner and as a well planned and coordinated movement. He cited the example of the case where a transgender was rejected for job on account of his gender identity. Here, not only could a

case be filed against Air India for the lack of a clear policy with regards to discrimination against LGBTQ persons for employment, but other private and public entities could also be challenged for the same - thus impacting large scale change. This would ultimately force corporations to come up with an appropriate sexual harassment policy and ensure its effective implementation. A similar case in Sikkim has resulted in a Supreme Court judgment requiring all public and private enterprises to develop related policies. Hence, precedent proves that these were clear cut issues and could be litigated expeditiously.

Talking about strategy for the litigation of cases, Mr Gonsalves stated that it would be ideal to involve lawyers belonging to the sexual minorities or working closely with the LGBTQ community since they had a much better understanding of the issues. Moreover, litigation could proceed on a dual strategy - with cases in High Courts as well as Supreme Courts, depending on the states and judges concerned.

Session 4:

Way forward - Recommendations and Plan of Action

Chair: Dr. L. Ramakrishnan is a public health professional and vice president of the non-governmental organization SAATHI, based out of its headquarters in Chennai. For the past 15 years he has been leading programs that promote access to health, legal and social services for populations marginalized on account of HIV, gender and sexuality. These programs are being implemented by teams in 13 offices and cover 25+ states. He was part of the Transgender Committee appointed by the Ministry of Social Justice and Empowerment in 2013-2014 to develop recommendations for transgender inclusion. These recommendations were referenced by the Honorable Supreme Court of India in the NALSA judgment of 2014.

Co-Chair: Kaushik Gupta a leading face of Kolkata's LGBT (lesbian-gay-bisexual-transgender) rights community is a noted lawyer at the High Court of Calcutta. He focuses on issues related to human rights, gender sexuality and alternate sexuality practices. He has taken up cases related to LGBT issues and guiding Oindreela from HRLN, Kolkata.



The last session of the symposium consisted of an open-ended discussion regarding the most pressing grievances activists faced in their state. The judiciary is the most accessible avenue for the masses to demand their rights, and to keep the state and central authorities in check with regards to safeguarding of fundamental rights of LGBTQ persons. The executive and legislature have acted as adversarial figures when it comes to provision of rights to education, health care and personal security of the community. Hence, the legal path must be availed in order to receive a guarantee of these rights under the law and ensure that all persons of sexual minorities have equal opportunities to live a life to its full potential.

Furthermore, the community as a whole has received a myriad of favourable judgments across India. However, a right which is afforded to an individual in one state, must also be granted to another in another state. Hence, it is vital that activists and lawyers working on related issues across the country come together to form a compendium of favourable judgments and a compilation of Chief Justices and what we know of their politics and

views, in order to strategically decide how to proceed in terms of which matters are taken up where.

Matters which were most pressing and required immediate response were as follows:

1. First and foremost, there is need to demand for the rights afforded to the transgender community under the NALSA judgment through its proper implementation. Further, rights of the sexual minorities must be ensured beyond the scope of NALSA.
2. There is urgent need of the presence of a functional transgender welfare board which allows for community participation at the decision making level. Here, it is vital that the various subsets of the transgender community are adequately represented so as to ensure that the diversity is maintained and their interests are protected.
3. This board must have clearly defined responsibilities and power. Hence, they must have a clear set of directions as well as the ability to deal with grievances brought up by transgender persons and to assist them in changing of names and genders on their identity proof documents.
4. There must be a clearly defined and straightforward process for the changing of names and gender so that it does not cause undue stress for individuals undergoing the change.
5. Furthermore, change in gender should be based on the principle of self-identification, as specified by the NALSA judgment. Currently, many states continue to require a district level screening committees for this purpose. These are known to conduct intrusive and bodily checks to verify gender, which not only defies the NALSA judgment but also undermines the dignity of transgender persons. Identification is required on two fronts: for individual identity and for the purpose of attaining entitlements. It is understandable that a level of screening is necessary to make sure that beneficiaries of government schemes are truly persons of sexual minority. However, this cannot hinder the crucial principle of self-identification. One possible solution is the creation of a screening body at the national level which lays down strict

guidelines of the examination required for a clinical diagnosis of gender by trained psychologists.

6. The Rights of Transgender Persons Bill is severely lacking in that it does not define or punish discrimination against transgender persons. It is crucial that laws be enacted to this effect in line with those for discrimination against scheduled castes and scheduled tribes (SC/ST).
7. It is extremely difficult for transgender persons to work as practicing lawyers due to the distressing professional environment. A lawyer from West Bengal talked about how he was forced to quit his practice merely three months after being enrolled in the bar in 2013 as a result of persistent bullying and related trauma. Hence, it is crucial that harassment in workplaces - including court houses - be dealt with utmost urgency. Creating safe working environments for persons of sexual minorities is pivotal in allowing them to live fulfilling professional lives instead of being forced into traditional occupations like that of begging.
8. Additionally, discrimination against persons of sexual minorities in applying for jobs requires immediate response to ensure they are afforded the same opportunities as cisgender individuals and that jobs are awarded on merit basis. Transgender persons are entitled to a life of dignity, and this must be afforded to them.
9. Harassment of transgender students at school level is one of the chief causes for them dropping out of school and thus hindering their fundamental right to education. Hence, at both school and university level, steps need to be taken to eliminate discrimination and bullying of transgender people. This can begin through strict laws against bullying of transgender as well as a change in curriculums to bring about better understanding of persons of sexual minorities and eliminate pre-existing bias. Teacher trainings must also include training of sensitivities regarding gender identity so that they can shape young minds accordingly and change can be brought about at the grassroots level.
10. Although the central government and multiple colleges have provided provisions of post metric scholarships for transgender persons on paper, they remain

unimplemented. Action is needed to ensure transgender persons have access to these funds with the provision of a stipend scholarship for persons with no family support.

11. A key issue which needs to be taken up in Tamil Nadu is that of separate reservation for transgender persons in the education, employment and political sector. This provision of horizontal reservation, rather than the vertical reservation system that currently exists, will empower individuals in accessing opportunities available to them and give them a voice.
12. SRS is a key procedure for transgender persons and amounts to a life saving surgery. However, many are unable to afford it due to the high costs involved. Therefore, actions must be taken for coverage of SRS and any related procedures (such as hormone therapy) under medical insurance by showing that gender dysphoria is a medical condition and thus SRS is a medically necessary procedure.
13. Additionally, the health department must be held accountable to the respective states so as to ensure that SRS procedures undergone at government healthcare facilities are of the best possible standard and follow guidelines laid down at the national or international level.
14. Furthermore, there must be a provision of paid medical leave for persons undergoing SRS procedures, taking into account that it is a medically necessary surgery and not a cosmetic or optional one.
15. There must be adequate access to health and life insurance for transgender persons. It is frequently difficult to access these insurances as they require a biological or marital family member to be registered as the nominee. However, due to rigid understanding of family and lack of recognition of non-biological family, transgender persons face issues in accessing insurance.
16. Infrastructure must support transgender persons and ensure their security. For instance, public gender neutral toilets must be constructed. Transgender favourable infrastructure must include hospital wards, correctional homes, JJ homes and hostels.

17. In cases of domestic violence, procedure dictates that perpetrator is removed from the premises. However, in case of abuse of transgender persons, it is the transgender person who is forced out of the house and moved into rehabilitation homes - where they may continue to suffer from abuse. Such laws must change and be brought in line with those under the Protection of Women Act.
18. There is no provision of personal or private law within the NALSA judgment. Therefore, laws like that of marriage, inheritance, divorce etc. must be enacted so that fundamental rights of transgender persons are protected.
19. Section 377 must exclude transgender relationships and must be treated as separate from trans issues and rights. Currently, there is a lack of clarity regarding trans marriages because, if a transgender female (that is, a biological male who identifies as a female) marries a biological male and consummates the marriage, they are liable to be charged under Section 377.
20. Till date, there are no provisions of obtaining property by inheritance for transgender persons, especially those who are members of the Hijra community. All existing laws related to inheritance are binary which creates a lack of clarity and makes it exceptionally difficult for transgender persons to inherit property.
21. All current laws and policies are in the binary, including the Indian Penal Code (IPC). DV and JJ Acts as well as the IPC must be amended to reflect gender non-conforming language. This must extend to all child related policies.
22. Another issue that transgender have to face is their crass portrayal in the media. There is a high level of sensationalism and crude stereotyping of transgender characters in cinema with no corresponding guidelines established by the censor board. This is points to a need of standard media guidelines adopted by the Press Trust of India. Although guidelines regarding the reporting of LGBT issues have been issued by UNICEF as well as NGOs in India (like HUMSAFAR), they must be adopted by government bodies in order to make them binding.

23. There is a need for budgetary allocations for public campaigns to inform and educate the masses regarding issues faced by sexual minorities and eliminate existing discrimination against the community. RTIs can be used to get a holistic picture of the funds spent for this purpose under the NALSA Act to understand action required in the future.

The session concluded with activists and lawyers optimistic about the idea of proceeding forward through PILs. It was decided that further action would focus on four to five key points. This will include school drop outs due to harassment; mandatory gender specific uniform structure which creates issues for transgender students and leads to drop outs. These issues are to be undertaken in the upcoming two months. Issues like that of reservation are more complex and can only be taken to court after a strategy has been planned out.

Working groups were formed to work on specific issues with one or two people taking up lead. Issues related to schools will be undertaken by the chapter in West Bengal and topics of reservation will be further looked into by the chapter in Tamil Nadu. Construction of gender neutral toilets, a uniform name and gender change procedure, and stopping harassment in the education sector are straightforward issues which can be taken up to the Supreme Court immediately.

Annexure 1: NALSA Judgment

Supreme Court of India

National Legal Ser. Auth vs. Union Of India & Ors on 15 April, 2014

Author: A Sikri

Bench: K.S. Radhakrishnan, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.400 OF 2012

National Legal Services Authority ... Petitioner

Versus

Union of India and others ... Respondents

WITH

WRIT PETITION (CIVIL) NO.604 OF 2013

J U D G M E N T

K.S. Radhakrishnan, J.

1. Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that 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.

2. We are, in this case, concerned with the grievances of the members of Transgender Community (for short 'TG community') who seek a legal declaration of their gender identity than the one assigned to them, male or female, at the time of

birth and their prayer is that non-recognition of their gender identity violates Articles 14 and 21 of the Constitution of India. Hijras/Eunuchs, who also fall in that group, claim legal status as a third gender with all legal and constitutional protection.

3. The National Legal Services Authority, constituted under the [Legal Services Authority Act, 1997](#), to provide free legal services to the weaker and other marginalized sections of the society, has come forward to advocate their cause, by filing Writ Petition No. 400 of 2012. Poojaya Mata Nasib Kaur Ji Women Welfare Society, a registered association, has also preferred Writ Petition No. 604 of 2013, seeking similar reliefs in respect of Kinnar community, a TG community.

4. Laxmi Narayan Tripathy, claimed to be a Hijra, has also got impleaded so as to effectively put across the cause of the members of the transgender community and Tripathy's life experiences also for recognition of their identity as a third gender, over and above male and female. Tripathy says that non-recognition of the identity of Hijras, a TG community, as a third gender, denies them the right of equality before the law and equal protection of law guaranteed under [Article 14](#) of the Constitution and violates the rights guaranteed to them under [Article 21](#) of the Constitution of India.

