

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 4 | Issue 1
2021

© 2021 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

Disenthrallment of Gender Crisis in India: A Discourse on Transgender Rights

DR. SONIA B. NAGARALE¹

ABSTRACT

"I know I am Transgender because my brain knows its Female, and my body disagrees"

-Alan Cohen

An age of civil and sexual rights is the 21st century. Developments around the world over the past 18 years reflect a growing acceptance of sexual orientation and gender identity rights. The enigmatic unknown world of Eunuchs, best known as Hijras in India, lies far and above the world of education and global social justice. There is still a mystery to the truth of their life and their omnipresence in Indian society is inevitable. Since ancient times, they have always remained an integral part of Indian society. Unfortunately, nevertheless, their existing state of life has been reduced to abject poverty, illiteracy, hate and ridicule. Curiously, while the whole world is engulfed in gay and other homosexual rights and legislation, the Hijras still exist in the shadow of denial of any universal right to freedom and education. Only because of their odd appearances have they been the focus for research and study. The world as a whole has forgotten that, like anyone else, they are human beings too and have equal rights. People's pessimistic attitudes and their alienation from society have left them with little chance. The Indian government has granted few rights to them like the right to vote, but without any access to education, they face a bleak future. This paper is an attempt to critically evaluate the NALSA judgement and have a discourse around the aspect of discrimination and gender identity in reference to transgenders in India.

Keywords: *Transgender, discrimination, gender crisis, NALSA judgment*

I. INTRODUCTION

Worldwide, regardless of their real or assumed homosexuality, individuals are exposed to persistent crimes against humanity. These abuses of human rights take many forms, ranging from denial of the right to life and liberty, freedom from torture and the protection of persons, to discrimination in access to economic, social and cultural rights such as health,

¹ Author is a Assistant Professor at Department of Law, Savitribai Phule Pune University, Pune, India.

housing, education and the right to housing.²

In the global human rights discussion, the right to be free from discrimination based on sexual orientation or gender identity has emerged as a prominent theme. The Yogyakarta Principles, introduced in 2006 by a group of human rights advocates, judges, scholars, NGO officials, and a former United Nations High Commissioner for Human Rights, call on the international community to acknowledge that The complete enjoyment of all human rights is entitled to human beings of all sexual orientations and gender identities, and that the self-defined sexual orientation and gender identity of each person is central to their personality and is one of the most fundamental aspects of self-determination, dignity and equality.³

“Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that lesbian, gay, bisexual and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.” - Louise Arbour⁴

The golden thread that runs through the equality scheme of the Indian constitution (Articles 14,15,16, 19 and 21) is ‘enjoyment of life by all citizens and an equal opportunity to grow as human beings irrespective of their race, caste, religion, community, social status and gender.’⁵

One of the basic tenets of the equality scheme lies in the recognition and acknowledgement of the ‘right of choice and self-determination’. Determination of the gender to which a person belongs and relates is intrinsic to their right of self-determination and their dignity.

Acknowledging that Indian laws are substantially binary in nature, recognising only male and female genders, the Honorable Supreme Court of India in its order in the case of National Legal Services Authority vs. Union of India (dated 15 April 2014, AIR2014SC1863, the ‘NALSA Judgement’), declared transgender individuals distinct from binary genders, as the ‘Third Gender’ under the Indian constitution and for the purposes of laws enacted by the

² StoriesAsia, *What Does India’s Transgender Community Want?*, <https://thediplomat.com/2020/01/what-does-indias-transgender-community-want/> (last visited Feb 1, 2021).

³ Respect and acceptance for transgender people in India | IPPF, , <https://www.ippf.org/stories/respect-and-acceptance-transgender-people-india> (last visited Feb 1, 2021).

⁴ Presentation by the Former United Nations High Commissioner for Human Rights, Ms Louise Arbour at the International Conference on LGBT Human Rights, Montreal, 26 July 2006

⁵ Sawant, Neena. (2017). Transgender: Status in India. *Annals of Indian Psychiatry*. 1. 59. 10.4103/aip.aip_43_17.

parliament and state legislatures.

