

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE C.V.BHASKAR REDDY

+ WRIT PETITION (PIL) Nos.44 and 355 of 2018
and 74 of 2020

W.P. (PIL) No.44 of 2018

% Date: 06.07.2023

V. Vasanta Mogli

... Petitioner

v.

§ The State of Telangana,
Rep.by its Principal Secretary, Social Welfare Department,
Secretariat, Hyderabad.
And others.

... Respondents

! Counsel for the petitioners : Ms. Jayna Kothari,
learned Senior Counsel representing
Mr. K.Sai Sandeep Pareekshit

^ Counsel for respondents : Mr. Andapalli Sanjeev Kumar,
learned Special Government Pleader

< GIST:

> HEAD NOTE:

? CASES REFERRED:

1. (2014) 5 SCC 438
2. (2017) 10 SCC 1 : 2017 SCC OnLine SC 996
3. 2014 (3) CTC 497
4. AIR 2015 All 124
5. 2015 SCC OnLine Del 12514
6. 2016 4 L.W. 594
7. AIR 1954 SC 300
8. AIR 1963 SC 1295
9. (1970) 1 SCC 248
10. (1978) 1 SCC 248
11. (2016) 7 SCC 761
12. (1976) 2 SCC 521
13. (2014) 1 SCC 1
14. (2018) 10 SCC 1
15. 2009 SCC OnLine Del 1762

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AND
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COMMON ORDER: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Issue raised in all the three public interest litigations (PIL) being inter-related, those were heard together and are being disposed of by this common judgment and order.

2. We have heard Ms. Jayna Kothari, learned Senior Counsel appearing for Mr. K. Sai Sandeep Pareekshit, learned counsel for the petitioners and Mr. Andapalli Sanjeev Kumar, learned Special Government Pleader for the respondents.

3. In W.P. (PIL) No.44 of 2018 prayer made is to declare Telangana Eunuchs Act, 1329 Fasli as *ultra vires* and unconstitutional.

4. Petitioners are transgender persons residing in the State of Telangana.

5. Telangana Eunuchs Act, 1329 Fasli previously referred to as Andhra Pradesh (Telangana Area) Eunuchs Act, 1329 Fasli was first enacted in the year 1919 and is applicable to eunuchs as defined under the said Act. Telangana Eunuchs Act, 1329 Fasli (briefly, 'the Act' hereinafter) mandates maintenance of a register of eunuchs residing in the city of Hyderabad who are suspected of kidnapping or emasculating boys or of committing unnatural offences or abetting the same. The Act permits arrest of transgender persons without a warrant and punished with imprisonment, if found in female clothing or ornamented or singing, dancing or participating in public entertainment in a street or a public place or where a transgender person is found in the company of a boy below the age of sixteen years.

6. It is contended that the aforesaid Act is an outdated legislation and is a complete anachronism with modern day life and thinking. It is a discriminatory law that criminalises the transgender community unfairly without

any legal basis. *Vires* of the Act has been questioned on the ground that it targets the transgender community and treats them as a distinct class with no reasonable basis for such classification, besides permitting discrimination against persons on the basis of their sexual orientation and gender, thus violating Articles 14 and 15(1) of the Constitution.

6.1. It is further contended that the Act imposes arbitrary restriction on the freedom of speech and expression of the transgender community and also breaches their fundamental right to privacy. Thus, the said legislation is violative of Articles 19(1) and 21 of the Constitution. It is also contended that the said legislation is against the letter and spirit of the Supreme Court decision in **National Legal Services Authority (NALSA) v. Union of India**¹ which has declared eunuchs etc., as third gender and also directing the Central and State Governments to treat them as socially and educationally backward classes of citizens. Petitioners have also relied upon the decision

¹ (2014) 5 SCC 438

of the Supreme Court in **K.S.Puttaswamy v. Union of India**² to contend that right to privacy is one of the facets of the right to life and dignity and thus is a cherished right under Article 21 of the Constitution. Impugned legislation violates the right to identity, personal autonomy and the right to be left alone, all facets of the right to privacy of the transgender people.

7. Petitioners had filed I.A.No.1 of 2018 in W.P. (PIL) No.44 of 2018 seeking a stay on the operation of the Telangana Eunuchs Act, 1329 Fasli.

8. This Court vide the order dated 18.09.2018 had admitted the public interest litigation and passed an interim direction that no arrest or prosecution shall be made invoking the provisions of Andhra Pradesh (Telangana Area) Eunuchs Act, 1329 Fasli, now called the Telangana Eunuchs Act, 1329 Fasli.

² (2017) 10 SCC 1 : 2017 SCC OnLine SC 996

9. Respondent No.2 i.e., State of Telangana represented by the Principal Secretary to Home Department, Government of Telangana has filed affidavit.

9.1. Adverting to the decision of the Supreme Court in **NALSA** (supra), it is stated that following the said decision, Parliament has enacted the Transgender Persons (Protection of Rights) Act, 2019. Referring to various provisions of the Transgender Persons (Protection of Rights) Act, 2019, it is stated that the said Act is the first statutory enactment meant for amelioration of the conditions of the transgenders. The said Act answers all the contentions raised by the petitioners.

9.2. Insofar challenge to the Telangana Eunuchs Act, 1329 Fasli is concerned, it is the contention of respondent No.2 that the Central Act i.e., the Transgender Persons (Protection of Rights) Act, 2019 covers only welfare measures to transgenders. There is no provision for specific offences committed usually by transgenders i.e., kidnapping or emasculating boys or committing unnatural

offences or any other offences abetting the commission of such offences. The impugned legislation governs and addresses the same. Petitioners claim for protection in respect of offences committed by transgenders under the guise of discrimination is not justified. The issue of discrimination has been taken care of by the Central Act.

9.3. It is stated that both Parliament and State Legislatures can legislate on the same subject. Referring to Section 4 of the Telangana Eunuchs Act, 1329 Fasli, it is contended that fundamental right is not absolute. It is subject to reasonable restriction in the collective interest of the society. It is asserted that the said Act is enacted in the interest of public order and to identify transgenders indulging in such acts. There is no discrimination shown against the transgenders in the Act. In the circumstances, respondent No.2 seeks dismissal of the public interest litigation.

10. Next comes WP (PIL) No.355 of 2018. The same has been filed by the petitioners of WP (PIL) No.44 of 2018 and seek the following reliefs:

a. issue a writ, order or direction to the respondents to frame a comprehensive policy in the State of Telangana to secure and protect the rights of transgender persons, and which will also lay down guidelines for self-identification of transgender persons and obtaining legal identity documents in their self-identified gender;

b. issue a writ, order or direction to the respondents to constitute a Transgender Welfare Board within a period of three months, in which there will be at least 50% representation from the transgender community;

c. issue a writ, order or direction to the respondents to provide reservation in admissions in educational institutions and in public employment for transgender persons and frame a scheme for such reservation;

d. issue a writ, order or direction to the respondents to provide scholarship for education of transgender persons at all levels of education, including secondary school and high school education as well as at the graduate and post-graduate levels and vocational training institutes;

e. issue a writ, order or direction to the respondents to frame social welfare schemes/programmes, including but not limited to housing schemes for the betterment of transgender persons, financial assistance for self-employment opportunities, skill development programmes, ration cards within a period of three months;

f. issue a writ, order or direction to the State Government to frame schemes for providing access to free medical care for transgender persons in all Government Hospitals, including the operation of HIV centres and provision of related medical care;

g. direct the respondents to provide gender transition and sex reassignment surgery services (with proper pre and post-operation/transition counselling) for free in public hospitals in Telangana;

h. direct the respondent State Government to make available the medical facility of Sex Reassignment Surgery to transgender persons free of cost in all Government Hospitals;

i. issue a writ, order or direction to the respondents to provide separate toilets for transgender persons in educational institutions and every public utility building including hospitals, bus stations, railway stations, public toilets etc within a period of three months;

j. issue a writ, order or direction to the respondent State Government to implement a pension scheme for transgender persons;

k. direct the respondents to implement stigma and discrimination reduction measures at various settings through a variety of ways, including gender sensitization curriculum in schools, colleges, universities, mass media awareness for the general public to focussed training and sensitization for government officials, public servants, police officials and health care providers;

l. issue a writ, order or direction to the State Government to take necessary measures to create awareness among the public to integrate transgender persons to be part of family and social life and further to enable transgender persons to freely access all public institutions, public spaces, public toilets, parks, playgrounds, roads, educational institutional, malls, market places, hospitals, hotels, restaurants etc without discrimination; and

m. pass such other order(s) as may be seen fit in the facts and circumstances of the case in the interest of justice and equity.

11. Petitioners have again relied upon the decision of the Supreme Court in **NALSA** (supra) as well as some of the decisions of different High Courts in support of the prayers made. Petitioners have also placed reliance on the report of the expert committee on the issues relating to transgender persons published in January, 2014 as well

as the report of the National Commission for Backward Classes dated 15.05.2014 recommending that the transgender community be treated as a socially and educationally backward class of citizens.

12. It is stated that following the decision of the Supreme Court in **NALSA** (supra), several States including West Bengal, Rajasthan, Chattisgarh and Maharashtra have established Transgender Welfare Boards. Constitution of such a Board in the State of Telangana would be in the interest of the transgender community. Reference has also been made to the Karnataka State Policy on Transgender Persons, 2017 and that of other States.

13. In this case though notice was issued on 20.11.2018, it appears that no affidavit has been filed by the respondents.

14. This brings us to the third public interest litigation being W.P. (PIL) No.74 of 2020.

15. In this writ petition filed by Vyjayanti Vasanta Mogli @ M.Vijay Kumar, petitioner has prayed for the following reliefs:

For the reasons stated in the accompanying affidavit filed in support of the present writ petition, it is therefore prayed that this Hon'ble Court may be pleased to issue a writ, order or direction more particularly one in the nature of "writ of mandamus"

(a) direct the respondents herein to provide free of cost rations, food and nutrition and provisions including vegetables and fruit to members of the transgender community from ration shops and also from other outlets without insisting on the production of ration card;

(b) direct the respondents herein to provide free of cost medicines to transgender person including HIV medications, hormone therapy medicines, diabetes and other medications to be made available to transgender persons from primary health centres and from government and public hospitals;

(c) direct the respondents herein to allow transgender persons to apply for and provide the payment of three months social security pension to transgender persons under the Aasara Scheme;

(d) direct the respondents herein to provide free LPG cylinders and waive electricity bill for six

months to transgender persons on the lines of similar assurance for three months under the PM Garib Kalyan Yojana;

(e) direct the respondents herein to extend the Aarogyashri government medical insurance to transgender persons and direct that Aarogyashri includes health challenges of Covid-19;

(f) direct the respondents herein to take appropriate action against those who are targeting the transgender persons by falsely labelling them in public as the potential carriers of HIV positive and Corona-virus and consequently direct the respondents herein to protect the life of transgender persons in all public places by providing appropriate security;

(g) direct the respondents to place moratorium on the collection of rents till the end of June free of interest and late payment penalty fees and pass orders directing that landlords should not evict transgender persons from existing rental premises for non-payment of rent during the present period;

And pass such other order or orders as may deem fit and proper in the circumstances of the case.

15.1. Basically, petitioner had sought for relief from the authorities in the form of ration, health facilities etc., during the covid-19 period. Additional prayer made is to

provide the benefit of Aasara Scheme to transgender persons.

