2025 INSC 1248

REPORTABLE

IN THE SUPREME COURT OF INDIA

ORIGINAL CIVIL JURISDICTION

WRIT PETITION (CIVIL) NO. 1405 OF 2023

JANE KAUSHIK **...PETITIONER**

VERSUS

UNION OF INDIA & ORS. **...RESPONDENTS**

J U D G M E N T

J.B. PARDIWALA & R. MAHADEVAN, JJ. ,

For the convenience of exposition, this judgment is divided into the following parts: -

INDEX

1. It has been more than half a decade since the Transgender Persons (Protection of Rights Act), 2019 (the "**2019 Act**"), came to be enacted and it has been more than a decade since this Court rendered the judgment in ***National Legal Services Authority v. Union of India ("NALSA"),*** reported in **(2014) 5 SCC 438**. However, the question whether the transgender persons are living a life with dignity continues to beg for an answer. One may get to read a lot about their rights in the statute books, but the reality is that these rights remain only an empty formality.

2. There is no gainsaying that the Union of India and the States need to do a lot more to create mechanisms for the transgender persons to translate their rights into reality. The lethargy exhibited on part of the concerned Government has also led the non-state establishments to put the compliance of the 2019 Act and of the Transgender Persons (Protection of Rights) Rules, 2020 (the "**2020 Rules**") in a cold freeze. This abeyance of rights is a matter of serious concern. The community continues to face discrimination and marginalization, with a scarcity of healthcare, economic opportunities and non-inclusive educational policies adding to their struggles. In 2014, this Court in ***NALSA*** (*supra*) recognized transgender people as the "Third Gender", upholding their fundamental rights to equality and dignity. In furtherance of ***NALSA*** (*supra*), the 2019

Act was enacted with a view to provide a legal framework for the recognition and protection of the rights of transgender people in India.

3. Transgender persons have found mention in the ancient history of the country with references to a "Third Sex" (*Tritiya Prakriti*) in *Vedic* and *Puranik* literature and characters like '*Mohini*' in Hindu mythology as well as periods of imperial recognition. However, with the onset of colonial-era, the history of the transgender community in India became rather sour: it comprised of centuries of criminalization, followed by institutionalized marginalization. Despite this, we must also acknowledge that the history is a witness to the community's simultaneous struggles for rights and acceptance. The 2019 Act is a much recent result of these modern struggles. However, what stands exposed in the present litigation is the indifferent behavior that the State machineries have exhibited towards this community. This is despite a host of positive obligations provided under the 2019 Act, more particularly, a duty on the State to integrate this community into the mainstream and implement their constitutional and statutory rights in a manner that assures them dignity.

A. FACTUAL MATRIX

4. The petitioner, Ms. Jane Kaushik, is a transgender woman. She has invoked the writ jurisdiction of this Court under Article 32 of the

Constitution of India, being aggrieved by the discrimination and humiliation she faced as a transgender person in employment which allegedly resulted in her termination from two different schools situated in two different States in the span of a year.

5. The Petitioner completed her undergraduate studies sometime in 2016 from Rajasthan, and was the recipient of a First Division. In 2017, she completed her Advanced Diploma in Nursery Teacher Training from Haryana and in 2018, she completed her post-graduate studies in Political Science from Gujarat. Alongside her studies, in 2019, she underwent her Gender Affirmative Surgery. By the year 2020, she was enrolled in a university located in the State of Uttar Pradesh for a Bachelors in Education, to further pursue a career in the noble profession of teaching.

6. Ms. Jane claims to have been illegally terminated from two private schools, namely the respondent no. 4 ("**the Second School**") and the respondent no. 5 ("**the First School**") respectively. Her termination from the First School emanated in the following manner:

i. Sometime in November 2022, Ms. Jane sat through a process of selection, including interviews and teaching demonstrations to verify her eligibility for the position of Trained Graduate Teacher in English

and Social Science. On 22.11.2022, she received an appointment letter from the school.

ii. The petitioner worked for a total of 8 days from 25.11.2022 to 02.12.2022. During these eight days, it is alleged that she was subjected to name-calling, harassment and body shaming by her colleagues and students for her inability to conform to the gender norms of a 'female' body. On 01.12.2022, the petitioner informed the Principal of the First School about the harassment she was being subjected to. The materials on record reveal that the Principal took cognizance of one specific faculty-member exhibiting hostile behavior towards Ms. Jane. The school Principal assured that the management would be talking to the concerned teacher to discontinue the harassment and assured her of all the support.

iii. It is the case of the petitioner that on 03.12.2022 she was forced to resign on account of having revealed her identity to one of the students at the school. It is her case that the school attempted to garner a resignation from her forcefully, by threatening her that they would withhold her monetary compensation for the period of eight days during which she had worked. In the resignation letter as well, she cited the reason that the school administration was not inclined to employ or continue with an "openly transgender" person.

iv. On 05.12.2022, she received an e-mail acknowledging her resignation. The said communication cited her poor performance in the subject of Social Science as the reason for her termination. However, the letter also read that Ms. Jane had a good command over the subject of English, and the school would appreciate to have her back as and when a vacancy would arise for a 'Core English Language' teacher.

v. The termination of the petitioner came to be reported in the national daily newspapers. On 08.12.2022, a defamation notice was issued to the petitioner by the First School claiming Rs. 1 crore as compensation. *Vide* the press note dated 10.12.2022, the Principal of the First School made a statement that the school never knew about the identity of Ms. Jane, and it was only after her termination that the school got to know of the same as the matter was covered in media reports.

vi. On 28.12.2022, the petitioner sent a reply to the aforesaid legal notice. In a rejoinder to the letter dated 28.12.2022, the First School stated that it was necessary to terminate the petitioner due to the "*forthcoming Board Examinations and in larger interest of the students*".

vii. Having failed to secure any job, Ms. Kaushik wrote back to the First School. The First School acceded to her request for re-hiring her, subject to her performance in an assessment test. For some time in January and February 2023 respectively, the petitioner and the First

School kept exchanging correspondences regarding the syllabus of the said test. On multiple occasions, the date of the test was deferred on the petitioner's requests. On 25.02.20223, a test was scheduled, but she did not show up for the said test, and the school warned that they would not be able to delay the process any longer. On 29.07.2023, the petitioner sent an e-mail to enquire if there were any vacancies. The First School, *vide* e-mail communication dated 31.07.2023, informed the petitioner that the school did not have any vacancies to accommodate the petitioner, and if any vacancy were to arise in the future, the petitioner would be given first priority.

7. The First School, on the other hand, placed before this Court on affidavit the following facts:

i. The candidature of the petitioner was initially rejected on account of her non-fulfilment of the selection criteria set by the school. However, upon repeated insistence and undertaking by the petitioner that she would prepare and perform well, the First School selected her on a conditional-basis. The school administration also accommodated all the requests made by the petitioner.

ii. Upon the petitioner's physical joining, the First School was informed that the petitioner's educational documents reflected her name as Rahul Kaushik and subsequently, she had undergone Gender

Affirmation Surgery and identified as a 'transgender woman'. She also presented her gender identity certificate in this regard.

iii. The First School accordingly placed her in the hostel for women, provided her access to female washrooms and treated her as a biological woman in all manners possible. Further, the school administration also treated her with respect and dignity thereby, attempting to reasonably accommodate her in the best manner possible.

iv. It was however, noticed that the petitioner was unable to meet the teaching standards required by the school. It was alleged that she was underprepared for lessons which led to dissatisfaction amongst the students.

v. There were incidents of misbehaviour and temperamental issues involving staff members in the school and students residing in the hostel. The First School has alleged that the petitioner was a ill-tempered person which is what ultimately came to be the reason of her termination.

vi. The incident that marked the last straw and concluded the petitioner's tenure at the First School was when she was allegedly late to school one day and forgot her charger. When she asked the members of the staff for a charger of the same make, it was informed to her that none of the staff members had it. Instead of accepting the

same, she started misbehaving. Upon intervention by the school administration and consequent arrangement of the charger, the petitioner was still not satisfied and alleged that the charger was deliberately withheld. Subsequently, she took leave without completing her lessons and returned to the hostel where she behaved in a very poor manner with a student. After the student lodged a complaint, the school decided to terminate the petitioner's employment and asked her to tender a resignation.

vii. Upon being relieved from service, the petitioner reached out to the First School after about a month, requesting them to re-hire her as she was unable to find another job. The school in an attempt to accommodate her request, agreed on the condition that the petitioner's employment was subject to her performance in a subject-specific assessment test. The petitioner agreed to the said condition with certain stipulations as regards the conducting of the said test. After some back and forth *via* e-mails, the school agreed to certain requests as regards the modalities of the test and accordingly, organized the assessment test on 25.02.2023. However, the petitioner did not attend the said test. The school also sent an e-mail questioning her absence and inquiring about her well-being. The petitioner, responded to the said e-mail, after a period of almost 4.5 months on 10.07.2023, and informed them about her mental health ailments. She

requested that her assessment be scheduled for 10.08.2023. The school, in response, informed that during the interregnum, in the absence of any communication by the petitioner, they were constrained to fill the vacancy as the subject concerned was important for board examinations. However, it is the case of the petitioner, that the First School had given her the assurance that she will receive first priority for the position of teaching Social Science or English in case of any future vacancy.

viii. However, on 19.08.2023, to the utter shock of the petitioner, the First School published an online advertisement for the post of an English teacher, without considering the petitioner's candidature for the position, despite their earlier assurances to her.

ix. On 25.08.2023, the petitioner again sent an application in response to the said advertisement, applying for the position of English teacher with the First School.

x. Since the petitioner received no response from the First School, she levelled charges of discrimination against them.

8. Ms. Kaushik's termination from the Second School emanated from the following facts:

i. It is the case of the petitioner that after several months of searching for employment, she finally found an opportunity *inter-alia* for the

position of an English and Social Studies Teacher at the Second School.

ii. It appears from the material on record that after successfully appearing for an interview with the Second School, the petitioner was offered the position of English Teacher *vide* offer letter dated 24.07.2023, which she accepted on the same day.

iii. While Ms. Kaushik was making her travels to Jamnagar, Gujarat, where the Second School is located, she received phone calls from the authorities of the Second School to share her identity proofs for completion of the requisite formalities. It is the case of the petitioner that as it was subsequently revealed that she was a transgender woman, the school denied her the employment. She was even denied entry into the school and did not receive any formal termination letter.

iv. On 29.07.2023, the petitioner served a legal notice on the Second School, to which she did not get any response.

9. The Second School, on the other hand, placed before this Court on affidavit the following facts:

i. The Second School sent the petitioner an offer letter on 24.07.2023, according to which it was clarified to the petitioner that she would be required to submit all the relevant documents upon joining, for

verification. The offer letter also made it clear that the petitioner would be kept on probation for a period of one month and only thereafter an appointment would be made on a permanent basis.

ii. The school's change of decision was an administrative action considering various factors. Further, there was no document brought onto the record showing that her gender identity was a relevant factor in denying the petitioner the job.

iii. The school had issued offer letters to other candidates as well for the post of English teacher with a view to consider their comparative merits, qualification and document verification. It is only after this exercise that the appointment letter was to be issued to any candidate. Therefore, the petitioner could not say that she was entitled to employment in the Second School solely on the strength of the offer letter.

iv. The school clarified that not all teachers from the pool of candidates who were issued the offer letter were finally granted permanent employment. It was also clarified that there was no vacancy remaining for the petitioner.

10. The materials on record indicate that before coming to this Court, Ms. Jane had approached different fora for the purpose of redressing her grievances, but her relentless efforts failed as none of the fora came to her

aid. She was compelled to approach these various fora as the grievance redressal mechanism mandated by the 2019 Act was not operational. We summarize the proceedings before the respective fora below in a chronological order:

i. Subsequent to her termination from the First School, the National Commission for Women ("**NCW**") *vide* the press note dated 08.12.2022 took *suo motu* cognizance of the allegations levelled by the petitioner.

ii. On 09.12.2022, Ms. Jane is said to have filed a criminal complaint against the functionaries of the First School before the police authorities.

iii. *Vide* the letter dated 29.12.2022, Ms. Jane approached the National Council for Transgender Persons ("**NCTP**"), a body authorized under Sections 16 and 17 of the 2019 Act respectively to deal with various grievances. However, she received no reply from the NCTP.

iv. The petitioner also filed a complaint with the National Human Rights Commission ("**NHRC**") which was ordered to be closed on 12.10.2023 by stating that the issue is being considered by the NCW.

11. The Proceedings before the NCW:

i. The NCW constituted a four-member Inquiry Committee ("**NCW's Inquiry Committee**") on 14.12.2022. On 16.07.2022, the petitioner

submitted her written complaint against the First School before the said Inquiry Committee. In her written complaint, she disclosed that on the day of her joining, when the school administration got to know of her gender identity, she was asked not to disclose it to the students or the staff members. She stated that her termination was purely on the ground that a student had gotten to know of her gender identity.

ii. On 17.12.2022, the said Committee conducted an on-site investigation. Ms. Jane could not remain personally present as she had no means to make her travels for the same.

iii. The Committee in its report recorded that the school did not have any service rules for teaching and non-teaching staff. The school failed to adduce any evidence to make good its case that due procedure was followed before terminating Ms. Jane Kaushik.

iv. The NCW's Inquiry Committee observed that the institution maintained its stance that they knew about the gender identity of Ms. Kaushik, and with this knowledge, her appointment was made. On the basis of the same and given the fact that Ms. Kaushik was provided accommodation in a female hostel and cab service was also provided by the school, the NCW's Inquiry Committee concluded that no case of discrimination was made out. The Committee closed the inquiry holding that the allegations levelled by Ms. Kaushik were not well-founded.

v. The petitioner sent a letter to the NCW in the form of her objections to the inquiry report, where she stated that the NCW's Inquiry Committee had deviated from the crucial investigation as it focused more on her performance as a teacher rather than unravelling if any gender discrimination had taken place.

B. SUBMISSIONS ON BEHALF OF THE PARTIES.

I. Submissions on Behalf of the Petitioner.

12. Mr. Yashraj Singh Deora, the learned Senior Counsel submitted that lack of adequate compliance, enforcement and implementation of the 2019 Act and the 2020 Rules by the State Respondents has led to the discrimination faced by the Petitioner. He submitted that the First and the Second School respectively could be said to have flagrantly violated the provisions of the 2019 Act by not providing a procedure for grievance redressal as per Section 11 of the 2019 Act and Rule 13 of the 2020 Rules respectively. He brought to our notice that the Respondent Nos. 2 and 3-States have failed to notify the Rules under Section 22(1) of the 2019 Act. He submitted that the statutory protections for the transgender persons, are failing to have a trickle down effect.

13. Mr. Deora submitted that the present petition seeks the enforcement of Fundamental Rights as enshrined under Articles 14, 15, 17, 19 and 21

respectively, and the following statutory recognitions of these Fundamental Rights and corresponding duties of the Respondents under the 2019 Act:

i) Section 3(b) of the 2019 Act which prohibits discrimination through unfair treatment in employment or occupation.

ii) Section 3(c) of the 2019 Act which prohibits discrimination through denial of or termination from employment or occupation.

iii) Section 9 of the 2019 Act which reiterates prohibition on discrimination in relation to employment.

iv) Section 10 read with Section 2(b) of the 2019 Act which mandates all establishments, government and/or private, to comply with the provisions of the Act.

v) Rule 11 of the 2020 Rules which mandates the State Government to take steps to prohibit discrimination in public or private institutions and to formulate a policy for protection of transgender persons.

vi) Rule 12 of the 2020 Rules which prohibits establishments from discrimination and mandates them to take appropriate measures to provide safe working environment and to have an equal opportunity policy for transgender persons.

14. The learned Senior Counsel invited our attention to the decision of this Court in ***Shanavi Ponnusamy* v. *Ministry of Civil Aviation***, reported in

2022 SCC OnLine SC 1581, wherein this Court recognized the obligations imposed on the public and private sector to ensure the effective guarantee of non-discrimination of transgender persons in matters relating to employment.

15. Mr. Deora indicated that owing to the negatively couched wordings of Sections 3 and 9 of the 2019 Act respectively, the provisions warrant strict and mandatory compliance. He further submitted that Articles 15, 17, 19 and 21 of the Constitution respectively cast both positive and negative obligations on the Respondents to ensure the protection of aforementioned rights. In respect of the Respondent Nos. 4 and 5 respectively, he submitted that despite them being private unaided schools, in view of the Constitution Bench judgment of this Court in ***Kaushal Kishore* v. *State of U.P. and Others***, reported in **(2023) 4 SCC 1**, a corresponding duty against non-state actors stands equally imposed under Articles 15, 17, 19 and 21 of the Constitution respectively. He further submitted that the failure of the State to protect the life and liberty of a person and the violation of constitutional rights being violated by non-state actors is enforceable under the writ jurisdiction of this Court.

16. The learned Senior Counsel further relied on the "*but for*" test, explained by the Supreme Court of the United States of Amercia in ***Bostock* v. *Clayton County***, reported in **590 US (2020)**, wherein in a batch of cases the

employees were illegally terminated just a few days after their sexual identities were revealed. The American Supreme Court applied the said "*but for*" test while holding that the employers had singled out their employees just on the basis of their sex, and it was only but for their sex that they were terminated, which constituted sex discrimination under Title VII of the Civil Rights Act, 1964. Mr. Deora also drew our attention to the judgment of this Court in ***Ravinder Kumar Dhariwal* v. *Union of India*** reported in **(2023) 2 SCC 209**, wherein a similar test seems to have been applied. In this case, the disciplinary proceedings were initiated against a person with disability. Such proceedings were challenged by the petitioner therein and this Court found the same to be discriminatory and violative of the provisions of the Rights of Persons with Disabilities Act, 2016 ("**the RPwD Act**").

17. Mr. Deora further submitted that discrimination violates one's dignity, right to life and right to choose one's profession. Relying on ***Lt. Col. Nitisha* v. *Union of India***, reported in **(2021) 15 SCC 125**, he pointed out the difference between formal and substantive anti-discrimination law. In the former, the general premise is that likes be treated alike to have consistency in treatment, whereas in the latter, there is a recognition of the historic and systemic patterns of marginalization due to which factual equality can only accrue if ground realities are well accounted for. He

further relied on ***NALSA*** (*supra*) to argue that equality would include affirmative action and reasonable accommodation.

18. He argued that in the case of Ms. Kaushik, she was subjected to both direct and indirect manifestations of discrimination. He submitted that the such discriminatory acts on the part of the Respondent Nos. 4 and 5 respectively have deprived her of the legitimate means of earning a livelihood amounting to sentencing her with "economic death", considering that she belongs to a vulnerable and marginalized group of the society. The mandate of Articles 17, 19 and 21 respectively ensures that discrimination is prohibited. He further relied on ***NALSA*** (*supra*) and ***Anuj Garg* v. *Hotel Assn. of India*** reported in **(2008) 3 SCC 1**, to underline that the right to self-determination is an integral part of one's personality, which allows them to choose their profession.

19. He relied on the concurring opinion of D.Y. Chandrachud, J., in ***Indian Young Lawyers Assn.* v. *State of Kerala***, reported in **(2019) 11 SCC 1**, whereby it was held that Article 17 of the Constitution, which seeks to abolish "untouchability" in "any form", is to preserve equality for those who have remained at the "lowest rung of the traditional belief system founded in graded inequality". Article 17, having a horizontal application, places a positive obligation on all the Respondents, state or non-state

actors, to ensure that socially backward individuals, including the transgender community, are treated with dignity.

20. Further, he submitted that this Court has consistently said in a plethora of its decisions that compensation may be awarded in exercise of its writ jurisdiction for violation of fundamental rights by the non-state actors who are amenable to writ jurisdiction. In saying so, he relied upon the decision in ***Jeeja Ghosh* v. *Union of India*** reported in **(2016) 7 SCC 761**, wherein this Court had ordered a private airline to compensate a disabled person for discrimination. He also argued that in the present case, Ms Kaushik is also entitled to compensation from the State for violation of her fundamental rights.

21. In the last, Mr. Deora submitted that the State machineries miserably failed to protect the Petitioner's constitutional rights. The State machineries failed in the implementation of the following statutory obligations:

a. A comprehensive policy for equal opportunity under Rule 12 of the 2020 Rules to ensure non-discrimination;

b. Requisite State Rules as per Section 22 of the 2019 Act;

c. Sensitisation Programs;

d. Complaint Officers at various establishments as per Section 11 of the 2019 Act and Rule 13 of the 2020 Rules; and

e. A mechanism for monitoring complaints by transgender persons.

II. <u>Submissions on behalf of the Respondent No. 5 ("the First School").</u>

22. Mr. Mohit Negi, the learned counsel appearing for the First School, would argue there are no valid reasons or justification for this Court to grant compensation in favour of the Petitioner, or even warrant any interference whatsoever.