Non-recognition of the Third Gender in the Indian legal framework has resulted in systematic denial of equal protection of law and widespread socio-economic discrimination in society at large as well as in Indian workplaces. In the wake of the NALSA Judgment, the Indian parliament recently enacted the Transgender Persons (Protection of Rights) Act, 2019 (the 'Act').

As described in the Act, 'Transgender' refers to and includes all people whose sex does not conform or correspond to the sex assigned to them at birth and includes trans-man and trans-woman (whether or not they have undergone sex reassignment surgery ('SRS') and people with socio-cultural identities such as 'kinner', 'hijra', 'aravani' and 'jogta'.⁶

The Ministry of Social Justice and Empowerment of the Union notified the Transgender Persons (Protection of Rights) Rules 2020 on 25 September 2020, which abolished the mandatory medical examination provision that had been established by the previous draft of these rules (issued in July 2020). The previous draft was highly criticized by the transgender community for stripping away their privacy because of the mandate that a third person (for instance, a District Magistrate) will verify and certify their gender identity. In addition to being an infringement upon their constitutional right to bodily autonomy and their protected right to privacy, the previous draft also flouted the provisions of the Transgender Persons (Protection of Rights) Act, 2019, which unequivocally reaffirmed the transgender persons' right to self-perceived their gender identity. Consequently, in light of such criticism and unconstitutionality, the new rules now state that the District Magistrate could process an application for a transgender person to declare gender, based only on an affidavit submitted in that regard by the person and without any physical or medical examination.⁷

However, an isolated reading of these rules does not authentically portray the entire spectrum of issues involved in this arduous struggle to establish an equal rights paradigm. To gain a holistic insight, it is important to begin with the 2014 Supreme Court of India judgment in NALSA vs Union of India, in which the apex court granted the transgender community an equal constitutional status under the Indian legal matrix for the first time and recognized their fundamental rights under Part-III of the constitution to include, inter alia, right to gender

⁶ Akhand Sharma, *Identity Crisis for Transgender in India: A Case-study from Madhya Pradesh*, 12 QUEST- J. UGC-HRDC NAINITAL 157 (2018).

⁷ Draft Transgender Persons (Protection of Rights) Rules, 2020, PRSINDIA (2020), <https://www.prsindia.org/bill-track/draft-transgender-persons-protection-rights-rules-2020> (last visited Feb 1, 2021).

equality and self-dignity importance. The non-recognition of such rights was perceived as a “human rights issue” and a capital violation of Article 15 of the Indian Constitution, which explicitly prohibits any discrimination on the basis of the sex of an individual.

Although in line with the cherished tenets of equality, liberty, and freedom of expression, the judgment was not complemented with any legislative framework that could operationalize the rights propounded by the court. This sought-after legislative clarity only ensued in December 2019 when the Transgender Persons (Protection of Rights) Act, 2019 was enacted with the aim of providing a statutory basis for constitutional rights and establishing procedures to be followed in enforcing them. Notably, the previous three drafts of this Act, introduced in 2014, 2016, and 2018 lapsed in the parliament and were condemned for their regressive provisions such as establishing a “screening committee” to ascertain if an applicant qualified as transgender. Consequently, the 2019 Act removed many such reprehensible provisions and sought to prohibit discrimination against transgender people while advocating for the introduction of welfare provisions for the historically marginalized communities.⁸