15.2. It is stated that during the covid-19 induced lock down, the transgender community faced extreme hardship particularly with regard to ration, social security and access to medication. G.O.Ms.No.17 dated 05.11.2014 was issued by the Panchayat Raj and Rural Development (RD.I) Department of the Government of Telangana introducing a new scheme called Aasara Pension Scheme to provide substantial financial benefits to the most vulnerable sections of society to ensure a secured life with dignity for all poor persons. The scheme would be available to people having HIV/AIDS, widows, incapacitated weavers and toddy toppers who have lost their means of livelihood with growing age. The categories of pensioners entitled to Aasara Pension Scheme are as under:

- | | |
|--------------------|---------------------------|
| (1) old age; | (2) widow; |
| (3) disabled; | (4) weavers; |
| (5) toddy toppers; | (6) persons with HIV/AIDS |

15.3. All such categories of pensioners would be paid monthly pension of Rs.1,000/-. The above scheme came into effect from 01.10.2014.

16. On 27.04.2020, this Court had passed the following order:

This writ petition has highlighted the plight of transgender population during the Covid-19 lockdown.

Mr. B.S. Prasad, the learned Advocate General is directed to accept notice on behalf of the respondents. He is further directed to submit a report with regard to (i) number of transgenders living in the major cities of the State, (ii) the concrete steps being taken by the State Government for ensuring that the members of the transgender community have ready availability of foodgrains, consumable items, and medicines as per their need and requirements, and (iii) the number of NGOs with which the Government is coordinating in order to ensure that all the essential commodities do reach the transgender community through these NGOs.

The State Government is further directed to ensure that these commodities are given to the members of the transgender community free of cost and without insisting on the production of ration card/white card etc. The report shall be submitted by the learned Advocate General on or before May 08, 2020.

16.1. Thereafter, Mr. B.S.Prasad, learned Advocate General submitted two reports before the Court, the first report dated 26.05.2020 and the second report dated 04.06.2020. On consideration of the two reports, this Court passed the following order on 29.06.2020:

A bare perusal of the report dated 26.05.2020, clearly reveals that it is a highly vague report. For, in para 5, the respondents claim that "they are making efforts to establish two Shelter Homes exclusively for transgenders". But the details of where these shelter homes are being constructed, and the capacity of these shelter homes, are not given in the report.

Similarly, although this Court had asked the exact figures with regard to the population of the transgender community in the major cities of the State, in para 11, a bald statement has been made that "the Government has identified 2,175 transgenders in the State of Telangana". Whether this number includes the transgenders in the major cities of Telangana, or merely in the GHMC area is unclear.

Similarly, in para 14, it is claimed that "medicines are also made available as per the requirement of the transgender community". It is unclear as to when the medicines were made available? By whom they were made available? And to whom they were made available? Therefore, the essential data is conspicuously missing.

Lastly, it is also stated that "dry ration supplies are arranged for 610 persons through local donors, and NGOs by reaching out to them". Despite the fact that the Government claims that it is distributing 5 kg rice, 1 kg tur dal, 200 grams chilli powder, 1 lr sunflower oil, 250 grams tamarind, 250 grams salt, 1 kg onions, 200 grams turmeric powder, one dettol soap, and one reusable cloth mask, it is unclear whether the members of the transgender community are permitted to buy their foodgrains from the Public Distribution System, or not?

Learned counsel for the petitioner submits that many of the transgender community do not have availability of ration cards, because in the form to be filled up for seeking ration card, the third gender is not indicated. In the absence of having valid ration cards, the transgender community is denied access to the Public Distribution System. She further submits that due to the spike in COVID-19 cases in the State, despite the fact that a member of the transgender community may be contracting COVID-19, their medical care requires special attention. For, according to the learned counsel, it is this community which is unfortunately neglected, and is ostracized by large number of people. Until and unless special wards are designated for housing the transgender community in the hospitals, there is a grave possibility that the medical needs, and medical attention of such transgender persons may be neglected by medical staff, and even by doctors. Therefore, she prays that a

direction should be issued to the Government to instruct the medical staff, firstly, to have separate ward for the members of the transgender community, and to instruct them to take special care of such persons.

This Court directs the learned Advocate General to immediately bring the two points raised by the learned counsel for the petitioner to the notice of the Government. He is also directed to inform this Court on 06.07.2020 as to whether any action has been taken by the Government on these points, or not?

16.2. When the matter was taken up next on 07.07.2020, Ms. Kothari, learned Senior Counsel for the petitioners submitted before the Court that the State had taken a position that it was not able to distribute foodgrains to the members of the transgender community who do not have ration cards in their names. However, she pointed out that under the Pradhan Mantri Gareeb Kalyan Yojana, Hon'ble Prime Minister had announced that foodgrains would be distributed even to those who are not holders of ration cards. The aforesaid scheme was extended upto November, 2020. She pointed out that according to the Central Government, State of Telangana had lifted till then only one per cent of the foodgrains being distributed

under the Central Scheme. Therefore, it was submitted that the transgender community members who do not have ration cards in their names should be given the benefit of the Central Scheme. On such submission, this Court directed learned Advocate General to instruct the Commissioner of Civil Supplies Department for extending the benefit of the Central Scheme not only to the members of the transgender community but also to others who may not be holding ration cards in their names. Learned Advocate General sought for time to file a report with regard to the distribution of food grains to those members of the transgender community who were not holders of ration cards.

16.3. On the next date of hearing i.e., 14.07.2020, learned Advocate General submitted a report of the Commissioner of Civil Supplies and ex officio Secretary to the Government of Telangana dated 10.07.2020. As per the report, 10 kgs of rice were being provided to each transgender person free of cost from July to November, 2020 under the Atma Nirbhar Bharat Yojana. However,

this Court recorded that it was not clear whether 10 kgs of rice would be for the entire period from July to November, 2020 or for each month. That apart, this Court noticed that as per the instructions issued by the Commissioner, a member of transgender community was subjected either to medical examination by a doctor or to a physical examination by the Revenue Tahsildar. Referring to the decision of the Supreme Court in **NALSA** (supra), this Court observed that subjecting a transgender person to physical examination was not only demeaning but also amounted to violation of the right to privacy. It was thereafter that this Court passed the following order on 14.07.2020:

The learned counsel for the petitioner submits that most of the transgenders do have either the Aadhaar card or other Government identification documents with them. These documents would clearly reveal that they are transgenders.

Therefore, it should be sufficient if the Government were to direct the Fair Price Shop owners to distribute 10 kgs of rice per month to the transgenders, who presents either the Aadhaar Card, or any other Governmental identification document.

The learned counsel further submits that, according to the instructions, a transgender is required to go to a Fair Price Shop having ePOS devices, but is not permitted to pick up 10 kgs of rice from manually operated Fair Price Shops. According to her, the inability of transgender to pick up the quantity of rice from manually operated fair price shop will create difficulties for the transgender community.

Once these factors have been pointed out to the learned Advocate General, he seeks time for getting further instructions from the Government.

This Court directs the respondents to clarify whether 10 kgs of rice would be available on a monthly basis or for the complete period of July to November. 2020. Secondly, the Government should consider if the transgender can receive the said quantity of rice on the basis of the Aadhaar card, or any other Government identification document. Thirdly, the Government should also consider if transgender community members can pick up the above mentioned quantities of rice from any of the Fair Price Shops rather than restricting it only to the shop having ePOS devices.

The learned Advocate General seeks time to address this Court on the above mentioned directions.

16.4. In the hearing held on 20.08.2020, this Court noticed that as per report dated 05.07.2020, Commissioner to the Government of Telangana, Vaidya

Vidhana Parishad had issued an order on 02.07.2020 directing Superintendents of all hospitals providing covid-19 protection not to neglect transgender patients. Another report dated 22.07.2020 was submitted by the learned Advocate General which communicated that members of the transgender community would be given 10 kg rice per month free of cost till November, 2020. Thus, this Court noted that concerns expressed in the public interest litigation were taken care of. Nonetheless learned Senior Counsel for the petitioners made a submission before the Court to keep the PIL pending so that the Court can monitor as to whether orders issued by the Government were being implemented in letter and spirit. Observing that the concern of the petitioners is a genuine one, this Court decided to keep the PIL pending.

16.5. In the proceedings held on 04.03.2021, learned Senior Counsel for the petitioners had submitted that the PIL would be confined to the question regarding permitting transgender persons to apply for and to receive social security pension under the Aasara Scheme and for

directing the respondents to extend Arogyasree Government Medical Insurance to them.

16.6. In the hearing held on 02.02.2022, Mr. Santosh Kumar, learned counsel appearing for the State submitted before the Court that the State was vaccinating transgender persons irrespective of whether one possessed Aadhaar card or not. In the light of the above, this Court directed the State Government to provide a centre in each district of the State of Telangana in the District Hospital for vaccination of people belonging to the transgender community. This Court clarified that while carrying out vaccination, the said officials would not insist on proof of Aadhaar card as large number of members of transgender community do not possess Aadhaar card. As a matter of fact, learned Government Pleader had given an undertaking that State would not have any objection in vaccinating people from the transgender community even without Aadhaar card. This Court directed the State to publicize the details of the centres in the media so that

people from the transgender community could get themselves vaccinated.

16.7. In the proceedings held on 20.09.2022, this Court had passed the following order:

This Public Interest Litigation (PIL) raises important questions relating to the transgender community in the State of Telangana.

Though order dated 02.02.2022 was confined to vaccination of the members of the transgender community, we are of the view that the prayer made in the Public Interest Litigation transcends such limited issue.

On the next date, learned Government Pleader shall submit the particulars of the Board recently constituted by the State of Telangana for the transgender community and also of extension of the benefit conferred by G.O.Ms.No.17 dated 05.11.2014 to members of the transgender community.

16.8. This Court observed that though initial thrust of the PIL was confined to vaccination of the members of the transgender community, issue raised in the PIL transcends such limited issue. Learned Government Pleader was directed to submit particulars of the Board constituted by the State of Telangana for the transgender

community and also for extension of the benefits conferred by G.O.Ms.No.17 dated 05.11.2014 which introduced the Aasara Pension Scheme to members of the transgender community.

16.9. In the hearing held on 19.10.2022, a detailed order was passed by this Court. First part of the order dated 19.10.2022 dealt with constitution of the State Welfare Board (briefly, 'the Board') for transgender persons in the State of Telangana. It was held as follows:

Today, learned Advocate General submits that a report has been submitted by Special Secretary to the Government of Telangana, WCDA&SC Department. It is stated that as per Rule 10(1) of the Transgender Persons (Protection of Rights) Rules, 2020 (briefly 'the Rules' hereinafter), Government of Telangana has issued G.O.Ms.No.21 dated 19.08.2022 of the Department for Women, Children, Disabled and Senior Citizens, Government of Telangana, constituting a State Welfare Board (briefly 'the Board' hereinafter) for transgender persons in the State of Telangana with the following members:

1.	Hon'ble Minister for Disabled Welfare and Senior Citizens Department	Chairperson, Ex-officio
2.	Spl.C.S./Prl.Scy/Secy to Government, Departments of 1. Women, Children, Disabled & Senior Citizens 2. School Education Department 3. Medical & Health Department	

	4. Home Department 5. B.C.Welfare Department 6. Scheduled Castes Development Department. 7. Tribal Welfare Department 8. Minorities Welfare Department 9. Panchayat Raj & Rural Development Department	Ex-officio Members
3.	(2) NGOs working for transgender (as nominated by the Government) (1) ANVESHNI (Research Centre for Women's Studies) (2) MSI (Montford Social Institute)	Members
4.	Transgender (6) Members 1. Navadeep Pannala (Tashi Choedup) 2. Meera Sanghamitra 3. Rachana Mudraboyina 4. Kiran Raj Gollapalli 5. Vyjayanti Vasanta Mogli 6. Laila Oruganti	Members
5.	Director, Welfare of Disabled and Senior Citizens Department	Member Secretary

It is stated that the Board had its first meeting on 28.09.2022 whereafter, an action plan has been chalked out which was forwarded to the Government by the Director, Welfare of Disabled and Senior Citizens Department on 29.09.2022.