23. He submitted that a fact-finding exercise to resolve a disputed question of fact does not fall within the jurisdiction under Article 32 of the Constitution. He relied on the decision of this Court in ***Sumedha Nagpal* v. *State of Delhi***, reported in **(2000) 9 SCC 745**, to argue that in cases where allegations and counter-allegations are made, unless the evidence is examined by an appropriate forum, a decision in the matter cannot be taken and such a course is impermissible in a summary proceeding. He submitted that the NCW's Inquiry Committee had already looked into the allegations of discrimination in detail, and thus, a writ by this Court is not warranted.

24. The learned counsel submitted that this Court should be loath in interfering with the affairs of private unaided schools and its employees. He relied upon the decision of this Court in ***St. Mary's Education Society* v. *Rajendra Prasad Bhargava***, reported in **(2023) 4 SCC 498**. By placing reliance on ***Army Welfare Education Society New Delhi* v. *Sunil Kumar Sharma and Others***, reported in **2024 SCC OnLine SC 1683**, he contended

that the relationship between the First School and the Petitioner is that of an employer-employee and the present employment is arising out of a private contract, and if there is a breach of a covenant of a private contract, the same does not touch any public law element.

III. Submissions on behalf of the Respondent No. 4 ("the Second School").

25. Mr. Atul Kumar, the learned counsel appearing for the Respondent No. 4, would submit that the Petitioner cannot seek any relief under Article 32 of the Constitution of India for the purpose of enforcing an "offer letter" relating to a contract of service. He would submit that it would amount to interfering with an administrative decision of a private unaided school. He submitted that an offer letter on its own does not culminate into a contract of service. He would submit that the issue in hand at best could be said to be one concerning a contract of employment and invoking writ jurisdiction is not the appropriate remedy. He submitted that this Court may not issue a writ of *mandamus*, as prayed by the Petitioner, as prayers of reinstatement, arrears in salary, etc. are purely within the realm of contractual law and granting the relief sought by the petitioner would tantamount to enforcing service conditions.

26. He submitted that even though Section 3(b) and Section 9 of the 2019 Act respectively has been pressed into service by the Petitioner as having been

violated, these provisions cast a negative duty on the "employer" and not a positive duty to give appointment even in case when other candidates are found to be meritorious. The learned counsel would argue that Rules 10 and 11 of 2020 Rules respectively cast a positive duty on the "appropriate government" to increase accessibility of employment opportunities for the transgenders. However, no such positive or mandatory duty has been casted upon a private school as an "establishment" to appoint transgenders.

27. In the last, relying on ***Satimbla Sharma and Others* v. *St. Pauls Senior Secondary School and Others***, reported in **(2011) 3 SCC 760**, the learned counsel submitted that an issue relating to salaries to be paid by a private unaided school does not fall within the purview of public law and hence a writ of *mandamus* would not lie.

C. ISSUES FOR DETERMINATION

28. Having heard the learned counsel appearing for the parties and having gone through the materials placed on record, the following questions fall for our consideration:

(I) Whether a positive obligation is cast upon the Union of India and the States respectively, under the Constitution of India and the 2019 Act along with the Rules thereunder to prevent discrimination against transgender persons?

(II) Whether the inaction and omissions on part of the respondent nos. 1 to 3 respectively led to discrimination against the petitioner?

(III) Whether the actions and inactions of the First School and the Second School respectively have led to discrimination against the petitioner on the ground of her gender identity?

(IV) If the answer to issues (b) and (c) are in the affirmative, whether the petitioner is entitled to any compensation?

D. ANALYSIS

I. Opening Remarks

29. The present litigation is an eye-opener for one and all. It calls for an immediate attention to the plight of the transgender community in the country. We are pained to observe that there has either been a superficial and sporadic, or a complete lack of implementation of measures to ensure the prevention of discrimination against transgender persons in various spheres of life, both public and private, including family welfare, education, health and medical care, and employment. The right against discrimination of transgender and gender diverse persons has long been recognised by this Court ever since the judgment in ***NALSA*** (*supra*) wherein it was held that the ground of "*sex*" under Article 15 of the Constitution also includes the analogous ground of gender identity. In other words, the expression "*sex*" must not be limited to the dichotomised

understanding of biological sex into "male" or "female" and that Articles 15 and 16 of the Constitution respectively must be read as prohibiting discrimination on the basis of gender identity.

30. The said mandate of Articles 15 and 16 of the Constitution respectively referred to above, stood bolstered through the enactment of the 2019 Act. It would be apposite to refer to the Statement of Objects and Reasons of the 2019 Act, which is reproduced as thus:

> "***Statement of Objects and Reasons***. –
> *Transgender community is one of the most marginalised communities in the country because they do not fit into the general categories of gender of male or female. Consequently, they face problems ranging from social exclusion to discrimination, lack of education facilities, unemployment, lack of medical facilities and so on.*
>
> *2. Though Article 14 of the Constitution guarantees to all persons equality before law, clauses (1) and (2) of Article 15 and clause (2) of Article 16, inter alia, prohibit in express terms, discrimination on the ground only of sex and sub-clause (a) of clause (1) of Article 19 ensures freedom of speech and expression to all citizens, yet the discrimination and atrocities against the transgender persons continue to take place.*
>
> *3. The Hon'ble Supreme Court, vide its order dated 15th April, 2014, passed in the case of National Legal Services Authority v. Union of India, inter alia, directed the Central Government and State Governments to take various steps for the welfare of transgender community and to treat them as a third gender for the purpose of safeguarding their rights under Part III of the Constitution and other laws made by Parliament and the State Legislature.*
>
> *4. The Transgender Persons (Protection of Rights) Bill, 2019 seeks to –*
> *(a) define the expression "transgender person";*

(b) prohibit discrimination against transgender persons;
(c) confer right upon transgender persons to be recognised as such, and a right to self-perceived gender identity;
(d) make provisions for issue of certificate of identity to transgender persons;
(e) provide that no establishment shall discriminate against transgender persons in matters relating to employment, recruitment, promotion and other related issues;
(f) provide for grievance redressal mechanism in each establishment;
(g) establish a National Council for Transgender Persons;
(h) provide punishment for contraventions of the provisions of the proposed legislation.

5. The Transgender Persons (Protection of Rights) Bill, 2016, for the aforementioned purpose, which was passed by the Lok Sabha and pending consideration and passing in the Rajya Sabha, lapsed on dissolution of the Sixteenth Lok Sabha. Hence, the Transgender Persons (Protection of Rights) Bill, 2019.

6. The Bill seeks to achieve the above objects."

31. The aforesaid indicates that the 2019 Act was enacted to secure the dignity, equality and inclusion of transgender persons in the mainstream, considering the cruel history of their policing. The 2019 Act sought to prevent several issues including the social exclusion, discrimination, the lack of educational facilities, medical facilities and unemployment faced by transgender persons which came as a consequence of the recognition and normalisation of the traditional binary understanding of gender, i.e., as male and female, by both the State and the society at large. Despite the guarantees under Articles 14, 15(1), 15(2), 16(2) and 19(1)(a) of the Constitution respectively, it was recognised that these fundamental rights were made alien to the transgender community due to the chasm created

by the lack of adequate laws as also the implementation of necessary social welfare measures and policies.

32. In this background, the 2019 Act sought to confer a right to self-perceived gender identity to transgender persons; make provisions for the issuance of a certificate of identity; prevent discrimination including discrimination by establishments in matters relating to employment, recruitment, promotion and other related issues; provide for a grievance redressal mechanism in each such establishment; establish a National Council for Transgender Persons; and provide for punishment in the event of contravention of the provisions of the 2019 Act, amongst others.

33. Section 22 of the 2019 Act empowered the appropriate government to make rules for carrying out the provisions of the Act. In exercise of the said powers, the Central Government brought forth the 2020 Rules.

34. The 2020 Rules, *inter alia,* deal with:

(i) The application and procedure involved in the issuance of a certificate of identity;

(ii) Directing the constitution of a welfare board for transgender persons for protecting their rights and interests along with facilitating access to schemes and welfare measures framed by the Government;

(iii) The setting up of Transgender Protection Cells under the charge of the District Magistrate in each District and the Director General of Police in each State;

(iv) The provision of equal opportunities in employment in every "establishment" as defined under the 2019 Act which includes the creation and publication of an Equal Opportunity Policy for transgender persons;

(v) The designation of a complaint officer in every establishment and the manner in which those complaints would be dealt with; and

(vi) The setting up of a grievance redressal mechanism operating through a helpline and outreach centres and the manner in which those complaints would be dealt with, amongst others.

35. Unfortunately, it appears that the 2019 Act and the 2020 Rules respectively have been brutishly reduced to dead letters. The Union of India and the States have exhibited a grossly apathetic attitude towards the transgender community, by defacing the lived realities of this community with their inaction. Considering the protraction of this inaction, such an attitude cannot be reasonably considered to be inadvertent or accidental; it appears intentional and seems to stem from deep-rooted societal stigma and the lack of bureaucratic will to effectuate the provisions of the 2019 Act and the 2020 Rules respectively.

36. In ***Shanavi Ponnusamy*** (*supra*), this Court acknowledged that the transgender community faces obstacles in accessing employment opportunities because of prejudicial societal norms, where deviation from the "masculine" and "feminine" perception is looked upon unfavourably. This Court directed the Union of India to devise a policy framework in

consultation with the NCTP formed under Section 16 of the 2019 Act, to reasonably accommodate transgender persons in the avenues of employment under establishments covered by the provisions of the 2019 Act. It had directed the following in its order dated 08.09.2022:

> *"7. Transgender persons routinely face multiple forms of oppression, social exclusion and discrimination, especially in the field of healthcare, employment and education. Gender diverse persons, including transgender persons, continue to face barriers in accessing equal employment opportunities, especially in the formal sector, due to the operation of gender stereotypes. Gender stereotypes in the workplace disproportionately impact transgender persons for not subscribing to societal norms about appropriate 'feminine' and 'masculine' appearances and mannerisms.*
>
> *8. Bearing the provisions of the 2019 Act and NALSA judgment (supra) in mind, it is necessary for the Central Government, in consultation with the National Council, to devise a policy framework in terms of which reasonable accommodation can be provided for transgender persons in seeking recourse to avenues of employment in establishments covered by the provisions of the 2019 Act. The enactment by Parliament embarks a watershed in the evolution of the rights of transgender persons. The provisions of the 2019 Act need to be implemented in letter and spirit by formulating appropriate policies. The Union Government must take the lead in this behalf and provide clear guidance and enforceable standards to all other entities, including, those of the Union Government, State Governments and establishments governed by the 2019 Act.*
>
> *9. The National Council under Section 16 has been constituted by a notification dated 21 August 2020. The Union Government shall adopt suitable measures after collaborating with the National Council and place a policy on the record before the next date of listing. The policy shall cover, but shall not be confined to the civil aviation industry. The Union Government in the Ministry of Social Justice and Empowerment and Department of Personnel and Training, shall consult all stake holders."*
>
> [Emphasis supplied]

37. Despite the clear directions of this Court in the order dated 08.09.2022 referred to above, the Union of India has feigned ignorance and has chosen not to act on these directions. Their inaction is, therefore, demonstrably continuous. To add to the above, the following response of the Ministry of Social Justice and Empowerment ("**MoSJE**") to a question put in the Upper House of the Parliament makes their intentions limpid:

> *"GOVERNMENT OF INDIA*
> *MINISTRY OF SOCIAL JUSTICE & EMPOWERMENT*
> ***RAJYA SABHA***
> ***UNSTARRED QUESTION NO -3321***
> *ANSWERED ON - 29/03/2023*
>
> ***POLICY FOR EMPLOYMENT GENERATION FOR TRANSGENDER PERSONS***
> *3321. SHRI NARANBHAI J. RATHWA*
> *Will the Minister of SOCIAL JUSTICE AND EMPOWERMENT be pleased to state:-*
> *(a) whether Government is formulating a policy in consultation with National Council for Transgender persons for providing transgender suitable jobs in Government organizations;*
> *(b) if so, complete details and status of policy document; and*
> *(c) whether it is fact that several private organizations are refusing jobs to transgender in contravention of the Transgender Persons (Protection of Rights) Act, 2019 and if so action taken by Government in this regard?*
>
> ***ANSWER***
> *THE MINISTER OF STATE FOR SOCIAL JUSTICE AND EMPOWERMENT*
> *(SUSHRI PRATIMA BHOUMIK)*
> *(a) & (b) Currently there is no such matter under consideration as the Transgender Persons (Protection of Rights) Act 2019 provide appropriate provisions for welfare of Transgender Persons in the field of employment, education, health and other related areas.*
> *(c) Ministry has not received any such information.*"

[Emphasis supplied]

38. After more than six months of the directions of this Court *vide* its order dated 08.09.2022, the official stance of the MoSJE was that there was no policy to reasonably accommodate transgender persons in employment which was under consideration. Effectively, the stance of the Union Government was that there is altogether no need for any policy, as of now, as the 2019 Act provides for appropriate remedies. Such a stance is in blatant disregard to the mandate of Chapter IV of the 2019 Act which obligates the appropriate Government to take steps in order to secure the full and effective participation of transgender persons and their inclusion in society.

39. The aforesaid response of the MoSJE is dated 29.03.2023. We are now in the year 2025. It is not just the period of delay that is weighing heavily in our minds; it is also the persisting inaction combined with a blanket refusal to bring forth any semblance of compliance to the 2019 Act, even in the future, which is deeply disturbing.

40. The Union of India is not the only party to be blamed. There seems to be a serious inertia on part of the States as well. With the exception of West Bengal[1], Tamil Nadu[2], and recently New Delhi[3] , no other State has

[1] West Bengal Transgender Persons (Protection of Rights) Rules, 2022.
[2] Tamil Nadu Transgender Persons (Protection of Rights) Rules, 2022.
[3] Delhi Transgender Persons (Protection of Rights) Rules, 2025.

brought forth any rules along the lines of the 2020 Rules. Orissa[4] and Kerala[5] respectively are the only States that have undertaken comprehensive policy measures. The other States have situated themselves in a comfortable silence.

41. Furthermore, despite Rule 11 of the 2020 Rules compulsorily requiring the State Government to form Transgender Protection Cells, only eleven States have formed such cells since the enactment of the 2020 Rules[6]. The 2020 Rules themselves put statutory prescriptions on the Union, the States, their respective machineries and all "establishments" under the 2019 Act, to craft an anti-discrimination and equal opportunity policy *vis-à-vis* employment within two years from the enforcement of the 2020 Rules and to also formulate a grievance redressal mechanism in every such establishment in the form of a complaint officer within thirty days from the enactment of the 2020 Rules. These obligations remain binding irrespective of whether the States decide to bring into force separate rules or not. However, the Union, the States and other establishments falling with the purview of the 2019 Act and the 2020 Rules respectively, have disregarded these obligations as well.

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[4] Guideline on Sweekruti (A Scheme for Promotion of Transgender Equality & Justice)
[5] State Policy for Transgenders in Kerala, 2015.
[6] Ambika Pandit, '5 years after enactment of law, only 11 states/UTs have set up transgender protection cells' *The Times of India* (New Delhi, 12 November 2024) <https://timesofindia.indiatimes.com/india/5-years-after-enactment-of-law-only-11-states/uts-have-set-up-transgender-protection-cells/articleshow/115225128.cms>.

42. As a consequence of all the above, at present we are faced with a situation wherein, all the concerned stakeholders have not only exhibited a serious and perennial lack of action, but have also reinforced discrimination towards the transgender community despite the existence of a statutory framework in that regard.

II. Rethinking Reasonable Accommodation in the Framework of the 2019 Act.

43. Mr. Deora has argued before us that "equality" under Article 14 would also include reasonable accommodation within its ambit. There is some merit in the argument of the learned Senior Counsel. We say so because the doctrine of reasonable accommodation, in its true essence, is related to the quest of substantive equality. It is capable of effectively addressing the barriers that certain individuals face due to their inherent characteristics, which may be a manifestation of discrimination on account of "*religion, race, caste, sex, place of birth or any of them*" and enables their full participation in society.[7] Reasonable accommodation is a measure to ensure that the beneficiary thereof enjoys or exercises all human rights and fundamental freedoms at par with the others. It envisions the making of necessary and appropriate modifications or adjustments that would

[7] Elise Bribosia and Isabelle Rorive, *Reasonable Accommodation beyond Disability in Europe?* (European Network of Legal Experts in the Non-discrimination Field, DG Justice, European Commission 2013) 8.

enable a person who faces disadvantages in both accessing and enjoying opportunities equally. What is important to note is that it is not a privilege, but something essential to ensure equal participation. It casts a positive obligation on the State and establishments to make the necessary modifications to reasonably accommodate the persons who are placed at a disadvantage.

44. Article 14 of the Constitution of India deals with equality before law. It reads as below:

> "***14. Equality before law.—***
> *The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*"

45. A promise of equal protection of law would also ensure the promise of reasonable accommodation. It is the responsibility of the State to not deny the equal protection of law. It bears some reiteration that the expression "equality before law" in Article 14 promises formalistic sense of equality, whereas the expression "equal protection of law" guarantees substantive equality. In other words, the promise of Article 14 not only ensures equal treatment of everyone in the eyes of law, but also recognizes that those who are placed unequally would require positive measures to achieve equal protection of laws.

46. In ***State of Kerala*** **v.** ***N.M. Thomas*** reported in **(1976) 2 SCC 310**, His Lordship C.N. Ray, C.J. (as he then was), noted that the varying needs of different classes of persons require special treatment. It was cautioned that equality cannot mean absolute equality. In other words, equality would only mean the parity of treatment when there are parity of conditions. In the absence of parity of conditions, the rule of positive differentiation is inherent in the concept of equality. He noted thus:

> *"31. The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."*
>
> [Emphasis supplied]

47. Even though, the aforesaid words that fell from Ray, C.J. (as he then was), are in view of classification under Article 16(1) *vis-à-vis* Article 14 of the Constitution, yet what stands underscored in the observations is that it would also be incumbent upon the State to make positive measures for those who are marginalised in order for them to enjoy the equal protection of law. That is the very function of reasonable accommodation as well. Reasonable accommodation is but a tool of substantive equality. When a statute contains provisions that provide for substantive equality, reasonable accommodation is implicit in the statutory obligations. Therefore, it is as clear as a noon day that reasonable accommodation is a positive obligation.

48. In India, the jurisprudence at present around reasonable accommodation primarily touches upon the cornerstones of the disability law. The RPwD Act is India's primary disability rights law, replacing the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 to align with the UN Convention on the Rights of Persons with Disabilities ("**the UN CRPD**"), which India ratified in 2007. The RPwD Act guarantees equality, non-discrimination, accessibility, and reservations in education and employment, while mandating reasonable accommodation and inclusive policies to ensure the full participation of persons with disabilities in society. It is a statute which attempts to achieve

the constitutional promise of participative democracy for persons with disability.

49. In ***Vikash Kumar* v. *UPSC*** reported in **(2021) 5 SCC 370**, a candidate with dysgraphia (writer's cramp) was denied a scribe, while he was sitting for the civil services exam. The three-judge Bench of this Court held that the denial of scribe violated his rights under the RPwD Act. It was emphasized that the statute ensures not just formal but substantive equality, requiring authorities to provide reasonable accommodation so that persons with disabilities can compete in the examination process on an equal footing. It rejected a narrow, medicalized view of disability and affirmed a rights-based approach, underscoring dignity, inclusivity, and accessibility as core constitutional values. It was highlighted that the concept of reasonable accommodation captures positive obligations on both State and non-State actors to provide additional support to facilitate the effective participation of persons with disability in society. This Court had very categorically held that a guarantee of equal opportunity must be accompanied by the provision of reasonable accommodation. We have reproduced the relevant portions of the judgment below:

> "*44. The principle of reasonable accommodation captures the positive obligation of the State and private parties to provide additional support to persons with disabilities to facilitate their full and effective participation in society. The concept of reasonable accommodation is developed in section (H) below. For the present, suffice it to say that, for a person with disability, the*

constitutionally guaranteed fundamental rights to equality, the six freedoms and the right to life under Article 21 will ring hollow if they are not given this additional support that helps make these rights real and meaningful for them. Reasonable accommodation is the instrumentality – are an obligation as a society – to enable the disabled to enjoy the constitutional guarantee of equality and non-discrimination. In this context, it would be apposite to remember R.M. Lodha, J's (as he then was) observation in Sunanda Bhandare Foundation v. Union of India [Sunanda Bhandare Foundation v. Union of I ndia, (2014) 14 SCC 383 : (2015) 3 SCC (L&S) 470; Disabled Rights Group v. Union of India, (2018) 2 SCC 397 : (2018) 1 SCC (L&S) 391] , where he stated : (SCC p. 387, para 9)

> *"9. … In the matters of providing relief to those who are differently abled, the approach and attitude of the executive must be liberal and relief oriented and not obstructive or lethargic."*

xxx xxx xxx

53. While most of the obligations under the 2016 RPwD Act are cast upon the Government or local authorities, the Act and Rules made under it have also imposed certain obligations on the private sector. The role of the private sector in the market has increased manifold since the advent of liberalisation in India. The 2016 RPwD Act recognises that with the burgeoning role of the private sector in generating employment in India, an active responsibility has to be cast upon private employers to create an inclusive workforce by providing persons with disabilities equal opportunities in the job market. However, the guarantee of equal opportunity must be accompanied by the provision of reasonable accommodation. The Rules framed under the 2016 RPwD Act stipulate that private establishments shall not discriminate against persons with disability on the ground of disability. [Rule 3(1) of the Rights of Persons with Disabilities Rules, 2017] It is to be noted that the definition of "discrimination" under Section 2(h) of the 2016 RPwD Act includes denial of reasonable accommodation. Private employers are mandated to frame an equal opportunity policy [Section 21 of the 2016 RPwD Act read with Rule 8 of the Rights of Persons with Disabilities Rules, 2017] . Equal opportunity policies for establishments having more than 20 employees are required to include provisions relating to : (i) appointment of liaison officers in establishments to look after the recruitment of persons with disabilities and

provisions of facilities and amenities for such employees [Rule 8(3)(e) of the Rights of Persons with Disabilities Rules, 2017] ; (ii) identification of posts/vacancies for disabled persons [Rule 8(3)(b) of the Rights of Persons with Disabilities Rules, 2017] ; (iii) provision of additional facilities and benefits such as training facilities, assistive devices, barrier free accessibility, preference in transfer and promotion, allotment of residential accommodation and special leave [Rule 8(3) sub-clauses (c) and (d) of the Rights of Persons with Disabilities Rules, 2017] . The 2016 RPwD Act further provides that private establishments have to conform with accessibility norms stipulated by the Government with respect to building plans [Section 44 of the 2016 RPwD Act] . The 2016 RPwD Act also provides that 5% of the workforce of establishments receiving incentives from the appropriate Government would be comprised of persons having benchmark disability [Section 35 of the 2016 RPwD Act]."