5. Shri Raju Ramachandran, learned senior counsel appearing for the petitioner – the National Legal Services Authority, highlighted the traumatic experiences faced by the members of the TG community and submitted that every person of that community has a legal right to decide their sex orientation and to espouse and determine their identity. Learned senior counsel has submitted that since the TGs are neither treated as male or female, nor given the status of a third gender, they are being deprived of many of the rights and privileges which other persons enjoy as citizens of this country. TGs are deprived of social and cultural participation and hence restricted access to education, health care and public places which deprives them of the Constitutional guarantee of equality before law and equal protection of laws. Further, it was also pointed out that the community also faces discrimination

to contest election, right to vote, employment, to get licenses etc. and, in effect, treated as an outcast and untouchable. Learned senior counsel also submitted that the State cannot discriminate them on the ground of gender, violating Articles 14 to 16 and 21 of the Constitution of India.

6. Shri Anand Grover, learned senior counsel appearing for the Intervener, traced the historical background of the third gender identity in India and the position accorded to them in the Hindu Mythology, Vedic and Puranic literatures, and the prominent role played by them in the royal courts of the Islamic world etc. Reference was also made to the repealed Criminal Tribes Act, 1871 and explained the inhuman manner by which they were treated at the time of the British Colonial rule. Learned senior counsel also submitted that various International Forums and U.N. Bodies have recognized their gender identity and referred to the Yogyakarta Principles and pointed out that those principles have been recognized by various countries around the world. Reference was also made to few legislations giving recognition to the trans-sexual persons in other countries. Learned senior counsel also submitted that non-recognition of gender identity of the transgender community violates the fundamental rights guaranteed to them, who are citizens of this country.

7. Shri T. Srinivasa Murthy, learned counsel appearing in I.A. No. 2 of 2013, submitted that transgender persons have to be declared as a socially and educationally backward classes of citizens and must be accorded all benefits available to that class of persons, which are being extended to male and female genders. Learned counsel also submitted that the right to choose one's gender identity is integral to the right to lead a life with dignity, which is undoubtedly guaranteed by [Article 21](#) of the Constitution of India. Learned counsel, therefore, submitted that, subject to such rules/regulations/protocols, transgender persons may be afforded the right of choice to determine whether to opt for male, female or transgender classification.

8. Shri Sanjeev Bhatnagar, learned counsel appearing for the petitioner in Writ Petition No.604 of 2013, highlighted the cause of the Kinnar community and submitted that they are the most deprived group of transgender people and calls for constitutional as well as legal protection for their identity and for other socio-economic benefits, which are otherwise extended to the members of the male and female genders in the community.

9. Shri Rakesh K. Khanna, learned Additional Solicitor General, appearing for the Union of India, submitted that the problems highlighted by the transgender community is a sensitive human issue, which calls for serious attention. Learned ASG pointed out that, under the aegis of the Ministry of Social Justice and Empowerment (for short "MOSJE"), a Committee, called "Expert Committee on Issues relating to Transgender", has been constituted to conduct an in-depth study of the problems relating to transgender persons to make appropriate recommendations to MOSJE. Shri Khanna also submitted that due representation would also be given to the applicants, appeared before this Court in the Committee, so that their views also could be heard.

10. We also heard learned counsel appearing for various States and Union Territories who have explained the steps they have taken to improve the conditions and status of the members of TG community in their respective States and Union Territories. Laxmi Narayan Tripathy, a Hijra, through a petition supported by an affidavit, highlighted the trauma undergone by Tripathy from Tripathy's birth. Rather than explaining the same by us, it would be appropriate to quote in Tripathy's own words:

"That the Applicant has born as a male. Growing up as a child, she felt different from the boys of her age and was feminine in her ways. On account of her femininity, from an early age, she faced repeated sexual harassment, molestation and sexual abuse, both within and outside the family. Due to her being different, she was isolated and had no one to talk to or express her feelings while she was coming to terms with her identity. She was constantly abused by everyone as a

'chakka' and 'hijra'. Though she felt that there was no place for her in society, she did not succumb to the prejudice. She started to dress and appear in public in women's clothing in her late teens but she did not identify as a woman. Later, she joined the Hijra community in Mumbai as she identified with the other hijras and for the first time in her life, she felt at home.

That being a hijra, the Applicant has faced serious discrimination throughout her life because of her gender identity. It has been clear to the Applicant that the complete non-recognition of the identity of hijras/transgender persons by the State has resulted in the violation of most of the fundamental rights guaranteed to them under the Constitution of India....” Siddarth Narrain, eunuch, highlights Narrain's feeling, as follows: "Ever since I can remember, I have always identified myself as a woman. I lived in Namakkal, a small town in Tamil Nadu. When I was in the 10th standard I realized that the only way for me to be comfortable was to join the hijra community. It was then that my family found out that I frequently met hijras who lived in the city. One day, when my father was away, my brother, encouraged by my mother, started beating me with a cricket bat. I locked myself in a room to escape from the beatings. My mother and brother then tried to break into the room to beat me up further. Some of my relatives intervened and brought me out of the room. I related my ordeal to an uncle of mine who gave me Rs.50 and asked me to go home. Instead, I took the money and went to live with a group of hijras in Erode." Sachin, a TG, expressed his experiences as follows: "My name is Sachin and I am 23 years old. As a child I always enjoyed putting make-up like 'vibhuti' or 'kum kum' and my parents always saw me as a girl. I am male but I only have female feelings. I used to help my mother in all the housework like cooking, washing and cleaning. Over the years, I started assuming more of the domestic responsibilities at home. The neighbours started teasing me. They would call out to me and ask: 'Why don't you go out and work like a man?' or 'Why are you staying at home like a girl?' But I liked being a girl. I felt shy about going out and working. Relatives would also mock and scold me on this score. Every day I would go out of

the house to bring water. And as I walked back with the water I would always be teased. I felt very ashamed. I even felt suicidal.

How could I live like that? But my parents never protested. They were helpless.” We have been told and informed of similar life experiences faced by various others who belong to the TG community.

11. Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. TG may also takes in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who, in this writ petition, describe themselves as “third gender” and they do not identify as either male or female. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since Hijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional “third gender”. Among Hijras, there are emasculated (castrated, nirvana) men, non-emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites). TG also includes persons who intend to undergo Sex Re-Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. Further, there are persons who like to cross-dress in clothing of opposite gender, i.e. transvestites. Resultantly, the term “transgender”, in contemporary usage, has become an umbrella term that is 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 strongly identify with the gender opposite to their biological sex; male and female.

HISTORICAL BACKGROUND OF TRANSGENDER PEOPLE IN INDIA:

12. TG Community comprises of Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. and they, as a group, have got a strong historical presence in our

country in the Hindu mythology and other religious texts. The Concept of tritiya prakrti or napunsaka has also been an integral part of vedic and puranic literatures. The word 'napunsaka' has been used to denote absence of procreative capability.

13. Lord Rama, in the epic Ramayana, was leaving for the forest upon being banished from the kingdom for 14 years, turns around to his followers and asks all the 'men and women' to return to the city. Among his followers, the hijras alone do not feel bound by this direction and decide to stay with him. Impressed with their devotion, Rama sanctions them the power to confer blessings on people on auspicious occasions like childbirth and marriage, and also at inaugural functions which, it is believed set the stage for the custom of badhai in which hijras sing, dance and confer blessings.

14. Aravan, the son of Arjuna and Nagakanya in Mahabharata, offers to be sacrificed to Goddess Kali to ensure the victory of the Pandavas in the Kurukshetra war, the only condition that he made was to spend the last night of his life in matrimony. Since no woman was willing to marry one who was doomed to be killed, Krishna assumes the form of a beautiful woman called Mohini and marries him. The Hijras of Tamil Nadu consider Aravan their progenitor and call themselves Aravanis.

15. Jain Texts also make a detailed reference to TG which mentions the concept of 'psychological sex'. Hijras also played a prominent role in the royal courts of the Islamic world, especially in the Ottaman empires and the Mughal rule in the Medieval India. A detailed analysis of the historical background of the same finds a place in the book of Gayatri Reddy, "With Respect to Sex: Negotiating Hijra Identity in South India" – Yoda Press (2006).

16. We notice that even though historically, Hijras/transgender persons had played a prominent role, with the onset of colonial rule from the 18th century onwards, the situation had changed drastically. During the British rule, a legislation was enacted to supervise the deeds of Hijras/TG community, called the Criminal Tribes Act,

1871, which deemed the entire community of Hijras persons as innately ‘criminal’ and ‘addicted to the systematic commission of non-bailable offences’. [The Act](#) provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place, as well as those who danced or played music in a public place. Such persons also could be arrested without warrant and sentenced to imprisonment up to two years or fine or both. [Under the Act](#), the local government had to register the names and residence of all eunuchs residing in that area as well as of their properties, who were reasonably suspected of kidnapping or castrating children, or of committing offences under [Section 377](#) of the IPC, or of abetting the commission of any of the said offences. [Under the Act](#), the act of keeping a boy under 16 years in the charge of a registered eunuch was made an offence punishable with imprisonment up to two years or fine and the Act also denuded the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, or from adopting a son. Act has, however, been repealed in August 1949.

17. [Section 377](#) of the IPC found a place in [the Indian Penal Code](#), 1860, prior to the enactment of Criminal Tribes Act that criminalized all penile- non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices. Reference may be made to the judgment of the Allahabad High Court in *Queen Empress v. Khairati* (1884) ILR 6 All 204, wherein a transgender person was arrested and prosecuted under [Section 377](#) on the suspicion that he was a ‘habitual sodomite’ and was later acquitted on appeal. In that case, while acquitting him, the Sessions Judge stated as follows:

“This case relates to a person named Khairati, over whom the police seem to have exercised some sort of supervision, whether strictly regular or not, as a eunuch. The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women

of a certain family. Having been subjected to examination by the Civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catamite – the distortion of the orifice of the anus into the shape of a trumpet and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months.”

18. Even though, he was acquitted on appeal, this case would demonstrate that [Section 377](#), though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons. A Division Bench of this Court in [Suresh Kumar Koushal and another v. Naz Foundation and others](#) [(2014) 1 SCC 1] has already spoken on the constitutionality of [Section 377](#) IPC and, hence, we express no opinion on it since we are in these cases concerned with an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation.

GENDER IDENTITY AND SEXUAL ORIENTATION

19. Gender identity is one of the most-fundamental aspects of life which refers to a person’s intrinsic sense of being male, female or transgender or transsexual person. A person’s sex is usually assigned at birth, but a relatively small group of persons may born with bodies which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender

at birth is found to be at variance with the assumed gender identity. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

20. Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexuals, bisexuals, heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

UNITED NATIONS AND OTHER HUMAN RIGHTS BODIES – ON GENDER IDENTITY AND SEXUAL ORIENTATION

21. United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. [Article 6](#) of the Universal Declaration of Human Rights, 1948 and [Article 16](#) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right. Everyone shall have a right to recognition, everywhere as a person before the law. [Article 17](#) of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his

honour and reputation and that everyone has the right to protection of law against such interference or attacks. International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations, took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to State's human rights obligations. A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity. Reference to few Yogyakarta Principles would be useful.

YOGYAKARTA PRINCIPLES:

22. Principle 1 which deals with the right to the universal enjoyment of human rights, reads as follows :-

“1. THE RIGHT TO THE UNIVERSAL ENJOYMENT OF HUMAN RIGHTS All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

States shall:

A. Embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;

B. Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;

C. Undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;

D. Integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

2. THE RIGHTS TO EQUALITY AND NON-DISCRIMINATION Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

States shall:

A. Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate

legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;

B. Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different- sex sexual activity;

C. Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

D. Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;

E. In all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;

F. Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

3. THE RIGHT TO RECOGNITION BEFORE THE LAW Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self- defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self- determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex

reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

A. Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;

B. Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;

C. Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity;

D. Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

E. Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;

F. Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

4. THE RIGHT TO LIFE Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

States shall:

A. Repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;

B. Remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;

C. Cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

6. THE RIGHT TO PRIVACY Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

States shall:

A. Take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;

B. Repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different- sex sexual activity;

C. Ensure that criminal and other legal provisions of general application are not applied to de facto criminalise consensual sexual activity among persons of the same sex who are over the age of consent;

D. Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;

E. Release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;

F. Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others

9. THE RIGHT TO TREATMENT WITH HUMANITY WHILE IN DETENTION Everyone deprived of liberty shall be treated with humanity and

with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall:

A. Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;

B. Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;

C. Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;

D. Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

E. Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;

F. Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;

G. Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

18. PROTECTION FROM MEDICAL ABUSES No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

States shall:

A. Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;

B. Take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;

C. Establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse;

D. Ensure protection of persons of diverse sexual orientations and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;

E. Review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;

F. Ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

19. THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

States shall:

A. Take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;

B. Ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and

gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;

C. Take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;

D. Ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;

E. Ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;

F. Ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate.”

23. UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their gender identity. United Nations Committee on Economic, Social and Cultural Rights in its Report of 2009 speaks of gender orientation and gender identity as follows:-

“Sexual orientation and gender identity ‘Other status’ as recognized in [article 2](#), paragraph 2, 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.”