Notwithstanding the multiple revisions, the 2019 Act and its associated rules of procedure, when tested against the touchstone of the NALSA judgment and the right to equality, dignity, bodily autonomy, privacy, self-identification, and freedom against unwarranted medical intervention, collapses colossally. To begin with, important terms such as “transgenders” and “discrimination” have been vaguely defined in that act. It not only allows for the inclusion of individuals with intersex variations into the category of transgender people but also does not lay down provisions for any civil or criminal remedy in the guarantee against discrimination. Moreover, in the case of sexual abuse of a transgender person, the act provides a punishment of up to two years imprisonment coupled with a fine. However, sexual assaults upon cis-women attract more stringent punishments that may even extend to life imprisonment. The extension of different punishments depending upon the sexual orientation of the individual does not exhibit any intelligible differentia and fails to satisfy the reasonable classification test and the standard of arbitrariness as envisaged by Article 14 of the Indian Constitution that guarantees equal protection of law to all persons. Another issue in this regard is that of the requirement of the transgender person to be a resident of the jurisdiction of the Magistrate for a minimum period of one year before filing the application to declare their identity as transgender. This raises two concerns: firstly, other certificates and licenses like the ones

⁸ Transgender Bill: Government makes two major changes in Transgender Bill; may introduce in Parliament next week, <https://economictimes.indiatimes.com/news/politics-and-nation/government-makes-two-major-changes-in-transgender-bill-may-introduce-in-parliament-next-week/articleshow/70269765.cms?from=mdr> (last visited Feb 1, 2021).

required in cases of a civil marriage or by the road transport department have a much lesser period of residence requirement (for instance, 30 days). This onerous one-year requirement has only been in place for transgender people. Secondly, the Expert Committee on Issues Related to Transgender Persons (2014) and the Supreme Court in NALSA Judgment opined that the transgender community faces ostracization from family, unemployment, and homelessness in the society and therefore, it is argued that it becomes strenuous and burdensome for them to reside continuously in an area for seeking certification.⁹

Tracing the identity of Third Gender: Historical development

The term 'homosexuality' was coined in the late 19th century by a German psychologist, Karoly Maria Benkert.¹⁰ Although the term is new, discussions about sexuality in general and same-sex attraction in particular, have occasioned philosophical discussion ranging from Plato's Symposium to contemporary queer theory. Since the history of cultural understandings of same-sex attraction is relevant to the philosophical issues raised by those understandings, it is necessary to review briefly some of the social history of homosexuality. Arising out of this history, at least in the West, is the idea of natural law and some interpretations of that law as forbidding homosexual sex.¹¹

II. CONSTITUTIONAL MANDATE ON THE GENDER EQUALITY

Even after having non-discrimination as a fundamental right, discrimination and violence is a major problem for transgenders. Provisions of the Constitution stipulates under Article 14iv equality where the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Additionally Articles 15 and 16 of the Constitution also prohibit discrimination against any citizen on certain enumerated grounds including the ground of sex. These Articles prohibit all forms of gender bias and gender based discrimination. Even after such protection which is fundamental in nature, transgenders face discrimination, indirect violence in society and are unable to compete at par with others. Ultimately they have to resort to either begging or sex work.¹²

⁹ Transgender Rights, The 'Third Gender' And Transforming The Workplace In India - Employment and HR - India, , <https://www.mondaq.com/india/discrimination-disability-sexual-harassment/905918/transgender-rights-the-third-gender39-and-transforming-the-workplace-in-india> (last visited Feb 1, 2021).

¹⁰Respect and acceptance for transgender people in India | IPPF, *supra* note 2.

¹¹ What is Trans History? | Perspectives on History | AHA, , <https://www.historians.org/publications-and-directories/perspectives-on-history/may-2018/what-is-trans-history-from-activist-and-academic-roots-a-field-takes-shape> (last visited Feb 1, 2021).

¹² A Brief History Of Hijra, India's Third Gender, , <https://theculturetrip.com/asia/india/articles/a-brief-history-of-hijra-indias-third-gender/> (last visited Feb 1, 2021).

Another provision which provides for freedom of speech and expression including right to express self-identified gender, freedom to trade and profession, freedom to move freely and reside and settle in any part of India as given under Article 19(1)(a) of the Constitution of India. Self-identified gender can be expressed through dress, words, action or behaviour or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution. However, these transgenders are not encouraged in work setup and other employment opportunities. They are generally not hired due to their style of dressing. Thus this violates their fundamental rights and due to social stigma they are unable to enforce their fundamental rights.