[Emphasis supplied]

50. Recently, in ***Kabir Paharia* v. *National Medical Commission***, reported in **2025 SCC OnLine SC 1025**, this Court again had the occasion to hold that reasonable accommodation is not in fact a matter of charity which is subject to the State's mercy, rather it is a positive obligation of the State in view of ensuring substantive equality and safeguarding the fundamental rights flowing from Articles 14, 16 and 21 of the Constitution respectively. The relevant extract reads thus:

"*14. We further direct that the National Medical Commission shall forthwith and not later than within a period of two months from today and at any cost before the counselling for the 2025-2026 session commence, complete the process of revising the guidelines in light of judgments of this Court in Om Rathod v. Director General of Health Sciences [2024 SCC OnLine SC 4283] and Anmol v. Union of India [2025 SCC OnLine SC 387] so that no deserving candidate in the PwBD category is denied admission into the MBBS course in spite of his/her/their entitlement. It must be ensured that systemic discrimination*

against persons with benchmark disabilities, whether direct or indirect, is eliminated and that the admission process upholds their right to equal opportunity and dignity.

15. The constitutional promise of equality is not merely formal but substantive, requiring the State to take affirmative measures to ensure that PwD and PwBD can meaningfully participate in all spheres of life, including professional education. We emphasize that reasonable accommodation is not a matter of charity but a fundamental right flowing from Articles 14, 16, and 21 of our Constitution. When administrative authorities create arbitrary barriers that exclude qualified PwBD candidates, they not only violate statutory provisions but also perpetuate the historical injustice and stigmatisation. The fundamental rights and the dignity of PwD and PwBD candidates must be protected by ensuring that assessment of their capabilities is individualised, evidence-based, and free from stereotypical assumptions that have no scientific foundation."

[Emphasis supplied]

51. Further, rights cannot exist as standalone ideals devoid of implementation. The spirit of the fundamental rights must accrue to the benefit of those that it seeks to protect. The glaring state of affairs with respect to the rights of the transgender community is solely due to such rights being envisaged without any clear statutory mechanism of implementation. Though the 2019 Act spells out rights, yet it does not create any mechanism for the concerned individuals to realise the benefit of these rights, thereby, aggravating the struggles of the community. This is so because the 2019 Act, in its plain words, does not spell reasonable accommodation the way it is done for say, in the RPwD Act. However, the decisions of this Court in ***NALSA*** (*supra*) and ***Shanavi Ponnuswamy*** (*supra*) have employed the

concept of reasonable accommodation in the context of discrimination faced by transgender persons in employment.

52. In ***NALSA*** (*supra*), this Court observed that equality is founded on two complementary principles, namely, non-discrimination and reasonable differentiation. This Court observed that equality would demand embracing notions of positive obligations and reasonable accommodation. The relevant paragraph reads as follows:

> "*95. In international human rights law, equality is found upon two complementary principles : non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of the TGs, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation*."
>
> [Emphasis supplied]

53. In ***Shanavi Ponnusamy*** (*supra*), a writ petition was filed by a transgender woman seeking for a direction to be issued to the respondents therein to consider her candidature for the post of a cabin crew member in an airline company namely Air India, pursuant to an advertisement in the "female category". This Court directed the Central Government to consult the NCTP and to devise a policy framework in terms of which reasonable

accommodation can be provided for transgender persons in seeking recourse to the avenues of employment in establishments under the 2019 Act. In paragraph 8, which we have already reproduced above, this Court ordered the Union of India "… *to devise a policy framework in terms of which reasonable accommodation can be provided for transgender persons*."

54. It is discernible from the aforesaid that under the 2019 Act, the appropriate Government and the "establishments", have a positive obligation to ensure that there is no discrimination against transgender persons, through affirmative action. There is no gainsaying that the principle of reasonable accommodation is implied in the 2019 Act, yet we are of the considered opinion that explicit recognition of the same would enable better implementation of the positive obligations placed on the appropriate Government and the establishments respectively, to ensure that the benefits of the 2019 Act are truly reaped by transgender persons. This is because unless we adopt a purposive interpretation to beneficial statutes which are riddled with inadequate implementation measures, we run the risk of leaving the statute toothless and the rights enshrined therein inutile. In such a view of the matter, it is imperative for us to heed to the jurisprudential developments which have taken place in the context of upliftment of marginalized sections of the society such as, persons with disabilities, and adopt them for the purposes of the present matter as well.

55. However, we may with a view to obviate any confusion, clarify at the very threshold, that in no way do we say that gender identity by itself is to be equated with disability. That is not the intention of this Court at all. In fact, the discrimination which is associated with a particular gender identity is a societal disability, i.e., the inability of the society at large to break free from its regressive norms. Furthermore, a lot of jurisprudence has evolved around taking the beneficial jurisprudence of disability rights to the broader themes of human rights.. It is with this intention that we hold that transgender persons also have a right to be reasonably accommodated. In the subsequent paragraphs we have discussed the international scenario.

a. Evolution of Canadian Jurisprudence.

56. The Canadian Human Rights Act, 1985 comprehensively creates provisions for reasonable accommodation on 13 different grounds, namely, race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. More particularly, the purpose of the said Act reads that in order for the principles of equal opportunity to be at play, it is very important that the different needs of persons are accommodated.

57. The limitation to the positive duty to accommodate is the notion of "*undue hardship*". An occupational practice can be shown as *bona fide* only where it can be shown that accommodating the needs of the affected individual or group would cause undue hardship to the accommodating party, i.e. the taking into account factors such as health, safety, and financial cost.[8] Therefore, apart from the aforesaid limited exceptions, the duty to accommodate remains a binding obligation. It requires institutions to make necessary adjustments so that individuals can participate on equal terms. The standard is not set by what is most convenient for the employer, but by what is essential to ensure fairness and inclusion. The central tenet underlying the duty is removal of discriminatory barriers related to the 13 prohibited grounds of discrimination by providing reasonable accommodation measures to ensure the full and equal participation of all employees.

b. A Reading of Reasonable Accommodation for Gender Dysphoria in the United States of America

58. In the USA, there are statutory provisions that recognise reasonable accommodation for disability and religion. The Americans with Disability Act of 1990 ("**ADA**") is a statutory framework that prohibits

[8] John Bowers, *Accommodating Difference: How Is Religious Freedom Protected When It Clashes with Other Rights; Is Reasonable Accommodation the Key to Levelling the Field?* (2022) 10 *Oxford Journal of Law and Religion* 275, 288.

discrimination against people with disabilities in everyday activities. Employers have a duty to reasonably accommodate qualified individuals with a disability under the ADA unless it would cause them undue hardship.

59. Title VII of the Civil Rights Act of 1964 ("**Title VII**") prohibits federal agencies from discriminating against employees or potential applicants in hiring, termination and other terms and conditions of employment, on account of their religious beliefs. Additionally, Title VII requires federal agencies to reasonably accommodate the religious beliefs or practices of employees or applicants unless doing so would impose an undue hardship upon the agency. The framework of reasonable accommodation in the USA is limited, when compared to Canada. In contrast to Canada's unified model, the USA operates on a dual legal framework, namely of the ADA and Title VII respectively.

60. However, when it comes to discrimination against transgender persons, there have been judicial developments. The U.S. Court of Appeals for the Fourth Circuit held in ***Williams* v. *Kincaid*** reported as **45 F.4th 759 (4th Cir. 2022)** that individuals with gender dysphoria may be protected under the ADA and the Rehabilitation Act of 1973. In the said judgment, a trans-woman, Kesha Williams, was placed in the men's prison and was denied

all care relating to her gender dysphoria, a disabling medical condition affecting several transgender persons. It was held that non-treatment of the condition amounted to a violation of the ADA thereby recognizing that medical conditions associated with the transgender community constitute a disability. Thus, a reasonable accommodation on this ground was mandatory under the American disability jurisprudence. The said judgment is said to have significantly expanded the scope of reasonable accommodation beyond the boundaries of traditional disability and religious grounds.

61. Though there is no separate legislation which protects the transgender persons from discrimination in the USA, yet the ADA has become a potent tool to address discrimination against transgender persons.[9] In ***Bostock*** (*supra*), the U.S. Supreme Court has held that an employer who fires someone simply for being transgender has engaged in impermissible '*sex discrimination*'. ***Bostock*** (*supra*), in essence, is a ruling on the lines of ***NALSA*** (*supra*) and ***Navtej Singh Johar* v. *Union of India***, reported in **(2018) 10 SCC 1**, as far as reading sexual and gender identity-based discrimination as sex-based discrimination.

[9] Susan V Hazeldean, *Accommodating Trans Rights* (2024) 68 *St Louis University Law Journal* 865, 873.

c. EU on Reasonable Accommodation.

62. The source of reasonable accommodation as a facet of substantive equality in the EU is backed by well-crafted legislations on disability law and precedents. However, the discussion is centered around disability, as no other equal treatment legislation displays specific provisions for reasonable accommodation. As discussed in the above exposition, we seek to borrow beneficial principles from disability jurisprudence to enable us to understand and effect better implementation of the 2019 Act.

63. Eminent Dutch jurist Dr. Jenny E. Goldschmidt has argued that the principles of Convention on the Rights of Persons with Disabilities ("**CRPD**") reflect Sandra Fredman's four dimensions of substantive equality to pave way for 'transformative' substantive equality.[10] Likewise Colm O'Cinneide has argued that before the CRPD was in place, the discourse on human rights struggled to articulate disability rights claims. However, with the CRPD, disability rights have now become part of the mainstream human rights and is shaping the broader human rights debate.[11] Reasonable accommodation has similar potential.

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[10] J E Goldschmidt, 'New Perspectives on Equality: Towards Transformative Justice through the Disability Convention?' (2017) 35 *Nordic Journal of Human Rights* 1, 11.

[11] Colm O'Cinneide, 'Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009) 164, 171, 189.

64. Goldschmidt has also highlighted that 'reasonable accommodation' is not a new development, for example, reasonable accommodation in the form of an obligation to create facilities for women at the workplace has existed for a long time. For the same reason, she has argued for taking the broader human rights context into account, to explain the scope and meaning of reasonable accommodation.[12] Bribosia and Rorive have argued that reasonable accommodation can be and has been extended to other grounds of discrimination.[13]

65. In July 2008, the European Commission proposed a directive that would provide protection from discrimination on grounds of age, disability, sexual orientation and religion or belief beyond the workplace, covering areas like social protection, healthcare, education and access to goods and services, including housing.[14] This proposal represented the most significant attempt to extend reasonable accommodation to concepts beyond disability.

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[12] J E Goldschmidt, 'Reasonable accommodation in EU equality law in a broader perspective' (2007) 8 *ERA Forum* 39, 42.

[13] Bribiosa and Rorive, n 1.

[14] European Parliament Directorate-General for Parliamentary Research Services, Directorate-General for Internal Policies of the Union, Milieu Ltd, Proli P., Lawlor N. et al, *Implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: Impact assessment of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, as well as amendments 37 and 41 of the European Parliament* (European Parliament, 2014) 42.

III. Addressing Omission in Discrimination Law

66. The discussion on equality is often focused on acts of commission and such explicit instances where individuals or institutions actively discriminate. However, discrimination also operates through omission: through the silences, exclusions, and failures of the law to protect certain groups or to recognise particular forms of disadvantage. Addressing omission in discrimination law, therefore, requires moving beyond the overtly unequal 'act' to examine the systemic 'inactions' or absences which enable inequality to persist. These omissions may arise from the narrow drafting of statutes, the exclusion of certain identities from legal protection, or the failure to impose positive duties on institutions to prevent discrimination. Recognising and remedying such gaps is crucial for realizing substantive equality.

67. We clarify that ensuring a viable framework of reasonable accommodation is a positive obligation and the failure to fulfil such obligation also amounts to discrimination. In other words, omission can be discriminatory where there is a duty to act. Addrain Conyers and Tony Carrizales in their work reflect on omissive discrimination as "privileged omission" that accrues from "administrative inaction".[15] They describe 'privileged

[15] Addrain Conyers and Tony Carrizales 'Privileged Omissions: The Impact of Discriminatory Inaction', (2024) 56(1) *Administration & Society* 3.

omissions' in their work to mean those decisions where the discretion not to act (omission) requires as much attention as the decision to act (commission).[16] They describe discriminatory omissions to be such derelictions which operate in a manner that further discriminates against already marginalized and disadvantaged groups.[17]

68. Unlike the USA, we have a legislation already in place which recognises and attempts to remedy discrimination against transgender persons. Nonetheless, it is unfortunate that the legislation, i.e., the 2019 Act, is dotted with shortcomings and pitfalls. The glaring reality remains that, as a statute, it plainly recognises the rights of transgender persons without creating any mechanisms for how the rights can be materialized. These shortcomings in themselves are an instance of omissive discrimination and in teeth of the principle of substantive equality provided in the Constitution.

a. A Four-Dimensional Approach to Address Substantial Equality: Situating 'Discrimination' in Omissive Discrimination.

69. This Court in ***Transmission Corpn. of A.P. v. Ch. Prabhakar***, reported in **(2004) 5 SCC 551**, observed that our Constitution is a living, organic document which needs to be construed in a broad and liberal sense. While

[16] *Ibid* 4.
[17] *Ibid* 5.

quoting the erudite opinion of Vivian Bose, J., in ***State of W.B. v. Anwar Ali Sarkar*****,** reported in **(1952) 1 SCC 1**, this Court observed that the words in the Constitution are not just dull lifeless words, static and hidebound as in some mummified manuscript, but living flames intended to give life to a great nation. Therefore, a construction most beneficial to the widest possible amplitude of its powers ought to be adopted. When it is said that the equality code of the Constitution captures both formal and substantive equality, it should be borne in mind that substantive equality is a very dynamic concept in itself. Thus, for attaining substantive equality, where it is the active obligation of the State to prohibit discrimination, the duty to accommodate becomes a facet of the same. Such understanding is erected on the ground that the principle of equality enshrined in the Constitution would demand that the gaps between constitutional requisites and actual access thereto are removed over the course of time. It is for this reason that this Court speaking through Vivian Bose, J., observed in ***Anwar Ali Sarkar*** (*supra*) that the Constitution must be left elastic enough to meet from time to time, the altering conditions of a changing world with its shifting emphasis and differing needs.

70. Sandra Fredman has opined a four-dimensional framework in order to factually observe the rigours of substantive equality. The four dimensions are: "*to redress disadvantage; to address stigma, stereotyping, prejudice and*

violence; to enhance voice and participation; and to accommodate difference and achieve structural change."[18]

71. Fredman argues that it is pertinent that the observance of these four dimensions are not made mutually exclusive. She concludes that in conflicts concerning substantive equality, it is only when the entire framework as a whole is considered that the conflict is actually resolved.

72. We go a step forward to say that this framework is a part of the Indian jurisprudence on equality and non-discrimination. We discuss each framework below and encapsulate its presence in the Indian jurisprudence.

i. Redressing disadvantage.

73. The Indian Constitution inherently embodies 'redressal of disadvantage' as a fundamental goal. For instance, under Article 15(4), the State is allowed to carry out positive discrimination by making special provisions for the advancement of any socially and educationally backward classes. However, the broader theme of the equality code of the Constitution has been employed by the courts to highlight factual disadvantage and redress it especially by way of Article 14. Further, such redressal has been on the grounds of constitutional morality and not popular morality. Therefore,

[18] Sandra Fredman, 'Substantive equality revisited' (2016) 14(3) *International Journal of Constitutional Law* 712, 713.

the letter and spirit of the Constitution by itself enables transformative constitutionalism. Redressal of historical, social or political disadvantages lies at the core of such transformative approach.

74. For instance, in ***Pragati Varghese* v. *Cyril George Varghese***, reported in **1997 SCC OnLine Bom 184**, the Bombay High Court was considering the constitutionality of Section 10 of the Indian Divorce Act, 1869. Under the said provision, the Christian wives were required to seek divorce on the ground of incestuous adultery or adultery coupled with bigamy, marriage with another women, cruelty or desertion, while the husband could seek divorce on the ground of mere adultery. The High Court held that the classification under Section 10 was unconstitutional as it put the Christian women at a disadvantageous position and considered them to be the "weaker sex", putting the male gender at a superior position. The Court rightly recognised the disadvantageous position of women, and realistically redressed said disadvantage by according a purposive and progressive interpretation to the Constitution.

75. The equality code enshrined in the Constitution was explained by this Court in ***M. Nagaraj v. Union of India***, reported in **(2006) 8 SCC 212** wherein it noted in paragraph 102 that equality has two facets: formal equality, which is equality '*in law*', and substantive equality, which is equality '*in fact*'. In case of the latter, the State is expected to take

affirmative action in favour of the disadvantaged groups of the society. This Court noted that egalitarian equality in its true essence encompasses substantive equality.

76. Similarly, in ***Indra Sawhney* v. *Union of India***, reported in **1992 Supp (3) SCC 217**, S. Ratnavel Pandian, J., writing in his concurring opinion had the occasion to note the following on substantial equality:

> *"146. The basic policy of reservation is to off-set the inequality and remove the manifest imbalance, the victims of which for bygone generations lag far behind and demand equality by special preferences and their strategies. Therefore, a comprehensive methodological approach encompassing jurisprudential, comparative, historical and anthropological conditions is necessary. Such considerations raise controversial issues transcending the routine legal exercise because certain social groups who are inherently unequal and who have fallen victims of societal discrimination require compensatory treatment. Needless to emphasise that equality in fact or substantive equality involves the necessity of beneficial treatment in order to attain the result which establishes an equilibrium between two sections placed unequally.*
>
> *147. It is more appropriate to recall that "There is equality only among equals and to equate unequals is to perpetuate inequality.*
>
> *148. Therefore, the submission that the implementation of the recommendations of the Report will curtail concept of equality as enshrined under Article 14 of the Constitution and destroy the basic structure of the Constitution, cannot be countenanced."*
>
> [Emphasis supplied]

77. Therefore, the concept of substantive equality is contained in the spirit of Article 14 and consequently, a positive obligation has been placed by the Constitution upon the State to redress disadvantages faced by

marginalized sections of the society, whether they be historical, social or political.