Government of Telangana has approved the action plan on 17.10.2022 and has also earmarked Rs.200 lakhs as additional funds for implementation of the action plan. However, nothing has been stated regarding extension of the benefits conferred by G.O.Ms.No.17, dated 05.11.2014 to the members of transgender community.

16.10. Thereafter, this Court referred to the counter affidavit filed by the State of Telangana in the Panchayat Raj and Rural Development Department on 14.10.2022, wherein it was stated that benefits of the Aasara Pension

Scheme contained in G.O.Ms.No.17 dated 05.11.2014 are being extended to the following categories of persons:

1. Old Age Pensions
2. Widow Pensions
3. Disabled Pensions
4. Weavers Pensions
5. Toddy Tappers Pensions
6. Filaria Pensions
7. HIV Pensions
8. Financial Assistance to Beedi Workers
9. Financial Assistance to Single Women
10. Dialysis Patients.

16.11. It was submitted before the Court by the learned Advocate General that a transgender person belonging to any of the above ten categories would be entitled to benefits under the Aasara Pension Scheme. This Court referred to the decision of the Supreme Court in **NALSA** (supra) and to the Transgender Persons (Protection of Rights) Act, 2019 as well as to the Transgender Persons (Protection of Rights) Rules, 2020 and thereafter held as follows:

It is in the above backdrop that we are examining the entitlement of the transgender community including extension of the benefits under the Aasara scheme. Members of the transgender community are not seeking benefits as charity. It is

their constitutional right under Articles 14 and 21 of the Constitution of India as upheld by the Supreme Court in its decision in **National Legal Services Authority v. Union of India** (supra).

On the next date, learned Advocate General shall apprise the Court as to what steps have been taken by the State of Telangana to comply with the directions of the Supreme Court in **National Legal Services Authority v. Union of India** (supra) and also in terms of Rule 10(2) of the Rules.

Learned Advocate General shall also inform the Court as to how the State proposes to reach out to the members of the transgender community inasmuch as because of social stigma and various other reasons, there may be difficulty for members belonging to the transgender community to come forward for registration with the said authorities seeking benefit.

Learned Advocate General shall further apprise the Court about any decision taken by the State for extension of the benefit conferred by G.O.Ms.No.17 dated 05.11.2014 to members of the transgender community as a separate class.

16.12. Thus, this Court observed that entitlement of the transgender community to various benefits including the benefits under the Aasara Scheme should not be seen as charity but emanating from their constitutional rights under Articles 14 and 21 of the Constitution of India as

held by the Supreme Court in **NALSA** (supra). This Court directed learned Advocate General to apprise the Court as to what steps State of Telangana has taken to comply with the directions of the Supreme Court in **NALSA** (supra) and also in terms of Rule 10(2) of the Transgender Persons (Protection of Rights) Rules, 2019 as per which the appropriate government is under a mandate to review all existing educational, social security, health schemes, welfare measures, vocational training and self-employment schemes to include transgender persons in order to protect their rights and interests and to facilitate their access to such schemes and welfare measures. Learned Advocate General was also directed to apprise the Court as to how the State proposed to reach out to the members of the transgender community in as much as because of social stigma and various other reasons, there may be difficulty for members belonging to the transgender community to come forward for registration with the concerned authorities seeking various benefits. Learned Advocate General was also directed to apprise the

Court about any decision taken by the State for extension of the benefits confirmed by G.O.Ms.No.17 dated 05.11.2014 to members of the transgender community as a separate class.

16.13. It was, thereafter that the matter was heard at length in which Mr. Andapalli Sanjeev Kumar, learned Special Government Pleader submitted that State has not taken any decision to include the transgender community as a class for availing the benefit of Aasara Pension Scheme in terms of G.O.Ms.No.17 dated 05.11.2014.

17. At this stage, we may briefly advert to the reports and affidavits filed by various authorities from time to time in W.P. (PIL) No.74 of 2020.

18. Member Secretary of Telangana State Legal Services Authority had submitted a consolidated report dated 10.07.2020 after compiling the reports received from District Legal Services Authorities. In his report, Member Secretary has stated that the common problem of transgender persons in the State of Telangana is that their

family members have necked them out from their houses or because of societal pressure or humiliation, thereby they themselves have left the family. As a result, most transgenders have become shelterless. Compounding the problem is the disinclination of landlords to rent out premises to transgenders. In the circumstances, there is a dire necessity to have shelter homes for transgenders exclusively. However, the Government has no special schemes or programmes in this regard. Representations submitted by persons belonging to the transgender community for allotting them single bedroom or double bedroom houses have also not been considered.

18.1. Member Secretary has pointed out that most transgenders have no fixed source of income. Most employers are reluctant to provide any employment to transgenders irrespective of whether it is a private sector or the public sector. Government is also not providing any financial assistance to enable the transgenders to have their own start ups. In this regard, the role played by the banks has also been found to be wanting. In such

circumstances, some transgenders have resorted to either begging or by acting as sex workers to earn some money per day. However, there are some NGOs in the State who have reached out to the transgender community. Transgenders complain that they have no ration cards or voter identification cards in their names. One of the common grievances of the transgenders is regarding grant of ration cards, voter identification cards etc. by recognizing them as transgenders. Though some of them are graduates and postgraduates, they are unable to get employment.

18.2. Substantial number of transgenders are engaged as sex workers as a result some of them have been infected with HIV or other sexually transmitted diseases. Access to health is a big issue for them. Many hospitals refuse to give admission to transgenders because the data format does not provide for a special column for transgenders.

18.3. Even in public toilets, transgenders are not allowed entry either into toilets meant for men or into toilets

meant for women. Therefore, they require separate toilets earmarked for transgenders. They have stated that they have been humiliated and facing insults on a daily basis. As per the report, the number of transgenders could be identified at 12,233.

19. In his report submitted by the Special Secretary to the Government of Telangana, Women, Children, Disabled and Senior Citizens Department dated 18.10.2022, it is stated that Transgender Persons (Protection of Rights) Act, 2019 and the Transgender Persons (Protection of Rights) Rules, 2020 are in vogue for protection of the rights of transgender persons and their welfare. As per Rule 10(1) of the Transgender Persons (Protection of Rights) Rules, 2020, Government of Telangana vide G.O.Ms.No.21 dated 19.08.2022 has constituted a State Welfare Board for transgender persons in the State of Telangana (already referred to as ‘the Board’ hereinabove) with the following members:

1.	Hon'ble Minister for Disabled Welfare and Senior Citizens Department	Chairperson, Ex-officio
2.	Spl.C.S./PrI.Scy/Secy to Government., Departments of	

	1. Women, Children, Disabled & Senior Citizens 2. School Education Department 3. Medical & Health department 4. Home Department 5. B.C.Welfare Department 6. Scheduled Castes Development Department. 7. Tribal Welfare Department 8. Minorities Welfare Department 9. Panchayat Raj & Rural Development Department	Ex-officio Members
3.	(2) NGOs working for transgender (as nominated by the Government) (1) ANVESH (Research Centre for Women's Studies) (2) MSI (Montford Social Institute)	Members
4.	Transgender (6) Members 7. Navadeep Pannala (Tashi Choedup) 8. Meera Sanghamitra 9. Rachana Mudraboyina 10. Kiran Raj Gollapalli 11. Vyjayanti Vasanta Mogli 12. Laila Oruganti	Members
5.	Director, Welfare of Disabled and Senior Citizens Department	Member Secretary

19.1. It is stated that State Welfare Board had convened its first meeting on 28.09.2022 wherein an action plan was chalked out which was thereafter forwarded to the Government on 29.09.2022. Government of Telangana in the Women, Children, Disabled and Senior Citizens Department approved the action plan on 17.10.2022 and also provided Rs.200 lakhs as additional funds in relaxation of treasury control for protection and welfare of transgender persons as per the action plan. A training programme was conducted for making jute products to benefit persons belonging to the transgender community. Government of Telangana is actively working towards

welfare of transgender persons by launching various measures including skill development training to promote entrepreneurship and employability so that they can lead a dignified life.

19.2. As per G.O.Ms.No.21 dated 19.08.2022, the function of the State Welfare Board for transgender persons is to advise the State Government on the formulation of policies, programmes, legislation and projects with respect to transgender persons; to monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of transgender persons; to review and coordinate the activities of all the departments of the Government and other Governmental and non-Governmental organizations which are dealing with matters relating to transgender persons etc. It further provided that tenure of the State Welfare Board would be for a period of two years but it would meet at least once in six months to advise the State Government on effective implementation of the Transgender Persons (Protection of

Rights) Act, 2019 and to perform such other functions in relation to transgenders.

20. We may also have a brief look at the action plan approved by the Government on 17.10.2022 for implementation of various welfare activities for transgender persons. The action plan provides for publicity of the Transgender Persons (Protection of Rights) Act, 2019 and to carry out awareness campaigns and sensitization programmes. The action plan also provides for skill development training and economic rehabilitation scheme. There is also a provision to set up a help desk for transgender persons in the Directorate of Welfare of Disabled and Senior Citizens. It has been proposed to have a corpus fund and for this, an amount of Rs.53,05,360-00 has been earmarked. However, it is seen that to be eligible for undertaking such skill development training or economic rehabilitation, certain eligibility criteria have been fixed, such as, having an identity card issued by the concerned District Collector or a certificate issued by a competent authority; age proof certificate (age

between 21 to 55 years); Aadhaar card; educational qualification etc. In fact, for availing the benefit of economic rehabilitation scheme, a transgender person is also required to furnish recent income certificate issued by the Tahsildar concerned who has less than Rs.2 lakhs for urban and Rs.1.5 lakh for rural areas. Action plan also provides for establishment of homes for transgender persons.

20.1. It goes without saying that meeting such eligibility criteria by a transgender person is almost next to impossible.

21. Secretary to the Government of Telangana, Medical and Family Welfare Department furnished a report dated 29.11.2022 as to providing health care facilities to transgender persons. As per the report, Government of Telangana issued the following orders on 16.11.2022:

- (i) Telangana State AIDS Control Society shall set up separate Human Immunodeficiency Virus Sero-Surveillance centres to conduct sero-surveillance for such persons in accordance with the

guidelines issued by the National AIDS Control Organisation.

(ii) Osmania General Hospital, Hyderabad is hereby designated as the nodal health facility for sex reassignment surgery and hormonal therapy.

(iii) Osmania General Hospital, Hyderabad shall provide counselling before and after sex reassignment surgery and also counselling for hormonal therapy.

(iv) Director of Medical Education shall bring out a Health Manual related to sex reassignment surgery in accordance with the 'World Professional Association for Transgender Health' guidelines.

(v) Director of Medical Education, Commissioner, Telangana Vaidya Vidhana Parishad and Director of Public Health shall ensure that transgender persons are facilitated in the matter of access in hospitals and other healthcare institutions.

21.1. In accordance with Rule 11(5) of the Transgender Persons (Protection of Rights) Rules, 2020, Telangana Police under the supervision of the Director General of Police has established a Transgender Protection Cell called "Pride Place" at the State level in the Women Safety Wing of Telangana Police. The Protection Cell works directly under the leadership of Additional Director General of

Police, Women Safety Wing, Telangana. It is stated that the following steps are being taken through the Pride Cell:

- Building database of Trans people age wise, occupation, economic status wise;
- Trainings and sensitisation programmes planned from time to time for all the police officers and other stakeholders;
- Awareness campaign taken up by the cell in collaboration with other stakeholders and Trans communities regularly;
- Involve the stakeholders like i.e., NGOs, Civil Society and students who will come forward to work on the same issue;
- Help in enrolment of transgender in National Transgender Portal for ID cards <https://transgender.dosje.gov.in/Applicant/Login/Index>
- Conduct counselling to sex workers and beggars;
- Conduct awareness for job for a dignified life style;
- Plan to train them to improve their skills through skilling programme;
- Any personal problem to transgender will be resolved at desk.

