

(2022) 08 PAT CK 0031

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 5627 Of 2020

Veera Yada

APPELLANT

Vs

Chief Secretary, Government Of Bihar

RESPONDENT

Date of Decision : 17-08-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 15, 15(2), 15(3), 15(4), 16, 16(2), 16(4), 19, 21, 51

Transgender Persons (Protection of Rights) Rules, 2020 — Rule 7

Indian Penal Code, 1860 — Section 377

Transgender Persons (Protection of Rights) Act, 2019 — Section 2, 8, 10, 22

Citation : (2022) 08 PAT CK 0031

Hon'ble Judges : Sanjay Karol, CJ;S. Kumar, J

Bench : Division Bench

Advocate : Akash Keshav, Deepak Kumar, Dr. K. N. Singh, Ratnesh Kumar, Lalit Kishore, Ajay, Pratik Kr. Sinha, Sanjay Pandey, Binod Kr. Mishra, Vivek Anand Amritesh

Final Decision : Disposed Of

Judgement

1. Following questions arise for consideration:-

(i) What is the nature of the duty cast upon the State to assimilate the members of the transgender community into the main stream of society and, reduce progressively, and eliminate discrimination against such a community?

(ii) Does not the State owe positive duty to create avenues of employment for transgender persons in a manner that they are enabled in becoming, in true sense citizens of the country as recognized by the Constitution?

2. The present writ petition highlights the extremely difficult conditions faced by the transgender community within the State of Bihar during the period of the Pandemic (COVID-19). The Petitioner drew our attention to various incidents such as denial of rations to certain persons belonging to the Transgender Community as also asking the Government to provide 25kg rations to all

members of such community; monetary assistance of Rs. 5000/-; Rs. 2000/- for rent for a period of at least six months; set up of a speedy grievance redressal system; and establish facilitation centre; etc.

3. This Court, appreciating effort taken to highlight the sorry condition in which people of the transgender community (hereinafter referred to as TGC), were living within the State of Bihar, vide order dated 01.05.2020 noted that as per the 2011 census more than 40 thousand people, of TGC living within the State were facing certain issues. Reference was made to the Transgender Persons (Protection of Rights) Act, 2019 (hereinafter referred to as the Act) to underline the responsibility of the State to undertake welfare measures for people of the community. Relevant portion of the order dated 01.05.2020 is quoted hereunder:-

"The Transgender Persons (Protection of Rights) Act, 2019 (hereinafter referred to as 'the Act') was enacted to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto.

As per the Act, no person or establishment shall discriminate against a transgender in the matter of education, employment, occupation, health, enjoyment of goods, accommodation, services, facilities etc. In fact, by virtue of the provisions contained in Chapter III thereof, identity of the transgender persons stands recognized with a right to have proper record maintained by the authorities. Section 8 mandates the appropriate authority, which in the instant case, as per definition (Section 2) would be the State, is required to take certain welfare measures. For ready reference Section 8 reads as under:-

"8. (1) The appropriate Government shall take steps to secure full and effective participation of transgender persons and their inclusion in society.

(2) The appropriate Government shall take such welfare measures as may be prescribed to protect the rights and interests of transgender persons, and facilitate their access to welfare schemes framed by that Government.

(3) The appropriate Government shall formulate welfare schemes and programmes which are transgender sensitive, nonstigmatising and non-discriminatory.

(4) The appropriate Government shall take steps for the rescue, protection and rehabilitation of transgender persons to address the needs of such persons.

(5) The appropriate Government shall take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities."

...

Also the State shall consider providing a Facilitation Centre a one Point Centre dealing with all problems- for the members of the community at the grass root level, which can be similar to the Anganwari system prevalent in the State of

Bihar.”

4. Further, vide order dated 27.08.2020, the Principal Secretary, Social Welfare Department, Government of Bihar, as well as Government of India were directed to file an affidavit with respect to compliance of the provisions of the Act as also the directions issued by Hon’ble the Apex Court in National

Legal Services Authority v. Union of India, (2014) 5 SCC 438 and in particular para 135 thereof which reads as under:-

“135. We, therefore, declare:

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 serosurveillance 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 TGs 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 TGs 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.”