Despite the following international law provisions, India is still facing the problem of discrimination, violence and deprived conditions of transgenders. Article 6 of the UDHR¹³ and Article 16 of the ICCPR¹⁴ recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right.

Everyone shall have a right to recognition, everywhere as a person before the law. However torture against transgenders by the police is not reported and thereby India fails in achieving this goal.

Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence or to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks. Article 7 of the ICCPR also provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Again the tortious acts against the transgenders isn't paid much attention hardly any action or cases are registered to protect the transgenders.

In April 2015, the Rajya Sabha passed the Rights of Transgender Persons Bill 2014. This was a private member bill introduced by a member of parliament, Tiruchi Siva. This Bill was later introduced in the Lok Sabha, but has not been passed yet. Simultaneously, the government of India began the process of developing its own draft of a transgender rights law. In July 2016, Cabinet had approved the Transgender Persons (Protection of Rights) Bill 2016, which has

¹³ Universal Declaration of Human Rights | United Nations, , <https://www.un.org/en/universal-declaration-human-rights/> (last visited Feb 1, 2021).

¹⁴ OHCHR | International Covenant on Civil and Political Rights, , <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (last visited Feb 1, 2021).

now been introduced in the Lok Sabha.

III. ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

According to section 2(k) of the THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019, "transgender person" means 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.¹⁵

It is pertinent to submit that the transgender person, the definition is weak. First of all, the definition stipulates that the gender does not match with the gender assigned to that person at birth. If we critically analyse this particular provision, we come to understand that as a society, we are being focused only to only the definition of a 'man' or a 'woman'. It is also stipulated that the very definition of a transgender, creates a voice on only man or a woman and not for transgender, which have been existing since time immemorial.

It is also pertinent to note, that the Equality provisions as provided under Article 14 of the Constitution of India, provides equality before laws and Equal protection to laws. Article 14 is a right enjoyed by "any person" (similarly, the reference to "citizen" in Article 15 is gender-neutral) and so applies equally to men, women and transgender people, who do not identify clearly as male or female. Hence, transgender people are entitled to equal legal protection of the law in all spheres, including employment, health care, education and civil rights. Discrimination on the grounds of sexual orientation and gender identity impairs equality before the law and equal protection of the law and violates Article 14. The Bill is in cognisance with the NALSA judgement. The essential ratio decidendi of the case are as follows:

- a. The Court upheld the right of all persons to self-identify their gender. Further, it declared that *hijras* and eunuchs can legally identify as "third gender". The Court clarified that gender identity did not refer to biological characteristics but rather referred to it as "an innate perception of one's gender". Thus, it held that no third gender persons should be subjected to any medical examination or biological test which would invade their right to privacy.

¹⁵ Transgender Persons (Protection of Rights) Act, 2019

- b. The court, also noted that, that gender identity is an integral part of the personality and one of the most basic aspects of self-determination, dignity and freedom. Thus, no one can be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy as a requirement for legal recognition of their gender identity. Psychological gender is to be given priority over biological sex. Rights have to be protected irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role.¹⁶
- c. Articles 15 and 16 prohibit discrimination in certain areas based on a list of grounds, including sex. The reference to “sex” is to be understood as prohibiting all forms of gender bias and gender-based discrimination, including discrimination against transgender people. The emphasis put on tackling sex-based discrimination in the Constitution means that people have a “fundamental right to not be treated differently for the reason of not being in conformity with stereotypical generalizations of the binary genders”¹⁷
- d. Furthermore, Article 15 includes a requirement to take affirmative action for the advancement of socially and educationally disadvantaged groups. The Court notes that transgender persons have not been afforded special provisions as envisaged under Article 15(4) for the advancement of the socially and educationally backward. They constitute such a group and the state is bound to take some affirmative action to remedy the injustice done to them for centuries.
- e. In addition, the Court stated that expressing one’s gender identity through words, dress, action or behavior is included in the right to freedom of expression (Article 19). Privacy, self-identity, autonomy and personal integrity are fundamental rights protected by Article 19. As gender identity lies at the core of one’s personal identity, gender expression and presentation, it has to be protected under Article 19(1)(a) of the Constitution. Often the state and its authorities, either due to ignorance or otherwise, fail to digest the innate character and identity of transgender persons, which it must do in order to realize their Article 19 rights.