21.2. We further find that as per letter dated 25.11.2022 of the Director and State Commissioner, Welfare of Disabled and Senior Citizens addressed to the Special

Secretary to the Government of Telangana, Department for Women, Children, Disabled and Senior Citizens, public awareness steps are being taken to ensure identification of transgender persons from the village level. In this connection, all the District Collectors have been directed to conduct awareness campaigns for identification of transgender persons and to expedite the process of issuing transgender persons survival and identification cards. In this process, steps have been taken to tabulate real time data as to the number of transgender persons identified in the districts, number of applications received, number of certificates issued etc.

22. Elaborate submissions have been made by learned counsel for the parties highlighting the plight of persons belonging to the transgender community and the need for inclusivity on the basis of constitutional principles. Submissions made have been duly considered.

23. In **NALSA** (supra), Supreme Court was examining the grievance of the members of the transgender community

seeking a legal declaration of their gender identity than the one assigned to them i.e. male or female at the time of birth. Ventilating such grievances, National Legal Services Authority moved the Supreme Court contending that non-recognition of the identity of persons belonging to the transgender community violates Articles 14 and 21 of the Constitution. Hijras and eunuchs falling within the transgender community claimed legal status as a third gender with all legal and constitutional protection. In the said judgment, Supreme Court observed that transgender is generally described as an umbrella term for persons whose gender identity/gender expression or behaviour do not conform to their biological sex. Transgender may also take in persons who do not identify with their sex assigned at birth, which include hijras/eunuchs. Hijras are not men by virtue of anatomical appearance and psychologically, they are also not women; though they are like women they have no female reproductive organ and no menstruation. Since hijras do not have reproductive capacities as either men or women, they are neither men

nor women and claim to be third gender. Among hijras, there are emasculated men, non-emasculated men and inter-sexed persons i.e. hermaphrodites. Transgender also includes persons who intend to undergo Sex Reassignment Surgery (SRS) or have undergone Sex Reassignment Surgery to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. 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.

23.1. After tracing the history of transgenders in the world and in India, Supreme Court acknowledged that transgender people, as a whole, face multiple forms of oppression in this country. Discrimination is writ large and pronounced, especially in the field of healthcare, employment, education, not to speak of social exclusion.

Supreme Court referred to the report submitted by United Nations Development Programme – India, 2010 which highlighted the extreme necessity of taking emergent steps to improve the sexual and mental health of transgenders and also to address the issue of social exclusion. It was noted that social exclusion and discrimination on the ground of gender stating that one does not conform to the binary gender i.e. male or female, strongly prevail in India. Supreme Court observed that many of them experience violence and discrimination because of their sexual orientation or gender identity.

23.2. Supreme Court agreed with the petitioners 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. Non-recognition of identity of hijras/transgender persons

results in them facing extreme discrimination in all spheres of the society, especially in the field of employment, education, healthcare etc. They face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem which 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 or harassment. Supreme Court concluded that discrimination on the ground of sexual orientation or gender identity impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.

23.3. Adverting to Articles 15 and 16 of the Constitution, Supreme Court observed that both the articles prohibit discrimination against any citizen on certain enumerated grounds including on the ground of sex. In fact, both the articles prohibit all forms of gender bias and gender based discrimination. After a careful analysis, Supreme Court opined that 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 nor female. Supreme Court noted that transgenders have been systematically denied the rights under Article 15(2) i.e. not to be subjected to any disability, liability, restriction or condition in regard to access to public places. Transgenders have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes. State is bound to take some affirmative action for their advancement so that injustice done to them for centuries could be remedied. Supreme Court has held that transgenders have also been denied rights under Article 16(2) and discriminated against in respect of employment under the State on the ground of sex. They are 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.

23.4. Thus, Supreme Court held that Articles 15(2) and (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 transgenders could realise, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

23.5. Elaborating further, Supreme Court observed that right to dignity which is a facet of Article 21 forms an essential part of our constitutional culture. Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender 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 the right to dignity guaranteed under the Constitution. Determination of gender to which a person belongs is to be decided by the person concerned. Thus, gender identity is integral to the dignity of an individual and is at the core of personal autonomy which is traceable to Article 21. Thus, hijras and eunuchs have to be considered as third

gender over and above the binary genders under our Constitution and the laws. It was, therefore, concluded 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.

23.6. In his concurring judgment, Dr A.K.Sikri, J posed the question as to whether transgenders who are neither males nor females have a right to be identified or categorised as third gender? He observed that indubitably, the issue of choice of gender identity has all the trappings of human rights. 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 as not giving them the status of a third gender results in depriving the community of transgenders 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. Justice Sikri has mentioned that though in the past transgenders in India were treated with great respect, that is not the scenario any longer. Attrition of their status was triggered with the passing of the Criminal Tribes Act, 1871 which deemed the entire community of hijra persons as innately criminals and adapted to the systematic commission of non-bailable offences. There could not have been more hardship caused to this community with the passing of the aforesaid brutal legislation during the British regime with the vicious and savage mindset. To add insult to irreparable injury caused, Section 377 IPC was misused and abused as there was a tendency in the British period to arrest and prosecute transgender persons under Section 377 merely on suspicion. Though there may have been marginal improvement in the social and economic condition of transgenders in India, it is still far from satisfactory. The transgender community continues to face different kinds of economic blockade and social degradation. They still face multiple forms of oppression in

the country. Discrimination *qua* them is clearly discernible in various fields including healthcare, employment, education, social cohesion etc.

23.7. Justice Sikri asserted that transgenders are also citizens of this country. They have equal right to achieve their potential as human beings. For this purpose, not only are they entitled to proper education, social assimilation, access to public and other places and employment opportunities as well. Therefore, it was opined that by recognising transgenders as third gender, they would be able to enjoy their human rights to which they are largely deprived of for want of this recognition. Thereafter, the learned Judge recorded some of the common and reported problems of people belonging to the transgender community, such as, harassment at home, harassment by the police, rape, discrimination, abuse in public places, lack of educational facilities, lack of medical facilities, homelessness, unemployment, depression etc.

23.8. In the circumstances, Supreme Court declared and directed as follows:

135.1. Hijras, eunuchs, apart from binary genders, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and the State Legislature.

135.2. 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.

135.3. 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.

135.4. The Centre and State Governments are directed to operate separate HIV sero-surveillance centres since hijras/transgenders face several sexual health issues.

135.5. The Centre and State Governments should seriously address the problems being faced by hijras/transgenders 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.

135.6. The Centre and State Governments should take proper measures to provide medical care to transgenders in the hospitals and also provide them separate public toilets and other facilities.

135.7. The Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

135.8. The Centre and State Governments should take steps to create public awareness so that transgenders will feel that they are also part and parcel of the social life and be not treated as untouchables.

135.9. The 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.

23.9. Thus, besides declaring transgenders as third gender for the purpose of safeguarding their rights, Centre and State Governments have been directed to grant legal recognition of the gender identity of the transgenders such as male, female or third gender. Centre and State Governments have also been directed to take steps to treat transgender persons 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.

24. Before we proceed to deal with the next important judgment of the Supreme Court **Puttaswamy** (supra), it would be useful to refer to some of the High Court judgments dealing with various issues confronting transgenders.

25. In **Nangai v. the Superintendent of Police**³, a single bench of the Madras High Court posed the question as to whether it is a sin to be born as a transsexual? Would it not be violative of Articles 14, 15, 16, 19 and 21 of the Constitution of India to deny employment to a transsexual? A learned Single Judge of the Madras High Court raised the above questions in the peculiar facts of that case. Petitioner therein identified herself as a female but the police department where she was serving as a police constable (women) terminated her from service by labelling her as a transgender. As a matter of fact, the medical board reported that petitioner was a transgender

³ 2014 (3) CTC 497

by birth. When the petitioner challenged her termination from service, stand taken by the police department was that since the petitioner did not disclose that she was a transgender, she was terminated from service as she was not eligible for appointment as a woman police constable. Learned Single Judge framed two questions for consideration:

- (1) Whether petitioner was a female and eligible for appointment as a woman police constable?
- (2) Whether termination of the petitioner from service on the ground that she was a transgender was sustainable?

25.1. It was in that context, learned Single Judge delved into the concept of sex and gender as appearing in different statutes. Learned Single Judge observed that the term 'sex' operates within the classic binary biological model in which human beings are divided into either male or female. Transsexuals do not fit in with the said classification in the domestic Indian laws as they do not fit in within the binary classification of sex. They feel completely neglected by the society and by the government. Learned Single Judge observed that in the

Indian scenario, an individual for all practical purposes is identified either as a male or as a female. Therefore, it was wrong on the part of the State authority to discard the description of gender by the petitioner on the basis of medical report. Learned Single Judge also referred to the decision of the Supreme Court in **NALSA** (supra) and thereafter concluded that since Indian laws did not recognise third gender and was confined to the binary classification of male and female, in such a case an individual who is born as a female but declared as a transsexual by the medical community cannot be kept out of the binary classification. Such medically declared transsexuals are to be treated by the legal community only by the sexual identity given to them at birth and recognised by the society. If such medically declared transsexuals are kept outside the purview of the female sexual identity, then the State would not be in a position to provide employment and other opportunities to transgenders by treating them as females or as males. In such circumstances, Madras High Court held that

petitioner was a female in the legal parlance and thus eligible for appointment as a woman police constable. Consequently, the impugned order of termination from service was found to be unsustainable and was accordingly set aside.

25.2. Madras High Court however declared that petitioner would have the liberty to choose a different sexual or gender identity as a third gender in future based on medical declaration if there is any law declaring them as third gender.

26. A division bench of the Allahabad High Court in **Ashish Kumar Misra v. Union of India**⁴ examined an important issue pertaining to availability of food security for transgenders under the National Food Security Act, 2013. In this connection, Allahabad High Court referred to Section 13 of the said Act as well as to the decision of the Supreme Court in **NALSA** (supra). Allahabad High Court referred to the statutory form for submitting applications under the aforesaid Act and noted that one of the items

⁴ AIR 2015 All 124

required disclosure of gender of the applicant. It was in that context, Allahabad High Court observed that reference to gender would be construed to mean either female or male or other. The expression 'other' would necessarily include a transgender. Object and purpose of Section 13 was not to exclude transgender. The solitary purpose underlying the enactment of Section 13 can be furthered by incorporating a situation where a transgender can be recognised as the head of an eligible household. Allahabad High Court emphasised that the right to live in dignity is traceable to Article 21 of the Constitution. Incidental to the fundamental right to live in dignity is the right to access all facilities for development of the personality including education, employment opportunities, access to public places etc.

27. A single bench of the Delhi High Court in **Shivani Bhat v. State of NCT of Delhi**⁵ noted that despite the decision of the Supreme Court in **NALSA** (supra) the trauma, agony and pain which members of the transgender community

⁵ 2015 SCC OnLine Del 12514

have to undergo continues unabated. Observing that transgenders enjoy basic human rights including protection from violence and discrimination, Delhi High Court held that transgenders also have the right to dignity and self-determination. Gender identity and sexual orientation are fundamental to the right of self-determination and dignity. These freedoms lie at the heart of personal autonomy and freedom of individuals. A transgender's sense or experience of gender is integral to her core personality and sense of being.

28. In **K.Prithika Yashini v. Chairman, Tamil Nadu Uniformed Services Recruitment Board**⁶, a division bench of the Madras High Court noted that in the recruitment process for appointment of Sub Inspector in the police department, benchmark was prescribed for such recruitment. The difference in the benchmark required specification of gender of the candidate as male or female. There was absence of any column for third gender. It was in that context, Madras High Court referred to the decision of the

⁶ 2016 4 L.W. 594

Supreme Court in **NALSA** (supra) and observed that the discrimination suffered by the transgenders would be difficult for any of the other two genders to realise. Noting that there was no other transgender as a candidate in the selection for recruitment as Sub Inspector, the Court observed that even if one person was recruited under the said category, it would be the petitioner. Social impact of such recruitment cannot be lost sight of. In the circumstances, Madras High Court directed that petitioner was entitled to be recruited to the post of Sub Inspector and hoped that she would carry out her duties with dedication and commitment to advance the cause of other transgenders.