5. Pursuant to the said order, the affidavit filed by the Ministry of Social Justice and Empowerment, Government of India, indicated a Helpline number to which

Dr. K. N. Singh, learned Additional Solicitor General, placed a call to verify the functionality as also enquire about the nature of calls being received. It was noted that psychological hardship and financial problems were the main topic upon which help was being sought and so this Court requested that the matter of economic assistance to the TGC to be taken up with the Government in the following terms:-

"We only request Sri Anjani Kumar, learned AAG IV, to take up the matter with the Government for enhancing the economic support to the members of the community who, at this point in time, are suffering acute hardship, more so on account of the nature of activity to which they are engaged. For economic sustenance, noticeably at this point of time, the Government is extending financial support to Rs.1500/- per person, perhaps, which amount should be increased considering the total members of the transgender community in Bihar not more than 40,000."

6. Vide order dated 21.09.2020, this Court noticed that ration was now being distributed, as prayed for, without the requirement of furnishing ration card as also the efforts taken by the Government to establish facilitation centre at the District level with which two members of the community would be associated, thereby also providing employment as an incidental benefit to the larger positive effect the centres would have on the population of TGC. A tabular chart was filed by respondent-State placing on record the steps taken by the State in realizing the statutory obligations as noted in earlier orders. The tabular chart is reproduced hereinbelow for reference:-

S.No.

Direction of the Hon'ble Court passed in NLSA Vs UoI Case

Steps taken by the State in the Compliance of the Case

Status

1.

Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State

Legislature.

GAD resolution number 12722 dated

12.09.2014 declares Hijras, Eunuchs and those apart from binary gender as "third gender".

Complied

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

GAD resolution number 12722 dated

12.09.2014 declares Hijras, Eunuchs and those apart from binary gender as "third gender".

Complied

3.

We direct the Centre and the State Governments to take steps to treat them socially and

educationally backward classes of citizens and extend all kinds of reservation in cases of admission in

educational institutions and for public appointments.

GAD resolution number 12722 dated

12.09.2014 declares "third gender" shall get the beneficial treatment as backward class in cases of admission in Universities and for appointments to State Governments services. District Council, Municipal Council, semi-government services

and public enterprises.

Complied

4.

Centre and State Governments are directed to operate separate HIV Sero - surveillance Centre since Hijras/Transgender face

several sexual health issues.

Letter No. 501 dated 27.02.2019 sent from SWD to Health Dept. about proposal outline prepared regarding.

(i) to operate separate HIV Sero - surveillance Centres since Hijras/ Transgender face several sexual health issues.

(ii) To address several psychological problems faced by Transgender.

(iii) To provide proper measure for medical care to Trans- gender.

In continuation of earlier letters sent to Health Dept. through letter 123 dated

17.01.2018, letter 889

dated 17.04.2018,
letter 56 dated
08.01.2019 and letter
852 dated 15.05.2020
requesting compliance.

>> Sensitization and awareness training of the plight of such persons has been done in SWD through meeting and Video Conferencing for all officials/ workforce of SWD and its 4 directorates (DSW, ICDS, DSS, DDE) as

well as State Disability Commission office. For remaining State government officials and other officers a letter No. 1352 dated 21.05.2019 from

SWD has been sent.

Partly complied, remaining under process

5.

Centre and State Governments should seriously address the problems being faced by Hijras/ Transgender such as fear, shame, gender dysphasia, social pressure, depression, suicidal tendencies, social stigma, etc and any insistence for SRS for declaring one's gender is immoral and

illegal.

6.

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

7.

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

Bihar Rajya Kalyan Board Rules, 2015

(notification 1378

dated 22.07.2015) covers this. According to the decision taken in Bihar Kalyan Board meeting dated 21.03.2018 for the purposes of

recommendations and suggestions for transgender welfare, two committees have been formed by SWD order 1320 dated

08.06.2018. viz (i)

Executive Committee and (ii) Advisory Committee.

Complied ongoing.

8.