¹⁶ Global Citizenship Commission, *Social and Economic Rights, 2 in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN THE 21ST CENTURY* 63–70 (Gordon Brown ed., 1 ed. 2016), <https://www.jstor.org/stable/j.ctt1bpmb7v.12> (last visited Mar 15, 2019)

¹⁷ The Transgender Persons (Protection of Rights) Bill, 2019, , PRSINDIA (2019), <https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019> (last visited Feb 1, 2021).

- f. The Court held that public awareness programs were required to tackle stigma against the transgender community. It also directed the Central and State Governments to take several steps for the advancement of the transgender community, including:
- Making provisions for legal recognition of “third gender” in all documents
 - Recognizing third gender persons as a “socially and educationally backward class of citizens”, entitled to reservations in educational institutions and public employment.¹⁸
 - Taking steps to frame social welfare schemes for the community

IV. LEGISLATIVE PITFALLS AND SUGGESTIONS

The Act does not provide for the definition of discrimination as was given in 2014 Bill.¹⁹ It laid down discrimination as distinction, exclusion or restriction on the basis of gender identity and expression which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination, including denial of reasonable accommodation. Due to lack of definition of discrimination, certain acts can qualify as discrimination on the basis of social, cultural and of other fields but transgender won't be able to enforce their rights under the umbrella definition of discrimination.²⁰

The definition of transgenders provided in the Bill has captured a very broad category of people in it. Transgenders are described as persons whose gender identity; gender expression or behaviour does not conform to their biological sex. Persons who do not identify with their sex assigned at birth and also who do not identify themselves as either male or female are also covered under the purview of transgenders.²¹ It states that transgenders also include persons who intend to undergo Sex Re-Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. Further, these are people who like to cross-dress the clothing of opposite

¹⁸ Rights, revised: on the Transgender Persons Bill, 2018, THE HINDU, December 20, 2018, <https://www.thehindu.com/opinion/editorial/rights-revised/article25783926.ece> (last visited Feb 1, 2021).

¹⁹ Rights of Transgender Persons Bill 2014 | orinam, <http://orinam.net/resources-for/law-and-enforcement/nalsa-petition-tg-rights-india/rights-of-transgender-persons-bill-2014/> (last visited Feb 1, 2021).

²⁰ Transgender Rights, The ‘Third Gender’ And Transforming The Workplace In India - Employment and HR - India, *supra* note 8.

²¹ India: Transgender Bill Raises Rights Concerns, HUMAN RIGHTS WATCH (2019), <https://www.hrw.org/news/2019/07/23/india-transgender-bill-raises-rights-concerns> (last visited Feb 1, 2021).

gender, i.e. transvestites. This definition treats intersex and transgender at the same pedestal. However, the judgment stated that Gender identity refers to an individual's self-identification as a man, woman, transgender or other identified category. The judgment had liberal interpretation to the term transgenders and allowed these persons to choose their genders as per their choice. Whereas in the legislation fails to protect right to self-identification.

The definition of establishment as given in the bill lacks the jurisdiction over private sector. It also does not cover the unorganized sector. Thus when there will be violation of the rights of transgender in private or unorganized sector they won't be able to enforce their rights.