24. In this respect, reference may also be made to the General Comment No.2 of the Committee on Torture and [Article 2](#) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2008 and also the General Comment No.20 of the Committee on Elimination of Discrimination against Woman, responsible for the implementation of the Convention on the Elimination of All Forms of Discrimination against Woman, 1979 and 2010 report.

SRS and Foreign Judgments

25. Various countries have given recognition to the gender identity of such persons, mostly, in cases where transsexual persons started asserting their rights after undergoing SRS of their re-assigned sex. In *Corbett v. Corbett* (1970) 2 All ER 33, the Court in England was concerned with the gender of a male to female transsexual in the context of the validity of a marriage. Ormrod, J. in that case took the view that the law should adopt the chromosomal, gonadal and genital tests and if all three are congruent, that should determine a person's sex for the purpose of marriage. Learned Judge expressed the view that any operative intervention should be ignored and the biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means. Later, in *R v. Tan* (1983) QB 1053, 1063-1064, the Court of Appeal applied Corbett approach in the context of criminal law. The Court upheld convictions which were imposed on Gloria Greaves, a post-operative male to female transsexual, still being in law, a man.

26. Corbett principle was not found favour by various other countries, like New Zealand, Australia etc. and also attracted much criticism, from the medical profession. It was felt that the application of the Corbett approach would lead to a

substantial different outcome in cases of a post operative inter-sexual person and a post operative transsexual person. In New Zealand in [Attorney-General v. Otahuhu Family Court](#) (1995) 1 NZLR 603, Justice Ellis noted that once a transsexual person has undergone surgery, he or she is no longer able to operate in his or her original sex. It was held that there is no social advantage in the law for not recognizing the validity of the marriage of a transsexual in the sex of reassignment. The Court held that an adequate test is whether the person in question has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex. In [Re Kevin \(Validity of Marriage of Transsexual\)](#) (2001) Fam CA 1074, in an Australian case, Chisholm J., held that there is no 'formulaic solution' to determine the sex of an individual for the purpose of the law of marriage. It was held that all relevant matters need to be considered, including the person's life experiences and self-perception. Full Court of the Federal Family Court in the year 2003 approved the above-mentioned judgment holding that in the relevant Commonwealth marriage statute the words 'man' and 'woman' should be given their ordinary, everyday contemporary meaning and that the word 'man' includes a post operative female to male transsexual person. The Full Court also held that there was a biological basis for transsexualism and that there was no reason to exclude the psyche as one of the relevant factors in determining sex and gender. The judgment [Attorney-General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission](#) is reported in (2003) Fam CA 94.

27. Lockhart, J. in [Secretary, Department of Social Security v. "SRA"](#), (1993) 43 FCR 299 and Mathews, J. in [R v. Harris & McGuiness](#) (1988) 17 NSWLR 158, made an exhaustive review of the various decisions with regard to the question of recognition to be accorded by Courts to the gender of a transsexual person who had undertaken a surgical procedure. The Courts generally in New Zealand held that the decision in [Corbett v. Corbett](#) (supra) and [R v. Tan](#) (supra) which applied a purely biological test, should not be followed. In fact, Lockhart. J. in [SRA](#) observed that the development in surgical and medical techniques in the field of

sexual reassignment, together with indications of changing social attitudes towards transsexuals, would indicate that generally they should not be regarded merely as a matter of chromosomes, which is purely a psychological question, one of self-perception, and partly a social question, how society perceives the individual.

28. *A.B. v. Western Australia* (2011) HCA 42 was a case concerned with the Gender Reassignment Act, 2000. In that Act, a person who had undergone a reassignment procedure could apply to Gender Reassignment Board for the issue of a recognition certificate. Under [Section 15](#) of that Act, before issuing the certificate, the Board had to be satisfied, inter alia, that the applicant believed his or her true gender was the person's reassigned gender and had adopted the lifestyle and gender characteristics of that gender. Majority of Judges agreed with Lockhart, J. in *SRA* that gender should not be regarded merely as a matter of chromosomes, but partly a psychological question, one of self-perception, and partly a social question, how society perceives the individual.

29. The House of Lords in *Bellinger v. Bellinger* (2003) 2 All ER 593 was dealing with the question of a transsexual. In that case, Mrs. Bellinger was born on 7th September, 1946. At birth, she was correctly classified and registered as male. However, she felt more inclined to be a female. Despite her inclinations, and under some pressure, in 1967 she married a woman and at that time she was 21 years old. Marriage broke down and parties separated in 1971 and got divorce in the year 1975. Mrs. Bellinger dressed and lived like a woman and when she married Mr. Bellinger, he was fully aware of her background and throughout had been supportive to her. Mr. and Mrs. Bellinger since marriage lived happily as husband and wife and presented themselves in that fashion to the outside world. Mrs. Bellinger's primary claim was for a declaration under Section 55 of the Family Law Act, 1986 that her marriage to Mr. Bellinger in 1981 was "at its inception valid marriage". The House of Lords rejected the claim and dismissed the appeal. Certainly, the "psychological factor" has not been given much prominence in determination of the claim of Mrs. Bellinger.

30. The High Court of Kuala Lumpur in *Re JG, JG v. Pengarah Jabatan Pendaftaran Negara* (2006) 1 MLJ 90, was considering the question as to whether an application to amend or correct gender status stated in National Registration Identity Card could be allowed after a person has undergone SRS. It was a case where the plaintiff was born as a male, but felt more inclined to be a woman. In 1996 at Hospital Siroros she underwent a gender reassignment and got the surgery done for changing the sex from male to female and then she lived like a woman. She applied to authorities to change her name and also for a declaration of her gender as female, but her request was not favourably considered, but still treated as a male. She sought a declaration from the Court that she be declared as a female and that the Registration Department be directed to change the last digit of her identity card to a digit that reflects a female gender. The Malaysian Court basically applied the principle laid down in *Corbett* (supra), however, both the prayers sought for were granted, after noticing that the medical men have spoken that the plaintiff is a female and they have considered the sex change of the plaintiff as well as her “psychological aspect”. The Court noticed that she feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her “psychological thinking” is that of a woman.

31. The Court of Appeal, New South Wales was called upon to decide the question whether the Registrar of Births, Deaths and Marriages has the power under the Births, Deaths and [Marriages Act](#), 1995 to register a change of sex of a person and the sex recorded on the register to “non-specific” or “non-specified”. The appeal was allowed and the matter was remitted back to the Tribunal for a fresh consideration in accordance with law, after laying down the law on the subject. The judgment is reported as *Norrie v. NSW Registrar of Births, Deaths and Marriages* (2013) NSWCA 145. While disposing of the appeal, the Court held as follows:-

“The consequence is that the Appeal Panel (and the Tribunal and the Registrar) were in error in construing the power in S.32DC(1) as limiting the Registrar to registering a person’s change of sex as only male or female. An error in the

construction of the statutory provision granting the power to register a person's change of sex is an error on a question of law. *Collector of Customs v. Pozzolanic Enterprises Pty. Ltd.* [1993] FCA 322; (1993) 43 FCR 280 at 287. This is so notwithstanding that the determination of the common understanding of a general word used in the statutory provision is a question of fact. The Appeal Panel (and the Tribunal and the Registrar) erred in determining that the current ordinary meaning of the word "sex" is limited to the character of being either male or female. That involved an error on a question of fact. But the Appeal Panel's error in arriving at the common understanding of the word "sex" was associated with its error in construction of the effect of the statutory provision of S.32DC (and also of S.32DA), and accordingly is of law: *Hope v. Bathurst City Council* [1980] HCA 16, (1980) 144 CLR 1 at 10."

32. In *Christine Goodwin v. United Kingdom* (Application No.28957/95 - Judgment dated 11th July, 2002), the European Court of Human Rights examined an application alleging violation of Articles 8, 12, 13 and 14 of the Convention for Protection of Human Rights and Fundamental Freedoms, 1997 in respect of the legal status of transsexuals in UK and particularly their treatment in the sphere of employment, social security, pensions and marriage. Applicant in that case had a tendency to dress as a woman from early childhood and underwent aversion therapy in 1963-64. In the mid- 1960s she was diagnosed as a transsexual. Though she married a woman and they had four children, her inclination was that her "brain sex" did not fit her body. From that time until 1984 she dressed as a man for work but as a woman in her free time. In January, 1985, the applicant began treatment at the Gender Identity Clinic. In October, 1986, she underwent surgery to shorten her vocal chords. In August, 1987, she was accepted on the waiting list for gender re-assignment surgery and later underwent that surgery at a National Health Service hospital. The applicant later divorced her former wife. She claimed between 1990 and 1992 she was sexually harassed by colleagues at work, followed by other human rights violations. The Court after referring to various provisions and Conventions held as follows:-

“Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under [Article 8](#) of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individuals, including the right to establish details of their identity as individual human beings (see, inter alia, *Pretty v. the United Kingdom* no.2346/02, judgment of 29 April 2002, 62, and *Mikulic v. Croatia*, no.53176/99, judgment of 7 February 2002, 53, both to be published in ECHR 2002...). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post- operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.”

33. The European Court of Human Rights in the case of *Van Kuck v. Germany* (Application No.35968/97 – Judgment dated 12.9.2003) dealt with the application alleging that German Court’s decisions refusing the applicant’s claim for reimbursement of gender reassignment measures and the related proceedings were in breach of her rights to a fair trial and of her right to respect for her private life and that they amounted to discrimination on the ground of her particular “psychological situation”. Reliance was placed on Articles 6, 8, 13 and 14 of the Convention for Protection of Human Rights and Fundamental Freedoms, 1997. The Court held that the concept of “private life” covers the physical and psychological integrity of a person, which can sometimes embrace aspects of an individual’s physical and social identity. For example, gender identifications, name and sexual orientation and sexual life fall within the personal sphere protected by [Article 8](#). The Court also held that the notion of personal identity is an important principle underlying the interpretation of various guaranteed rights and the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security.

34. Judgments referred to above are mainly related to transsexuals, who, whilst belonging physically to one sex, feel convinced that they belong to the other, seek to achieve a more integrated unambiguous identity by undergoing medical and surgical operations to adapt their physical characteristic to their psychological nature. When we examine the rights of transsexual persons, who have undergone SRS, the test to be applied is not the “Biological test”, but the “Psychological test”, because psychological factor and thinking of transsexual has to be given primacy than binary notion of gender of that person. Seldom people realize the discomfort, distress and psychological trauma, they undergo and many of them undergo “Gender Dysphoria’ which may lead to mental disorder. Discrimination faced by this group in our society, is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Rights of transgender people, pure and simple, like Hijras, eunuchs, etc. have also to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity. Before addressing those aspects further, we may also refer to few legislations enacted in other countries recognizing their rights.