78. In the context of the mandate of non-discrimination under Article 15, we may refer with profit to the judgment rendered by the Constitution Bench of this Court in ***Navtej*** (*supra*) wherein Section 377 of the Indian Penal Code was read down and intercourse between persons of the same sex was decriminalised. This Court speaking through Indu Malhotra, J., noted that the object underlying Article 15 of the Constitution is to guarantee protection to those citizens who continue to suffer disadvantages due to historical injustices, whether it be of a political, social, or economic nature. Further, this Court relied upon the interpretation of "sex"under Article 15 as expounded in ***NALSA*** (*supra*) wherein it was held that "sex" includes *inter alia* both "gender identity" and "sexual orientation". The relevant portion of judgment is reproduced below:

> *"638.2. The term "sex", as it occurs in Article 15 has been given an expansive interpretation by this Court in National Legal Services Authority v. Union of India [National Legal Services Authority v. Union of India, (2014) 5 SCC 438] (referred to as Nalsa judgment) to include sexual identity. Para 66 of the judgment reads thus : (SCC p. 488)*
>
> > *"66. … 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 includes 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 neither male nor female."*
>
> *(emphasis supplied and internal quotations omitted)*
>
> *xxx xxx xxx*
>
> *640.2.3. In National Legal Services Authority v. Union of India [National Legal Services Authority v. Union of India, (2014) 5 SCC 438] , this Court recognised the right of transgender persons to decide their self-identified gender. In the context of the legal rights of transgender persons, this Court held that (SCC p. 465, para 22) sexual orientation and gender identity is an integral part of their personality. The relevant excerpt from Radhakrishnan, J.'s view is extracted hereinbelow : (National Legal Services Authority case [National Legal Services Authority v. Union of India, (2014) 5 SCC 438] , SCC p. 465, para 22)*
>
> > *"22. … Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. ..."*
>
> [Emphasis supplied]

79. This Court also tests the constitutionality of statutory provisions by considering factual realities associated with their implementation. In other words, the courts examine whether a provision claiming to resolve a mischief or disadvantage is addressing the issue or is in effect perpetuating the same or a different disadvantage. In ***Joseph Shine* v. *Union of India***, reported in **(2019) 3 SCC 39**, this Court decriminalised Section 497 of the IPC as it was violative of Articles 14, 15(1) and 21 of the Constitution respectively. This Court speaking through Chandrachud, J., opined that

the first step towards realising substantive equality is to test if a provision enacted to address a disadvantage, itself results in a handicap to a group of citizens or not. Further, the provisions, measures or redressal of such a disadvantage must not be grounded in the notions and stereotypes about a section of the society. Such stereotypical redressal gives birth to social, economic and political impediments and is in fact no real remedy at all. This is so because, in essence, the same would lead to the legitimization of the disadvantage. It was recognised that the object underlying Article 15(3) includes giving effect to substantive equality in the fullest sense by assuring dignity and autonomy to the section of the society sought to be benefited. While doing so, there can be no possibility for the legislature or executive to entrench their remedial measures in stereotypes and notions that find their origin in the very disadvantage sought to be remedied. The relevant portion of the judgment is reproduced below:

> *"172. The primary enquiry to be undertaken by the Court towards the realisation of substantive equality is to determine whether the provision contributes to the subordination of a disadvantaged group of individuals. [Nivedita Menon (Ed.), Ratna Kapur and Benda Cossman "On Women, Equality and the Constitution : Through the Looking Glass of Feminism in Gender and Politics in India" (1993).] The disadvantage must be addressed not by treating a woman as "weak" but by construing her entitlement to an equal citizenship. The former legitimises patronising attitudes towards women. The latter links true equality to the realisation of dignity. The focus of such an approach is not simply on equal treatment under the law, but rather on the real impact of the legislation. [Maureen Maloney, "An Analysis of Direct Taxes in India : A Feminist Perspective", Journal of the Indian Law Institute (1988).] Thus, Section 497*

has to be examined in the light of existing social structures which enforce the position of a woman as an unequal participant in a marriage."

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189. Article 15(3) encapsulates the notion of "protective discrimination". The constitutional guarantee in Article 15(3) cannot be employed in a manner that entrenches paternalistic notions of "protection". This latter view of protection only serves to place women in a cage. Article 15(3) does not exist in isolation. Articles 14 to 18, being constituents of a single code on equality, supplement each other and incorporate a non-discrimination principle. Neither Article 15(1), nor Article 15(3) allow discrimination against women. Discrimination which is grounded in paternalistic and patriarchal notions cannot claim the protection of Article 15(3). In exempting women from criminal prosecution, Section 497 implies that a woman has no sexual agency and that she was "seduced" into a sexual relationship. Given the presumed lack of sexual agency, criminal exemption is then granted to the woman in order to "protect" her. The "protection" afforded to women under Section 497 highlights the lack of sexual agency that the section imputes to a woman. Article 15(3) when read with the other Articles in Part III, serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense. Dignity and autonomy are crucial to substantive equality. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women."

[Emphasis supplied]

80. It is also apposite to note that facial neutrality can also reinforce disadvantage. A facially equal application of laws to parties situated unequally is also an anathema to 'substantive equality'. In ***Nitisha*** (*supra*), this Court had the occasion to discuss and expound the doctrine of indirect discrimination. In doing so, it was observed that discrimination is not necessarily a result of *mala fide* intention, rather, it can be a by-product of

unconscious biases or an inability to recognize that the laws, rules or measures enacted can have the effect of perpetuating an unjust *status quo*. In other words, indirect discrimination occurs when a facially neutral criteria is put into effect, which does not take into account the underlying effect of a provision or a practice. The relevant portions of the judgment are reproduced below:

> *"50. The jurisprudence relating to indirect discrimination in India is still at a nascent stage. Having said that, indirect discrimination has found its place in the jurisprudence of this Court in Navtej Singh Johar v. Union of India [Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, paras 442-446 : (2019) 1 SCC (Cri) 1] , where one of us (Chandrachud, J.), in holding Section 377 of the Penal Code, 1860 as unconstitutional insofar as it decriminalises homosexual intercourse amongst consenting adults, drew on the doctrine of indirect discrimination. <u>This was in arriving at the conclusion that this facially neutral provision disproportionately affected members of the LGBT community</u>. This reliance was in affirmation of the decision of the Delhi High Court in Naz Foundation v. State (NCT of Delhi) [Naz Foundation v. State (NCT of Delhi), 2009 SCC OnLine Del 1762 : (2009) 111 DRJ 1] which had relied on the "Declaration of Principles of Equality" issued by the Equal Rights Trust Act, in 2008 in recognising that indirect discrimination occurs*
>
> > *"<u>when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary</u>." [Id, para 93.]*
>
> *Similarly, this Court has recognised the fashion in which discrimination operates by dint of "structures of oppression and domination" which prevent certain groups from enjoying the full panoply of entitlements. [Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1, (Chandrachud, J., concurring opinion, para 420); Joseph Shine v. Union of*

India, (2019) 3 SCC 39 : (2019) 2 SCC (Cri) 84, (Chandrachud, J., concurring opinion, paras 113-114) ("Joseph Shine")] The focus in anti-discrimination enquiry, has switched from looking at the intentions or motive of the discriminator to examining whether a rule, formally or substantively, "contributes to the subordination of a disadvantaged group of individuals" [Joseph Shine v. Union of India, (2019) 3 SCC 39 : (2019) 2 SCC (Cri) 84] .

51. Indirect discrimination has also been recognised by the High Courts in India [Patel Suleman Gaibi v. State of Maharashtra, 2014 SCC OnLine Bom 4639 : (2015) 3 Mah LJ 855] . For instance, in the matters of public sector employment, the Delhi High Court in Ravina v. Union of India [Ravina v. Union of India, 2015 SCC OnLine Del 14619] and in Madhu v. Northern Railway [Madhu v. Northern Railway, 2018 SCC OnLine Del 6660. A challenge to conditions of employment/promotion in the Army Dental Corps was also made before the Delhi High Court in Jacqueline Jacinta Dias v. Union of India, 2018 SCC OnLine Del 12426. However, the challenge could not succeed as the Court failed to discern any manifest bias. In doing so however, the High Court pointed out to the lack of clear norms regarding indirect discrimination in India and noted : (Jacqueline Jacinta Dias case, SCC OnLine Del para 35)"35. This Court is conscious of the fact that indirect discrimination is harder to prove or establish. Hidden biases, where establishments or individuals do not overtly show bias, but operate within a discriminatory environment therefore, is hard to establish. Yet, to show such bias … there should have been something in the record—such as pattern of marking, or predominance of some element, manifesting itself in the results declared. This Court is unable to discern any; Nor is there any per se startling consequence apparent from the granular analysis of the results carried out. Furthermore, equality jurisprudence in India has not yet advanced as to indicate clear norms (unlike legislative rules in the EU and the UK) which guide the courts. Consequently, it is held that the complaint of gender discrimination or arbitrariness is not made out from the record."] , has upheld challenges to conditions of employment, which though appear to be neutral, have an adverse effect on one section of the society. Bhat, J., while analysing the principles of indirect discrimination in Madhu [Madhu v. Northern Railway, 2018 SCC OnLine Del 6660] , held : (Madhu case [Madhu v. Northern Railway, 2018 SCC OnLine Del 6660] , SCC OnLine Del para 20)

"20. This Court itself has recognised that actions taken on a seemingly innocent ground can in fact have discriminatory effects due to the structural inequalities that exist between classes. When the CRPF denied promotion to an officer on the ground that she did not take the requisite course to secure promotion, because she was pregnant, the Delhi High Court struck down the action as discriminatory. Such actions would inherently affect women more than men. The Court in Ravina v. Union of India [Ravina v. Union of India, 2015 SCC OnLine Del 14619] stated : (SCC OnLine Del para 12)

> *'12. … A seemingly "neutral" reason such as inability of the employee, or unwillingness, if not probed closely, would act in a discriminatory manner, directly impacting her service rights. That is exactly what has happened here : though CRPF asserts that seniority benefit at par with the petitioner's colleagues and batchmates (who were able to clear Course No. 85) cannot be given to her because she did not attend that course, in truth, her "unwillingness" stemmed from her inability due to her pregnancy.'"*

52. We must clarify here that the use of the term "indirect discrimination" is not to refer to discrimination which is remote, but is, instead, as real as any other form of discrimination. Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion [Interchangeably referred as "PCP".] .

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70. A study of the above cases and scholarly works gives rise to the following key learnings. First, the doctrine of indirect discrimination is founded on the compelling insight that discrimination can often be a function, not of conscious design or malicious intent, but unconscious/implicit biases or an inability to recognise how existing structures/institutions, and ways of doing things, have the consequence of freezing an unjust status quo. In order to achieve substantive equality prescribed under the Constitution, indirect discrimination, even sans discriminatory intent, must be prohibited."

[Emphasis supplied]

81. This Court in ***Nitisha*** (*supra*) also alluded to the American doctrine of "*disparate discrimination*" propounded in ***Griggs* v. *Duke Power Co.***, reported in **401 U.S. 424** wherein it was observed that meaningful equality is not only mere absence of intentional inequality but also encompasses within its fold the introduction of efficacious systems that resolve existing inequality and does not reinforce them. The relevant portions of the judgment in ***Nitisha*** (*supra*) are reproduced below:

> "*58. The genesis of the doctrine can be traced to the celebrated United States Supreme Court judgment in Griggs v. Duke Power Co. [Griggs v. Duke Power Co., 1971 SCC OnLine US SC 47 : 28 L Ed 2d 158 : 401 US 424 at p. 431 (1971)] The issue concerned manual work for which the prescribed qualifications included the possession of a high school education and satisfactory results in an aptitude test. Two facts about the case bear emphasis. First, due to the inferior quality of segregated school education, African-American candidates were disqualified in higher numbers because of the aforementioned requirements than their white counterparts. Second, neither of these two requirements was shown to be significantly related to successful job performance.*
>
> *59. Construing the prohibition on discrimination embodied in Title VII of the Civil Rights Act of 1964, Burger, C.J. held : (Griggs case [Griggs v. Duke Power Co., 1971 SCC OnLine US SC 47 : 28 L Ed 2d 158 : 401 US 424 at p. 431 (1971)] , SCC OnLine US SC para 11)*
>
> > *"11. … <u>The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation</u>."*
>
> *He went on : (Griggs case [Griggs v. Duke Power Co., 1971 SCC OnLine US SC 47 : 28 L Ed 2d 158 : 401 US 424 at p. 431 (1971)] , SCC OnLine US SC para 14)*

> *"14. … good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability." [Griggs v. Duke Power Co., 1971 SCC OnLine US SC 47 : 28 L Ed 2d 158 : 401 US 424 at p. 431 (1971)]*

On the question of the standard of justification for rebutting a charge of indirect discrimination, the Court held as follows : (Griggs case [Griggs v. Duke Power Co., 1971 SCC OnLine US SC 47 : 28 L Ed 2d 158 : 401 US 424 at p. 431 (1971)] , SCC OnLine US SC para 11)

> *"11. … The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." [Griggs v. Duke Power Co., 1971 SCC OnLine US SC 47 : 28 L Ed 2d 158 : 401 US 424 at p. 431 (1971)]*

Griggs, therefore, laid the groundwork for the thinking that meaningful equality does not merely mean the absence of intentional inequality. A statutory manifestation of disparate impact was codified in US law in the shape of the Civil Rights Act, 1991. Section 105 of the Civil Rights Act, 1991 makes a practice causing disparate impact a prima facie violation. The presumption can be rebutted by establishing that the practice is linked to the job and business. This can be overcome by a showing of alternative, equally efficacious, practices not causing disparate impact."

[Emphasis supplied]

82. In ***Nitisha*** (*supra*), a two-pronged test was borrowed from the Supreme Court of Canada's judgment in ***Joanne Fraser* v. *Attorney General of Canada***, reported in **2020 SCC 28 (Can SC)**, to identify if indirect discrimination has taken place. While examining the question of indirect discrimination, the courts undertake the following enquiry:

(i) ***First***, whether the impugned provision, rule, policy or action disproportionately impacts a particular group. While looking into this question, the courts are tasked with seeing not only the language of the provision but also the purported impact on the section of society being discriminated against. This is so because a seemingly innocent provision, rule, policy or action may not be detrimental to other sections of the society but may lead to discrimination against persons belonging to a particular group or community.

(ii) ***Secondly***, whether the impugned provision, rule, policy or action perpetuates or exacerbates the disadvantage suffered by a particular group. It is apposite for the courts to examine whether a provision or policy is rooted in the stereotypes or notions associated with a discriminated segment of the society thereby magnifying the social fault lines.

The relevant portions of the judgment in ***Nitisha*** (*supra*) are reproduced below:

> *"69. The principles laid down in Ontario HRC [Ontario Human Rights Commission v. Simpsons Sears Ltd., 1985 SCC OnLine Can SC 75 : (1985) 2 SCR 536] were consistently applied by the courts in Canada to protect indirect discrimination. In a recent judgment in Joanne Fraser v. Attorney General of Canada [Joanne Fraser v. Attorney General of Canada, 2020 SCC 28 (Can SC)] ("Fraser"), the Canadian Supreme Court was called on to determine the constitutionality of a rule categorising job-sharing positions as "part-time work" for which participants could not receive full-time pension. Under the job-sharing*

programme, optees for the programme could split the duties and responsibilities of one full-time position. A large majority of the optees for the job-sharing programme were women, who found it burdensome to carry out the responsibilities of work and domestic work and were particularly hit by the new rule as they would lose out on pension benefits. The Court recognised indirect discrimination as a legal response to the fact that discrimination is "frequently a product of continuing to do things the way they have always been done", as opposed to intentionally discriminatory actions. [Id., para 31] Pertinently, the Court outlined a 2-step test for conducting an indirect discrimination enquiry. First, the Court has to enquire whether the impugned rule disproportionately affects a particular group. As an evidentiary matter, this entails a consideration of material that demonstrates that "membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group". However, as such evidence might be hard to come by, reliance can be placed on evidence generated by the claimant group itself. Further, while statistical evidence can serve as concrete proof of disproportionate impact, there is no clear quantitative threshold as to the quantum of disproportionality to be established for a charge of indirect discrimination to be brought home. Equally, recognising the importance of applying a robust judicial common sense, the Court held:

> *"In some cases, evidence about a group will show such a strong association with certain traits – such as pregnancy with gender – that the disproportionate impact on members of that group will be apparent and immediate." [Id., paras 50-72]*

Second, the Court has to look at whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage. Such disadvantage could be in the shape of:

> *"[e]conomic exclusion or disadvantage, [s]ocial exclusion…[p]sychological harms…[p]hysical harms…[or] [p]olitical exclusion, and must be viewed in light of any systemic or historical disadvantages faced by the claimant group." [Id., para 76]"*

[Emphasis supplied]

83. What is discernible from the expositions in ***Joseph*** (*supra*) and ***Nitisha*** (*supra*) is that indirect discrimination does not stem from active discrimination arising out of an intention to exclude, but rather from the lethargy or inertia to not change the unjust *status quo* and move towards more progressive practices. It is in this context that redressal of disadvantage and how it is done gains importance. It becomes abundantly clear that when the disadvantage stands recognised, its redressal should not be such that it exacerbates the very disadvantage sought to be addressed. There is no gainsaying that the approach to eradicate historical, social, political and economic disadvantages must be such that redressal mechanisms do not become perpetrators of discrimination by themselves.

84. The aforesaid may also be looked at from one another angle. The concept of redressal of disadvantage serves as a core component of 'substantive equality' however, the ensuring the efficacy of the same in cases where marginality is multi-dimensional and dynamic is equally important to promote equality in its truest sense. In ***Patan Jamal Vali*** **v.** ***State of A.P.***, reported in **(2021) 16 SCC 225**, this Court gave an intersectional perspective to oppression. In this case, the rape victim belonged to a scheduled caste and was blind by birth. The Court adopted a multi-dimensional approach towards oppression to account for various other factors which contribute to the marginalization of an individual on the

basis of their identity. It is apposite to understand that such factors are intertwined in such a manner that one cannot distinguish between determinants of marginality and put them into watertight compartments for the purpose of introducing legal and policy measures to address the same. This Court advocated that gender violence be seen from the lens of intersectionality which requires viewing caste, disability, sexual orientation, gender identity, class, religion, etc., holistically and not as mere "add-ons".

85. Similarly, in ***M. Sameeha Barvin* v. *Joint Secretary, Ministry of Youth and Sports & Ors.***, reported in **2021 SCC OnLine Mad 6456**, a female athlete with 90% loss of hearing and lack of speech ability was denied participation in the World Deaf Athletics Championship due to her female gender and the additional vulnerability in travel associated with her disability. In the said case, one of us (R. Mahadevan, J.) discussed the concept of intersectionality to emphasize that addressing difficulties and barriers faced by a person from the perspective of only one axis of discrimination may not ensure substantive equality for them if they face multiple axes of discrimination. Therefore, a study of equality from an intersectional point of view subscribes to the understanding that factors or markers of discrimination do not operate in isolation. Hence, reasonable accommodation of persons placed at the intersections of various grounds

of discrimination, can also not be unidimensional. The relevant portions of the judgment are reproduced below:

> *"16. In the Indian context, it is often seen that the factors like caste and gender are intrinsically linked. Similarly, disability and gender are linked in a way that make females with disabilities more vulnerable to such cumulative or compounded disadvantage and resultant discrimination. Here, it is important to emphasize that the difficulties and barriers faced by a person facing any one axis of discrimination, for example-gender, are different from a person facing multiple axis of discrimination like disability, caste and gender together. The different identities within the same person intersect and co-exist in a way so as to give the individual a qualitatively different experience than any one of the individual markers of discrimination or any of the individual characteristics. Therefore, where the axis of discrimination intersect, it is essential to view such cases from the lens of intersectionality in order to understand that the barriers, the challenges, the stigma as well as the practical difficulties faced by such persons are not only more intense, but also different and unique which call for a more in-depth and all-encompassing approach for addressing their grievances and ensuring substantive equality to them. Intersectionality, therefore, rejects a narrow or limited understanding of equality where the factors or markers of discrimination are isolated or are in singular spheres.*
>
> *xxx xxx xxx*
>
> *24. In the Convention on the Rights of Persons with Disabilities as observed by the Committee in General Comment No. 6, "intersectional discrimination can be direct, indirect, denial of reasonable accommodation, or harassment". This approach has also been reiterated by the Supreme Court in Vikash Kumar v. UPSC wherein, the supreme court has held that "disability-based discrimination is intersectional in nature and policy of reasonable accommodation thus cannot be unidimensional". The Convention on the Elimination of Discrimination against Women Committee (CEDAW), which promotes action in order to support persons with disabilities and their families and caregivers, also recognises that the categories of discrimination cannot be reduced to watertight compartments. In General Recommendation No. 25, the CEDAW committee*

suggests "the adoption of special measures for women to eliminate multiple rounds of discrimination"."

[Emphasis supplied]

86. The aforesaid leaves no manner of doubt in our minds that redressal of a disadvantage cannot be devoid of an understanding of the other impediments that an individual may face on account of other identity markers that may cause such an individual to be stigmatized and marginalized. The avowed objective of substantive equality may be rendered unworkable if actions and measures to achieve the said goal suffer from a parochial understanding of discrimination.

ii. Addressing stigma and stereotypes.