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

Sensitization and awareness training of the plight of such persons in the light of the observations contained in WP (Criminal) 76/2016 (before Hon'ble Supreme Court) has been done in SWD through meeting and Video Conferencing for all

officials/workforce of SWD and its 4 directorates (DSW, ICDS, DSS, DDE) as

well as State Disability Commission office.

For remaining State government officials and other officers a letter No. 1352 dated 21.05.2019 from

SWD has been sent. For Police Officials :

>>Letter no. 2385

dated 02.05.2019

from Deputy Inspector General of Police (Personnel) sent to SWD annexing copy of Letter no. 5811/400655/X.L.

dated 10.12.2018

which was sent by Inspector General of Police (Provision) to apar Police Mahanideshak (aparadh anusandhan dept), all Prashetriya Police Mahanirikshak,, all Shetriya Police Up- mahanirikshak, all variya police adhikshak, all variya police adhikshak (Rail Sahit) requesting them to ensure compliance with the SC directions in WP(Criminal) 76/2016.

Complied ongoing.

9.

Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

GAD resolution number 12722 dated

12.09.2014 declares 'third gender" shall get the beneficial treatment as backward class in cases of admission in Universities and for appointments to State Government services, District Council, Municipal Council, semi government services and public enterprises.

<< Sensitization and awareness training of the plight such persons has been conducted as stated above.

Complied ongoing.

10.

An Expert Committee has already been constituted to make an in-depth study of the problems faced by the Transgender community and suggest measures that can be taken by the Government to

ameliorate their problems and to submit its report with recommendations within three months of its constitution .

Let the

recommendations be examined based on the legal declaration made in this Judgment and implemented within six months.

Steps taken as above.

Reply from SWD to Ministry of Social Justice and

Empowerment, UOI by Gyapank 1789

dated 05.07.2019 to Letter F.No. P. 13011/7(3)/2019-DP- III dated 03.06.2019

from GOI. [This letter also referred to D.O. No. 17-08-2013-DP-II

(Vol. II) dated 21.07.2014 sent from the Ministry of Social Justice and

Empowerment to all CS which provides in its 'Annexure II' a summary of conclusions and recommendations of the Expert

Committee.

State part complied, rest on going

7. Certain other points which required further attention were noted and a supplementary affidavit indicating the degree of fulfillment was directed to be filed. The same reads as under:-

"i. Evidently, the proposal for setting up of a separate HIV Surveillance Centre has yet not been established.

ii. As per the decision taken in the meeting dated 21.03.2018 by the Bihar Kalyan Board established under the Bihar Rajya Kalyan Board Rules, 2015 two committees were formed for making recommendations and giving suggestions for the welfare of the members of the community. What is its outcome is not known.

iii. The process of sensitization of the residents of the State of the plight and problem faced by the members of the transgender community is under process. But details thereof are not disclosed.

iv. What are the steps taken for affording reservation in the field of education or

services is not clear.”

8. One of the contentions put forth by the petitioner, by filing an Interlocutory Application No.02 of 2020, was with respect to employment of persons from TGC into the police force creating a separate unit. In supplementary counter affidavit filed on behalf of the Additional Chief Secretary, Home Department, Government of Bihar on 04.08.2021, it was contented by the State that, considering the low population as also the low level of education available to and availed by people of TGC, a separate unit is practical to be created termed as Special Unit (Transgender) at the District Level. An advertisement for such employment was issued. Perusing the copy of the advertisement placed on record, vide order dated 14.12.2020, this Court observed that ...

“The Advertisement in question, issued by the Central Selection Board of Constable, falls short of the Constitutional mandate.

From the Advertisement, it is not clear as to whether persons falling under the provisions of the Transgender Persons (Protection of Rights) Act, 2019 (hereinafter referred to as the Act) can even apply for the post or not. The Advertisement only specifies the gender of the applicants to be ‘male’ or ‘female’. Does it imply that the persons hailing from the Transgender Community are precluded from applying at all, or should not the authorities clarify that it shall also be open for such persons to apply?”...

...

Well, at this point, we need not go into the aspect of reservation, but prima facie what we find is that the persons belonging to the Transgender Community are

totally precluded from the process of applying for a post of a constable, much less, agitate their right of reservation.