LEGISLATIONS IN OTHER COUNTRIES ON TGs

35. We notice, following the trend, in the international human rights law, many countries have enacted laws for recognizing rights of transsexual persons, who have undergone either partial/complete SRS, including United Kingdom, Netherlands, Germany, Australia, Canada, Argentina, etc. United Kingdom has passed the General Recommendation Act, 2004, following the judgment in Christine Goodwin (supra) passed by the European Courts of Human Rights. [The Act](#) is all encompassing as not only does it provide legal recognition to the acquired gender of a person, but it also lays down provisions highlighting the consequences of the newly acquired gender status on their legal rights and entitlements in various aspects such as marriage, parentage, succession, social security and pensions etc. One of the notable features of the Act is that it is not necessary that a person needs

to have undergone or in the process of undergoing a SRS to apply under the Act. Reference in this connection may be made to the Equality Act, 2010 (UK) which has consolidated, repealed and replaced around nine different anti-discrimination legislations including the Sex Discrimination Act, 1986. [The Act](#) defines certain characteristics to be “protected characteristics” and no one shall be discriminated or treated less favourably on grounds that the person possesses one or more of the “protected characteristics”. [The Act](#) also imposes duties on Public Bodies to eliminate all kinds of discrimination, harassment and victimization. Gender reassignment has been declared as one of the protected characteristics under the Act, of course, only the transsexuals i.e. those who are proposing to undergo, is undergoing or has undergone the process of the gender reassignment are protected under the Act.

36. In Australia, there are two Acts dealing with the gender identity, (1) Sex Discrimination Act, 1984; and (ii) Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013 (Act 2013). Act 2013 amends the Sex Discrimination Act, 1984. Act 2013 defines gender identity as the appearance or mannerisms or other gender- related characteristics of a person (whether by way of medical intervention or not) with or without regard to the person’s designated sex at birth.

[Sections 5\(A\), \(B\) and \(C\)](#) of the 2013 Act have some relevance and the same are extracted hereinbelow:-

“5A Discrimination on the ground of sexual orientation (1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person’s sexual orientation if, by reason of:

(a) the aggrieved person’s sexual orientation; or

(b) a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or

(c) a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation.

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's sexual orientation if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

5B Discrimination on the ground of gender identity (1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's gender identity if, by reason of:

(a) the aggrieved person's gender identity; or

(b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or

(c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity.

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's gender identity if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

5C Discrimination on the ground of intersex status (1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's intersex status if, by reason of:

- (a) the aggrieved person's intersex status; or
- (b) a characteristic that appertains generally to persons of intersex status; or
- (c) a characteristic that is generally imputed to persons of intersex status;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who is not of intersex status.

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's intersex status if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of intersex status.

(3) This section has effect subject to sections 7B and 7D.” Various other precautions have also been provided under the Act.

37. We may in this respect also refer to the European Union Legislations on transsexuals. Recital 3 of the Preamble to the Directive 2006/54/EC of European Parliament and the Council of 5 July 2006 makes an explicit reference to discrimination based on gender reassignment for the first time in European Union Law. Recital 3 reads as under :-

“The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of this purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.”

38. European Parliament also adopted a resolution on discrimination against transsexuals on 12th September, 1989 and called upon the Member States to take steps for the protection of transsexual persons and to pass legislation to further that end. Following that Hungary has enacted Equal Treatment and the Promotion of Equal Opportunities Act, 2003, which includes sexual identity as one of the grounds of discrimination. 2010 paper on ‘Transgender Persons’ Rights in the EU Member States prepared by the Policy Department of the European Parliament presents the specific situation of transgender people in 27 Member States of the European Union. In the United States of America some of the laws enacted by the States are inconsistent with each other. The Federal Law which provides protection to transgender people is The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 2009, which expands the scope of the 1969 United States Federal Hate-crime Law by including offences motivated by actual or perceived gender identity. Around 15 States and District of Columbia in the United States have legislations which prohibit discrimination on grounds of gender identity and expression. Few States have issued executive orders prohibiting discrimination.

39. The Parliament of South Africa in the year 2003, enacted Alteration of Sex Description and Sex Status Act, 2003, which permits transgender persons who have undergone gender reassignment or people whose sexual characteristics have evolved naturally or an intersexed person to apply to the Director General of the National Department of Home Affairs for alteration of his/her sex description in the birth register, though the legislation does not contemplate a more inclusive definition of transgender people.

40. The Senate of Argentina in the year 2012 passed a law on Gender Identity that recognizes right by all persons to the recognition of their gender identity as well as free development of their person according to their gender identity and can also request that their recorded sex be amended along with the changes in first name and image, whenever they do not agree with the self-perceived gender identity. Not necessary that they seemed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment had taken place. [Article 12](#) deals with dignified treatment, respecting the gender identity adopted by the individual, even though the first name is different from the one recorded in their national identity documents. Further laws also provide that whenever requested by the individual, the adopted first name must be used for summoning, recording, filing, calling and any other procedure or service in public and private spaces.

41. In Germany, a new law has come into force on 5th November, 2013, which allows the parents to register the sex of the children as 'not specified' in the case of children with intersex variation. According to [Article 22](#), Section 3 of the German Civil Statutes Act reads as follows:-

“If a child can be assigned to neither the female nor the male sex then the child has to be named without a specification”

42. The law has also added a category of X, apart from “M” and “F” under the classification of gender in the passports.

Indian Scenario

43. We have referred exhaustively to the various judicial pronouncements and legislations on the international arena to highlight the fact that the recognition of “sex identity gender” of persons, and “guarantee to equality and non-discrimination” on the ground of gender identity or expression is increasing and gaining acceptance in international law and, therefore, be applied in India as well.

44. Historical background of Transgender people in India has already been dealt in the earlier part of this Judgment indicating that they were once treated with great respect, at least in the past, though not in the present. We can perceive a wide range of transgender related identities, cultures or experiences which are generally as follows:

“Hijras: Hijras are biological males who reject their ‘masculine’ identity in due course of time to identify either as women, or “not- men”, or “in-between man and woman”, or “neither man nor woman”. Hijras can be considered as the western equivalent of transgender/transsexual (male-to-female) persons but Hijras have a long tradition/culture and have strong social ties formalized through a ritual called “reet” (becoming a member of Hijra community). There are regional variations in the use of terms referred to Hijras. For example, Kinnars (Delhi) and Aravanis (Tamil Nadu). Hijras may earn through their traditional work: ‘Badhai’ (clapping their hands and asking for alms), blessing new-born babies, or dancing in ceremonies. Some proportion of Hijras engage in sex work for lack of other job opportunities, while some may be self-employed or work for non- governmental organisations.” (See UNDP India Report (December, 2010).

Eunuch: Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth, but this is discovered the child previously assigned to the male sex, would be recategorized as intersexed – as a Hijra.

“Aravanis and ‘Thirunangi’ – Hijras in Tamil Nadu identify as “Aravani”. Tamil Nadu Aravanigal Welfare Board, a state government’s initiative under the Department of Social Welfare defines Aravanis as biological males who self-identify themselves as a woman trapped in a male’s body. Some Aravani activists want the public and media to use the term ‘Thirunangi’ to refer to Aravanis.

Kothi – Kothis are a heterogeneous group. ‘Kothis’ can be described as biological males who show varying degrees of ‘femininity’ – which may be situational. Some proportion of Kothis have bisexual behavior and get married to a woman. Kothis are generally of lower socioeconomic status and some engage in sex work for survival. Some proportion of Hijra-identified people may also identify themselves as ‘Kothis’. But not all Kothi identified people identify themselves as transgender or Hijras.

Jogtas/Jogappas: Jogtas or Jogappas are those persons who are dedicated to and serve as a servant of goddess Renukha Devi (Yellamma) whose temples are present in Maharashtra and Karnataka. ‘Jogta’ refers to male servant of that Goddess and ‘Jogti’ refers to female servant (who is also sometimes referred to as ‘Devadasi’). One can become a ‘Jogta’ (or Jogti) if it is part of their family tradition or if one finds a ‘Guru’ (or ‘Pujari’) who accepts him/her as a ‘Chela’ or ‘Shishya’ (disciple). Sometimes, the term ‘Jogti Hijras’ is used to denote those male-to-female transgender persons who are devotees/servants of Goddess Renukha Devi and who are also in the Hijra communities. This term is used to differentiate them from ‘Jogtas’ who are heterosexuals and who may or may not dress in woman’s attire when they worship the Goddess. Also, that term differentiates them from ‘Jogtis’ who are biological females dedicated to the Goddess. However, ‘Jogti Hijras’ may refer to themselves as ‘Jogti’ (female pronoun) or Hijras, and even sometimes as ‘Jogtas’.

Shiv-Shakthis: Shiv-Shakthis are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression. Usually, Shiv-Shakthis are inducted into the Shiv- Shakti community by senior gurus, who

teach them the norms, customs, and rituals to be observed by them. In a ceremony, Shiv-Shakthis are married to a sword that represents male power or Shiva (deity). Shiv- Shakthis thus become the bride of the sword. Occasionally, Shiv- Shakthis cross-dress and use accessories and ornaments that are generally/socially meant for women. Most people in this community belong to lower socio-economic status and earn for their living as astrologers, soothsayers, and spiritual healers; some also seek alms.” (See Serena Nanda, Wadsworth Publishing Company, Second Edition

45. Transgender people, as a whole, face multiple forms of oppression in this country. Discrimination is so large and pronounced, especially in the field of health care, employment, education, leave aside social exclusion. A detailed study was conducted by the United Nations Development Programme (UNDP – India) and submitted a report in December, 2010 on Hijras/transgender people in India: “HIV Human Rights and Social Exclusion”. The Report states that the HIV Human Immunodeficiency Virus and Sexually Transmitted Infections (STI) is now increasingly seen in Hijras/transgender people population. The estimated size of men who have sex with men (MSM) and male sex workers population in India (latter presumably includes Hijras/TG communities) is 2,352,133 and 235,213 respectively. It was stated that no reliable estimates are available for Hijras/TG women. HIV prevalence among MSM population was 7.4% against the overall adult HIV prevalence of 0.36%. It was stated recently Hijras/TG people were included under the category of MSM in HIV sentinel serosurveillance. It is also reported in recent studies that Hijras/TG women have indicated a very high HIV prevalence (17.5% to 41%) among them. Study conducted by NACO also highlights a pathetic situation. Report submitted by NACI, NACP IV Working Group Hijras TG dated 5.5.2011 would indicate that transgender people are extremely vulnerable to HIV. Both the reports highlight the extreme necessity of taking emergent steps to improve their sexual health, mental health and also address the issue of social exclusion. The UNDP in its report has made the following recommendations, which are as under:

“Multiple problems are faced by Hijras/TG, which necessitate a variety of solutions and actions. While some actions require immediate implementation such as introducing Hijra/TG-specific social welfare schemes, some actions need to be taken on a long-term basis changing the negative attitude of the general public and increasing accurate knowledge about Hijra/TG communities. The required changes need to be reflected in policies and laws; attitude of the government, general public and health care providers; and health care systems and practice. Key recommendations include the following:

1. Address the gape in NACP-III: establish HIV sentinel serosurveillance sites for Hijras/TG at strategic locations; conduct operations research to design and fine-tune culturally- relevant package of HIV prevention and care interventions for Hijras/TG; provide financial support for the formation of CBOs run by Hijras/TG; and build the capacity of CBOs to implement effective rogrammes.
2. Move beyond focusing on individual-level HIV prevention activities to address the structural determinants of risks and mitigate the impact of risks. For example, mental health counseling, crisis intervention (crisis in relation to suicidal tendencies, police harassment and arrests, support following sexual and physical violence), addressing alcohol and drug abuse, and connecting to livelihood programs all need to be part of the HIV interventions.
3. Train health care providers to be competent and sensitive in providing health care services (including STI and HIV-related services) to Hijras/TG as well as develop and monitor implementation of guidelines related to gender transition and sex reassignment surgery (SRS).
4. Clarify the ambiguous legal status of sex reassignment surgery and provide gender transition and SRS services (with proper pre-and post-operation/transition counseling) for free in public hospitals in various parts in India.