87. Fredman's second dimension focuses on combating the *dignitarian harm* caused by stereotyping, prejudicing, and stigmatization. This approach is not alien to the Indian jurisprudence on right to dignity as an intrinsic part of the right to life under Article 21. In ***NALSA*** (*supra*), this Court held that gender-based stereotyping is categorically against the spirit of Articles 15 and 16 of the Constitution. Such stereotypes are patently discriminatory and they perpetuate stigma and violence, which cannot be permitted in the constitutional framework. This Court read discrimination on the ground of "gender identity" to be included within the fold of discrimination on the ground of "sex" and held that the word "sex" in Article 15 cannot be limited by the stereotypical notions associated with

gender binary. The ambit of the said word is wider than societal notions of "sex" and therefore, also includes persons who do not perceive their gender identity to be the same as the sex assigned at birth. The Court observed thus:

> *"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."*
>
> [Emphasis supplied]

88. The Constitution Bench of this Court, in ***Navtej*** (*supra*), has dealt with how stereotypes and prejudicial notions cause significant harm when translated into laws, rules or policies. This Court speaking through R.F. Nariman, J., observed about the dangers of introducing legislations or policies on the basis of stigma and stereotypes associated with the LGBTQ+ community, which in turn resulted in their criminalisation in the

pre-colonial era provision of Section 377 of the IPC. R.F. Nariman, J. in his concurring opinion noted the following:

> *"350. Given our judgment in Puttaswamy [K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1] , in particular, the right of every citizen of India to live with dignity and the right to privacy including the right to make intimate choices regarding the manner in which such individual wishes to live being protected by Articles 14, 19 and 21, it is clear that Section 377, insofar as it applies to same sex consenting adults, demeans them by having them prosecuted instead of understanding their sexual orientation and attempting to correct centuries of stigma associated with such persons."*
>
> [Emphasis supplied]

89. We are in complete agreement with this Court's exposition in ***Navtej*** (*supra*) wherein Dipak Misra, C.J. (as he then was), speaking for himself and A.M. Khanwilkar, J. observed that stigmatic attitudes towards the transgender community lead to their dehumanization, which in turn legitimizes any legislative or policy measure that strips them of their personhood and human rights. Actions founded on such dehumanizing stigma and stereotypes have deprived the community from living a dignified life for a very long time. Such discriminatory practices cannot be allowed to subsist for it cannot be the intent of the Constitution, which regards equality as the foremost fundamental right of any person, to let a marginalized section of the society to remain suppressed while others thrive. The relevant portions of the judgment are reproduced below:

> *"262. In view of the test laid down in the aforesaid authorities, Section 377 IPC does not meet the criteria of proportionality and*

is violative of the fundamental right of freedom of expression including the right to choose a sexual partner. Section 377 IPC also assumes the characteristic of unreasonableness, for it becomes a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves. Thus, an archaic law which is incompatible with constitutional values cannot be allowed to be preserved.

263. Bigoted and homophobic attitudes dehumanise the transgenders by denying them their dignity, personhood and above all, their basic human rights. It is important to realise that identity and sexual orientation cannot be silenced by oppression. Liberty, as the linchpin of our constitutional values, enables individuals to define and express their identity and individual identity has to be acknowledged and respected.

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."

[Emphasis supplied]

90. Therefore, we do not hesitate to say for a moment that drawing on stereotypes and stigma associated with a particular community, transgender community in the instant case, is impermissible for the

purpose of formulating laws, rules and policies as it would be squarely opposed to the principle of substantive equality. In ***Navtej*** (*supra*), Chandrachud, J., further noted that stigma and stereotypes operate to justify discrimination. Thus, a formalistic view of prohibition of discrimination without taking into account how the stigmas and stereotypes associated with the transgender community or sexual minorities would play out in actual implementation in reality, is rejected by Article 15 of the Constitution. This is because the Constitution envisages equality not only in letter but also in spirit, and stereotyped application of provisions mandating prohibition of discrimination is no different from a provision itself being discriminatory. Therefore, Article 15 seeks to give effect to equality not only facially but also substantively. In his concurring opinion, Chandrachud, J., noted thus:

> "*431. This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground ("Sex plus") and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex and height. Such a formalistic view of the prohibition in Article 15, rejects the true*

operation of discrimination, which intersects varied identities and characteristics."

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453. Relationships that tend to undermine the male/female divide are inherently required for the maintenance of a socially imposed gender inequality. Relationships which question the divide are picked up for target and abuse. Section 377 allows this. By attacking these gender roles, members of the affected community, in their move to build communities and relationships premised on care and reciprocity, lay challenge to the idea that relationships, and by extension society, must be divided along hierarchical sexual roles in order to function. For members of the community, hostility and exclusion aimed at them, drive them into hiding, away from public expression and view. It is this discrimination faced by the members of the community, which results in silence, and consequently invisibility, creating barriers, systemic and deliberate, that effect their participation in the workforce and thus undermines substantive equality. In the sense that the prohibition of miscegenation was aimed to preserve and perpetuate the polarities of race to protect White supremacy, the prohibition of homosexuality serves to ensure a larger system of social control based on gender and sex."

[Emphasis supplied]

91. What is discernible from the aforesaid is that stigma and stereotypes that form the basis of popular morality cannot be the considerations underlying measures to address discrimination. This has been explained by this Court in several of its judgments. We may refer to the judgment rendered in ***Indian Young Lawyers Assn.* v. *State of Kerala***, reported in **(2019) 11 SCC 1.** Therein, the question that arose was whether entry in the Sabrimala Temple could be restricted for women who menstruate, on the notions of "purity and pollution" associated with menstruation. A 4:1 majority held that this Court as a constitutional court is governed not by

popular morality but rather by constitutional morality. Thus, it can neither allow nor be swayed by stigmatising and stereotypical contentions that perpetuate a distinction between "menstruating" and "non-menstruating" women. It was observed that though the practices that legitimize menstrual taboos may be popular due to notions of "purity and pollution", yet they do not have any place under the scheme of the rights afforded to a woman by the Constitution. The Court noted that the discrimination associated with menstruation is a societal disability that restricts a woman from attaining freedom of movement, worship, education, etc. Most importantly, they lose agency of their own bodies solely because of prevalent stigma and stereotypes thereby perpetuating their exclusion from social life. It was held that in any circumstance, the values of constitutional morality will outweigh notions of "purity and pollution" which are rooted in prejudices harboured by the society. This Court came down heavily on such stereotypical notions and gave prominence to constitutional morality. The separate concurring opinions of Misra, C.J. (as he then was) and Chandrachud, J. gave a pragmatic reading of Article 17 to include social exclusion of women. Misra, C.J., speaking for himself and Khanwilkar, J., noted as below:

> *"299. The respondents submitted that the deity at Sabarimala is in the form of a Naishtika Brahmacharya : Lord Ayyappa is celibate. It was submitted that since celibacy is the foremost requirement for all the followers, women between the ages of ten and fifty must not be allowed in Sabarimala. <u>There is an</u>*

assumption here, which cannot stand constitutional scrutiny. The assumption in such a claim is that a deviation from the celibacy and austerity observed by the followers would be caused by the presence of women. Such a claim cannot be sustained as a constitutionally sustainable argument. Its effect is to impose the burden of a man's celibacy on a woman and construct her as a cause for deviation from celibacy. This is then employed to deny access to spaces to which women are equally entitled. To suggest that women cannot keep the Vratham is to stigmatise them and stereotype them as being weak and lesser human beings. A constitutional court such as this one, must refuse to recognise such claims.

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301. It was briefly argued that women between the ages of ten and fifty are not allowed to undertake the pilgrimage or enter Sabarimala on the ground of the "impurity" associated with menstruation. The stigma around menstruation has been built up around traditional beliefs in the impurity of menstruating women. They have no place in a constitutional order. These beliefs have been used to shackle women, to deny them equal entitlements and subject them to the dictates of a patriarchal order. The menstrual status of a woman cannot be a valid constitutional basis to deny her the dignity of being and the autonomy of personhood. The menstrual status of a woman is deeply personal and an intrinsic part of her privacy. The Constitution must treat it as a feature on the basis of which no exclusion can be practised and no denial can be perpetrated. No body or group can use it as a barrier in a woman's quest for fulfilment, including in her finding solace in the connect with the Creator.

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357. Our society is governed by the Constitution. The values of constitutional morality are a non-derogable entitlement. Notions of "purity and pollution", which stigmatise individuals, can have no place in a constitutional regime. Regarding menstruation as polluting or impure, and worse still, imposing exclusionary disabilities on the basis of menstrual status, is against the dignity of women which is guaranteed by the Constitution. Practices which legitimise menstrual taboos, due to notions of "purity and pollution", limit the ability of menstruating women to attain the freedom of movement, the

right to education and the right of entry to places of worship and, eventually, their access to the public sphere. Women have a right to control their own bodies. The menstrual status of a woman is an attribute of her privacy and person. Women have a constitutional entitlement that their biological processes must be free from social and religious practices, which enforce segregation and exclusion. These practices result in humiliation and a violation of dignity. Article 17 prohibits the practice of "untouchability", which is based on notions of purity and impurity, "in any form". Article 17 certainly applies to untouchability practices in relation to lower castes, but it will also apply to the systemic humiliation, exclusion and subjugation faced by women. Prejudice against women based on notions of impurity and pollution associated with menstruation is a symbol of exclusion. The social exclusion of women, based on menstrual status, is but a form of untouchability which is an anathema to constitutional values. As an expression of the anti-exclusion principle, Article 17 cannot be read to exclude women against whom social exclusion of the worst kind has been practised and legitimised on notions of purity and pollution. Article 17 cannot be read in a restricted manner. But even if Article 17 were to be read to reflect a particular form of untouchability, that Article will not exhaust the guarantee against other forms of social exclusion. The guarantee against social exclusion would emanate from other provisions of Part III, including Articles 15(2) and 21. Exclusion of women between the age group of ten and fifty, based on their menstrual status, from entering the temple in Sabarimala can have no place in a constitutional order founded on liberty and dignity."

[Emphasis supplied]

92. In ***Ministry of Defence* v. *Babita Puniya***, reported in **(2020) 7 SCC 469**, this Court lamented the stereotypes which were being casted against women in the armed forces in order to deny their claim for permanent commission. It was observed therein that stereotypical assumptions about women on the basis of marriage and family and, treating them differently

from men because of the same, cannot be a constitutionally sound basis for denying equal opportunity to women. This Court noted thus:

> *"69. The submissions advanced in the note tendered to this Court are based on sex stereotypes premised on assumptions about socially ascribed roles of gender which discriminate against women. Underlying the statement that it is a "greater challenge" for women officers to meet the hazards of service "owing to their prolonged absence during pregnancy, motherhood and domestic obligations towards their children and families" is a strong stereotype which assumes that domestic obligations rest solely on women. Reliance on the "inherent physiological differences between men and women" rests in a deeply entrenched stereotypical and constitutionally flawed notion that women are the "weaker" sex and may not undertake tasks that are "too arduous" for them. Arguments founded on the physical strengths and weaknesses of men and women and on assumptions about women in the social context of marriage and family do not constitute a constitutionally valid basis for denying equal opportunity to women officers. To deny the grant of PCs to women officers on the ground that this would upset the "peculiar dynamics" in a unit casts an undue burden on women officers which has been claimed as a ground for excluding women. The written note also relies on the "minimal facilities for habitat and hygiene" as a ground for suggesting that women officers in the services must not be deployed in conflict zones. The respondents have placed on record that 30% of the total women officers are in fact deputed to conflict areas.*
>
> *70. These assertions which we have extracted bodily from the written submissions which have been tendered before this Court only go to emphasise the need for change in mindsets to bring about true equality in the Army. If society holds strong beliefs about gender roles – that men are socially dominant, physically powerful and the breadwinners of the family and that women are weak and physically submissive, and primarily caretakers confined to a domestic atmosphere – it is unlikely that there would be a change in mindsets. Confronted on the one hand with a solemn policy decision taken by the Union Government allowing for the grant of PC to women SSC officers in ten streams, we have yet on the other hand a whole baseless line of submissions solemnly made to this Court to detract from the vital*

role that has been played by women SSC officers in the line of duty."

[Emphasis supplied]

93. What flows from the aforesaid is that seemingly neutral policies may result in discriminatory results if such policies are viewed and implemented with a stereotypical approach that is detrimental to the interests of a particular section of the society.

94. In ***Nitisha*** (*supra*), this Court was, *inter alia,* faced with the issue of implementation of the directions in ***Babita Puniya*** (*supra*). It was noted that stereotypes are constitutionally impermissible and laws which perpetuate such stereotypes are patently against the spirit of the Constitution. Such laws cannot stand the test of constitutionality. It noted thus:

> *49. Indirect discrimination is closely tied to the substantive conception of equality outlined above. The doctrine of substantive equality and anti-stereotyping has been a critical evolution of the Indian constitutional jurisprudence on Articles 14 and 15(1). The spirit of these tenets have been endorsed in a consistent line of authority by this Court. To illustrate, in Anuj Garg v. Hotel Assn. of India [Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1] , this Court held that laws premised on sex-based stereotypes are constitutionally impermissible, in that they are outmoded in content and stifling in means. The Court further held that no law that ends up perpetuating the oppression of women could pass scrutiny. Barriers that prevent women from enjoying full and equal citizenship, it was held, must be dismantled, as opposed to being cited to validate an unjust status quo. In National Legal Services Authority v. Union of India [National Legal Services Authority v. Union of India, (2014) 5 SCC 438] , this Court recognised how the patterns of*

> *discrimination and disadvantage faced by the transgender community and enumerated a series of remedial measures that can be taken for their empowerment. In Jeeja Ghosh v. Union of India [Jeeja Ghosh v. Union of India, (2016) 7 SCC 761 : (2016) 3 SCC (Civ) 551] and Vikash Kumar v. UPSC [Vikash Kumar v. UPSC, (2021) 5 SCC 370 : (2021) 2 SCC (L&S) 1] this Court recognised reasonable accommodation as a substantive equality facilitator.*
>
> [Emphasis supplied]

95. A three-judge Bench of which one of us (J.B. Pardiwala, J.) was a part, in ***X2* v. *State (NCT of Delhi)***, reported in **(2023) 9 SCC 433**, while interpreting the Rule 3-B of the Medical Termination of Pregnancy Rules, 2004, held that it cannot allow an interpretation to the said rule that perpetuates the stereotype that only married women indulge in sexual intercourse, blatantly violating the sexual autonomy of unmarried women. This Court made a stern observation that it is such social stigmas and stereotypes which prevent unmarried women from exercising their right to reproductive health. It was also noted that such stigmas and stereotypes, in essence, stand as a barrier to unmarried women from accessing medical professionals and clinics. It was held that the artificial distinction between "married women" and "unmarried women" was offensive to the spirit of the Constitution. This Court noted thus:

> "*28. The social stigma that women face for engaging in pre-marital sexual relations prevents them from realising their right to reproductive health in a variety of ways. They have insufficient or no access to knowledge about their own bodies due to a lack of sexual health education, their access to contraceptives is limited, and they are frequently unable to approach healthcare*

providers and consult them with respect to their reproductive health. Consequently, unmarried and single women face additional obstacles.

29. The social stigma surrounding single women who are pregnant is even greater and they often lack support from their family or partner. This leads to the proliferation of persons not qualified/certified to practise medicine. Such persons offer the possibility of a discreet abortion and many women may feel compelled by their circumstances to engage the services of such persons instead of opting for a medically safe abortion. As illustrated in Surendra Chauhan [Surendra Chauhan v. State of M.P., (2000) 4 SCC 110 : 2000 SCC (Cri) 772] , this often leads to disastrous consequences for the woman. Keeping in view these barriers to accessing reproductive healthcare, we now turn to the interpretation of Section 3(2) of the MTP Act and Rule 3-B of the MTP Rules."

[Emphasis supplied]

96. What this Court has said in so many words is that anti-stereotyping is an elemental part of the equality code enshrined in the Constitution. It is worth noting that in many cases, despite the well-intentioned measures adopted to alleviate the discrimination faced by certain communities, such remedies may cause more harm than good as such solutions emanate from a stereotypical perspective to discrimination and disadvantage. Therefore, in order to ensure substantive equality, it is imperative that laws, policies and implementation thereof are not manifestations of deep-seated prejudicial notions.

iii. Enhancement of voice and participation.

97. A fundamental requirement of substantive equality is the elimination of structural and institutional discrimination to achieve true participation in

social settings by the community being discriminated against. Articles 14, 15 and 16 of the Constitution respectively provide a framework for equality that translates into participation of communities situated at the fringes of society and mandate that the constitutional vision of inclusion of different and diverse voices be achieved. Such a constitutional mandate flows not only from the equality provisions contained in Articles 14, 15 and 16 respectively but also from the broader themes of freedom of speech, expression and participation enshrined in Article 19 along with the right to a dignified social life contained in Article 21. The fundamental right to equality, fundamental freedoms and the right to life together ensure and aspire for meaningful participation and expression of the minorities.

98. The political framework of the country also recognizes minorities and especially those communities that have been historically marginalized, as essential threads of the democratic fabric that make up our polity, thereby emphasizing the importance of their participation in social and political life. This Court has underscored the value of participation and expression in several of its judgments.

99. We may, with a view to further explain the principles underlying citizen participation, refer to the judgment delivered by the High Court of Kenya in the ***Matter of Mui Coal Basin Local Community***, Constitutional Petition

No. 305 of 2012, wherein a six-fold principle of public participation was expounded in the context of environmental litigation:

(i) ***First***, the concerned government must evolve a public participation programme which accounts for both quantity and quality of the governed to participate in their own governance.

(ii) ***Secondly,*** the concerned governmental authority must ensure that a reasonable opportunity to participate in the public life is afforded to the interested parties and the members of the public at large.

(iii) ***Thirdly,*** the concerned government must ensure access to information to the public and in this regard, bring suitable mechanisms to disseminate information and make information-seeking effective and convenient for the public.

(iv) ***Fourthly,*** the opportunity of public participation must be afforded to all sections of the society and must reflect intentional inclusivity and diversity.

(v) ***Fifthly,*** though the government is not constrained to accept the views shared in the process of public participation, yet it is a duty incumbent upon them to consider, in good faith, all the views received.

(vi) ***Lastly,*** public participation must be ensured so as to enable the persons who are affected by or interested in a particular law or policy issue to share their views.

The relevant portion of the judgment in ***Mui Coal*** (*supra*) is reproduced below:

> *"97. From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:*
>
> *a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*
>
> *b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:*
>
> > *"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))"*

c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

> *"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."*

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment Â- as we will point out below.

d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views Â- not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or

engaging in democratic theatre so as to tick the Constitutional box.

f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand."

[Emphasis supplied]

100. The government's duty to facilitate public participation has manifested itself through at least two out of the six principles explained aforesaid: *first*, by ensuring that the public has the necessary information to meaningfully engage with the law, and *secondly,* by granting the public an effective opportunity to exercise their right to political participation.

101. The first element arises from the 'right to know' that this Court has located in several of its judgments including ***Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd. and Ors.***, reported in **(1988) 4 SCC 592**. The recognition of this right gave rise to the right to information movement which culminated into the Right to Information Act, 2005. This movement was primarily developed on the understanding that information is the currency to develop views on issues and participate in discussions. In a recent judgment, ***Association of Democratic Reforms* v. *Union of India and Others***, reported in **2024 INSC 113**, the Constitution Bench of this Court strengthened the 'right to know' by noting that information which furthers democratic participation must

be provided to voters because the voters' right to information is one of the foremost forms of effective and conscious participation.

102. As regards the second element, this Court located the freedom and opportunity to exercise the right to political participation in Article 19 supported by the broader and overarching theme of Article 21. It has already been held by this Court in a plethora of judgments that the right to life and personal liberty is not formalistic. It pertains not to a bare existence or meaningless freedom but rather encompasses basic necessities and amenities that are vital to human existence and all the liberties associated therewith. Krishna Iyer, J., in ***Sunil Batra (II)* v. *Union of India***, reported in **(1980) 3 SCC 488**, emphasised that the right to life under Article 21 does not refer to an animal existence. The right enshrined in Article 21 safeguards the quality of life along with life itself. The Calcutta High Court moved a step ahead in respect of the right to political participation and observed in ***Kamil Siedczynski v. Union of India and Ors.,*** reported in **2020 SCC OnLine Cal 670** that the freedom of expression cannot be restricted only to citizens by virtue of the usage of the word "citizens" therein. The said freedom extends to foreigners as part of their right to life enshrined in Article 21. The relevant portions of the judgment in ***Kamil Siedczynski*** (*supra*) are reproduced below:

> *"52. A perusal of Article 19 of the Constitution of India shows that the rights provided therein have been conferred upon*

"citizens" of India. However, such rights are not specifically excluded by the said provision in respect of foreigners. In the event the right to life and liberty and associated rights are curtailed by any government action, the same is always subject to judicial scrutiny on the yardstick of fundamental rights guaranteed by the Constitution of India.

53. It is evident from the language of the Constitution that Articles 14, 20, 21 and 22 apply to all human beings living in India and is not restricted to her citizens only.

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55. It is evident that the right to life or personal liberty of a person cannot be curtailed except according to "procedure established by law". The application of the said Articles has not been restricted by the Constitution of India to citizens of India only. Such rights, as held time and again by the Supreme Court and various High Courts of India, some of which have been cited on behalf of the petitioner, extend to all persons living in India, be they citizens or foreigners.