We need not remind the State of the mandate of the Constitution as also the law laid down by Hon’ble the Apex Court, mandating the State to adopt a pro-active approach in pursuing the causes of persons with disabilities; and more so in the light of the Act.

We are hopeful that the State would adopt a sensitive approach and immediately take remedial measures and the last date to invite applications, for the members of the Transgender Community, shall be extended for such time and period, the State determines it to be feasible and appropriate.

Equally, State shall ensure giving wider publicity of the action taken to reach out to the members of such community, enabling them to apply for the post in question.

Till further orders, the process of finalization of the list of candidates to appear in the examination shall not be finalized by the Central Selection Board of Constable. However, the process of preparation may continue.

...

An affidavit filed by the State does indicate grant of benefit of reservation for certain posts, as a class to the Transgenders, in the category of OBC. If that were so, then how can such a benefit accorded, unless a person applies and not precluded from applying for the post.

It appears that either the officers are working at cross purposes; without co-ordination; or not adequately sensitized, both of law as also the welfare measures undertaken by the State."

9. Pursuant to the above quoted observations, the State Government appreciably with a notification dated 14th January, 2021 took a decision to implement reservation to the position of Constable/Sub-Inspector for people of TGC-one post per five hundred.

10. Vide order dated 03.02.2021, this Court took note of affidavit filed by Additional Chief Secretary, Government of Bihar, relevant portion of which is reproduced hereinunder:-

"3. It is further submitted that as stated above, the total population of transgender community in the State is very low i.e. 0.039% of total population of the State. Possibility of eligible candidate of transgender community for appointment of constable and sub inspector of Police would also very low. In above situation, it is considered practical to create a separate unit of Transgender Police Personnel named as Special Unit (Transgender) at the District Level under the District S.P. Initially, the structure of this unit will be 1-4(One officer-4 Constable/Havildar). As and when during the course of time the recruited number of transgender personnel increases, the number of units will be increased and converted into a squad strength comprising of 2-8, and subsequently into a platoon strength of 6-24."

(Emphasis supplied)

11. It was in the light of this affidavit, the process of selection by Central Selection Board of Constables was allowed to continue in terms of the advertisement. Keeping in view the reformative nature of this inclusive selection process, this Court suggested that the lowest possible application fee may be charged from applicants from the reserved category.

12. Vide order dated 09.03.2021, the Court noted that the issue to be considered is whether provisions of the Act would apply to people of TGC seeking appointment within the State. Such benefits stood accorded for recruitment of Constables/Inspectors. In addition to this, the Court suggested that benefit may also be extended to other Departments within the State considering the small population numbers as also have an overall positive impact on the community. The relevant portion of the order dated 09.03.2021 is quoted hereinunder:

"Perhaps, the limited issue which arises for consideration is as to whether benefit

of the provisions of the Transgender Persons (Protection of Rights) Act, 2019 would be applying to the transgenders for seeking appointment in the State of Bihar. We are informed that such benefit stands accorded for recruitment of Constables/Inspectors, Home Department. In fact, considering the total population of the transgender community in Bihar, which is 0.039% (Approximately 39,000 and odd), perhaps, the Government may consider conferring similar benefit with respect to other Departments.

A decision in the affirmative would not only uplift the lifestyle and education of the persons, but also going to be a correct step in bringing them into the mainstream. Perhaps, at this point in time, there may not be very many persons to be even eligible to apply. But then, such benefit would only inspire persons from such community to undertake education and to become eligible for appointment to such posts. May be, reservation on regular basis can be confined upto O.B.C. category for transgenders. But then, that is a decision which the Government has to take.”

13. The State is under constitutional as well as statutory obligation to protect the transgender community from the pervasive discrimination that they are facing. As citizens of India, they not only have all rights under the golden triangle of the Indian Constitution, i.e. Articles 14, 19 and 21, as recognized by Hon’ble the Supreme Court in National Legal Services Authority Judgment (supra), but also, such obligation imposed by an enactment of statute as well as International Instruments to which, India as a Nation is a signatory. Provisions which necessitate taking of steps for welfare of this community are reproduced hereinbelow for emphasis.