29. A division bench of the Uttarakhand High Court in writ petition criminal No.1794 of 2018 (**Rano v. State of Uttarakhand**) decided on 28.09.2018, examined the grievance of the petitioners who were transgenders. After referring to the decision of the Supreme Court in **NALSA** (supra), Uttarakhand High Court noted that the State Government had not implemented the directions issued by

the Supreme Court. No reservation had been provided for public employment as well as in educational institutions. No proper measures have been provided for medical care to transgenders. No social welfare schemes have been framed for the betterment of the transgenders. Uttarakhand High Court took note of the fact that State of Odisha has framed a scheme for promotion of transgender equality and justice and directed the Government of Uttarakhand to frame social welfare schemes/programmes for transgenders. State Government was directed to take steps to provide habitable accessible appropriate houses to the transgenders including the right to education.

30. We may now deal with the seminal decision of the nine-Judge Bench of the Supreme Court in **Puttaswamy** (supra). The nine-Judge Bench was constituted to determine whether privacy is a constitutionally protected value. In the opening reference, Justice Dr. D.Y.Chandrachud (as His Lordship then was) speaking for the Bench observed that the issue reaches out to the foundation of a constitutional culture based on the

protection of human rights and enables the Supreme Court to revisit the basic principles on which the Constitution has been founded and their consequences for a way of life it seeks to protect. It has been observed that if privacy is to be construed as a protected constitutional value, it would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection.

30.1. Supreme Court observed that privacy in its simplest sense allows each human being to be left alone in a core which is inviolable. Supreme Court examined the above issue in the backdrop of two of its earlier decisions i.e., **M.P.Sharma v. Satish Chandra**⁷ and **Kharak Singh v. State of Uttar Pradesh**⁸ and observed that the Indian Constitution does not specifically protect the right to privacy. Therefore, existence of a fundamental right to privacy was in doubt in view of the aforesaid two decisions. Supreme Court noted that the decision in **M.P.Sharma** (supra) and **Kharak Singh** (supra) stood abrogated by the judgment in

⁷ AIR 1954 SC 300

⁸ AIR 1963 SC 1295

R.C.Cooper v. Union of India⁹ and the subsequent statement of doctrine in **Maneka Gandhi v. Union of India**¹⁰. The right “to be let alone” represents a manifestation of “an inviolate personality”, a core of freedom and liberty from which the human being had to be free from intrusion. The right “to be let alone” is not so much an incident of property (in view of advancing technology) as a reflection of the inviolable nature of the human personality.

30.2. On the above basis, Supreme Court proceeded in its analysis that privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights. Natural rights are not bestowed by the State. They inhere in human beings because they are human. They exist equally in the

⁹ (1970) 1 SCC 248

¹⁰ (1978) 1 SCC 248

individual irrespective of class or strata, gender or orientation.

30.3. Supreme Court, thereafter, made a comprehensive analysis of all relevant judicial precedents indicating evolution of the right to privacy in our constitutional jurisprudence. The analysis indicates the manner in which the debate on the existence of a constitutional right to privacy has progressed. The content of the constitutional right to privacy and its limitations have proceeded on a case to case basis, each precedent seeking to build upon and follow the previous formulations. Thereafter, Supreme Court observed that these decisions had to weave a jurisprudence of privacy as new challenges emerged from a variety of sources: wiretapping, narco-analysis, gender based identity, medical information, informational autonomy and other manifestations of privacy. The right to privacy has been traced in the decisions which have been rendered over the last several decades to the guarantee of life and personal liberty in Article 21 and the freedoms set out in Article 19. In

addition, India's commitment to a world order founded on respect for human rights has been noticed along with the specific articles of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Personal Rights (ICCPR) which embodied the right to privacy.

30.4. Thereafter, Supreme Court observed that our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity which as a constitutional value finds adequate expression in the Preamble. The Preamble contains the constitutional precepts to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective wellbeing of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the freedoms (Article 19) and in the right to life and personal liberty (Article 21).

30.5. Supreme Court referred to its decision in **Jeeja Ghosh v. Union of India**¹¹ which observed that human dignity is a constitutional value and a constitutional goal. Thereafter, Supreme Court observed that life is precious in itself. But life is worth living because of the freedoms which enable each individual to live a life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. The duty of the State is to safeguard the ability to take decisions i.e., the autonomy of the individual, and not to dictate those decisions. To live is to live with dignity. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.

¹¹ (2016) 7 SCC 761

30.6. It is in that context, Supreme Court repelled the submission that to recognise the right to privacy would require a constitutional amendment and cannot be a matter of judicial interpretation. Supreme Court asserted that right to privacy is an element of human dignity. Sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so, privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution. To recognise the value of privacy as a constitutional entitlement is not to fashion a new fundamental right by a process of amendment.

30.7. Supreme Court however noted that in the evolution of the doctrine of right to privacy and dignity in India which placed the dignity of the individual and the

freedoms and liberties at the forefront, there had been a few discordant notes. One of them being **ADM, Jabalpur v. Shivakant Shukla**¹² was particularly discussed whereafter, the majority view that the remedy for enforcement of the right to life or liberty would stand suspended when an order is issued by the President under Article 359(1) of the Constitution was found to be seriously flawed and expressly overruled. The dissenting judgment rendered by Justice H.R.Khanna that the suspension of the right to move any court for the enforcement of the right under Article 21 upon a proclamation of emergency would not affect the enforcement of the basic right to life and liberty has been expressly approved. Life and personal liberty are inalienable to human existence. These rights are primordial rights. They constitute rights under natural law. The human element in the life of an individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. Supreme Court declared that the view taken by Justice Khanna was the

¹² (1976) 2 SCC 521

correct view and accordingly overruled the decision in **ADM Jabalpur** (supra).

30.8. Insofar the second decision i.e., **Suresh Kumar Koushal v. Naz Foundation**¹³ is concerned, we will discuss in detail the same while analysing the Constitution Bench Judgment of the supreme Court in **Navtej Singh Johar v. Union of India**¹⁴. Suffice it to say, Supreme Court in **Puttuswamy** (supra) did not go into the correctness of the view taken by it in **Suresh Kumar Koushal** (supra) as at that point of time challenge to Section 377 of the Indian Penal Code, 1860 (IPC) was pending consideration before the Constitution Bench. Nonetheless Supreme Court observed that sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the

¹³ (2014) 1 SCC 1

¹⁴ (2018) 10 SCC 1

fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution. Supreme Court also elaborated that sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.

30.9. While repelling the submission that privacy is a privilege for the few, Supreme Court has held that every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects. Pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals.

30.10. Thereafter, Supreme Court posed the question as to what does privacy postulate? Answering this question, Supreme Court held that privacy postulates reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices

lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. Since the observations of the Supreme Court are extremely relevant for our present discourse, it is important to extract and restate the same. Supreme Court held as follows:

R. Essential Nature of Privacy:

297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The

integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out

of a thread of diversity into the fabric of a plural culture.

298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the

integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the

ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

299. Privacy represents the core of the human personality and recognises the ability of each individual to make choices and to take decisions governing matters intimate and personal. Yet, it is necessary to acknowledge that individuals live in communities and work in communities. Their personalities affect and, in turn are shaped by their social environment. The individual is not a hermit. The lives of individuals are as much a social phenomenon. In their interactions with others, individuals are constantly engaged in behavioural patterns and in relationships impacting on the rest of society. Equally, the life of the individual is being consistently shaped by cultural and social values

imbibed from living in the community. This state of flux which represents a constant evolution of individual personhood in the relationship with the rest of society provides the rationale for reserving to the individual a zone of repose. The lives which individuals lead as members of society engender a reasonable expectation of privacy. The notion of a reasonable expectation of privacy has elements both of a subjective and objective nature. Privacy at a subjective level is a reflection of those areas where an individual desires to be left alone. On an objective plane, privacy is defined by those constitutional values which shape the content of the protected zone where the individual ought to be left alone. The notion that there must exist a reasonable expectation of privacy ensures that while on the one hand, the individual has a protected zone of privacy, yet on the other, the exercise of individual choices is subject to the rights of others to lead orderly lives. For instance, an individual who possesses a plot of land may decide to build upon it subject to zoning regulations. If the building bye-laws define the area upon which construction can be raised or the height of the boundary wall around the property, the right to privacy of the individual is conditioned by regulations designed to protect the interests of the community in planned spaces. Hence while the individual is entitled to a zone of privacy, its extent is based not only on the subjective expectation of the individual but on an objective principle which defines a reasonable expectation.

30.11. Thus, Supreme Court has explained that privacy of the individual is an essential aspect of dignity. The family, marriage, procreation and sexual orientation are integral to the dignity of the individual. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

30.12. Thus, Supreme Court concluded that privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Privacy is the constitutional core of human dignity. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. It also connotes a right to be left alone. It safeguards individual autonomy and recognises the ability

of the individual to control vital aspects of his/her life. However, Supreme Court recognised that privacy is not an absolute right in the context of Article 21 but invasion of privacy must be justified on the basis of law which stipulates a procedure which is fair, just and reasonable. Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

31. In **Navtej Singh Johar** (supra), Constitution Bench of the Supreme Court was considering the constitutional dimension of the contention that right to sexuality, right to sexual autonomy and right to choice of a sexual partner are part of the right to life guaranteed under Article 21 of the Constitution; the further contention was to declare Section 377 IPC as unconstitutional. It may be mentioned that two-Judge Bench of the Supreme Court in **Suresh Kumar Koushal** (supra) had overturned the decision

rendered by the Delhi High Court in **Naz Foundation V. Government (NCT of Delhi)**¹⁵. The correctness of the said decision was also an issue in **Navtej Singh Johar** (supra).

31.1. Chief Justice Deepak Misra in the leading judgment adverted to the Delhi High Court decision in **Naz Foundation** (supra). Delhi High Court had taken the view that Article 15 of the Constitution prohibits discrimination on several enumerated grounds including sex. Delhi High Court preferred an expansive interpretation of the word 'sex' so as to include prohibition of discrimination on the ground of sexual orientation and that sex discrimination cannot be read as applying to gender simpliciter. According to the Delhi High Court, Indian Constitution reflects the value of inclusiveness which is deeply ingrained in the Indian society and those who are perceived by the majority as deviants or different are not to be, on that score, excluded or ostracised. Where a society displays inclusiveness and understanding, LGBT (Lesbian, Gay, Bisexual and Transgender) persons can be

¹⁵ 2009 SCC OnLine Del 1762

assured of a life of dignity and non-discrimination. Delhi High Court opined that the Constitution does not permit any statutory criminal law to be held captive of the popular misconception of who the LGBTs are. Social morality has to succumb or give way to the higher concept of constitutional morality. On the above reasons, Delhi High Court declared Section 377 IPC as violative of Articles 14, 15 and 21 of the Constitution insofar as it criminalises consensual sexual acts of adults in private.

31.2. The Delhi High Court judgment in **Naz Foundation** (supra) was challenged in **Suresh Kumar Koushal** (supra). Supreme Court opined that acts which fall within the ambit of Section 377 IPC can only be determined with reference to the act itself and to the circumstances in which it is executed. Section 377 IPC would apply irrespective of age and consent; it does not criminalise a particular people or identity or orientation but only identifies certain acts which, when committed, would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.