56. It has been held in a plethora of judgments and is now well-settled that the right to life and personal liberty does not merely pertain to a bare existence and meaningless freedom. All persons living in India are guaranteed the right to life and personal liberty, which, it is well-settled by judicial propositions, is not restricted to a bare existence. The expressions, "life" and "personal liberty" also include basic necessities and amenities to live a life worth human existence and the liberties associated therewith.

57. Such rights emanate not merely from the Constitution of India but are basic rights inherent in all human beings, as recognized time and again by the United Nations as well as several Charters and treaties between all the nations in the world. Hence, such rights cannot be fettered by a limited use of the term "citizens" in Article 19 of the Constitution."

[Emphasis supplied]

103. This Court has further attempted to strengthen the right to public participation in ***Hanuman Laxman Aroskar v. Union of India,*** reported in **(2019) 15 SCC 401** wherein it was noted that the concerns raised by the members of the public and other civil society stakeholders were not addressed properly. In this regard, this Court examined the 2006 Environmental Impact Assessment Notification and observed that the importance of public consultation is underscored therein. Further, public consultation cannot constitute a superficial participation of the public, it necessarily has to entail addressing of all material concerns of the public so as to ensure accountability and inclusivity. The relevant portions of the judgment are reproduced below:

> *"110. The importance of public consultation is underscored by the 2006 Notification. Public consultation, as it states, is "the process by which the concerns of local affected persons and others who have a plausible stake in the environmental impacts of the project or activity are ascertained with a view to take into account all the material concerns in the project or activity design as appropriate". This postulates two elements. They have both, an intrinsic and an instrumental character. The intrinsic character of public consultation is that there is a value in seeking the views of those in the local area as well as beyond, who have a plausible stake in the project or activity. Public consultation is a process which is designed to hear the voices of those communities which would be affected by the activity. They may be affected in terms of the air which they breathe, the water which they drink or use to irrigate their lands, the disruption of local habitats, and the denudation of environmental ecosystems which define their existence and sustain their livelihoods.*
>
> *111. Public consultation involves a process of confidence building by giving an important role to those who have a plausible stake. It also recognises that apart from the knowledge*

which is provided by science and technology, local communities have an innate knowledge of the environment. The knowledge of local communities is transmitted by aural and visual traditions through generations. By recognising that they are significant stakeholders, the consultation process seeks to preserve participation as an important facet of governance based on the rule of law. Participation protects the intrinsic value of inclusion.

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112.5. The duty of the applicant to address all material concerns expressed during the process of public consultation.

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112.8. Each of these features is crucial to the success of a public consultation process. Public consultation cannot be reduced to a mere incantation or a procedural formality which has to be completed to move on to the next stage. Underlying public consultation is the important constitutional value that decisions which affect the lives of individuals must, in a system of democratic governance, factor in their concerns which have been expressed after obtaining full knowledge of a project and its potential environmental effects.

113. Apart from the intrinsic value of public consultation, it serves an instrumental function as well. The purpose of ascertaining the views of stakeholders, is to account for all the material concerns in the design of the proposed project or activity. For this reason, the process of public consultation involves several important stages. The Pollution Control Board is under a mandate to forward the proceedings to the regulatory authority. The project proponent must address all material environmental concerns and make appropriate changes in the draft EIA and EMP. The project proponent may even submit a supplementary report to the draft EIA. Each of these elements is crucial to the design features of the 2006 Notification. A breach will render the process vulnerable to challenge on the ground that:
(i) significant environmental concerns have not been taken into account;

(ii) there was an absence of a full disclosure when the EIA report was put up for consultation; and
(iii) concerns which have been expressed by persons affected by the project have not been adequately dealt with or analysed."

[Emphasis supplied]

104. What the Court held in effect was that public participation should not be reduced to a mere procedural formality which must be completed before proceeding to the next stage. The governmental authorities must provide due respect and consideration to the constitutional value underlying public participation. This is because in a democracy, the decisions which affect lives of the people must account for their concerns. Sanjiv Khanna, J., has provided due deference to this constitutional value in his dissenting opinion in ***Rajeev Suri v. DDA*****,** reported in **(2022) 11 SCC 1**. He observed therein that deliberative democracy accentuates the right of participation in decision-making and in contesting public decision-making. He noted that though participatory democracy is founded on the principle of indirect participation of the citizens, yet where the legislations by themselves stipulate the duty to consult, it translates into a substantive right to be heard for the stakeholders concerned. Further, superficial fulfilment of such duty or obligation by the government authorities, which ultimately renders the right to participate infructuous, is a violation of the law and the idea of democracy. The relevant portions of the judgment are reproduced below:

"633. The Gunning Principles, first established in 1985, can be crystallised as under:

> *(a) consultation must occur when the proposals are still at a formative stage;*
> *(b) the proponent must give sufficient reasons for the proposal that permit intelligent consideration and response;*
> *(c) adequate time must be given for consideration and response; and*
> *(d) the product of consultation must be conscientiously taken into account in finalising any statutory proposals.*

These principles reflect the basic requirements essential if the public consultation process is to be sensible and meaningful. They would normally form the basis and foundation for proper application of the duty to consult and the right to be consulted. Nevertheless, these Principles should not be put in a straitjacket and the degree of application would depend upon the factual matrix and is situation specific.

639. Gunning Principles can be substantially read as resonating in Sections 10, 11 and 11-A of the Development Act and Rules 4, 8, 9 and 10 of the Development Rules. To ignore their salutary mandate as to the manner and nature of consultation in the participatory exercise, would be to defeat the benefic objective of exercise of deliberation. Public participation to be fruitful and constructive is not to be a mechanical exercise or formality, it must comply with the least and basic requirements. Thus, mere uploading of the gazette notification giving the present and the proposed land use with plot numbers was not sufficient compliance, but rather an exercise violating the express as well as implied stipulations, that is, necessity and requirement to make adequate and intelligible disclosure. This condition also flows from the common law general duty of procedural fairness. Doctrine of procedural legitimate expectation as explained below would be attracted. Intelligible and adequate disclosure of information in the context of the Development Act and the Development Rules means and refers to the degree to which information should be available to public to enable them to have an informed voice in the deliberative decision-making legislative exercise before a final decision is taken on the proposals. In the present matter this lapse and failure was acknowledged and

accepted by the BoEH, which had recommended disclosure and furnishing of details. Intelligible and adequate disclosure was critical given the nature of the proposals which would affect the iconic and historical Central Vista. The citizenry clearly had the right to know intelligible details explaining the proposal to participate and express themselves, give suggestions and submit objections. The proposed changes, unlike policy decisions, would be largely irreversible. Physical construction or demolition once done, cannot be undone or corrected for future by repeal, amendment or modification as in case of most policies or even enactments. They have far more permanent consequences. It was therefore necessary for the respondents to inform and put in public domain the redevelopment plan, layouts, etc. with justification and explanatory memorandum relating to the need and necessity, with studies and reports. Of particular importance is whether by the changes, the access of the common people to the green and other areas in the Central Vista would be curtailed/restricted and the visual and integrity impact, and proposed change in use of the iconic and heritage buildings.

640. In Hanuman Laxman Aroskar v. Union of India [Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401] on the question of public consultation in the case of environment clearance had observed : (SCC p. 451, para 112)

> *"112.8. … <u>Public consultation cannot be reduced to a mere incantation or a procedural formality which has to be completed to move on to the next stage. Underlying public consultation is the important constitutional value that decisions which affect the lives of individuals must, in a system of democratic governance, factor in their concerns which have been expressed after obtaining full knowledge of a project and its potential environmental effects</u>."*

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653. Deliberative democracy accentuates the right of participation in deliberation, in decision-making, and in contestation of public decision-making. Contestation before the courts post the decision or legislation is one form of participation. Adjudication by courts, structured by the legal principles of procedural fairness and deferential power of judicial review, is not a substitute for public participation before and at the

decision-making stage. In a republican or representative democracy, citizens delegate the responsibility to make and execute laws to the elected government, which takes decisions on their behalf. This is unavoidable and necessary as deliberation and decision-making is more efficient in smaller groups. The process requires gathering, processing and drawing inferences from information especially in contentious matters. Vested interests can be checked. Difficult, yet beneficial decisions can be implemented. Government officers, skilled, informed and conversant with the issues, and political executive backed by the election mandate and connected with electorate, are better equipped and positioned to take decisions. This enables the elected political executive to carry out their policies and promises into actual practice. Further, citizens approach elected representatives and through them express their views both in favour and against proposed legislations and policy measures. Nevertheless, when required draft legislations are referred to Parliamentary Committees for holding elaborate consultation with experts and stakeholders. The process of making primary legislation by elected representatives is structured by scrutiny, consultation and deliberation on different views and choices infused with an element of garnering consensus.

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655. It is no doubt true that the South African Constitution obligates the duty to inform and consult; albeit it would be wrong to state that this obligation and the right is a utopian and an impractical proposition in electoral democracies. India itself is a shining exemplar of how the citizens have been indirect participants in primary legislations. By contrast, indirect public participation in delegated legislation gets restricted, an aspect highlighted with reservations in earlier judgments of this Court [See paras 10 and 23 of this judgment.]. Traditionally this has passed judicial acceptance for several reasons, including exercise of keen legislative oversight over the executive agencies thereby ensuring integrity of the collective rule. This concern can be however be addressed by adopting good governance principles, or by way of legislative mandate in the enacted statutes, rules and regulations. In fact, we have several legislations which mandate public participation in the form of consultation and even hearing, with an objective that the decisions and policies take into account people's concerns and opinions. Public

participation in this manner is more direct and of a higher order, than primary legislations enacted by elected representatives.

656. However, delegation of the power to legislate and govern to elected representatives is not meant to deny the citizenry's right to know and be informed. Democracy, by the people, is not a right to periodical referendum; or exercise of the right to vote, and thereby choose elected representatives, express satisfaction, disappointment, approve or disapprove projected policies. Citizens' right to know and the Government's duty to inform are embedded in the democratic form of governance as well as the fundamental right to freedom of speech and expression. Transparency and receptiveness are two key propellants as even the most competent and honest decision-makers require information regarding the needs of the constituency as well as feedback on how the extant policies and decisions are operating in practice. This requires free flow of information in both directions. When information is withheld/denied suspicion and doubt gain ground and the fringe and vested interest groups take advantage. This may result in social volatility. [With reference to Olson's 7th implication, "7. Distributional coalitions … reduce the rate of economic growth…". 'The Rise and Decline of Nations' by Mancur Olson and subsequent studies.]"

[Emphasis supplied]

105. What is discernible from the aforesaid judgments is that though the courts have not expressly carved out a right to public participation, yet they have emphasized on the constitutional value of the same by associating it with the right to freedom of expression and the right to life. In our considered opinion, participation in public life is an important facet of the right to equality as well. The Constitution considers all the people to be equal citizens. The ability and choice to participate in public and social life without any fear of discrimination and ridicule, is a reflection of the same.

106. The availability of this choice also stems from the right to dignity which is impossible to be achieved without equality of status and opportunity. This Court in ***State of Karnataka v. Appa Balu Ingale,*** reported in **1995 Supp (4) SCC 469** observed that denial of equal opportunities in any walk of social life is a prevention of equal participation, which in turn is a breach of the right to dignity. The relevant para reads thus:

> *"10. The Preamble of the Indian Constitution imbued its people with pride of being its citizens in an integrated Bharat with fraternity, dignity of person and equality of status. But casteism; sectional and religious diversities and parochialism are disintegrating the people. Social stratification needs restructure. Democracy meant fundamental changes in the social and economic life of the people, absence of inequitous conditions, inequalities and discrimination. There can be no dignity of person without equality of status and opportunity. Denial of equal opportunities in any walk of social life is denial of equal status and amounts to preventing equal participation in social intercourse and deprivation of equal access to social means. Human relations based on equality, equal protection of laws without discrimination would alone generate amity and affinity among the heterogenous sections of the Indian society and a feeling of equal participants in the democratic polity. Adoption of new ethos and environment are, therefore, imperatives to transform the diffracted society into high degree of mobility for establishing an egalitarian social order in Secular Socialist Democratic Bharat Republic. "Untouchability" of the Dalits stands an impediment for its transition and is a bane and blot on civilised society."*
>
> [Emphasis supplied]

107. The worth of meaningful social participation has been emphasized by this Court in ***Sukanya Shanta* v. *Union of India***, reported in **2024 SCC OnLine SC 2694**, wherein the discriminatory provisions of various State Prison

Manuals were repealed. The petition highlighted practices embedded in caste-based discrimination persisting in prisons with respect to division of manual labour, segregation of barracks, etc. It was further noticed that the provisions of the State Prison Manuals by themselves perpetuated discriminatory practices against prisoners belonging to de-notified tribes and "habitual offenders". This Court recognized how the stereotyping of de-notified tribes as habitual offenders excludes them from having a meaningful participation in social life. D.Y. Chandrachud, J., noted thus:

> *"175. The tendency to treat members of denotified tribes as habitual to crime or having bad character reinforces a stereotype, which excludes them from meaningful participation in social life. When such stereotypes become a part of the legal framework, they legitimize discrimination against these communities. Members of the denotified tribes have faced the brunt of colonial caste-based undertones of discriminating against them, and the prison Manuals are reaffirming the same discrimination. Discrimination against denotified tribes is prohibited under the ground of "caste" in Article 15(1), as the colonial regime considered them as belonging to separate hereditary castes."*
>
> [Emphasis supplied]

108. Similarly, in ***Nipun Malhotra* v. *Sony Pictures Films India (P) Ltd.***, reported in **2024 INSC 465**, a three-judge Bench of this Court, of which one of us (J.B. Pardiwala, J.) was a part, cast a positive obligation on the State to ensure safety against discriminatory stereotypes for disabled persons, to lead a meaningful social life. It further observed that reasonable accommodation entailed adequate representation and opportunities to

participate for persons with disability. It was noted that substantive equality required creation of an environment that is conducive to participation on an equal footing. In saying so, the Court also referred to the principle '*nothing about us, without us*,' which is based on the promotion of participation for persons with disabilities or any other marginalized section of the society, as the case may be.

109. The aforesaid expositions leave no manner of doubt in our minds that the right to participation is an embodiment of the constitutional vision of equal opportunity and dignity for all. The said right finds its roots in the right to freedom of expression and is shaped by the constitutional mandate of substantive equality with the end goal of affording the marginalized sections of the society a meaningful life in terms of Article 21 of the Constitution.

iv. Accommodating Difference to Achieve Structural Changes.

110. This facet of equality is very intricately linked with participation. Equality of opportunity and choice of participation enables transformation by way of which accommodation of marginalized sections remains not an obligation but becomes a natural course of events. However, we are conscious of the fact that this is an ideal scenario and unfortunately, the society as it exists today is far from it. The Constitution makers were

cognizant of the need to achieve structural changes and deliberately left the scope for constitutional transformation through progressive interpretations of its text.

111. Further, the Constitution by itself clearly reflects this dimension by way of providing affirmative actions under Article 15(3), which enables special provision for women and children, Articles 15(5) & (6) respectively, which permit reservations for socially and educationally backward classes, Article 16(4), which allows reservation in public employment, and Article 46 which is a directive principle for protecting the weaker sections.

112. In ***NALSA*** (*supra*), this Court mandated structural changes in the legal, medical and educational system to accommodate the gender identity of those who do not conform to the binary norms. Likewise, in ***Navtej*** (*supra*) this Court rejected the majoritarian morality as a basis of law. Therefore, this Court has developed the concept of transformative constitutionalism, which accepts the reality that differences will exist and in order to afford accommodation to such differences, the Constitution will have to transform from time to time to allow structural changes.

113. We also recognize that affirmative action and reasonable accommodation serve as the tools for bridging historical differences and discrimination in social and political spheres of the society. Therefore, the obligation to

accommodate differences is not just negative and limited to prohibition of stereotypical and prejudicial attitudes. Such obligation is equally positive in nature and requires the State and concerned authorities/entities to facilitate structural change and thereby ensure that marginalized communities are able to purposefully participate in social and political life. Therefore, all actions taken in pursuance of accommodation of difference and substantive equality are a call of war against discrimination and marginalization.

114. In light of the aforesaid detailed discussion on the four dimensional approach to substantive equality, could it be said that the petitioner had adequate and accessible measures at her disposal to resort to, the moment she felt that she was being discriminated against? In other words, did the system as envisaged by the 2019 Act redress her disadvantage, address the stigma and stereotypes associated with her gender identity, ensure a framework that could help her participate in social life and, accommodate her community's needs to achieve structural change? Unfortunately, we are doubtful if we can answer the same in the affirmative.

b. Omission by Legislature resulting in violation of the Right against Discrimination.

115. This Court under its jurisdiction in Articles 32 and 142 of the Constitution inheres the power to not only act against actions that violate the

Constitution, but also against the omissions that lead to the breach of constitutional mandates. Legislative omission occurs occurs when the legislature loses sight of its duty to formulate a framework essential for the implementation of the constitutional mandate or when it fails to bring in force the statutory provisions that prohibit discrimination. This is known as, "absolute legislative omission".

116. The intent behind addressing any legislative omission is to remedy the violation caused by such inaction and protect the interests of those who are affected by such lack of regulation. It is also to ensure the paramountcy of the Constitution which includes protection of the rights guaranteed therein. A few of the possible consequences of such an omission would be violation of the right to equality and the right against discrimination, or ambiguity arising because of such omission that causes obstruction in giving effect to the principles of the Constitution and/or of the concerned statute or both.

117. This Court has never been slow in taking judicial notice of legislative omissions when scrutiny has revealed violation of the rights guaranteed by the Constitution. In ***Lakshmi Kant Pandey* v. *Union of India***, reported in **(1984) 2 SCC 244**, the petitioner complained of malpractices committed by social organisations engaged in the work of facilitating the adoption of

an Indian child to foreign parents. In the absence of a statutory enactment or any prescribed procedure in the country providing for the adoption of a child by foreign parents, the Court held that the provisions of the Guardians and Wards Act, 1890 must be resorted to. This Act, *inter alia*, provided for the appointment of a guardian for a person or property of a minor. By keeping in mind, the ethos of the provisions of the Guardians and Wards Act, 1890, this Court evolved normative and procedural safeguards and principles which were to operate the field of law concerning the adoption of a child by foreign parents.

118. In ***Vishaka* v. *State of Rajasthan***, reported in **(1997) 6 SCC 241**, a writ petition was preferred for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution respectively, in the context of prevention of sexual harassment of women at workplaces. A three-judge Bench of this Court addressed the legislative vacuum by framing guidelines to ensure effective redressal of violation of fundamental rights of working women. While exercising its power under Article 32, this Court observed that the said guidelines would be treated as law under Article 141 of the Constitution, in the absence of a legislation providing for the effective enforcement of the right to equality and the right against sexual harassment and abuse.

119. Again, in ***Aruna Ramachandra Shanbaug* v. *Union of India***, reported in **(2011) 4 SCC 454**, this Court acknowledged that there was no statutory provision in India governing the legal procedure for withdrawing life support from a person in persistent vegetative state or who is incompetent to take such a decision. The Court, therefore, laid down guidelines on the issue, which were to remain in force until Parliament enacted a law on the subject. Similarly, in ***NALSA*** (*supra*), this Court declared transgender persons as constituting a "third gender", for the purpose of safeguarding their rights under Part III of the Constitution. The Court directed the Union and State Governments to implement protective measures and ensure recognition, in the absence of comprehensive statutory safeguards.

120. At this stage, it would be apposite to discuss another facet of legislative omission, i.e., a situation in which the subject matter is not entirely unattended by legislation, yet discrimination still ensues owing to the gaps in the said legislation. Such gaps have the consequence of violating the constitutional mandate. In such cases, discrimination is not the result of an explicit act but of institutional legislative inaction. This is commonly known as, "relative legislative omission".

121. The duty of the legislature does not cease with a mere incorporation of a provision which guarantees overarching rights without also

simultaneously bringing provisions that create a mechanism to enforce such rights in the event the same come to be violated. To contextualize this better with the 2019 Act, it was not enough for the legislature to enact Section 3 which grants an overarching prohibition against discrimination. It was also incumbent upon the legislature to envision adequate institutional mechanisms which would remain at the disposal of a transgender individual in the event of their discrimination. The right to equality not only implies prohibition against discrimination but also rectifying the systemic discrimination against marginalized groups.

122. In ***Rajive Raturi* v. *Union of India***, reported in **(2018) 2 SCC 413**, this Court, in furtherance of Section 44 of the RPwD Act, which mandates that all establishments, whether government or private, comply with accessibility norms while constructing any structure, issued directions to give effect to the right against discrimination and to enforce the constitutional rights and provisions embodied in the RPwD Act.