5. Implement stigma and discrimination reduction measures at various settings through a variety of ways: mass media awareness for the general public to focused training and sensitization for police and health care providers.

6. Develop action steps toward taking a position on legal recognition of gender identity of Hijras/TG need to be taken in consultation with Hijras/TG and other key stakeholders. Getting legal recognition and avoiding ambiguities in the current procedures that issue identity documents to Hijras/TGs are required as they are connected to basic civil rights such as access to health and public services, right to vote, right to contest elections, right to education, inheritance rights, and marriage and child adoption.

7. Open up the existing Social Welfare Schemes for needy Hijras/TG and create specific welfare schemes to address the basic needs of Hijras/TG including housing and employment needs.

8. Ensure greater involvement of vulnerable communities including Hijras/TG women in policy formulation and program development.”

46. Social exclusion and discrimination on the ground of gender stating that one does not conform to the binary gender (male/female) does prevail in India. Discussion on gender identity including self-identification of gender of male/female or as transgender mostly focuses on those persons who are assigned male sex at birth, whether one talks of Hijra transgender, woman or male or male to female transgender persons, while concern voiced by those who are identified as female to male trans-sexual persons often not properly addressed. Female to male unlike Hijra/transgender persons are not quite visible in public unlike Hijra/transgender persons. Many of them, however, do experience violence and discrimination because of their sexual orientation or gender identity.

INDIA TO FOLLOW INTERNATIONAL CONVENTIONS

47. International Conventions and norms are significant for the purpose of interpretation of gender equality. [Article 1](#) of the Universal declaration on Human Rights, 1948, states that all human-beings are born free and equal in dignity and rights. [Article 3](#) of the Universal Declaration of Human Rights states that everyone has a right to life, liberty and security of person. [Article 6](#) of the International Covenant on Civil and Political Rights, 1966 affirms that every human-being has the inherent right to life, which right shall be protected by law and no one shall be arbitrarily deprived of his life. [Article 5](#) of the Universal Declaration of Human Rights and [Article 7](#) of the International Covenant on Civil and Political Rights provide that no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment. United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (dated 24th January, 2008) specifically deals with protection of individuals and groups made vulnerable by discrimination or marginalization. Para 21 of the Convention states that States are obliged to protect from torture or ill-treatment all persons regardless of sexual orientation or transgender identity and to prohibit, prevent and provide redress for torture and ill-treatment in all contests of State custody or control. [Article 12](#) of the Universal Declaration of Human Rights and [Article 17](#) of the International Covenant on Civil and Political Rights state that no one shall be subjected to “arbitrary or unlawful interference with his privacy, family, home or correspondence”.

48. Above-mentioned International Human Rights instruments which are being followed by various countries in the world are aimed to protect the human rights of transgender people since it has been noticed that transgender people/transsexuals often face serious human rights violations, such as harassment in work place, hospitals, places of public conveniences, market places, theaters, railway stations, bus stands, and so on.

49. Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person’s sex assigned by birth, which permits gender

system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations. We have exhaustively referred to various articles contained in the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966 as well as the Yogyakarta principles. Reference was also made to legislations enacted in other countries dealing with rights of persons of transgender community. Unfortunately we have no legislation in this country dealing with the rights of transgender community. Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence the necessity to follow the International Conventions to which India is a party and to give due respect to other non-binding International Conventions and principles. Constitution makers could not have envisaged that each and every human activity be guided, controlled, recognized or safeguarded by laws made by the legislature. [Article 21](#) has been incorporated to safeguard those rights and a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights knowing the pulse and feeling of that community, though a minority, especially when their rights have gained universal recognition and acceptance.

50. [Article 253](#) of the Constitution of India states that the Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention. Generally, therefore, a legislation is required for implementing the international conventions, unlike the position in the United States of America where the rules of international law are applied by the municipal courts on the theory of their implied adoption by the State, as a part of its own municipal law. Article VI, Cl. (2) of the U.S. Constitution reads as follows:

“.....all treaties made, or which shall be made, under the authority of the united States, shall be the supreme law of the land, and the judges in every State shall be

bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”

51. In the United States, however, it is open to the courts to supersede or modify international law in its application or it may be controlled by the treaties entered into by the United States. But, till an Act of Congress is passed, the Court is bound by the law of nations, which is part of the law of the land. Such a ‘supremacy clause’ is absent in our Constitution. Courts in India would apply the rules of International law according to the principles of comity of Nations, unless they are overridden by clear rules of domestic law. See: [Gramophone Company of India Ltd. v. Birendra Bahadur Pandey](#) (1984) 2 SCC 534 and [Tractor Export v. Tarapore & Co.](#) (1969) 3 SCC 562, [Mirza Ali Akbar Kashani v. United Arab Republic](#) (1966) 1 SCR 391. In the case of [Jolly George Varghese v. Bank of Cochin](#) (1980) 2 SCC 360, the Court applied the above principle in respect of the International Covenant on Civil and Political Rights, 1966 as well as in connection with the Universal Declaration of Human Rights. India has ratified the above mentioned covenants, hence, those covenants can be used by the municipal courts as an aid to the Interpretation of Statutes by applying the Doctrine of Harmonization. But, certainly, if the Indian law is not in conflict with the International covenants, particularly pertaining to human rights, to which India is a party, the domestic court can apply those principles in the Indian conditions. The Interpretation of International Conventions is governed by Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969.

52. [Article 51](#) of the Directive Principles of State Policy, which falls under Part IV of the Indian Constitution, reads as under:

“Art. 51. The State shall endeavour to –

- a) promote international peace and security;
- b) maintain just and honourable relations between nations;

c) Foster respect for international law and treaty obligation in the dealings of organised peoples with one another; and

d) Encourage settlement of international disputes by arbitration.”

53. [Article 51](#), as already indicated, has to be read along with [Article 253](#) of the Constitution. If the parliament has made any legislation which is in conflict with the international law, then Indian Courts are bound to give effect to the Indian Law, rather than the international law. However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law. In [His Holiness Kesavananda Bharati Sripadavalvaru v. State of Kerala \(1973\) 4 SCC 225](#), it was stated that in view of [Article 51](#) of the Constitution, the Court must interpret language of the Constitution, if not intractable, in the light of United Nations Charter and the solemn declaration subscribed to it by India. In [Apparel Export Promotion Council v. A. K. Chopra \(1999\) 1 SCC 759](#), it was pointed out that domestic courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. Reference may also be made to the Judgments of this Court in [Githa Hariharan \(Ms\) and another v. Reserve Bank of India and another \(1999\) 2 SCC 228](#), [R.D. Upadhyay v. State of Andhra Pradesh and others \(2007\) 15 SCC 337](#) and [People’s Union for Civil Liberties v. Union of India and another \(2005\) 2 SCC 436](#). In [Vishaka and others v. State of Rajasthan and Others \(1997\) 6 SCC 241](#), this Court under [Article 141](#) laid down various guidelines to prevent sexual harassment of women in working places, and to enable gender equality relying on Articles 11, 24 and general recommendations 22, 23 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. Principles discussed hereinbefore on TGs and the International Conventions,

including Yogyakarta principles, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country.

ARTICLE 14 AND TRANSGENDER PEOPLE

54. [Article 14](#) of the Constitution of India states that the State shall not deny to “any person” equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. [Article 14](#) of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. [Article 14](#) does not restrict the word ‘person’ and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression ‘person’ and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.

55. Petitioners have asserted as well as demonstrated on facts and figures supported by relevant materials that despite constitutional guarantee of equality, Hijras/transgender persons have been facing extreme discrimination in all spheres of the society. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities. Further, non-recognition of identity of Hijras /transgender persons results in them facing extreme

discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities for Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates [Article 14](#) of the Constitution of India.

ARTICLES 15 & 16 AND TRANSGENDER PEOPLE

56. Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds, including the ground of 'sex'. In fact, both the Articles prohibit all forms of gender bias and gender based discrimination.

57. [Article 15](#) states that the State shall not discriminate against any citizen, inter alia, on the ground of sex, with regard to

- (a) access to shops, public restaurants, hotels and places of public entertainment; or
- (b) use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

The requirement of taking affirmative action for the advancement of any socially and educationally backward classes of citizens is also provided in this Article.

58. [Article 16](#) states that there shall be equality of opportunities for all the citizens in matters relating to employment or appointment to any office under the State. [Article 16 \(2\)](#) of the Constitution of India reads as follows :

“16(2). No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.” [Article 16](#) not only prohibits

discrimination on the ground of sex in public employment, but also imposes a duty on the State to ensure that all citizens are treated equally in matters relating to employment and appointment by the State.

59. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.

60. TGs have been systematically denied the rights under [Article 15\(2\)](#) that is not to be subjected to any disability, liability, restriction or condition in regard to access to public places. TGs have also not been afforded special provisions envisaged under [Article 15\(4\)](#) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. TGs have also been denied rights under [Article 16\(2\)](#) and discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in

the matter of appointment, as envisaged under [Article 16\(4\)](#) of the Constitution. State is bound to take affirmative action to give them due representation in public services.

61. Articles 15(2) to (4) and [Article 16\(4\)](#) read with the Directive Principles of State Policy and various international instruments to which India is a party, call for social equality, which the TGs could realize, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

[ARTICLE 19\(1\)\(a\)](#) AND TRANSGENDER PEOPLE

62. [Article 19\(1\)](#) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from exercise of those rights. The rights conferred by [Article 19](#) are not available to any person who is not a citizen of India. [Article 19\(1\)](#) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country. [Article 19\(1\) \(a\)](#) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in [Article 19\(2\)](#) of the Constitution.

63. We may, in this connection, refer to few judgments of the US Supreme Courts on the rights of TG's freedom of expression. The Supreme Court of the State of Illinois in the *City of Chicago v. Wilson et al.*, 75 Ill.2d 525(1978) struck down the municipal law prohibiting cross-dressing, and held as follows “-

“the notion that the State can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with “values

of privacy, self-identity, autonomy and personal integrity that the Constitution was designed to protect.”

64. In *Doe v. Yunits et al.*, 2000 WL33162199 (Mass. Super.), the Superior Court of Massachusetts, upheld the right of a person to wear school dress that matches her gender identity as part of protected speech and expression and observed as follows :-

“by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with the gender. In addition, plaintiff’s ability to express herself and her gender identity through dress is important for her health and well- being. Therefore, plaintiff’s expression is not merely a personal preference but a necessary symbol of her identity.”

65. Principles referred to above clearly indicate that the freedom of expression guaranteed under [Article 19\(1\)\(a\)](#) includes the freedom to express one’s chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc.

66. Gender identity, therefore, lies at the core of one’s personal identity, gender expression and presentation and, therefore, it will have to be protected under [Article 19\(1\)\(a\)](#) of the Constitution of India. A transgender’s personality could be expressed by the transgender’s behavior and presentation. State cannot prohibit, restrict or interfere with a transgender’s expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under [Article 19\(1\)\(a\)](#) of the Constitution of India and the State is bound to protect and recognize those rights.

[ARTICLE 21 AND THE TRANSGENDER PEOPLE](#)

67. [Article 21](#) of the Constitution of India reads as follows:

“21. Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law.” [Article 21](#) is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. [Article 21](#) takes all those aspects of life which go to make a person’s life meaningful. [Article 21](#) protects the dignity of human life, one’s personal autonomy, one’s right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. In [Francis Coralie Mullin v. Administrator, Union Territory of Delhi](#) (1981) 1 SCC 608 (paras 7 and 8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes “expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings”.