According to the Bench, those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes. People falling in the latter category cannot claim that Section 377 IPC suffers from the vice of arbitrariness and irrational classification. While holding such a view it was observed that only a minuscule fraction of the country's population constitutes LGBT and in last more than 150 years, less than 200 persons have been prosecuted under Section 377 IPC and therefore cannot be made a sound basis for declaring Section 377 IPC *ultra vires* the provisions of Articles 14, 15 and 21 of the Constitution. The submission advanced that Section 377 IPC had become a pernicious tool for perpetrating harassment, blackmail and torture on those belonging to LGBT community was repelled by stating that such treatment is neither mandated by the Section nor condoned by it. Mere fact that the section is misused by police authorities and others cannot be a reflection on the *vires* of the Section.

31.3. In the context of the above, Supreme Court in **Navtej Singh Johar** (supra) observed that while testing the constitutional validity of Section 377 IPC, due regard must be given to the elevated right to privacy as has been proclaimed in **Puttaswamy** (supra). Within the compartment of privacy, individual autonomy has a significant space. Autonomy is individualistic. It is expressive of self-determination and such self-determination includes sexual orientation and declaration of sexual identity. It is an inalienable part of an individual's identity. Supreme Court observed as under:

161. While testing the constitutional validity of Section 377 IPC, due regard must be given to the elevated right to privacy as has been recently proclaimed in *Puttaswamy* [*K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1]. We shall not delve in detail upon the concept of the right to privacy as the same has been delineated at length in *Puttaswamy* [*K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1]. In the case at hand, our focus is limited to dealing with the right to privacy vis-à-vis Section 377 IPC and other facets such as right to choice as part of the freedom of expression and sexual orientation. That apart, within the compartment of privacy, individual autonomy has a

significant space. Autonomy is individualistic. It is expressive of self-determination and such self-determination includes sexual orientation and declaration of sexual identity. Such an orientation or choice that reflects an individual's autonomy is innate to him/her. It is an inalienable part of his/her identity. The said identity under the constitutional scheme does not accept any interference as long as its expression is not against decency or morality. And the morality that is conceived of under the Constitution is constitutional morality. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual. This dignity is special to the man/woman who has a right to enjoy his/her life as per the constitutional norms and should not be allowed to wither and perish like a mushroom. It is a directional shift from conceptual macrocosm to cognizable microcosm. When such culture grows, there is an affirmative move towards a more inclusive and egalitarian society. Non-acceptance of the same would tantamount to denial of human rights to people and one cannot be oblivious of the saying of Nelson Mandela — “to deny people their human rights is to challenge their very humanity”.

31.4. It was observed that after the nine-Judge Bench decision in **Puttaswamy** (supra), the challenge to the *vires* of Section 377 IPC has become stronger than ever. In **Puttaswamy** (supra), it has been held that sexual orientation is also a facet of a person's privacy and that the right to privacy is a fundamental right under the Constitution of India. Supreme Court opined that the observations made in **Suresh Kumar Koushal** (supra) that LGBT including transgenders constitute a very minuscule part of the population is perverse due to the very reason that such an approach would be violative of the equality principle enshrined under Article 14 of the Constitution. The mere fact that the percentage of population whose fundamental right to privacy is abridged by the existence of Section 377 IPC in its present form is low does not impose a limitation upon the Supreme Court from protecting the fundamental rights of those who are affected by Section 377 IPC. After due elaboration, Supreme Court declared that whatever be the percentage of LGBTs including the transgenders, Court is not

concerned with the number of persons belonging to the LGBT community. What matters is whether this community is entitled to certain fundamental rights which they claim and whether such fundamental rights are being violated due to the presence of a law in the statute book. If the answer to both the questions is in the affirmative, then the constitutional Court must not display an iota of doubt and must not hesitate in striking down such provision of law on account of it being violative of the fundamental rights of certain citizens, howsoever minuscule their percentage may be.

31.5. The entirety of the discussion as to *vires* of Section 377 IPC may not be relevant for the present purpose. Suffice it so say that in **Navtej Singh Johar** (supra), Supreme Court observed that Section 377 IPC does not criminalise carnal intercourse between consenting heterosexuals. If it is so, then it should not be labelled and designated as unnatural offence under Section 377 IPC. Adverting to the Criminal Law (Amendment) Act, 2013 and the amendment introduced in Section 375 IPC, Supreme Court held that if

any proclivity amongst the heterosexual population towards consensual carnal intercourse has been allowed, such kind of proclivity amongst any two persons including LGBT community cannot be treated as untenable so long as it is consensual and it is confined within their private and intimate spaces. Thereafter, Supreme Court declared as follows:

238. At the very least, it can be said that criminalisation of consensual carnal intercourse, be it amongst homosexuals, heterosexuals, bisexuals or transgenders, hardly serves any legitimate public purpose or interest. Per contra, we are inclined to believe that if Section 377 remains in its present form in the statute book, it will allow the harassment and exploitation of the LGBT community to prevail. We must make it clear that freedom of choice cannot be scuttled or abridged on the threat of criminal prosecution and made paraplegic on the mercurial stance of majoritarian perception.

31.6. After holding so, Supreme Court declared that Section 377 IPC in its present form abridges both human dignity as well as the fundamental right to privacy. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the

right of every individual including that of the LGBT persons to express their choice in terms of their sexual inclination without the fear of persecution or criminal prosecution.

31.7. Supreme Court observed that LGBT community possesses the same human, fundamental and constitutional rights as other citizens do since these rights inhere in every individual as natural and human rights. Adverting particularly to transgenders, Supreme Court observed that bigoted and homophobic attitudes dehumanise the transgenders by denying them their dignity, personhood and above all, their basic human rights. Identity and sexual orientation cannot be silenced by oppression. The very existence of Section 377 IPC criminalising transgenders cast a great stigma on an already oppressed and discriminated class of people. This stigma, oppression and prejudice has to be eradicated and the transgenders have to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of

the shadows with full realisation of their potential and equal opportunities in all walks of life. This is what the Supreme Court observed:

264. The very existence of Section 377 IPC criminalising transgenders casts a great stigma on an already oppressed and discriminated class of people. This stigma, oppression and prejudice has to be eradicated and the transgenders have to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of the shadows with full realisation of their potential and equal opportunities in all walks of life. The ideals and objectives enshrined in our benevolent Constitution can be achieved only when each and every individual is empowered and enabled to participate in the social mainstream and in the journey towards achieving equality in all spheres, equality of opportunities in all walks of life, equal freedoms and rights and, above all, equitable justice. This can be achieved only by inclusion of all and exclusion of none from the mainstream.

31.8. Finally, Supreme Court concluded by overruling its decision in **Suresh Kumar Koushal** (supra) and declaring that Section 377 IPC so far as it criminalises any sexual relationship between two consenting adults of the same sex is unconstitutional.

31.9. In his concurring judgment, Justice Dr. D.Y.Chandrachud (as His Lordship then was) observed that sexuality is a natural and precious aspect of life, an essential and fundamental part of humanity. Sexual rights are entitlements related to sexuality and emanate from the rights to freedom, equality, privacy, autonomy and dignity of all people. Individuals belonging to sexual and gender minorities experience discrimination, stigmatisation and in some cases denial of care on account of their sexual orientation and gender identity. Under our constitutional scheme, no minority group must suffer deprivation of a constitutional right because they do not adhere to the majoritarian way of life. LGBT people including transgender persons are excluded from access to healthcare due to the societal stigma attached to sexual identity. Being particularly vulnerable to contraction of HIV, this deprivation can only be described as cruel and debilitating. The indignity suffered by the sexual minority cannot, by any means, stand the test of constitutional validity. Thereafter, it has been summed up as follows:

606. Constitutional morality will impact upon any law which deprives the LGBT individuals of their entitlement to a full and equal citizenship. After the Constitution came into force, no law can be divorced from constitutional morality. Society cannot dictate the expression of sexuality between consenting adults. That is a private affair. Constitutional morality will supersede any culture or tradition.

607. The interpretation of a right in a matter of decriminalisation and beyond must be determined by the norms of the Constitution.

608. LGBT individuals living under the threats of conformity grounded in cultural morality have been denied a basic human existence. They have been stereotyped and prejudiced. Constitutional morality requires this Court not to turn a blind eye to their right to an equal participation of citizenship and an equal enjoyment of living. Constitutional morality requires that this Court must act as a counter-majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe. [Arvind Narrain, “A New Language of Morality : From the Trial of Nowshirwan to the Judgment in *Naz Foundation*”, *The Indian Journal of Constitutional Law*, Vol. 4 (2010).] Constitutional morality must turn into a habit of citizens. By respecting the dignity of LGBT individuals, this Court is only fulfilling the foundational promises of our Constitution.

31.10. Thus, it has been held that constitutional morality will impact upon any law which deprives the LGBT individuals of their entitlement to a full and equal citizenship. LGBT individuals living under the threats of conformity grounded in cultural morality have been denied a basic human existence. They have been stereotyped and prejudiced. Constitutional morality does not permit such discrimination and must supersede cultural morality. In his concurring judgment, Justice Dr. D.Y.Chandrachud (as His Lordship then was) held and declared as follows:

618.1. Section 377 of the Penal Code, insofar as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional;

618.2. Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;

618.3. The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation;

618.4. Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law; and

618.5. The decision in *Koushal [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1]* stands overruled.

31.11. Amongst others and relevant for the present discourse, it has been held and declared that members of the LGBT community including transgenders are entitled as all other citizens are to the full range of constitutional rights including the liberties protected by the Constitution. They are entitled to the benefit of equal citizenship without discrimination and to the equal protection of law.

32. Parliament enacted the Transgender Persons (Protection of Rights) Act, 2019 (briefly, 'the Transgender Persons Act' hereinafter) to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto. It was

published in the Gazette of India Extraordinary on 05.12.2019.

32.1. Section 2(d) defines “*inclusive education*” to mean as a system of education wherein transgender students learn together with other students without fear of discrimination, neglect, harassment or intimidation and the system of teaching and learning is suitably adapted to meet the learning needs of such students.

32.2. A “transgender person” has been defined in Section 2(k) meaning a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as *kinner*, *hijra*, *aravani* and *jogta*.

32.3. Section 3 prohibits discrimination against a transgender person. It says that no person or

establishment shall discriminate against a transgender person on any of the following grounds – a) denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof; b) unfair treatment in, or in relation to, employment or occupation; c) denial of, or termination from, employment or occupation; d) denial or discontinuation of, or unfair treatment in, healthcare services; e) denial or discontinuation of, or unfair treatment with regard to, access to, or provision for enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public; f) denial or discontinuation of, or unfair treatment with regard to the right of movement; g) denial or discontinuation of, or unfair treatment with regard to the right to reside, purchase, rent, or otherwise occupy any property; h) denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; and i) denial of access to, removal from, or

unfair treatment in government or private establishment in whose care or custody a transgender person may be.

32.4. Section 4 acknowledges the right of a transgender person to be recognized as such in accordance with the provisions of the Transgender Persons Act. Sub-section (2) of Section 4 makes it abundantly clear that a person recognized as transgender under sub-section (1) shall have a right to self-perceived gender identity.

32.5. Sections 5 and 6 deal with certificate of identity of a transgender person. While Section 5 provides for making of an application by a transgender person to the District Magistrate for issuing a certificate of identify, Section 6 requires the District Magistrate to issue such certificate after following the procedure and in the manner as may be prescribed. In the said certificate, the gender of the certificate holder should be indicated as “transgender”, which shall be recorded in all official documents. Sub-section (3) of Section 6 clarifies that a certificate of identity issued to a transgender person by the District Magistrate

shall confer rights and be a proof of recognition of his identity as a transgender person.

32.6. Section 7 deals with change in gender. As per sub-section (1), if after the issue of a certificate under sub-section (1) of Section 6, a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for a revised certificate, in such form and manner as may be prescribed. Under sub-section (2), the District Magistrate, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the corrections of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed. Sub-section (3) clarifies that the person who has been issued a certificate of identity under Section 6 or a revised

certificate under sub-section (2) shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person.