Obligations of Establishments provide for non-discrimination and for a complaint mechanism for establishments of more than hundred persons. However there is no complaint mechanism existing for the establishments which have less than hundred persons and the affected transgender will have to straight away approach the expensive and longer route like resort from police or court for enforcing their rights. Either complaint establishment should be developed in small scale organisations or a committee should be set up looking after complaints of these persons as per territorial jurisdiction. These committees should function in an expedite manner.²² This Bill of 2014 provided with Transgenders Rights Court which is taken away from this Bill. Such courts will help expedite the justice delivery to transgenders.

Since District Screening Committee is responsible for recognition of transgender persons, it is mandatory for transgenders to disclose their private parts to them for recognition of their identity. It should be made mandatory to have both, a female and a male doctor, during such disclosure. Along with gender identity, an examination should also be done regarding any sexually transmitted diseases in these persons. Since there are high chances of suffering from depression, the psychiatrist should also examine these persons for depression. And then treatment should be given to them accordingly.

As the bill of 2014 provided for the transgender health care centres and subsidies to be provided for them, however, the current bill does not provide for separate health care centres and no subsidies are given to them.²³ It provides for the coverage of

²² Between the (Gender) Lines: the Science of Transgender Identity - Science in the News, , <http://sitn.hms.harvard.edu/flash/2016/gender-lines-science-transgender-identity/> (last visited Feb 1, 2021).

²³ Rights of Transgender Persons Bill 2014 | orinam, *supra* note 17.

medical expenses by a comprehensive insurance scheme which is not laid down in the bill. Transgenders should be given an insurance scheme while registering them during the gender identification. This will ensure two fold purposes. Firstly, it will act as an incentive to transgenders to register them as a transgender. And secondly, transgenders while examination and treatment, will be able to use this insurance scheme as well. Liberty should be given to the state governments to form such schemes as necessary in each state.²⁴

The National Council advises Central Government regarding the policies; monitor and evaluate schemes; review and coordinate activities of all departments of Government and NGOs. The council consists of 30 members from various fields like executive, representative from NGOs, commissions which are National Human Rights Commission and National Commission for Women, transgender community and various ministries which are Ministries of Health and Family Welfare, Home Affairs, Housing, Urban and Poverty Alleviation, Development, Human Resources Development, Rural Development, Labour and Employment and Departments of Legal Affairs, Pensions and Pensioners Welfare and NITI Ayog.²⁵ Having such an elaborate council will lead to slow decision making and lack of consensus during the decision making by the council. For effective advisory opinion from the council, it is suggested to narrow down the people involved in the council or provide decision making in the hands of few without any interference from executive.

The offences and penalties in the bill lays down injury or harm which endanger the life, safety, health or well-being of transgender. Transgenders encounter derogatory comments, criticism and ridicule, abandonment, isolation, and expulsion from the family or marital home. In order to strengthen the laws and make stringent provisions for violation of rights of transgender, it is necessary to amend other laws like in Indian Penal Code and introduce sexual assault of transgender as an offence. Section 354 of IPC should be Assault, criminal force to any person with intent to outrage his modesty. Section 375 should be gender neutral and the usage of word 'female' be replaced with 'any person' keeping in mind regard of transgenders and even male rapes.²⁶ US Department of Education's Office of Civil Rights requires schools to respond to the courts for sexual harassment and sexual violence against the transgender students.

²⁴ Between the (Gender) Lines: the Science of Transgender Identity - Science in the News, *supra* note 20.

²⁵ Respect and acceptance for transgender people in India | IPPF, *supra* note 2.