68. Recognition of one’s gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one’s sense of being as well as an integral part of a person’s identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

69. [Article 21](#), as already indicated, guarantees the protection of “personal autonomy” of an individual. In [Anuj Garg v. Hotel Association of India](#) (2008) 3 SCC 1 (paragraphs 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under [Article 21](#) of the Constitution of India.

LEGAL RECOGNITION OF THIRD/TRANSGENDER IDENTITY

70. Self-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female. Gender identity, as already indicated, refers to a person's internal sense of being male, female or a transgender, for example Hijras do not identify as female because of their lack of female genitalia or lack of reproductive capability. This distinction makes them separate from both male and female genders and they consider themselves neither man nor woman, but a "third gender". Hijras, therefore, belong to a distinct socio-religious and cultural group and have, therefore, to be considered as a "third gender", apart from male and female. State of Punjab has treated all TGs as male which is not legally sustainable. State of Tamil Nadu has taken lot of welfare measures to safeguard the rights of TGs, which we have to acknowledge. Few States like Kerala, Tripura, Bihar have referred TGs as "third gender or sex". Certain States recognize them as "third category". Few benefits have also been extended by certain other States. Our neighbouring countries have also upheld their fundamental rights and right to live with dignity.

71. The Supreme Court of Nepal in *Sunil Babu Pant & Ors. v. Nepal Government* (Writ Petition No.917 of 2007 decided on 21st December, 2007), spoke on the rights of Transgender people as follows:-

"the fundamental rights comprised under Part II of the Constitution are enforceable fundamental human rights guaranteed to the citizens against the State. For this reason, the fundamental rights stipulated in Part III are the rights similarly vested in the third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women are, and they are the citizens of this country as well.... Thus, the people other than 'men' and 'women', including the people of 'third gender' cannot be discriminated. The State should recognize the existence of all natural persons including the people of third gender other than the men and women. And it cannot deprive the people of third gender from enjoying the fundamental rights provided by Part III of the Constitution."

72. The Supreme Court of Pakistan in *Dr. Mohammad Aslam Khaki & Anr. V. Senior Superintendent of Police (Operation) Rawalpindi & Ors.* (Constitution Petition No.43 of 2009) decided on 22nd March, 2011, had occasion to consider the rights of eunuchs and held as follows:-

“Needless to observe that eunuchs in their rights are citizens of this country and subject to the Constitution of the Islamic Republic of Pakistan, 1973, their rights, obligations including right to life and dignity are equally protected. Thus no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned. The Government functionaries both at federal and provincial levels are bound to provide them protection of life and property and secure their dignity as well, as is done in case of other citizens.”

73. We may remind ourselves of the historical presence of the third gender in this country as well as in the neighbouring countries.

74. [Article 21](#), as already indicated, protects one’s right of self- determination of the gender to which a person belongs. Determination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of “personal autonomy” and “self-determination”. Hijras/Eunuchs, therefore, have to be considered as Third Gender, over and above binary genders under our Constitution and the laws.

75. Articles 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude Hijras/Transgender people from its ambit, but Indian law on the whole recognize the paradigm of binary genders of male and female, based on one’s biological sex. As already indicated, we cannot accept the Corbett principle of “Biological Test”, rather we prefer to follow the psyche of the person in determining sex and gender and prefer the “Psychological Test” instead of “Biological Test”. Binary notion of gender reflects in [the Indian Penal Code](#), for example, [Section 8, 10](#), etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NAREGA, 2005, etc. Non-recognition of the identity of

Hijras/Transgender people in the various legislations denies them equal protection of law and they face wide-spread discrimination.

76. Article 14 has used the expression “person” and the Article 15 has used the expression “citizen” and “sex” so also Article 16. Article 19 has also used the expression “citizen”. Article 21 has used the expression “person”. All these expressions, which are “gender neutral” evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgender people and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one’s personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.

77. We, therefore, conclude that 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.

.....J (K.S. Radhakrishnan) A.K. SIKRI, J.

78. I have carefully, and with lot of interest, gone through the perspicuous opinion of my brother Radhakrishnan, J. I am entirely in agreement with the discussion contained in the said judgment on all the cardinal issues that have arisen for consideration in these proceedings. At the same time, having regard to the fact that the issues involved are of seminal importance, I am also inclined to pen down my thoughts.

79. As is clear, these petitions essentially raise an issue of “Gender Identity”, which is the core issue. It has two facets, viz.:

“(a) Whether a person who is born as a male with predominantly female orientation (or vice-versa), has a right to get himself to be recognized as a female as per his choice moreso, when such a person after having undergone operational procedure, changes his/her sex as well;

(b) Whether transgender (TG), who are neither males nor females, have a right to be identified and categorized as a “third gender”?

80. We would hasten to add that it is the second issue with which we are primarily concerned in these petitions though in the process of discussion, first issue which is somewhat inter-related, has also popped up.

81. Indubitably, the issue of choice of gender identify has all the trappings of a human rights. That apart, as it becomes clear from the reading of the judgment of my esteemed Brother Radhakrishnan, J., the issue is not limited to the exercise of choice of gender/sex. Many rights which flow from this choice also come into play, inasmuch not giving them the status of a third gender results in depriving the community of TGs of many of their valuable rights and privileges which other persons enjoy as citizens of this Country. There is also deprivation of social and cultural participation which results into eclipsing their access to education and health services. Radhakrishnan, J. has exhaustively described the term ‘Transgender’ as an umbrella term which embraces within itself a wide range of identities and experiences including but not limited to pre- operative/post-operative trans sexual people who strongly identify with the gender opposite to their biological sex i.e. male/ female. Therein, the history of transgender people in India is also traced and while doing so, there is mention of upon the draconian legislation enacted during the British Rule, known as Criminal Tribes Act, 1871 which treated, per se, the entire community of Hizra persons as innately ‘criminals’, ‘addicted to the systematic commission of non-bailable offences’.

82. With these introductory remarks, I revert to the two facets of pivotal importance mentioned above. Before embarking on the discussion, I may clarify

that my endeavour would be not to repeat the discussion contained in the judgment of my Brother Radhakrishnan, J., as I agree with every word written therein. However, at times, if some of the observations are re-narrated, that would be only with a view to bring continuity in the thought process.

(1) Re: Right of a person to have the gender of his/her choice. When a child is born, at the time of birth itself, sex is assigned to him/her. A child would be treated with that sex thereafter, i.e. either a male or a female. However, as explained in detail in the accompanying judgment, some persons, though relatively very small in number, may be born with bodies which incorporate both or certain aspects of both male or female physiology. It may also happen that though a person is born as a male, because of some genital anatomy problems his innate perception may be that of a female and all his actions would be female oriented. The position may be exactly the opposite wherein a person born as female may behave like a male person.

83. In earlier times though one could observe such characteristics, at the same time the underlying rationale or reason behind such a behavior was not known. Over a period of time, with in depth study and research of such physical and psychological factors behaviour, the causes of this behaviour have become discernable which in turn, has led to some changes in societal norms. Society has starting accepting, though slowly, these have accepted the behavioral norms of such persons without treating it as abnormal. Further, medical science has leaped forward to such an extent that even physiology appearance of a person can be changed through surgical procedures, from male to female and vice-versa. In this way, such persons are able to acquire the body which is in conformity with the perception of their gender/gender characteristics. In order to ensure that law also keeps pace with the aforesaid progress in medical science, various countries have come out with Legislation conferring rights on such persons to recognize their gender identity based on reassigned sex after undergoing Sex Re-Assignment Surgery (SRS). Law and judgments given by the courts in other countries have been exhaustively and grandiloquently traversed by my learned Brother in his judgment, discussing

amongst others, the Yogyakarta principles, the relevant provisions of the Universal Declaration of Human Rights 1948 and highlighting the statutory framework operating in those countries.

84. The genesis of this recognition lies in the acknowledgment of another fundamental and universal principal viz. “right of choice” given to an individual which is the inseparable part of human rights. It is a matter of historical significance that the 20th Century is often described as “the age of rights”.

85. The most important lesson which was learnt as a result of Second World War was the realization by the Governments of various countries about the human dignity which needed to be cherished and protected. It is for this reason that in the U.N.Charter, 1945, adopted immediately after the Second World War, dignity of the individuals was mentioned as of core value. The almost contemporaneous Universal Declaration of Human Rights (1948) echoed same sentiments.

86. The underlined message in the aforesaid documents is the acknowledgment that human rights are individual and have a definite linkage of human development, both sharing common vision and with a common purpose. Respect for human rights is the root for human development and realization of full potential of each individual, which in turn leads to the augmentation of human resources with progress of the nation. Empowerment of the people through human development is the aim of human rights.

87. There is thus a universal recognition that human rights are rights that “belong” to every person, and do not depend on the specifics of the individual or the relationship between the right-holder and the right- grantor. Moreover, human rights exist irrespective of the question whether they are granted or recognized by the legal and social system within which we live. They are devices to evaluate these existing arrangements: ideally, these arrangements should not violate human rights. In other words, human rights are moral, pre-legal rights. They are not granted by people nor can they be taken away by them.

88. In international human rights law, equality is found upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of the TGs, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.

89. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. Moreover, the requirement contained in [Article 2](#) of the Covenant that the rights enunciated will be exercised without discrimination of any kind based on certain specified grounds or other status clearly applies to cover persons with disabilities.

90. India attained independence within two years of adoption of the aforesaid U.N.Charter and it was but natural that such a Bill of Rights would assume prime importance insofar as thinking of the members of the Constituent Assembly goes. It in fact did and we found chapter on fundamental rights in Part-III of the Constitution. It is not necessary for me, keeping in view the topic of today's discussion, to embark on detailed discussion on Chapter-III. Some of the provisions relevant for our purposes would be [Article 14](#), [15](#),[16](#) and [21](#) of the Constitution which have already been adverted to in detail in the accompanying judgment. At this juncture it also needs to be emphasized simultaneously is that in addition to the fundamental rights, Constitution makers also deemed it proper to impose certain

obligations on the State in the form of “Directive Principles of State Policy” (Part-IV) as a mark of good governance. It is this part which provides an ideal and purpose to our Constitution and delineates certain principles which are fundamental in the governance of the country. Dr.Ambedkar had explained the purpose of these Directive Principles in the following manner (See Constituent Assembly debates):

“The Directive Principles are like the Instruments of Instructions which were issued to the Governor-General and the Governors of Colonies, and to those of India by the British Government under the 1935 Government of India Act. What is called “Directive Principles” is merely another name for the Instrument of Instructions. The only difference is that they are instructions to the legislature and the executive. Whoever capture power will not be free to do what he likes with it. In the exercise of it he will have to respect these instruments of instructions which are called Directive Principles”.

91. The basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status. Granville Austin while analyzing the functioning of Indian Constitution in first 50 years ha described three distinguished strands of Indian Constitution: (i)protecting national unity and integrity, (ii)establishing the institution and spirit of democracy; and (iii) fostering social reforms. The Strands are mutually dependent, and inextricably intertwined in what he elegantly describes as “a seamless web”. And there cannot be social reforms till it is ensured that each and every citizen of this country is able to exploit his/her potentials to the maximum. The Constitution, although drafted by the Constituent Assembly, was meant for the people of India and that is why it is given by the people to themselves as expressed in the opening words “We the People”. What is the most important gift to the common person given by this Constitution is “fundamental rights” which may be called Human Rights as well.

92. The concept of equality in [Article 14](#) so also the meaning of the words 'life', 'liberty' and 'law' in [Article 21](#) have been considerably enlarged by judicial decisions. Anything which is not 'reasonable, just and fair' is not treated to be equal and is, therefore, violative of [Article 14](#).