123. In ***Lalaram* v. *Jaipur Development Authority***, reported in **(2016) 11 SCC 31**, this Court took cognizance of the prolonged non-compliance of the policy framework governing land compensation and allotment. It observed that the failure of the authorities to act in accordance with policy and statutory provisions created a situation of disadvantage for the

affected parties, effectively resulting in discrimination. This Court directed the authorities to remedy the inaction and ensure compliance with the statutory scheme, highlighting that persistent administrative inaction, particularly where rights are recognized by law, can amount to unfair treatment requiring judicial intervention. It made a stringent remark that any callous inaction or apathy of the State in making compensation would be a dereliction of the constitutional duties.

124. In ***Delwin Vriend* v. *Her Majesty the Queen in Right of Alberta*** ("***Vriend* v. *Alberta***"), reported in **1998 SCC OnLine Can SC 29**, the Supreme Court of Canada held that the omission of "*sexual orientation*" as a ground for prohibition of discrimination in the Individual Rights Protection Act ("**IRPA**") of Alberta Province violated Section 15(1) of the Canadian Charter of Rights and Freedoms. Cory, J., in his reasonings, held that the IRPA's failure to consider and include "*sexual orientation*" as a ground amounted to violation of the right to equality. It was emphasized that an omission can be as constitutionally harmful as an express discriminatory provision when it denies equal protection and benefit of the law. He pithily held that the exclusion of "*sexual orientation*" perpetuated disadvantage and reinforced prejudice. This denial stigmatized and marginalized persons of different sexual orientation, contrary to the

Charter's guarantee of substantive equality. We have produced some relevant extracts from erudite opinion of Cory, J.,:

> "*98. It may at first be difficult to recognize the significance of being excluded from the protection of human rights legislation. However it imposes a heavy and disabling burden on those excluded. In Romer v. Evans, 116 S.Ct. 1620 (1996), the U.S. Supreme Court observed, at p. 1627:*
>
> > *… the [exclusion] imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint…. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.*
>
> *While that case concerned an explicit exclusion and prohibition of protection from discrimination, the effect produced by the legislation in this case is similar. The denial by legislative omission of protection to individuals who may well be in need of it is just as serious and the consequences just as grave as that resulting from explicit exclusion.*
>
> *99. Apart from the immediate effect of the denial of recourse in cases of discrimination, there are other effects which, while perhaps less obvious, are at least as harmful. In Haig, the Ontario Court of Appeal based its finding of discrimination on both the "failure to provide an avenue for redress for prejudicial treatment of homosexual members of society" and "the possible inference from the omission that such treatment is acceptable" (p. 503). It can be reasonably inferred that the absence of any legal recourse for discrimination on the ground of sexual orientation perpetuates and even encourages that kind of discrimination. The respondents contend that it cannot be assumed that the "silence" of the IRPA reinforces or perpetuates discrimination, since governments "cannot legislate attitudes". However, this argument seems disingenuous in light of the stated purpose of the IRPA, to prevent discrimination. It cannot be claimed that human rights legislation will help to protect*

individuals from discrimination, and at the same time contend that an exclusion from the legislation will have no effect."

[Emphasis supplied]

125. We would like to remind the State that the duty to protect the right to equality implies not only prohibition of discrimination on the grounds of religion, race, caste, sex, place of birth or any of them but also to take actionable measures which effectively redress the disadvantage ensuing from and perpetuated by historical and systemic discrimination. We may with a view to obviate any confusion, clarify that the Constitution does not permit judicial inaction when dealing with violations of fundamental rights that stem from legislative omission, be it absolute or relative. It is incumbent upon this Court to fill the legislative vacuum to the extent in so far as is required to redress the violation of rights, for it cannot assume or usurp the function that constitutionally belongs to the legislature.

126. The marginalisation of transgender persons is often perpetuated not only by overt acts of discrimination, but also through the silence and gaps in the statute i.e., the 2019 Act. In the present case, the appropriate Government failed in reviewing the existing educational and employment schemes to include transgender persons, to protect their rights and interests and facilitate their access to such schemes and welfare measures. The appropriate Government also failed in its duty to formulate

educational schemes in a manner that is sensitive to the needs of transgender persons and free from stigma or discrimination. Most importantly, the appropriate Government has not taken any step to prohibit discrimination to ensure equitable access to social and public spaces. Furthermore, the appropriate Government was also under the obligation to sensitize the teachers and faculty in the First School and Second School respectively.

127. The appropriate Government was not only required to take steps to prohibit discrimination in any Government or private organization or establishment, but also to formulate a comprehensive policy detailing the measures and procedures necessary to protect transgender persons, within two years from the date of the 2020 Rules coming into force. However, the respondent nos. 2 and 3 respectively have failed to discharge this obligation.

128. Further, the appropriate Government was required to ensure that every establishment, including the First School and Second School respectively, designated a complaint officer in accordance with Section 11 of the 2019 Act, within thirty days from the date of the 2020 Rules coming into force. It was also required to establish a grievance redressal mechanism to ensure the effective implementation of the provisions of Chapter V of the Act,

which includes Section 9, i.e., the right not to be discriminated in employment.

129. As per sub-rule 8 of Rule 10 of the 2020 Rules, the First School and the Second School respectively were required to constitute a committee for transgender persons, which would be accessible to them in cases of harassment or discrimination. Further, according to Rule 12 of the 2020 Rules, the First School and Second School respectively ought to have published an equal opportunity policy for transgender persons.

130. Thus, this Court is mindful that constitutional guarantees do not attain their true meaning by mere textual inclusion in statute books but through their faithful realization in the lived experiences of individuals. Legislative omission, whether absolute or relative, strikes at the very root of this realization by creating voids that impede the enforcement of fundamental rights. The Constitution entrusts this Court with the solemn duty to act when such voids result in the denial of equality, dignity, and non-discrimination. The present case exemplifies how the silence of the legislature and the inaction of the executive in implementing the mandate of the 2019 Act and the 2020 Rules have perpetuated systemic exclusion of transgender persons. The failure of the appropriate Government to formulate inclusive policies, constitute redressal mechanisms, and ensure safe and equitable access to educational and employment opportunities,

constitutes not a mere administrative lapse but a violation of the constitutional rights. It is, therefore, incumbent upon this Court to remind the State that the promise of equality under the Constitution is not a passive assurance but an active obligation, one that demands continuous vigilance and affirmative measures to translate the guarantees of the Constitution into tangible and transformative realities for all persons, including transgender individuals.

IV. Legislative Framework and Manifestation of Horizontal Application of Fundamental Rights.

a. Indirect Horizontal Application by the Means of the 2019 Act.

131. The question as to whom the fundamental rights bind or constrain, would flow as a necessary consequence of the distinction underlying the 'vertical' and 'horizontal' effect of such rights. When fundamental rights are said to have a vertical effect, they apply only between the individual and the State, thereby, limiting how the State may act towards its citizens. In contradistinction, when rights are understood to have a horizontal effect, they extend to relationships between private individuals or entities, ensuring that constitutional values such as equality, dignity, and non-discrimination are also respected in private interactions, be it in employment, housing, education, or access to public spaces.

132. The 2019 Act represents a significant step towards giving horizontal application to constitutional rights in India. It imposes enforceable duties on both the State and private establishments to prevent discrimination against transgender persons. Section 3 of the 2019 Act expressly prohibits discrimination in a wide range of social and economic spheres, namely employment, education, healthcare, and access to public or private spaces. In doing so, Section 3 extends the guarantees of equality and dignity enshrined under Articles 14, 15, and 21 of the Constitution respectively in the private sphere. By creating statutory obligations for non-state actors, the 2019 Act translates the constitutional promise of equality into a social duty, mandating inclusion beyond State instrumentalities. However, while the Act operationalizes the horizontal effect of constitutional rights in form, its limited enforcement mechanisms often weaken its transformative potential.

133. In light of the 2019 Act explicitly manifesting the horizontal application of fundamental rights, a reconciliation of the oft-debated controversy over whether fundamental rights can have horizontal application becomes largely academic in this context, since the legislature has itself already imposed obligations upon non-state actors to guarantee the non-discrimination against transgender persons who continue to be victims of prejudice, stigma and social stratification.

134. This legislative trend is not novel. In furtherance of this endeavour to realise the ideals underlying our fundamental rights, the Parliament has consistently enacted several legislations that protect marginalized communities and disadvantaged persons even within non-state spaces, thereby democratizing access and opportunity. In other words, even apart from the 2019 Act, Indian statutes have long reflected the horizontal application of constitutional principles. The POSH Act, 2013 protects women against sexual harassment at workplaces, including in the private sector. The Protection of Human Rights Act, 1993 mandates that private institutions uphold human rights standards. Similarly, the Equal Remuneration Act, 1976 imposes duties on private employers to ensure gender parity in wages, while labour statutes such as the Industrial Disputes Act, 1947 and the Factories Act, 1948 respectively, safeguard workers' fundamental rights, including equality and dignity, within private workplaces. Collectively, these enactments operationalize constitutional values horizontally by regulating private actors to uphold the guarantees of equality, right to life and dignity.

135. The broader controversy surrounding the horizontality of fundamental rights has, in any case, been settled by a Constitution Bench of this Court in ***Kaushal*** (*supra*). Therefore, it is unnecessary to undertake a detailed discussion on the issue in the present case. What is relevant here is that an indirect horizontal application of State-guaranteed rights already exists by

virtue of the 2019 Act. The present petition, therefore, is confined to a limited yet significant question, namely, the absence of a grievance redressal mechanism under the 2019 Act, which leaves the petitioner without an effective remedy to address the violations of her rights under the statute.

b. The Statutory Framework at Play

136. The 2019 Act came into force on 10.01.2020. The long title of the Act reads as thus: "*An Act to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto.*"

137. The 2019 Act in itself represents the legislative effort to prevent discrimination by both public and private actors. This is reflected through the expansive manner in which the term "establishment" has been defined under Section 2(b) of the 2019 Act. The same reads thus:

> "*(b) "establishment" means –*
>
> *(i) any body or authority established by or under a Central Act or a State Act or an authority or a body owned or controlled or aided by the Government or a local authority, or a Government company as defined in section 2 of the Companies Act, 2013 (18 of 2013), and includes a Department of the Government; or*
>
> *(ii) <u>any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency, institution</u>;*"
>
> [Emphasis supplied]

138. On a plain reading of the aforesaid definition, it is apparent that the term "establishment" has a wide import and includes within its ambit the non-state actors listed under Section 2(b)(ii). It includes any company, body corporate, association, body of individuals, firm, cooperative or other society, association, trust, agency, or institutions and also seeks to curb discrimination occurring in such private spaces.

139. Chapter II of the 2019 Act is titled "*Prohibition Against Discrimination*". Section 3 prohibits any person or establishment from discriminating against transgender persons. The provision prohibits discrimination in areas of education, employment, healthcare services, in public places, housing and accommodation, and other services. At these spaces, it is mandated that no person shall discriminate against transgender persons on the ground of their gender identity. This prohibition against discrimination is with the view to broadly target systemic and everyday discrimination. Section 3 of the 2019 Act reads thus:

> "***3. Prohibition against discrimination.—***
> *No person or establishment shall discriminate against a transgender person on any of the following grounds, namely:—*
> *(a) the denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;*
> *(b) the unfair treatment in, or in relation to, employment or occupation;*
> *(c) the denial of, or termination from, employment or occupation;*
> *(d) the denial or discontinuation of, or unfair treatment in, healthcare services;*

(e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or 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) the denial or discontinuation of, or unfair treatment with regard to the right of movement;
(g) the denial or discontinuation of, or unfair treatment with regard to the right to reside, purchase, rent, or otherwise occupy any property;
(h) the denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; and
(i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a transgender person may be."

140. Especially for the purposes of the present matter, it would be beneficial to read Section 3 along with Sections 9, 10 and 11 respectively which are subsumed under Chapter V of the 2019 Act titled "*Obligation of Establishments and Other Persons*". Section 9 specifically deals with discrimination in employment. It prohibits all establishments from discriminating against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues. The presence of the expression "*and other related issues*" indicates that recruitment and promotion are not the only circumstances which may involve employment-related discrimination. In other words, the aforesaid circumstances do not constitute an exhaustive list and Section 9 does not limit itself strictly to these two aspects. Further,

Section 10 casts an active obligation on all establishments to provide certain facilities to transgender persons, as may be prescribed.

141. At this juncture, it would be apposite to point out that Rule 12 of the 2020 Rules carries forward the mandate under Sections 9 and 10 respectively. Rule 12 of the 2020 Rules is concerned with the provision of equal employment opportunities and requires every establishment to maintain a safe and non-discriminatory workplace for transgender persons. This obligation encompasses all aspects of employment including recruitment, promotions, service benefits, infrastructure modifications, and other employment-related matters. Each establishment is required to have developed and published a dedicated Equal Opportunity Policy for transgender persons, which was to be made accessible through the organization's website or displayed prominently on its premises. The policy is required to specify practical arrangements such as infrastructural accommodations (including unisex restrooms), security provisions (transportation facilities, security personnel), and necessary amenities (like hygiene products) to ensure transgender employees could work with dignity. The policy is also required to guarantee that all service conditions are applied equally to transgender employees and also ensure that the gender identity of the employees is kept confidential. The details and necessary information about the designated complaint officer was also to

be made available. This overall framework was designed to operationalize workplace inclusion and directly tackle institutional discrimination in employment settings.

142. As per Section 11 of the 2019 Act, titled as "*Grievance Redressal Mechanism*", all establishments are required to designate a complaint officer ("**CO**") to deal with complaints concerning violations of the Act. The aforesaid section must necessarily be read with Rule 13 of the 2020 Rules which also deal with the creation of an internal complaint mechanism for addressing the violations of transgender rights within establishments. Rule 13 requires that the designation of a CO as per Section 11 of the 2019 Act, be made within thirty days of the coming into force of the 2020 Rules. The onus is placed upon the appropriate Government that this designation happens within the prescribed time period. Rule 13 goes on to create a framework for both the enquiry and subsequent action to be taken on these complaints within established and clear timelines. To elaborate, the appointed CO is required to investigate any complaint received within fifteen days of its receipt, after which they would submit an enquiry report to the head of the establishment. The establishment's head is then required to take action based on the findings of the enquiry report within another period of fifteen days. In case no timely action is taken by the CO, the rule permits the head of the establishment to take necessary action forthwith.

Therefore, it can be seen that Section 11 of the 2019 Act read with Rule 13 of the 2020 Rules establishes a systematic, deadline-driven internal grievance system designed to protect transgender individuals from discriminatory treatment while also requiring the complaints officer and the head of the establishment to work in tandem with one another. Both provisions seek to ensure that the concerned establishment remains a discrimination-free environment and any incident/complaint is dealt with expeditiously and comprehensively.

143. Chapter IV of the 2019 Act is very important. It is titled - "*Welfare Measures by Appropriate Government*". Section 8 affixes a positive obligation on the appropriate Government to secure the full and effective participation and inclusion of transgender persons in the society. The provision requires the appropriate Government to undertake and also facilitate access to welfare measures, as may be prescribed, that protect the rights and interests of transgender persons. These welfare schemes and programmes must be transgender sensitive, non-stigmatising and non-discriminatory. Additionally, onus is also placed on the appropriate Government to take steps for the rescue, protection and rehabilitation of transgender persons. Finally, it is also mandated that appropriate measures be taken to protect the rights of transgender persons to participate in cultural and recreational activities.

144. Chapter VI of the 2019 Act is titled "*Education, Social security and health of transgender persons*". Section 13 mandates every educational institution funded or recognised by the government to provide inclusive education and ensure non-discriminatory access to sports, recreation, and leisure. Section 14 requires the government to frame welfare schemes for supporting the livelihoods of transgender persons through vocational training and self-employment opportunities. Section 15 focuses on healthcare measures, obligating the government to establish HIV sero-surveillance centres, provide access to medical care including sex reassignment surgery ("**SRS**") and hormonal therapy, ensure counselling before and after such procedures, and publish a Health Manual in line with international standards like the guidelines of World Professional Association for Transgender Health. It also directs a review of medical curricula to address transgender-specific health needs, mandates non-discriminatory access to hospitals, and provides for insurance coverage of medical expenses including SRS, hormone therapy, laser therapy, and related health issues. Collectively, these provisions aim at securing substantive equality by addressing obstacles to education, livelihood, and healthcare for transgender persons.

145. The aforesaid Sections 8, 13, 14, and 15 respectively have to be read with Rule 10 of the 2020 Rules. Rule 10 places extensive obligations on the

appropriate Government to secure the rights and welfare of transgender persons. It mandates the constitution of a welfare board, a review of the existing schemes along with the formulation of new education, social security, health and livelihood schemes. The Governments must prohibit discrimination in both public and private institutions, ensure equitable access to social and public spaces (including burial grounds). Furthermore, institutional and infrastructure facilities, including but not limited to, rehabilitation centres, separate HIV sero-surveillance centres, separate wards in hospitals, washrooms in establishments, temporary shelters, short-stay homes and accommodation facilities, are required to be created by the appropriate Government within two years from the date of coming into force of the 2020 Rules. Further, the Rule emphasises on carrying out awareness campaigns to eradicate stigma, sensitisation of teachers, healthcare professionals, workplaces, and complaint officers, as well as bringing forth curriculum reforms to promote respect for gender diversity. Educational institutions are also required to set up committees to address harassment and protect transgender students from bullying.

146. Therefore, Sections 8, 13, 14, and 15 of the 2019 Act respectively read with Rule 10 of the 2020 Rules place wide obligations on the appropriate Government to take necessary measures such that the true intent and spirit of the present legal framework be realised at the ground-level. It also

recognizes that the protection of rights must extend beyond ensuring non-discrimination and enable the proactive facilitation of equal opportunities.

147. Along with the aforesaid, Rule 11 places certain additional obligations. Within a period of two years, the appropriate Governments were to formulate a comprehensive policy in order to safeguard transgender persons and their rights, which include preventive, administrative and policing measures to protect the community. Additionally, the Rule 11 holds the appropriate Governments responsible for ensuring the timely prosecution of offences committed against transgender persons under Section 18 of the 2019 Act or other relevant laws. In order to institutionalize protection, every State is required to establish a Transgender Protection Cell at both the district-level (under the DM) and the state-level (under the Director General of Police), which would be tasked with monitoring the offences committed against transgender persons, ensuring the registration of complaints, and overseeing prompt investigation and prosecution of such offences.

148. Apart from the aforementioned provisions, the 2019 Act under Chapter III and the 2020 Rules respectively, also provide for the "*Recognition of Identity of Transgender Persons*". Sections 4, 5, 6, and 7 respectively, along with Rules 3, 4, 5, 6, 7, 8 and 9 of the 2020 Rules respectively, lay down the procedure involved in the issuance of a certificate of identity.

149. We are yet again at our wits' end to understand that despite such legislative obligations and statutory timelines as discussed above and despite the directions issued by this Court in ***Shanavi Ponnusamy*** (*supra*), why the Union of India and the States have been slow to act on bringing the requisite policies and supporting measures in place. We are dismayed with such lethargy. Such lethargy has also led to an absence of redressal mechanisms. Such a state of affairs is alarming and calls for immediate intervention.

c. The Discrimination Faced by the Petitioner at the end of the First School and the Second School.

150. We shall now proceed to deal with the submissions canvassed on behalf of the Respondent nos. 4 and 5, i.e., the First School and the Second School. At the outset, we clarify that the legislature in its endeavour to enforce fundamental rights for the transgender community, has placed an obligation to uphold the rights of the community on both the State as well as private parties, in the 2019 Act and the 2020 Rules. Some of these rights are couched in a negative language thereby enjoining upon the State and private parties to not act in an exclusionary manner, whereas, others are framed in the nature of a positive duty of the State and private parties to ensure that the community is brought into the mainstream.

151. Pertinently, Section 10 of the Act is very clear in its words that all establishments, including non-state establishments as per Section 2(b), have a responsibility to accommodate transgender persons by providing them with the statutorily prescribed facilities. Section 11 further ensures that if such establishment fails to stand by the mandate of any provision of the Act, including Section 10 read with Section 3, a Complaint Officer shall be in place to deal with such complaints of non-compliance.

152. Having perused the legislative framework, we now come to the facts of this particular case. In the present case, a lot of allegations and counter-allegations have been levelled. According to the petitioner she was terminated from service on the ground of her '*gender identity*' included in the ground of '*sex*' mentioned in Article 15. However, the First School contends that the reason for her dismissal was the fact that she had been irregular and was not standing up to the tasks which were allotted to her.

153. The submissions canvassed on behalf of the petitioner indicate that her termination from the First School was a result of the discriminatory attitude and non-accommodation by the latter. It is her case that she was forced to resign as the school was not open to employing an openly transgender person. The First School, on the other hand, has stated that the school administration was made aware of the petitioner's gender

identity upon her joining and she was accordingly placed in a women's hostel and provided access to female washroom.

154. A bare perusal of the communications attached by the parties in their writ petition and affidavits indicates that the First School accommodated the petitioner's requests from the beginning and attempted to make her stay and school environment as conducive for her as possible. Though we admonish the school administration for turning a blind eye to the body shaming of the petitioner and problematic conduct by one teacher, yet we are of the considered view that the school did not actively or intentionally support or commit discrimination.