32.7. Section 8 deals with obligation of appropriate Government to take welfare measures for transgender persons. As per sub-section (1), the appropriate Government shall take steps to secure full and effective participation of transgender persons and their inclusion in society. Sub-section (2) provides that the appropriate Government shall take such welfare measures as may be prescribed to protect the rights and interests of transgender persons and to facilitate their access to welfare schemes framed by that Government. Under sub-section (3) of Section 8, the appropriate Government shall formulate welfare schemes and programmes which are transgender sensitive, non-stigmatising and non-discriminatory. Further, as per sub-section (4), the appropriate Government shall take steps for the rescue, protection and rehabilitation of transgender persons to address the needs of such persons. Sub-section (5)

mandates the appropriate Government to take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities.

32.8. Section 9 makes it clear that no establishment shall discriminate against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues.

32.9. Under Section 11, every establishment shall designate a person to be a complaint officer to deal with the complaints relating to violation of the provisions of the Transgender Persons Act.

32.10. Section 12 deals with right of residence. As per sub-section (1), no child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such child. As per sub-section (2), every transgender person shall have – a) a right to reside in the household where parent or immediate family members reside; b) a

right not to be excluded from such household or any part thereof; and c) a right to enjoy and use the facilities of such household in a non-discriminatory manner. Sub-section (3) provides that where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre.

32.11. Section 13 requires every educational institution funded or recognized by the appropriate Government to provide inclusive education and opportunities for sports, recreation and leisure activities to transgender persons without discrimination on an equal basis with others.

32.12. As per Section 14, the appropriate Government shall formulate welfare schemes and programmes to facilitate and support livelihood for transgender persons including their vocational training and self-employment.

32.13. Under Section 15, the appropriate Government shall take various measures in relation to transgender persons including facilitating access to hospitals and

other healthcare institutions and centres, to provide for coverage of medical expenses by a comprehensive insurance scheme for Sex Reassignment Surgery, hormonal therapy, laser therapy or any other health issues of transgender persons.

32.14. That apart, the Central Government in terms of Section 16 is required to constitute a National Council for Transgender Persons which shall have the Union Minister of the Ministry of Social Justice and Empowerment as the *ex officio* Chairperson.

32.15. Section 18 deals with offences and penalties. It says that whoever –

(a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by the Government;

(b) denies a transgender person the right of passage to a public place or obstructs such person from using or

having access to a public place to which other members have access to or a right to use;

(c) forces or causes a transgender person to leave household, village or other place of residence;

(d) harms or injures or endangers the life, safety, health or wellbeing whether mental or physical of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;

Shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

33. In exercise of the powers conferred by Section 22 of the Transgender Persons Act and following the procedure laid down therein, Central Government has made the Transgender Persons (Protection of Rights) Rules, 2020 (briefly, 'the Transgender Persons Rules' hereinafter).

33.1. Rule 2(i) defines "medical intervention" to include any gender affirming medical intervention undertaken by

an individual to facilitate the transition to their self-identified gender, including but not limited to counselling, hormonal therapy, and surgical intervention, if any.

33.2. Rules 3 to 7 deal with application for issue of certificate of identity and the procedure for issuance of such certificate.

33.3. In case of rejection of application for issuing a certificate of identity, the District Magistrate under Rule 8 is required to inform the applicant the reason or reasons for such rejection within thirty days. However, the District Magistrate has the power to review the decision of rejection based on the reply submitted by the applicant on the reason for rejection.

33.4. However, under Rule 9, against an order of rejection of application for the certificate of identity, the applicant has the right to file an appeal before the appellate authority within a period of ninety days from the date of intimation of the rejection of the application.

33.5. Rule 10 is crucial. It deals with welfare measures, education, social security and health of transgender persons by appropriate Government. Sub-rule (1) mandates the appropriate Government to constitute a welfare board for the transgender persons for the purpose of protecting their rights and interests and facilitating access to schemes and welfare measures framed by the Government. Sub-rule (2) of Rule 10 provides that the appropriate Government shall review all existing educational, social security, health schemes, welfare measures, vocational training and self-employment schemes to include transgender persons to protect their rights and interests and to facilitate their access to such schemes and welfare measures framed by the Government. As per sub-rule (3), the appropriate Government shall formulate educational, social security, health schemes and welfare schemes and programmes in a manner which is transgender sensitive, non-stigmatising and non-discriminatory to transgender persons. Sub-rule (4) says that the appropriate Government shall take

adequate steps to prohibit discrimination in any Government or private organisation, or private and public educational institution under their purview and ensure equitable access to social and public spaces. The appropriate Government under sub-rule (5) is under a mandate to create institutional and infrastructure facilities, including but not limited to rehabilitation centre, separate wards in hospitals and washrooms in the establishment within two years from the date of coming into force of the rules to protect the rights of transgender persons. That apart, the appropriate Government is required to carry out an awareness campaign to educate, communicate and train transgender persons to avail themselves of the benefits of welfare schemes etc., besides providing for sensitisation of various establishments including sensitisation of teachers and faculty members in educational institutions to foster respect for equality and gender diversity as well as sensitization of healthcare professionals etc. Very importantly, as per sub-rule (8) of Rule 10, all educational institutions shall have a

committee which shall be accessible for transgender persons in case of any harassment or discrimination. Under sub-rule (9) of Rule 10, the appropriate Government shall create institutional and infrastructure facilities including but not limited to temporary shelters, short-stay homes and accommodation, choice of male, female or separate wards in hospitals and washrooms in the establishment within two years of coming into force of these rules.

32.6. While sub-rule (11) requires the appropriate Government to take adequate steps to prohibit discrimination in any Government or private organisation or establishment including in the areas of education, employment, healthcare, public transportation, participation in public life, sports, leisure and recreation and opportunity to hold public or private office, the appropriate Government is required to formulate a comprehensive policy on the measures and procedures necessary to protect transgender persons in accordance with the provisions of the Transgender Persons Act. Such

a policy shall include preventive administrative and police measures to protect vulnerable transgender communities. The appropriate Government shall be responsible for supervision of timely prosecution of individuals charged under Section 18 of the Transgender Persons Act or under any other law for similar offences committed against transgender persons. Besides that, under Rule 11(5), every State Government shall set up a Transgender Protection Cell under the charge of the District Magistrate in each District and under the Director General of Police in the State to monitor cases of offences against transgender persons and to ensure timely registration, investigation and prosecution of such offences.

33.7. Under Rule 12(1), every establishment shall implement all measures for providing a safe working environment and to ensure that no transgender person is discriminated in any matter relating to employment etc.

33.8. Rule 13 requires the appropriate Government to ensure that every establishment designates a complaint

officer in accordance with Section 11 to enquire into complaints received.

34. Annexure II to the Transgender Persons Rules contains a list of welfare measures to be considered. It includes access to health, access to education including providing scholarship for transgender students; access to housing including providing affordable housing, shelters and community centres for at risk transgender youths providing nutritious food and counselling etc, welfare measures and economic support.

35. After enactment of the Transgender Persons Act and the Transgender Persons Rules, Government of Telangana in the Department for Women, Children, Disabled and Senior Citizens issued G.O.Ms.No.21 dated 19.08.2022. Vide the said G.O.Ms.No.21 proposal submitted by the Director, Welfare of Disabled and Senior Citizens for constitution of State Welfare Board for transgender persons for protecting the rights and interests of transgender persons in terms of Rule 10(1) of the

Transgender Persons Rules was accepted. Whereafter, the State Welfare Board has been constituted which we have noted in our order dated 19.10.2022. While the said G.O.Ms.No.21 has laid down the functions of the Board, the tenure of the Board has been made for two years with the caveat that it would meet once in six months to advise the State Government on effective implementation of the Transgender Protection Act and to perform such other functions in relation to transgender persons. We have also noted the action plan prepared by the Government of Telangana for implementation of various welfare activities for transgenders for the year 2022-23.

36. While we appreciate constitution of the State Welfare Board and drawing up of action plan, what is required is that the State Welfare Board should take pro-active steps for betterment of the transgender population and to ensure implementation not only of the action plan but also the provisions of the Transgender Persons Act and the Transgender Persons Rules. We also feel that having regard to the mandate of the Legal Services Authority Act,

1987, the State should also involve the legal services authorities while implementing various provisions of the Transgender Persons Act and the Transgender Persons Rules as well as the action plan. Involvement of legal services authorities to implement the aforesaid provisions would go a long way in providing access to justice for the transgender persons. There are many transgender persons in the society and to expect all of them to approach the district magistrate or the revenue divisional officer for a certificate of identity would be wholly unrealistic. In situation such as this, legal services authorities certainly have a role to play. Instead of asking the transgender persons to approach the authorities for certificate of identity or for various other welfare measures, proactive steps should be taken to reach out to the members of the transgender community considering their vulnerability.

37. We further notice that notwithstanding the direction of the Supreme Court in **NALSA** (supra) for providing affirmative action to persons belonging to the transgender community as socially and educationally backward class

no such steps have been taken either by the Central Government or by the State Government even though more than nine years have elapsed since delivery of the aforesaid judgment.

38. We are therefore of the view that till proper legislation is brought in place, the State Government as well as the Central Government may issue administrative instructions providing for reservation to persons belonging to the transgender community in public employment as well as in educational institutions. This would go a long way in bringing the transgender community into the mainstream fold.

39. We may mention that Government of Telangana in the Panchayat Raj and Rural Development Department had issued G.O.Ms.No.17 dated 05.11.2014 whereby Government of Telangana as a part of its social safety need strategy introduced the Aasara Pension Scheme with a view to ensure secured life with dignity for poor persons. The object of the scheme is to protect the most vulnerable

sections of society in particular “the old and the disabled” people having HIV/AIDS, widows, incapacitated weavers and toddy tappers who have lost their means of livelihood with growing age and in order to support their day-to-day minimum needs to lead a life with dignity and social security. Government noted that in the past social security pensions provided were meagre and barely sufficient to cover the basic minimum requirements of the needy. With a view to combat the ever increasing cost of living and inflation, the Government introduced the scheme called “Aasara Pensions” to provide financial benefit to all the above categories particularly those who are most needy. The scheme was made effective from 01.10.2014 and initially the following categories were made eligible for Aasara Pension Scheme:

- | | |
|--------------------|---------------------------|
| (1) old age; | (2) widow; |
| (3) disabled; | (4) weavers; |
| (5) toddy toppers; | (6) persons with HIV/AIDS |

39.1. The scheme provides for grant of monthly pension of Rs.1,000/- per month except for the disabled in which case it was made Rs.1,500/-.

40. In the affidavit filed by the Secretary to the Government of Telangana, Panchayat Raj and Rural Development Department on 14.10.2022, it is stated that after formation of Telangana State, Government of Telangana had launched Aasara Pension Scheme vide G.O.Ms.No.17 dated 05.11.2014 wherein detailed guidelines have been framed for implementation of the said scheme in the State of Telangana. Society for Elimination of Rural Poverty is the nodal agency for implementation of the scheme. As per the affidavit, the following categories are covered under Aasara Pension Scheme:

1. Old Age Pensions
2. Widow Pensions
3. Disabled Pensions
4. Weavers Pensions
5. Toddy Tappers Pensions
6. Filaria Pensions
7. HIV Pensions
8. Financial Assistance to Beedi Workers
9. Financial Assistance to Single Women
10. Dialysis Patients.

40.1. In the said affidavit, it has been submitted that transgender persons are eligible for sanction of pension under the Aasara Pension Scheme provided they fall within any of the eligible categories mentioned above.