93. Speaking for the vision of our founding fathers, in [State of Karnataka v. Rangnatha Reddy](#) (AIR 1978 SC 215), this Court speaking through Justice Krishna Iyer observed:

“The social philosophy of the Constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value system, and the debate in this case puts precisely this soul in peril....Our thesis is that the dialectics of social justice should not be missed if the synthesis of Parts III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socio-economic vacuum, since socio- cultural changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity-loaded legality. A judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties.”

94. While interpreting [Art. 21](#), this Court has comprehended such diverse aspects as children in jail entitled to special treatment ([Sheela Barse vs. Union of India](#) [(1986)3 SCC 596], health hazard due to pollution ([Mehta M.C. v. Union of India](#) [(1987) 4 SCC 463], beggars interest in housing ([Kalidas Vs. State of J&K](#) [(1987) 3 SCC 430] health hazard from harmful drugs ([Vincent Panikurlangara Vs. Union of India](#) AIR 1987 SC 990), right of speedy trial ([Reghubir Singh Vs. State of Bihar](#), AIR 1987 SC 149), handcuffing of prisoners([Aeltemesh Rein Vs. Union of India](#), AIR 1988 SC 1768), delay in execution of death sentence, immediate medical aid to injured persons([Parmanand Katara Vs. Union of India](#), AIR 1989 SC 2039), starvation deaths([Kishen Vs. State of Orissa](#), AIR 1989 SC 677), the right to know([Reliance Petrochemicals Ltd. Vs. Indian Express Newspapers Bombay Pvt.](#)

Ltd. AIR 1989 SC 190), right to open trial(Kehar Singh Vs. State (Delhi Admn.) AIR 1988 SC 1883), inhuman conditions an after-care home(Vikram Deo Singh Tomar Vs. State of Bihar, AIR 1988 SC 1782).

95. A most remarkable feature of this expansion of [Art.21](#) is that many of the non-justiciable Directive Principles embodied in Part IV of the Constitution have now been resurrected as enforceable fundamental rights by the magic wand of judicial activism, playing on [Art.21](#) e.g.

(a) Right to pollution-free water and air (Subhash Kumar Vs. State of Bihar, AIR 1991 SC 420).

(b) Right to a reasonable residence (Shantistar Builders Vs. Narayan Khimalal Totame AIR 1990 SC 630).

(c) Right to food (Supra note 14), clothing, decent environment (supra note 20) and even protection of cultural heritage (Ram Sharan Autyanuprasi Vs. UOI, AIR 1989 SC 549) .

(d) Right of every child to a full development (Shantistar Builders Vs. Narayan Khimalal Totame AIR 1990 SC 630).

(e) Right of residents of hilly-areas to access to roads(State of H.P. Vs. Umed Ram Sharma, AIR 1986 SC 847).

(f) Right to education (Mohini Jain Vs. State of Karnataka, AIR 1992 SC 1858), but not for a professional degree (Unni Krishnan J.P. Vs. State of A.P., AIR 1993 SC 2178).

96. A corollary of this development is that while so long the negative language of [Art.21](#) and use of the word 'deprived' was supposed to impose upon the State the negative duty not to interfere with the life or liberty of an individual without the sanction of law, the width and amplitude of this provision has now imposed a

positive obligation (Vincent Panikurlangara Vs. UOI AIR 1987 SC 990) upon the State to take steps for ensuring to the individual a better enjoyment of his life and dignity, e.g. –

(i) Maintenance and improvement of public health (Vincent Panikurlangara Vs. UOI AIR 1987 SC 990).

(ii) Elimination of water and air pollution (Mehta M.C. Vs. UOI (1987) 4 SCC 463).

(iii) Improvement of means of communication (State of H.P. Vs. Umed Ram Sharma AIR 1986 SC 847).

(iv) Rehabilitation of bonded labourers (Bandhuva Mukti Morcha Vs. UOI, AIR 1984 SC 802).

(v) Providing human conditions in prisons (Sher Singh Vs. State of Punjab AIR 1983 SC 465) and protective homes (Sheela Barse Vs. UOI (1986) 3 SCC 596).

(vi) Providing hygienic condition in a slaughter-house (Buffalo Traders Welfare Ass. Vs. Maneka Gandhi (1994) Suppl (3) SCC 448) .

97. The common golden thread which passes through all these pronouncements is that [Art.21](#) guarantees enjoyment of life by all citizens of this country with dignity, viewing this human rights in terms of human development.

98. The concepts of justice social, economic and political, equality of status and of opportunity and of assuring dignity of the individual incorporated in the Preamble, clearly recognize the right of one and all amongst the citizens of these basic essentials designed to flower the citizen's personality to its fullest. The concept of equality helps the citizens in reaching their highest potential.

99. Thus, the emphasis is on the development of an individual in all respects. The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.

100. More than 225 years ago, Immanuel Kant propounded the doctrine of free will, namely the free willing individual as a natural law ideal. Without going into the detail analysis of his aforesaid theory of justice (as we are not concerned with the analysis of his jurisprudence) what we want to point out is his emphasis on the “freedom” of human volition. The concepts of volition and freedom are “pure”, that is not drawn from experience. They are independent of any particular body of moral or legal rules. They are presuppositions of all such rules, valid and necessary for all of them.

101. Over a period of time, two divergent interpretations of the Kantian criterion of justice came to be discussed. One trend was an increasing stress on the maximum of individual freedom of action as the end of law. This may not be accepted and was criticized by the protagonist of ‘hedonist utilitarianism’, notably Bentham. This school of thoughts laid emphasis on the welfare of the society rather than an individual by propounding the principle of maximum of happiness to most of the people. Fortunately, in the instant case, there is no such dichotomy between the individual freedom/liberty we are discussing, as against public good. On the

contrary, granting the right to choose gender leads to public good. The second tendency of Kantian criterion of justice was found in re-interpreting “freedom” in terms not merely of absence of restraint but in terms of attainment of individual perfection. It is this latter trend with which we are concerned in the present case and this holds good even today. As pointed out above, after the Second World War, in the form of U.N.Charter and thereafter there is more emphasis on the attainment of individual perfection. In that united sense at least there is a revival of natural law theory of justice. Blackstone, in the opening pages in his ‘Vattelian Fashion’ said that the principal aim of society “is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature.....”

102. In fact, the recognition that every individual has fundamental right to achieve the fullest potential, is founded on the principle that all round growth of an individual leads to common public good. After all, human beings are also valuable asset of any country who contribute to the growth and welfare of their nation and the society. A person who is born with a particular sex and his forced to grow up identifying with that sex, and not a sex that his/her psychological behavior identifies with, faces innumerable obstacles in growing up. In an article appeared in the magazine “Eye” of the Sunday Indian Express (March 9-15, 2014) a person born as a boy but with trappings of female (who is now a female after SRS) has narrated these difficulties in the following manner:

“The other children treated me as a boy, but I preferred playing with girls. Unfortunately, grown-ups consider that okay only as long as you are a small child. The constant inner conflict made things difficult for me and, as I grew up, I began to dread social interactions”.

103. Such a person, carrying dual entity simultaneously, would encounter mental and psychological difficulties which would hinder his/her normal mental and even physical growth. It is not even easy for such a person to take a decision to undergo SRS procedure which requires strong mental state of affairs. However, once that is decided and the sex is changed in tune with psychological behavior, it facilitates

spending the life smoothly. Even the process of transition is not smooth. The transition from a man to a woman is not an overnight process. It is a “painfully” long procedure that requires a lot of patience. A person must first undergo hormone therapy and, if possible, live as a member of the desired sex for a while. To be eligible for hormone therapy, the person needs at least two psychiatrists to certify that he or she is mentally sound, and schizophrenia, depression and transvestism have to be ruled out first. The psychiatric evaluation involved a series of questions on how Sunaina felt, when she got to know of her confusion and need for sex change, whether she is a recluse, her socio-economic condition, among other things.

104. In the same article appearing in the “Eye” referred to above, the person who had undergone the operation and became a complete girl, Sunaina (name changed) narrates the benefit which ensued because of change in sex, in harmony with her emotional and psychological character, as is clear from the following passage in that article:

“Like many other single people in the city, she can spend hours watching Friends, and reading thrillers and Harry Potter. A new happiness has taken seed in her and she says it does not feel that she ever had a male body. “I am a person who likes to laugh. Till my surgery, behind every smile of mine, there was a struggle. Now it’s about time that I laughed for real. I have never had a relationship in my life, because somewhere, I always wanted to be treated as a girl. Now, that I am a woman, I am open to a new life, new relationships. I don’t have to hide anymore, I don’t feel trapped anymore. I love coding and my job. I love cooking. I am learning French and when my left foot recovers fully, I plan to learn dancing. And, for the first time this year, I will vote with my new name. I am looking forward to that,” she says.

105. If a person has changed his/her sex in tune with his/her gender characteristics and perception, which has become possible because of the advancement in medical science, and when that is permitted by medical ethics with no legal embargo, we

do not find any impediment, legal or otherwise, in giving due recognition to the gender identity based on the reassign sex after undergoing SRS.

106. For these reasons, we are of the opinion that even in the absence of any statutory regime in this country, a person has a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but has become his/her physical form as well.

(2) Re: Right of TG to be identified and categorized as “third gender”.

107. At the outset, it may be clarified that the term ‘transgender’ is used in a wider sense, in the present age. Even Gay, Lesbian, bisexual are included by the descriptor ‘transgender’. Etymologically, the term ‘transgender’ is derived from two words, namely ‘trans’ and ‘gender’. Former is a Latin word which means ‘across’ or ‘beyond’. The grammatical meaning of ‘transgender’, therefore, is across or beyond gender. This has come to be known as umbrella term which includes Gay men, Lesbians, bisexuals, and cross dressers within its scope. However, while dealing with the present issue we are not concerned with this aforesaid wider meaning of the expression transgender.

108. It is to be emphasized that Transgender in India have assumed distinct and separate class/category which is not prevalent in other parts of the World except in some neighbouring countries . In this country, TG community comprise of Hijaras, enunch, Kothis, Aravanis, Jogappas, Shiv- Shakthis etc. In Indian community transgender are referred as Hizra or the third gendered people. There exists wide range of transgender-related identities, cultures, or experience –including Hijras, Aravanis, Kothis, jogtas/Jogappas, and Shiv-Shakthis (Hijras: They are biological males who reject their masculinity identity in due course of time to identify either as women, or ‘not men’. Aravanis: Hijras in Tamil Nadu identify as ‘Aravani’. Kothi: Kothis are heterogeneous group. Kothis can be described as biological males who show varying degrees of ‘femininity’. Jogtas/Jogappas: They are those who are dedicated to serve as servant of Goddess Renukha Devi whose temples are present

in Maharashtra and Karnataka. Sometimes, Jogti Hijras are used to denote such male-to-female transgender persons who are devotees of Goddess Renukha and are also from the Hijra community. Shiv-Shakthis: They are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression). The way they behave and acts differs from the normative gender role of a men and women. For them, furthering life is far more difficult since such people are neither categorized as men nor women and this deviation is unacceptable to society's vast majority. Endeavour to live a life with dignity is even worse. Obviously transvestites, the hijra beg from merchants who quickly, under threat of obscene abuse, respond to the silent demands of such detested individuals. On occasion, especially festival days, they press their claims with boisterous and ribald singing and dancing.(A Right to Exist: Eunuchs and the State in Nineteenth-Century India Laurence W. Preston Modern Asian Studies, Vol.21,No.2 (1987), pp.371-

387).

109. Therefore, we make it clear at the outset that when we discuss about the question of conferring distinct identity, we are restrictive in our meaning which has to be given to TG community i.e. hijra etc., as explained above.