²⁶ Id

The Bill of 2014 had mechanism to propagate the bill for creating awareness amongst the people and initiatives to be taken by the government, however the current bill does not provide for any such mechanism. This Bill also neglects reservation for transgenders for employment as was provided in the Bill of 2014.²⁷ Sensitization drives, awareness campaigns, workshops, seminars and incentives for employment and integrating them in the society will help curbing discrimination and other human rights violation against transgenders. To achieve this government programs should be initiated and Non-Government organizations working towards betterment of conditions of transgenders should be promoted.²⁸

The importance of the NAZ decision was that it gave a new interpretation to the existing framework of Constitutional Rights. These four provisions included above are the heart of the Fundamental Rights Chapter. Prior to the NAZ decision, it was never seen fit to apply these provisions to LGBT persons. What the NAZ decision did was to apply the understanding of Constitutional rights to a minority which had never been deemed worthy of rights protection or judicial consideration. As the Delhi High Court observed, invoking Jawaharlal Nehru: ‘If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as “deviants” or “different” are not on that score excluded or ostracised.’²⁹

The NAZ decision interpreted Article 21 to include protection for both zonal and decisional privacy of individuals as well as the dignity of LGBT individuals. As the Court noted, ‘In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.

With respect to Article 14, the NAZ decision held that, The criminalisation of private sexual relations between consenting adults absent any evidence of serious harm deems the provision’s objective both arbitrary and unreasonable. The state interest “must be legitimate

²⁷ Id

²⁸ Id

²⁹ Indian Rape Laws Cannot Be Gender-Neutral, Says Central Government, , <https://www.vice.com/en/article/m88dey/rape-laws-in-india-cannot-be-gender-neutral-says-ministry-of-home-affairs> (last visited Feb 1, 2021).

and relevant” for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily the classification will have to be held as unreasonable. The nature of the provision of Section 377 IPC and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else.

NALSA has taken this concern forward by now filing a public interest litigation (PIL) specifically related to entitlements for transgender people. The NALSA petition states that Article 21 of the Constitution provided fundamental right to life and personal liberty that could not be denied to transgender people. It further stated:

- “Right to life includes right to live with human dignity and transgenders are entitled to bare necessities in life such as food, nutrition, clothes, shelter, medical facilities, right to education and to adopt children, and marry.
- Every citizen has the right to decide their sex orientation and to espouse and determine their identity including transsexuals, transgenders, transvestites and they are entitled to be considered as third and equal sex. The Citizenship Act of India uses the expression person without reference to sex. Transgenders, being citizens of India, ought to be entitled to vote and to contest elections as they are natural persons.
- Many hospitals and other institutions do not admit them in women’s ward because women do not feel comfortable or free in their presence and in men’s ward they face sexual abuse. Provision of separate wards in all hospitals and other institutions is necessary.
- Various manifestations of deprivation are the consequence of the practice of recognising only two sexes-or-genders for various facilities, amenities and privileges; that is, male and female. There is an urgent need for recognising the third gender that is transgender.
- Treating a transgender as a legal non-entity was a violation of Articles 14, 15 and 16 of the Constitution and it was arbitrary and discriminatory, NALSA noted and sought a direction to the Centre and States to recognise them as a third category for the purpose of conferring various benefits.”³⁰

Potentially, the case before the Supreme Court has radically altered the field of transgender rights and has very well turned out to be the most significant recent development on transgender rights.³¹

³⁰ Supra note 5

³¹ Supra note 3

V. CONCLUDING REMARK

The collective functioning of the different social structures and processes that weigh down on the affected individual creates a mentality in which the individual starts to think of himself as filthy, worthless, unclean and vulgar. The invisibility and secrecy accompanying the life of minority lives and realms of sexuality creates its own order of injustice, generating in many the belief that they are the only ones 'cursed' with such desires in the world. There is an enormous erosion of self-esteem, which is perpetuated by the way dominant society operates, what it believes in and what it says. It is a process of self-abuse wherein the person believes that what society says about sexual minorities is true for her. This process of self-abuse in some people leads to cycles of depression and self-rejection.

The authors of this research article would like to conclude by stating that there must be an immediate progress in propagation about the Transgenders rights and the Transgender Act. Although there are prodigious changes brought to light, it's the attitude of the society that needs to be changed. As rightly said by John F. Kennedy, "If we cannot now end our differences, at least we can help make the world safe for diversity". Appropriate steps need to be taken to remedy such deplorable situation through strong legal as well as social angles