41. We are afraid the State has not appreciated the judgments of the Supreme Court and different High Courts as well as proceedings of this Court in the correct perspective. If widows, disabled persons, beedi workers, single woman, HIV persons etc., are entitled to the benefit under the Aasara Pension Scheme as a class, we fail to understand as to why and how transgender persons can be excluded from such benefits as a class. As we have discussed above, transgender community is one of the most deprived, neglected and discriminated against communities in the State and in the country. They have been held to be belonging to socially and economically backward class. They fulfil eligibility requirement under the Aasara Pension Scheme. We are, therefore, of the view that benefit of G.O.Ms.No.17 dated 05.11.2014 as

amended from time to time should be made available to the members belonging to the transgender community.

42. This brings us to the Telangana Eunuchs Act, 1329 Fasli. Earlier it was called the Andhra Pradesh (Telangana Area) Eunuchs Act, 1329 Fasli. Following reorganisation of the combined State of Andhra Pradesh into the States of Telangana and Andhra Pradesh following the Andhra Pradesh Reorganisation Act, 2014, the aforesaid Act came to be known as ‘Telangana Eunuchs Act, 1329 Fasli’.

42.1. Section 1-A defines the word ‘eunuch’. It says that the word ‘eunuch’ shall for the purpose of the Act include all persons of the male sex who admit to be impotent or who clearly appear to be impotent on medical inspection. This definition of eunuch is not only repugnant to the definition of transgender person under Section 2(k) of the Transgender Persons Act but also opposed to the interpretation given by the Supreme Court to the word ‘transgender’ in **NALSA** (supra) and subsequent judgments.

42.2. As per Section 2, the Government shall cause a register to be kept of the names and place of residence of eunuchs residing in the city of Hyderabad. A person who may feel aggrieved by an entry made or proposed to be made in the aforesaid register, may lodge a complaint before the registering authority either when the register is first made or subsequently. Upon lodging of such complaint, the aforesaid officer shall either enter, remove or retain the name of such person in the register as he thinks fit. However, every order for removal of the name of such person from the register shall contain the grounds of the removal thereof. The concerned District Magistrate has been conferred the power to review such an order.

42.3. As per Section 4, every registered eunuch found in female dress or ornamented in a street or a public place or in any place with the intention of being seen from a street or public place or who dances or plays music or takes part in any public entertainment in a street or public place may be arrested without warrant and shall be punished

with imprisonment for a term which may extend to two years or with fine or with both.

42.4. Section 5 provides that any registered eunuch who has with him or in his house or under his control a boy of less than sixteen years of age shall be punished with imprisonment for a term which may extend to two years or with fine or with both. In such an event, the District Magistrate has been empowered to direct that such a boy be delivered to his parents or guardian, if they can be discovered and if they are not eunuchs; if they cannot be discovered or the parents or guardian are eunuchs, the Magistrate may make such arrangement as he thinks necessary for the maintenance, education of such boy and may direct that the whole or any part of a fine inflicted under Section 5 may be applied for such arrangement.

42.5. Section 7 provides for penalty for emasculation or abetting thereof. It says that any person who emasculates himself or any other person with or without his consent or abets in emasculation shall be punished with

imprisonment for a term which may extend to seven years and shall also be liable to fine.

43. It may be mentioned that the colonial British Government had enacted the Criminal Tribes Act, 1871 for registration of criminal tribes and eunuchs. The preamble to the said Act states that it was expedient to provide for registration, surveillance and control of certain criminal tribes and eunuchs.

43.1. Thus, from the preamble itself, it is seen that the said Act had grouped together certain tribes declared as criminal tribes and eunuchs under a single classification. Therefore, the Act proceeded on the assumption that eunuchs as a class were criminal. As per Section 2, if the local government had reason to believe that any tribe, gang or class of persons was addicted to the systematic commission of non-bailable offences, it would report the case to the Governor General in Council requesting his permission to declare such tribe, gang or class to be a criminal tribe.

43.2. Section 3 mandated furnishing of reasons in the report as to why such tribe, gang or class was considered to be addicted to the systematic commission of non-bailable offences etc. While rest of the provisions provide for the procedure to deal with such tribe, gang or class declared as criminal tribes, it is Part II of the said Act which has relevance to the present discourse.

43.3. Part II comprising of Sections 24 to 31 deal with eunuchs. Section 24 provided for maintenance of a register containing the names and residences of all eunuchs residing in any town or place who were reasonably suspected of kidnapping or castrating children or committing offences under Section 377 IPC or abetting the commission of any of the said offences. A register of property of such registered eunuchs were also required to be maintained. The term 'eunuch' was defined for the purpose of the Criminal Tribes Act, 1871 to include all persons of the male sex who admitted themselves or on medical inspection clearly appeared to be impotent.

43.4. Section 25 provides for lodging of complaint by a person on his name being entered in the register of eunuchs. The officer entertaining such a complaint could enter such person's name or erase it or retain it, as he deemed fit. However, every order for eraser of such person's name should state the grounds for such erasement.

43.5. Section 26 penalised any registered eunuch who appeared dressed or ornamented like a woman in a public street or place, or in any other place with the intention of being seen from a public street or place or who danced or played music or took part in any public exhibition in a public street or place or for hire in a private house. Such a eunuch could be arrested without warrant and punished with imprisonment of either description for a term which could extend to two years or with fine or with both.

43.6. Section 27 imposed penalty on a registered eunuch who had in his charge or kept in his house or under his control any boy who had not completed the age of sixteen

years. The penalty prescribed was imprisonment for a term which could extend to two years or with fine or with both.

43.7. Section 28 mandated the jurisdictional magistrate to return such boy to the parents or guardian, if they could be discovered. However, if they could not be discovered, the magistrate was required to make such arrangements as he thought necessary for the maintenance and education of such boy, in which event the whole or any part of the fine inflicted under Section 27 would be employed in defraying the cost of such arrangements.

43.8. As per Section 29, no registered eunuch was capable of or being or acting as guardian to any minor; or of making a gift; or of making a will, or of adopting a son. Power to require information as to register a eunuch's property was provided in Section 30. Any officer authorised by the local government in this behalf could direct any eunuch so required to furnish information as to the property whether movable property or immovable

property which he possessed or entitled or which was held by him. If any eunuch intentionally omitted to furnish such information or furnished information which he had reason to believe to be false was deemed to have committed an offence under Section 176 IPC or under 177 IPC.

44. Pausing here for a moment, we find that provisions of the Telangana Eunuchs Act, 1329 Fasli are almost in *pari materia* to the provisions contained in Part II of the Criminal Tribes Act, 1871 comprising Sections 24 to 31 which we have discussed.

45. After India became independent, a high level committee was constituted to examine the Criminal Tribes Act, 1871, as amended from time to time. Following its recommendations, the Criminal Tribes Act, 1871 was repealed in 1952. It was one of the most draconian laws enacted by the colonial Government. Under the aforesaid law, people belonging to various tribes were declared as criminal tribes and were put under continuous

surveillance. We have already noticed above that eunuchs were categorised with such tribes declared as criminal tribes. Such an enactment was not only arbitrary but had stigmatised entire communities including the eunuchs as criminals. Once a tribe was declared as a criminal tribe or in case of eunuch, they were presumed to be criminal and police had the power of surveillance over them, to arrest them and to monitor their day-to-day lives.

46. Supreme Court in **NALSA** (supra) observed that during the British rule, a legislation was enacted to supervise the hijras/transgender community called the Criminal Tribes Act, 1871 which deemed the entire community of hijra persons as innately 'criminal' and addicted to the systematic commission of non-bailable offences. Supreme Court held as under:

18. 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 *hijra* 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 penalised 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 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. The Act has, however, been repealed in August 1949.

46.1. In his concurring judgment, Justice Sikri also referred to the Criminal Tribes Act, 1871 as follows:

116.1. Though in the past TGs in India were 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 hijra persons as innately “criminal” and “adapted to the systematic commission of non-bailable offences”. This dogmatism and indoctrination of the 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 the British Regime with the vicious and savage mind-set. To add insult to the irreparable injury caused, Section 377 of the Penal Code was misused and abused as there was a tendency, in the 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.

47. On a comparative analysis, it is evident that Telangana Eunuchs Act, 1329 Fasli is *pari materia* to Part II of the Criminal Tribes Act, 1871. While Criminal Tribes Act, 1871 as amended from time to time, has been repealed by the Central Government, the Telangana Eunuchs Act, 1329 Fasli continues to remain in the statute book though this Court vide the order dated 18.09.2018 had stayed its implementation.

48. Following the law laid down by the Supreme Court in **NALSA** (supra) and in subsequent judgments in **Puttaswamy** (supra) and **Navtej Singh Johar** (supra), there can be no iota of doubt that such an enactment is anathema to our constitutional philosophy as explained by the Supreme Court in the above judgments. This is not only arbitrary and unreasonable but is also manifestly arbitrary in as much as it criminalises the entire community of eunuchs.

49. This legislation is violative of the human rights of the third gender community besides it is an intrusion into their private sphere as well as an assault on their dignity. It is thus offensive of both the right to privacy and the right to dignity of transgender persons. It is not only violative of Article 14 but is also clearly violative of Article 21 of the Constitutional of India. Such an enactment can no longer continue to find a place in our statute book. It is accordingly declared as unconstitutional.

50. In **NALSA** (supra), Supreme Court had issued a series of directions besides declaring that hijras/eunuchs etc. be

declared and treated as third gender. Supreme Court had directed the Central and State Governments to treat persons belonging to the third gender as socially and educationally backward class of citizens and to extend all kinds of reservation in cases of admission to educational institutions and in appointments. Though Parliament had enacted the Transgender Persons Act whereafter the Central Government has framed the Transgender Persons Rules, no reservation has been provided for to the transgender community in matters of admission to educational institutions and for recruitment to public services. It is high time steps are taken in this regard.

51. We are therefore of the view that till the Telangana Legislative Assembly enacts any law providing for such reservation, State of Telangana may issue necessary Government orders/administrative instructions providing for such reservation to persons belonging to transgender community in respect of admission to educational institutions and in recruitment to public services.

52. Having regard to the discussions made above, we feel that the State Welfare Board for transgender persons should be made a permanent body though the Members may have a tenure of two years. It shall be the duty of the said Board to monitor various steps taken by the State Government for implementation of the directions of the Supreme Court in **NALSA** (supra) as well as the steps taken by the State Government for upliftment of persons belonging to the transgender community. It should also oversee the proper implementation of the Transgender Persons Act and the Transgender Persons Rules. We feel that having regard to the mandate of such a Board, it would be useful to involve Telangana State Legal Services Authority in its functioning. We are therefore of the view that the State Government should co-opt the Member Secretary of Telangana State Legal Services Authority as a Member of the State Welfare Board for transgender persons.

53. Summing up our discussions, we issue the following directions:

(1) The Telangana Eunuchs Act, 1329 Fasli is declared as *ultra vires* the Constitution of India and accordingly is struck down as unconstitutional;

(2) The benefits of Aasara Pension Scheme introduced by the Government of Telangana vide the G.O.Ms.No.17 dated 05.1.2014 shall be extended to the transgender persons as a class;

(3) State of Telangana is directed to issue government orders/administrative instructions providing for reservation to persons belonging to the transgender community in matters of admission into educational institutions and recruitment to Government and public services;

(4) State Welfare Board for transgender persons, Telangana State shall co-opt Member Secretary, Telangana State Legal Services Authority as one of its members. It shall be a permanent body though individual members may have a limited tenure; and

(5) State Welfare Board for transgender persons, Telangana State shall monitor the various steps taken by

the Government of Telangana for upliftment of the transgender community including the proper and effective implementation of the Transgender Persons (Protection of Rights) Act, 2019 and the Transgender Persons (Protection of Rights) Rules, 2020.

54. With the above directions, all the three public interest litigations are disposed of.

Miscellaneous applications, if any pending, shall stand closed.

UJJAL BHUYAN, CJ

C.V.BHASKAR REDDY, J

06.07.2023

Note: LR copy be marked.

By order

Pln