110. Their historical background and individual scenario has been stated in detail in the accompanying judgment rendered by my learned Brother. Few things which follow from this discussion are summed up below:

“(a) Though in the past TG in India was treated with great respect, that does not remain the scenario any longer. Attrition in their status was triggered with the passing of the Criminal Tribes Act, 1871 which deemed the entire community of Hijara persons as innately ‘criminal’ and ‘adapted to the systematic commission of non-bailable offences’. This dogmatism and indoctrination of Indian people with aforesaid presumption, was totally capricious and nefarious. There could not have been more harm caused to this community with the passing of the aforesaid brutal

Legislation during British Regime with the vicious and savage this mind set. To add insult to the irreparable injury caused, [Section 377](#) of the Indian Penal Code was misused and abused as there was a tendency, in British period, to arrest and prosecute TG persons under [Section 377](#) merely on suspicion. To undergo this sordid historical harm caused to TGs of India, there is a need for incessant efforts with effervescence.

(b) There may have been marginal improvement in the social and economic condition of TGs in India. It is still far from satisfactory and these TGs continue to face different kinds of economic blockade and social degradation. They still face multiple forms of oppression in this country. Discrimination qua them is clearly discernable in various fields including health care, employment, education, social cohesion etc.

(c) The TGs are also citizens of this country. They also have equal right to achieve their full potential as human beings. For this purpose, not only they are entitled to proper education, social assimilation, access to public and other places but employment opportunities as well. The discussion above while dealing with the first issue, therefore, equally applies to this issue as well.

111. We are of the firm opinion that by recognizing such TGs as third gender, they would be able to enjoy their human rights, to which they are largely deprived of for want of this recognition. As mentioned above, the issue of transgender is not merely a social or medical issue but there is a need to adopt human right approach towards transgender people which may focus on functioning as an interaction between a person and their environment highlighting the role of society and changing the stigma attached to them. TGs face many disadvantages due to various reasons, particularly for gender abnormality which in certain level needs to physical and mental disability. Up till recently they were subjected to cruelty, pity or charity. Fortunately, there is a paradigm shift in thinking from the aforesaid approach to a rights based approach. Though, this may be the thinking of human rights activist, the society has not kept pace with this shift. There appears to be limited public

knowledge and understanding of same-sex sexual orientation and people whose gender identity and expression are incongruent with their biological sex. As a result of this approach, such persons are socially excluded from the mainstream of the society and they are denied equal access to those fundamental rights and freedoms that the other people enjoy freely. (See, Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion, UNDP report on India Issue: December, 2010).

112. Some of the common and reported problem that transgender most commonly suffer are: harassment by the police in public places, harassment at home, police entrapment, rape, discriminations, abuse in public places et.al. The other major problems that the transgender people face in their daily life are discrimination, lack of educational facilities, lack of medical facilities, homelessness, unemployment, depression, hormone pill abuse, tobacco and alcohol abuse, and problems related to marriage and adoption. In spite of the adoption of Universal Declaration of Human Rights (UDHR) in the year 1948, the inherent dignity, equality, respect and rights of all human beings throughout the world, the transgender are denied basic human rights. This denial is premised on a prevalent juridical assumption that the law should target discrimination based on sex (i.e., whether a person is anatomically male or female), rather than gender (i.e., whether a person has qualities that society consider masculine or feminine (Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: the Disaggregation of Sex from Gender*, 144 U.Pa.Rev.1,3 (1995) (arguing that by defining sex in biological terms, the law has failed to distinguish sex from gender, and sexual differentiation from sex discrimination)). Transgender people are generally excluded from the society and people think transgenderism as a medical disease. Much like the disability, which in earlier times was considered as an illness but later on looked upon as a right based approach. The question whether transgenderism is a disease is hotly debated in both the transgender and medical-psychiatric communities. But a prevalent view regarding this is that transgenderism is not a disease at all, but a benign normal variant of the human experience akin to left-handedness.

113. Therefore, gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on.

114. Further, there seems to be no reason why a transgender must be denied of basic human rights which includes Right to life and liberty with dignity, Right to Privacy and freedom of expression, Right to Education and Empowerment, Right against violence, Right against Exploitation and Right against Discrimination. Constitution has fulfilled its duty of providing rights to transgender people. Now it's time for us to recognize this and to extend and interpret the Constitution in such a manner to ensure a dignified life of transgender people. All this can be achieved if the beginning is made with the recognition that TG as third gender.

115. In order to translate the aforesaid rights of TGs into reality, it becomes imperative to first assign them their proper 'sex'. As is stated earlier, at the time of birth of a child itself, sex is assigned. However, it is either male or female. In the process, the society as well as law, has completely ignored the basic human right of TGs to give them their appropriate sex categorization. Up to now, they have either been treated as male or female. This is not only improper as it is far from truth, but indignified to these TGs and violates their human rights.

116. Though there may not be any statutory regime recognizing 'third gender' for these TGs. However, we find enough justification to recognize this right of theirs in natural law sphere. Further, such a justification can be traced to the various provisions contained in Part III of the Constitution relating to 'Fundamental Rights'. In addition to the powerful justification accomplished in the accompanying opinion of my esteemed Brother, additional *raison d'être* for this conclusion is stated hereinafter.

117. We are in the age of democracy, that too substantive and liberal democracy. Such a democracy is not based solely on the rule of people through their representatives' namely formal democracy. It also has other percepts like Rule of Law, human rights, independence of judiciary, separation of powers etc.

118. There is a recognition to the hard reality that without protection for human rights there can be no democracy and no justification for democracy. In this scenario, while working within the realm of separation of powers (which is also fundamental to the substantive democracy), the judicial role is not only to decide the dispute before the Court, but to uphold the rule of law and ensure access to justice to the marginalized section of the society. It cannot be denied that TGs belong to the unprivileged class which is a marginalized section.

119. The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social reality. When we discuss about the rights of TGs in the constitutional context, we find that in order to bring about complete paradigm shift, law has to play more pre-dominant role. As TGs in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of these constitutional rights. It is the denial of social justice which in turn has the effect of denying political and economic justice.

120. [In Dattatraya Govind Mahajan vs. State of Maharashtra](#) (AIR 1977 SC

915) this Court observed:

“Our Constitution is a tryst with destiny, preamble with luscious solemnity in the words ‘Justice – social, economic and political.’ The three great branches of Government, as creatures of the Constitution, must remember this promise in their

fundamental role and forget it at their peril, for to do so will be a betrayal of those high values and goals which this nation set for itself in its objective Resolution and whose elaborate summation appears in Part IV of the Paramount Parchment. The history of our country's struggle for independence was the story of a battle between the forces of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation.....Once we grasp the dharma of the Constitution, the new orientation of the karma of adjudication becomes clear. Our founding fathers, aware of our social realities, forged our fighting faith and integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice.”

121. Oliver Wendell Holmes said: “the life of law has been logical; it has been experience”. It may be added that ‘the life of law is not just logic or experience. The life of law is renewable based on experience and logic, which adapted law to the new social reality’. Recognizing this fact, the aforesaid provisions of the Constitution are required to be given new and dynamic meaning with the inclusion of rights of TGs as well. In this process, the first and foremost right is to recognize TGs as ‘third gender’ in law as well. This is a recognition of their right of equality enshrined in [Art.14](#) as well as their human right to life with dignity, which is the mandate of the [Art.21](#) of the Constitution. This interpretation is in consonance with new social needs. By doing so, this Court is only bridging the gap between the law and life and that is the primary role of the Court in a democracy. It only amounts to giving purposive interpretation to the aforesaid provisions of the Constitution so that it can adapt to the changes in reality. Law without purpose has no *raison d’être*. The purpose of law is the evolution of a happy society. As Justice Iyer has aptly put:

“The purpose of law is the establishment of the welfare of society “and a society whose members enjoy welfare and happiness may be described as a just society. It is a negation of justice to say that some members, some groups, some minorities,

some individuals do not have welfare: on the other hand they suffer from ill-fare. So it is axiomatic that law, if it is to fulfil itself, must produce a contented, dynamic society which is at once meting out justice to its members.”

122. It is now very well recognized that the Constitution is a living character; its interpretation must be dynamic. It must be understood in a way that intricate and advances modern realty. The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to TGs, we are simply protecting the Constitution and the democracy inasmuch as judicial protection and democracy in general and of human rights in particular is a characteristic of our vibrant democracy.

123. As we have pointed out above, our Constitution inheres liberal and substantive democracy with rule of law as an important and fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. Rule of law demands protection of individual human rights. Such rights are to be guaranteed to each and every human being. These TGs, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights.

124. [In National Human Rights Commission vs. State of Arunachal Pradesh](#) (AIR 1996 SC 1234), This Court observed:

“We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws.”

125. The rule of law is not merely public order. The rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to life in dignity and development himself. The human being and human rights underlie this substantive perception of the rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive

rule of law “is the rule of proper law, which balances the needs of society and the individual.” This is the rule of law that strikes a balance between society’s need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. It is the duty of the Court to protect this rich concept of the rule of law.

126. By recognizing TGs as third gender, this Court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights. It is, therefore, the only just solution which ensures justice not only to TGs but also justice to the society as well. Social justice does not mean equality before law in papers but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Rights and the Directive Principles of State Policy into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the TGs which legitimately belongs to them.

127. Aristotle opined that treating all equal things equal and all unequal things unequal amounts to justice. Kant was of the view that at the basis of all conceptions of justice, no matter which culture or religion has inspired them, lies the golden rule that you should treat others as you would want everybody to treat everybody else, including yourself. When Locke conceived of individual liberties, the individuals he had in mind were independently rich males. Similarly, Kant thought of economically self-sufficient males as the only possible citizens of a liberal democratic state. These theories may not be relevant in today’s context as it is perceived that the bias of their perspective is all too obvious to us. In post-traditional liberal democratic theories of justice, the background assumption is that humans have equal value and should, therefore, be treated as equal, as well as by equal laws. This can be described as ‘Reflective Equilibrium’. The method of Reflective Equilibrium was first introduced by Nelson Goodman in ‘Fact, Fiction and Forecast’ (1955). However, it is John Rawls who elaborated this method of

Reflective Equilibrium by introducing the conception of ‘Justice as Fairness’. In his ‘Theory of Justice’, Rawls has proposed a model of just institutions for democratic societies. Herein he draws on certain pre-theoretical elementary moral beliefs (‘considered judgments’), which he assumes most members of democratic societies would accept. “[Justice as fairness [....] tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretations. Justice as fairness is a political conception in part because it starts from within a certain political tradition. Based on this preliminary understanding of just institutions in a democratic society, Rawls aims at a set of universalistic rules with the help of which the justice of present formal and informal institutions can be assessed. The ensuing conception of justice is called ‘justice as fairness’. When we combine Rawls’s notion of Justice as Fairness with the notions of Distributive Justice, to which Noble Laureate Prof. Amartya Sen has also subscribed, we get jurisprudential basis for doing justice to the Vulnerable Groups which definitely include TGs. Once it is accepted that the TGs are also part of vulnerable groups and marginalized section of the society, we are only bringing them within the fold of aforesaid rights recognized in respect of other classes falling in the marginalized group. This is the minimum riposte in an attempt to assuage the insult and injury suffered by them so far as to pave way for fast tracking the realization of their human rights.

128. The aforesaid, thus, are my reasons for treating TGs as ‘third gender’ for the purposes of safeguarding and enforcing appropriately their rights guaranteed under the Constitution. These are my reasons in support of our Constitution to the two issues in these petitions.

.....J.

(A.K.Sikri)

129. We, therefore, declare:

(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/ Transgender people face several sexual health issues.

(5) Centre and State Governments should seriously address the problems being faced by Hijras/Transgender people 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 will 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.

130. We are informed an Expert Committee has already 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 their problems and to submit its report with recommendations within three months of its constitution. Let the recommendations be examined based on the legal declaration made in this Judgment and implemented within six months.

131. Writ Petitions are, accordingly, allowed, as above.

.....J.

(K.S. Radhakrishnan)J.

(A.K. Sikri) New Delhi, April 15, 2014.