RELEVANT PROVISIONS

14. After the recognition of transgender persons by Hon’ble the Supreme Court in the celebrated National Legal Services Authority Judgment (supra), the Union Government has enacted certain laws for the welfare of this hitherto neglected community, the same are being reproduced for effect:-

The Transgender Persons(Protection of Rights) Act 2019.

15. The object and reasons of clause of this Act reads-

‘An Act to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto’.

16. Under Chapter IV of the Act titled as “Welfare Measures By Government”, the Government is obligated to initiate welfare measures for persons of the transgender community.

17. Section 8 obligates the appropriate Government to take steps to secure full and effective participation of transgender persons and their inclusion in society; (2) such welfare measures as may be prescribed to protect the rights and interests of transgender persons, and facilitate their access to welfare schemes

framed by that Government; (3) formulate welfare schemes and programmes which are transgender sensitive, non-stigmatising and non-discriminatory; (4) take steps for the rescue, protection and rehabilitation of transgender persons to address the needs of such persons; (5) take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities.

18. Under Section 22, the Government is empowered to make rules for carrying out the provisions of the Act.

19. The Transgender Persons (Protection of Rights) Rules were notified in 2020. Rule 7 thereof provides for Welfare measures, education, social security and health of transgender persons by appropriate Government; notifying the general category transgender persons in 'other backward classes' so as to enable them to avail the benefits of vertical reservation provided for the other backward classes; review all existing educational, social security and health schemes and welfare measures to include transgender persons so as to protect their rights and interests and facilitate their access to such schemes and welfare measures; formulate educational, social security and health schemes and welfare schemes and programmes in a manner so as to be transgender sensitive, non-stigmatising and non-discriminatory to transgender persons; review Acts, rules, regulations, codes, bye-laws, and such statutes for the rescue, protection and rehabilitation of transgender persons to address their needs; create facilities such as separate persons to participate in cultural activities; carry out awareness campaigns to enlighten and facilitate transgender persons to avail benefits of welfare schemes as well as to other stakeholders in developing appropriate change in behavior towards transgender persons.

20. In *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, Hon'ble the Supreme Court held as under:-

"181. The observation made in *Suresh Koushal* [*Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] that gays, lesbians, bisexuals and 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 being abridged by the existence of Section 377 in its present form is low does not impose a limitation upon this Court from protecting the fundamental rights of those who are so affected by the present Section 377 IPC.

182. The Constitution Framers could have never intended that the protection of fundamental rights was only for the majority population. If such had been the intention, then all provisions in Part III of the Constitution would have contained qualifying words such as "majority persons" or "majority citizens". Instead, the provisions have employed the words "any person" and "any citizen" making it manifest that the constitutional courts are under an obligation to protect the

fundamental rights of every single citizen without waiting for the catastrophic situation when the fundamental rights of the majority of citizens get violated.

183. Such a view is well supported on two counts, namely, one that the constitutional courts have to embody in their approach a telescopic vision wherein they inculcate the ability to be futuristic and do not procrastinate till the day when the number of citizens whose fundamental rights are affected and violated grow in figures. In the case at hand, whatever be the percentage of gays, lesbians, bisexuals and transgenders, this 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 these questions is in the affirmative, then the constitutional courts must not display an iota of doubt and must not hesitate in striking down such provision of law on the account of it being violative of the fundamental rights of certain citizens, however minuscule their percentage may be."

21. In National Legal Services Authority (supra), Hon'ble the Supreme Court held as under:-

"66. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognising that sex discrimination is a historical fact and needs to be addressed. The Constitution-makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalisations of binary genders. Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of "sex" under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression "sex" used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female.

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

discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services.

68. Articles 15(2) to (4) and Article 16(4) read with the directive principles of State policy and various international instruments to which India is a party, call for social equality, which TGs 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.

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

75. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In *Anuj Garg v. Hotel Assn. of India* [(2008) 3 SCC 1] (SCC p. 15, paras 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

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

81. Articles 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude hijras/transgenders from their ambit, but the Indian law on the whole recognise the paradigm of binary genders of male and female, based on one's biological sex. As already indicated, we cannot accept the Corbett Principle of "biological test", rather we prefer to follow the psyche of the person in determining sex and gender and prefer the "psychological test" instead of "biological test". Binary notion of gender reflects in the Penal Code, 1860 for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NREGA, 2005, etc. Non-recognition of the identity of hijras/transgenders in the various legislations denies them equal protection of law and they face widespread discrimination.

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

100. Speaking for the vision of our Founding Fathers, in *State of Karnataka v. Ranganatha Reddy* [(1977) 4 SCC 471 : AIR 1978 SC 215] , this Court speaking through Krishna Iyer, J. observed : (SCC p. 496, paras 44-45)

"44. The social philosophy of the Constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value system, and the debate in this case puts precisely this soul in peril.

45. ... Our thesis is that the dialectics of social justice should not be missed if the synthesis of Part III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socio-economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process of the new equity-loaded legality. A Judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties."

(emphasis in original)

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

106. The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set-up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognise the right of a human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspect of self-determination, dignity and freedom. In fact,

there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.”

OBLIGATION UNDER INTERNATIONAL LAW

22. In keeping with Article 51 of the Constitution of India which relates to fostering respect for international law and treaties, it is pertinent to mention in light of the expanded scope of the petition vide order dated 20.05.2020, that we must also obligations of the state under international law, which will serve as markers of the direction in which our efforts, collectively as institutions of a democracy, should proceed.

23. Article 4 (1) of the International Covenant for Civil and Political Rights to which India is a signatory, imposes an obligation upon the State, even in times of emergency, to not discriminate. The text of the Article is reproduced hereunder-

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

24. Article 26 of International Covenant for Civil and Political Rights reads as under:-

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

25. This has been echoed by Hon'ble the Apex Court in Navtej Singh Johar (supra).

26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights reads as under:-

“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

27. Article 11 of this Covenant recognizes that everyone has a right of an adequate standard of living, in the following terms-

“1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living

conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed..."

28. The UN Fact Sheet on 'International Human Rights Law and Sexual Orientation & Gender Identity' puts it succinctly and directly as-

"The equality and non-discrimination guarantee provided by international human rights law applies to all people, regardless of sex, sexual orientation and gender identity or "other status." There is no fine print, no hidden exemption clause, in any of our human rights treaties that might allow a State to guarantee full rights to some but withhold them from others purely on the basis of sexual orientation and gender identity."

29. From the holding and observations of Hon'ble the Supreme Court in the above judgments as also the statutory as well as the International obligations referred to above, the duty of the State cannot be given further emphasis to. As a welfare State, it is first and foremost responsibility of the State to ensure the well being of all citizens. In case of the transgender community, not only were the eyes of the State shut, but also the prejudices so engrained were continued without thought.

30. Significantly now, since the institution of this public interest litigation, the State has taken a number of appreciable steps which will/are having a positive impact on the community. It is hope which we hereby express, that the State will continue making efforts and breaking new ground in realization of all rights to the TGC as they are entitled under the Constitution of India.

31. Beneficial treatment to members of TGC stands granted in compliance of directions of the Hon'ble Supreme Court in National Legal Services Authority (supra) as per the chart reproduced above. However, systemic discrimination shall not be cured only by employment opportunities. Other than welfare measures directed at TGC, the State must take steps to root out discrimination from within the general public. That may include awareness, sensitization programmes; educational reforms, training for educators; etc.

32. Apart from the steps that already stands taken, we direct that the steps labelled as pending in the chart referred to above, if still continue in the same status, be expedited.

33. Considering that much time has passed since the last order of the Court, we further direct the Additional Chief Secretary, Social Welfare Department, Government of Bihar to convene a meeting, seek updates on the welfare measures and issue appropriate directions to ensure that further, all possible

steps are taken for benefit of this community without any further delay.

34. Issues are answered accordingly.

35. This petition as also the associated interlocutory applications stand disposed of with the above observations and directions.