155. The First School, also acceded to the petitioner's requests for re-hiring, subject to an assessment test. The documents placed on the record show that there were several e-mails exchanged between the school and the petitioner in this regard wherein, the school's communications reflect respect and accommodation for the petitioner's requests and financial situation. Despite the school's agreement to conducting an assessment test in February 2023, the petitioner did not attend such test and gave no explanation for her absence until after the lapse of 4.5 months, i.e., in July 2023. She explained *via* e-mail that she could not attend the test as she was suffering from mental health issues and requested the school to take her

assessment test in August 2023. The school accordingly replied that they had filled the vacancy in the period of time when they could not reach the petitioner and therefore, could not employ her.

156. The NCW Inquiry Committee also came to the conclusion that the First School's conduct was not discriminatory against the petitioner.

157. It goes without saying that we sympathize with the petitioner's mental state and have full faith in her competence as a teacher. However, from the conspectus of facts described in the aforesaid, we are able to see that the First School attempted to meet the needs and wants of the petitioner as best as possible. While the conduct of the school authorities, during the 8 days that the petitioner was employed with them cannot be said to be unimpeachable, yet it is not sufficient to establish intentional discrimination on part of the school.

158. At this stage, it is apposite to clarify that the First School's lack of compliance with the 2019 Act and 2020 Rules has not gone unnoticed. We are fully cognizant that had there been a Complaint Officer in the school, the petitioner would not have had to run from pillar to post to redress her grievances. However, before we can call into question the school's omission, we find it necessary to come down heavily on the State's inaction

in enforcing the grievance redressal provisions of the 2019 Act and 2020 Rules in schools and other workplaces.

159. We recognize that though private parties are dutybound under the 2019 Act and 2020 Rules to uphold and promote the fundamental rights that these enactments seek to horizontally apply, yet it cannot, as a matter of course, be expected from private institutions to comply with provisions that do not find strict implementation by the State. In the present case, the State of Uttar Pradesh, the Union and State Ministry of Education as well as the Union and State Ministry of Social Justice, and the Central Board of Secondary Education, ought to have ensured that the provisions of the 2019 Act and the Rules thereto are abided by. By failing to do so, the State has committed omissive discrimination against the members of the transgender community.

160. In so far as the Second School is concerned, the solitary contention that has been canvassed before us is that the Petitioner was only issued an offer letter and there was no contract of employment between the two parties. The Second School has not been able to explain the reason for denial of employment to the petitioner after issuing an offer letter that too before her joining and completion of the probation period. Though the school has stated that it had issued such offer letters to several candidates for comparing their relative merit, yet there is absolutely no justification

provided for how the school undertook this exercise without letting the petitioner even join. The only explanation that comes across as reasonable to us is that the school came to know of the fact that the petitioner is a transgender woman and consequently, denied her employment on the said ground.

161. Even if we were to give any weight to the argument advanced by the counsel for the Second School, it is pertinent to note that Section 9 prohibits discrimination even in respect of recruitment of a transgender person.

162. The Second School has relied on the judgment of this Court in ***St. Mary's Education Society v. Rajendra,*** reported in **(2023) 4 SCC 498**. The facts therein pertained to termination of employment simpliciter, with no attendant circumstances that indicate discrimination on grounds of gender identity as a factor in such termination. It is for this reason that the right therein originated from private law. However, in the instant case, the mandate of non-discrimination emanates from Article 14, 15 and 21 of the Constitution. A bare perusal of the provisions of the 2019 Act shows that it is this very constitutional mandate that has been horizontally applied to private parties. Therefore, we find that the dictum of this Court in ***St. Mary's*** (*supra*) is not applicable to the instant case. Accordingly, we do not find force in the Second School's argument as regards absence of a contract

of employment. More pertinently, the fact that the petitioner was denied employment only when she was revealed to be a transgender woman reflects *mala fides* intention on part of the school.

163. Further, the Second School also failed to comply with the necessary provisions of the 2019 Act, which required them to appoint a complaint officer to allow the petitioner to raise her grievance. As we have mentioned in the earlier part of this judgment, such failure reflects not only negligence on part of the private party but more importantly gross apathy and omission on part of the State authorities. In our considered view, such infractions attract close scrutiny.

164. The petitioner has sought compensation from the respondent no. 4 and respondent no. 5 respectively for mental harassment, torture and discriminatory treatment. It is the case of the petitioner that it is within this Court's power to grant compensation, even by private parties, for the violation of fundamental rights. The petitioner further sought compensation from the State on the ground that the State has violated her fundamental rights by its inaction in the implementation the 2019 Act. The respondent nos. 4 and 5 respectively, on the other hand, contended that they should not be held liable to pay any compensation to the petitioner because: (i) they are not amenable to the writ jurisdiction, and (ii) they have not discriminated against the petitioner in any manner whatsoever.

165. We deem it opportune to discuss a few cases wherein this Court has granted compensation to parties seeking relief under the writ jurisdiction. In ***Rudul Sah v. State of Bihar & Anr.***, reported in **(1983) 4 SCC 141**, a Three-judge Bench of this Court was dealing with a petitioner who had been illegally detained in prison for over 14 years, despite being acquitted by the trial court. The petitioner therein filed a *habeas corpus* petition under Article 32 of the Constitution seeking release and compensation for his illegal detention. Though, the petitioner was released before this Court could decide the petition, however, the state failed to provide a satisfactory reasons or material to justify the detention, despite the acquittal. It is in this context, this Court made the following pertinent observations:

> *"8. That takes us to the question as to how the grave injustice which has been perpetrated upon the petitioner can be rectified, insofar as it lies within our power to do in the exercise of our writ jurisdiction under Article 32 of the Constitution. That Article confers power on the Supreme Court to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by Part III. The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III is "guaranteed", that is to say, the right to move the Supreme Court under Article 32 for the enforcement of any of the rights conferred by Part III of the Constitution is itself a fundamental right.*
>
> *9. <u>It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced</u>*

efficaciously through the ordinary processes of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a Court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases. The petitioner was detained illegally in the prison for over 14 years after his acquittal in a full-dressed trial. He filed a habeas corpus petition in this Court for his release from illegal detention. He obtained that relief, our finding being that his detention in the prison after his acquittal was wholly unjustified. He contends that he is entitled to be compensated for his illegal detention and that we ought to pass an appropriate order for the payment of compensation in this habeas corpus petition itself.

10. We cannot resist this argument. We see no effective answer to it save the stale and sterile objection that the petitioner may, if so advised, file a suit to recover damages from the State Government. Happily, the State's counsel has not raised that objection. The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in

> *the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."*
>
> [Emphasis supplied]

166. In ***Sebastian M. Hongray v. Union of India & Ors.***, reported in **(1984) 3 SCC 82**, this Court was dealing with a writ petition seeking production of two missing persons alleged to have been illegally kept under the custody of army. Despite the issuance of a writ of *habeas corpus*, there was a failure to produce the missing persons in respect of whom the writ was issued. This Court held that the respondents therein had committed civil contempt by their wilful disobedience of the writ. However, instead of imposing a fine or imprisonment for the act of contempt, the court directed that the wives of the missing persons be paid exemplary costs for the agony, torture and mental oppression that they had suffered.

167. In ***Bhim Singh, MLA v. State of J&K & Ors.***, reported in **(1985) 4 SCC 677**, this Court was dealing with the illegal detention of an MLA in order to prevent him from attending the session of the legislative assembly. Further, the petitioner was also not produced before the magistrates and

orders of remand also were obtained without the production of the petitioner. The petitioner was released from detention before the petition was decided by this Court. The Court conclusively established that there was a gross violation of the petitioner's constitutional rights under Article(s) 21 and 22(2). However, since the petitioner was already released, the Court noted that the petitioner had to be adequately compensated for the violation of his fundamental rights. In the context, this Court held as follows:

> *"[...] We have no doubt that the constitutional rights of Shri Bhim Singh were violated with impunity. Since he is now not in detention, there is no need to make any order to set him at liberty, but suitably and adequately compensated, he must be. That we have the right to award monetary compensation by way of exemplary costs or otherwise is now established by the decisions of this Court in Rudul Sah v. State of Bihar and Sebastian M. Hongray v. Union of India. When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this an appropriate case. We direct the first respondent, the State of Jammu and Kashmir to pay to Shri Bhim Singh a sum of Rs 50,000 within two months from today. The amount will be deposited with the Registrar of this Court and paid to Shri Bhim Singh."*
>
> [Emphasis supplied]

168. In ***M.C. Mehta & Anr. v. Union of India & Ors.***, reported in **(1987) 1 SCC 395**, a Five-judge Bench of this Court was dealing with a writ petition under Article 32 on a reference made by a Three-judge Bench. This Court

was addressing a range of questions related to the Oleum gas leak that occurred in Delhi. For purposes relevant here, the Court was dealing with the scope and ambit of this Court under Article 32 to grant compensation. In this context the court made the following pertinent observations:

> *"3. The first question which requires to be considered is as to what is the scope and ambit of the jurisdiction of this Court under Article 32 since the applications for compensation made by the Delhi Legal Aid and Advice Board and the Delhi Bar Association are applications sought to be maintained under that article. We have already had occasion to consider the ambit and coverage of Article 32 in the Bandhua Mukti Morcha v. Union of India and we wholly endorse what has been stated by one of us namely, Bhagwati, J. as he then was in his judgment in that case in regard to the true scope and ambit of that article. It may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights. It is in realisation of this constitutional obligation that this Court has in the past innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights, particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to whom freedom and liberty have no meaning.*
>
> *xxx xxx xxx*
>
> *7. We are also of the view that this Court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Article 32(2) the court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The power of the court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed vide Bandhua Mukti Morcha case. If the*

court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the court can inject such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32. That would, to a large extent, emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile. We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the court to grant such remedial relief may include the power to award compensation in appropriate cases. We are deliberately using the words "in appropriate cases" because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the court in a petition under Article 32. The infringement of the fundamental right must be gross and patent, that is, incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue action in the civil courts. Ordinarily, of course, a petition under Article 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of civil court. It is only in exceptional cases of the nature indicated by us above, that compensation may be awarded in a petition under Article 32. This is the principle on which this Court awarded compensation in Rudul Shah v. State of Bihar. So also, this Court awarded compensation to Bhim Singh, whose fundamental right to personal liberty was grossly violated by the State of Jammu and Kashmir. If we make a fact analysis of the cases where compensation has been awarded by this Court, we will find that in all the cases, the fact of infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the court and it would have been gravely unjust to the person whose fundamental right was violated, to require him to go to the civil court for claiming compensation."

[Emphasis supplied]

169. A three-judge Bench of this Court in ***Nilabati Behera v. State of Orissa & Ors.***, reported in **(1993) 2 SCC 746,** was dealing with a writ petition wherein the petitioner, the mother of a victim of custodial death, prayed for award of compensation for contravention of the fundamental right to life. This Court, based on the evidence presented to it, established that the death of the victim was indeed a custodial death. Thereafter, the Court addressed the prayer for compensation and took note of various precedents related to this issue, more particularly, the decision of this Court in ***Rudul Sah*** (*supra*). J.S. Verma, J., (as His Lordship then was), speaking for the majority, observed as follows:

> *"12. It does appear from the above extract that even though it was held that compensation could be awarded under Article 32 for contravention of a fundamental right, yet it was also stated that "the petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was actually controversial" and "Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes". This observation may tend to raise a doubt that the remedy under Article 32 could be denied "if the claim to compensation was factually controversial" and, therefore, optional, not being a distinct remedy available to the petitioner in addition to the ordinary processes. The later decisions of this Court proceed on the assumption that monetary compensation can be awarded for violation of constitutional rights under Article 32 or Article 226 of the Constitution, but this aspect has not been adverted to. <u>It is, therefore, necessary to clear this doubt and to indicate the precise nature of this remedy which is distinct and in addition to the available ordinary processes, in case of violation of the fundamental rights</u>.*
>
> *xxx xxx xxx*

17. It follows that 'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. [...] It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in Rudul Sah and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights.

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20. We respectfully concur with the view that the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress

being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.

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22. The above discussion indicates the principle on which the court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was indicated in Rudul Sah and certain further observations therein adverted to earlier, which may tend to minimise the effect of the principle indicated therein, do not really detract from that principle. This is how the decisions of this Court in Rudul Sah and others in that line have to be understood and Kasturilal distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son.

23. The question now, is of the quantum of compensation. The deceased Suman Behera was aged about 22 years and had a monthly income between Rs 1200 to Rs 1500. This is the finding based on evidence recorded by the District Judge, and there is no reason to doubt its correctness. In our opinion, a total amount of Rs 1,50,000 would be appropriate as compensation, to be awarded to the petitioner in the present case. We may, however, observe that the award of compensation in this proceeding would be taken into account for adjustment, in the event of any other proceeding taken by the petitioner for recovery of compensation on the same ground, so that the amount to this extent is not recovered by the petitioner twice over. Apart from the fact that such an order is just, it is also in consonance with the statutory recognition of this principle of adjustment provided in Section 357(5) CrPC and Section 141(3) of the Motor Vehicles Act, 1988.

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25. We clarify that the award of this compensation, apart from the direction for adjustment of the amount as indicated, will not affect any other liability of the respondents or any other person flowing from the custodial death of petitioner's son Suman Behera [...]"

[Emphasis supplied]

170. Dr. A.S. Anand, J., concurring with the majority, made the following insightful observations on the issue at hand:

"33. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations.

34. The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong

done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.

35. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law – through appropriate proceedings. Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible. The decisions of this Court in the line of cases starting with Rudul Sah v. State of Bihar granted monetary relief to the victims for deprivation of their fundamental rights in proceedings through petitions filed under Article 32 or 226 of the Constitution of India, notwithstanding the rights available under the civil law to the aggrieved party where the courts found that grant of such relief was warranted. It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties

properly particularly where the fundamental right of a citizen under Article 21 is concerned. Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self-restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law. Some of those situations have been identified by this Court in the cases referred to by Brother Verma, J."

[Emphasis supplied]

171. Thus, this Court in ***Nilabati Behera*** (*supra*) amply clarified that the remedy of compensation under a petition under Article 32 or Article 226 respectively is different from the remedy of damages available under private law. Consequently, it is not mandatory that to avail compensation in a petition under Article 32 or Article 226, the petitioner has to showcase that a civil court would have upheld his claim. However, the Court in ***Nilabati Behera*** (*supra*) cautioned against the potential misuse of the compensatory jurisdiction under Articles 32 or 226 by rendering it as a substitute for civil action in private law.

172. The key principles that can be culled out from this Court's observations in the aforementioned cases are as follows:

a. Article 32 has a very wide ambit, and its power is not merely injunctive, i.e., to prevent violations, but is also remedial, i.e., to

address infringements that have already occurred. This is critical because if the Court's power were limited to preventing violations, it would be powerless once a fundamental right has already been breached. In such situations, to avoid rendering fundamental rights enforcement a "mere lip-service", the Court has a constitutional obligation to forge new tools and fashion remedies appropriate to the facts of each case.

b. One of the key remedies the Court can provide is monetary compensation. It is crucial to note that compensation awarded under Article 32 is a public law remedy and is fundamentally different from a claim for damages in private law. These remedies operate in different legal realms, and the grant of such remedies is also based on different considerations.

c. The Court does not grant compensation in every case involving the violation of a fundamental right. It is to be granted in 'appropriate cases', especially where the following conditions are fulfilled: (1) there is a breach of fundamental rights, and (2) no alternate remedy is available. [*See* ***United Air Travel Services v. Union of India***, reported in **(2018) 8 SCC 141**] Compensation is a powerful tool in such cases, as it ensures that the petitioners' rights are enforced in a tangible manner. However, if the Court is not convinced of the factum

of discrimination itself, then no question of providing compensation will arise. [*See* ***S.P.S. Rathore v. State of Haryana & Ors***, reported in **(2005) 10 SCC 1**]

d. The grant of compensation is especially important when the petitioners are from disadvantaged sections of society, the "have-nots".

e. Courts should exercise their power to grant compensation in petitions under Article 32 with caution, taking into account the specific facts and circumstances of each case. Courts must specifically remain vigilant against attempts to couch what are essentially private law claims in the language of fundamental rights, ensuring that the exceptional compensatory power under Article 32 is not misused as a disguised substitute for ordinary civil remedies.

Thus, there is no doubt in our mind that this Court can grant compensation to petitioners seeking relief through a writ petition under Article 32, on the condition that the court considers it to be an 'appropriate case'.

173. The rulings of this Court in ***Jeeja Ghosh*** (*supra*), ***M.C. Mehta v. Kamal Nath & Ors***, reported in **(2000) 6 SCC 213** and ***Consumer Education & Research Centre & Ors v. Union of India & Ors***, reported in **(1995) 3 SCC**

42, are examples of cases under the writ jurisdiction in which compensation was held to be payable even by private parties.

174. In ***Jeeja Ghosh*** (*supra*), the Court awarded compensation to the petitioner, payable by a private airline, on the grounds that the airline had acted in a manner that not only violated the relevant rules and guidelines but also meted out discrimination against the petitioner, who was a person with a disability.

175. In ***Consumer Education & Research Centre* v. *Union of India***, reported in **(1995) 3 SCC 42**, a public interest litigation was filed to enforce the right to safe workplace of workpersons employed in asbestos industry, who were becoming prone to lung cancer and allied ailments. In view of the occupational health hazard, this Court recognised the right to health and medical aid during service and thereafter as a facet of right to life and liberty under Article 21 of the Constitution. This Court noted that it would be entirely appropriate for this Court to make directions towards the State, an industry, a company or a private employer to make the rights meaningful or to pay compensation to affected workmen. As a consequence this Court held the employer to be obliged to provide protective measures towards the workers

176. The only question that remains to be answered is whether this particular case is an 'appropriate case' for the grant of compensation under the writ jurisdiction. We deem it to be an appropriate case for the following reasons:

a. **Compensation by respondent no. 4** – It has been clearly established above that the respondent no. 4, i.e., the Second School discriminated against the petitioner on the basis of her gender identity. Further, it is also clear that no other remedy is available against the said school. Are we now to tell the petitioner that she has suffered a violation of her very fundamental right, but that this Court is powerless to grant her a tangible remedy and punish those responsible? To do so would be to render the fundamental right a hollow promise. A right, without a remedy, is no right at all. It is a mere platitude. When an injustice is proved, the law must provide a balm for the wound. Thus, we deem it necessary that respondent no. 4 pay compensation to the petitioner.

b. **Compensation by Respondent Nos. 1 to 3 –** We have established in great detail above how the sheer apathy and inaction of respondent nos. 1 to 3 have created a scenario wherein the rights of transgender persons, hard-won after decades of struggle, remain aspirational promises rather than a lived reality. As established above, it is not just state action that is amenable to review, but also omissions, especially

those that result in the state failing to fulfil its obligation to protect fundamental rights. If not for such inaction and apathy, the petitioner would have been in a significantly better position to exercise her rights, especially those related to employment. Thus, it is only appropriate that the respondent nos. 1 to 3 compensate the petitioner for the 'loss' caused to her due to their inaction and lethargy.

177. In such view of the matter, we are inclined to award compensation of Rs 50,000/- to the Petitioner, payable by the Second School. Moreover, we also direct the Union of India to pay a sum of Rs 50,000/- to the Petitioner by way of compensation for failure to provide the relevant mechanism which disabled her to seek appropriate redressal. Likewise, the Respondent Nos. 2 and 3-States respectively are also directed to pay a sum of Rs 50,000/- each to the Petitioner.

V. <u>Shortcomings of the 2019 Act and the Administrative Lethargy</u>.

178. In light of the aforesaid discussion, we would like to highlight few shortcomings of the 2019 Act. Along with this, we also bring forth some of the problems faced by the community to reflect on how the statutory framework falls short of catering to them. More so, it shall also be a reminder to the Union and the respective States, that there remains much more to be done to ensure that the rights of the transgender community

are safeguarded. The principal critique of the 2019 Act is that the rights so imagined are far away from the praxis.[31] The legislative language fails to provide clear guidance on addressing the specific challenges faced by this community, including their specialized healthcare requirements, restricted employment opportunities, and widespread societal stigma from the gender-binary majority.[32] The Act is also criticized for diluting the sanctity of the right to self-determination as envisioned by this Court in ***NALSA*** (*supra*).[19]

a. Problems Faced by the Transgender Community in Day-to-Day Life.

179. It is a matter of grave constitutional concern that members of the transgender community continue to encounter systemic barriers in the ordinary conduct of their lives. Their daily existence is marred by a pattern of discrimination that operates across domains: beginning with the hurdles pertaining to recognition in official records, extending to harassment at public spaces, exclusion from educational and employment opportunities, and summing up in social ostracism and violence. A chain of precedents from various High Courts reveals a disturbing continuum of prejudice. We cannot but express our dismay towards the intrusive

[19] *See* Kothari J, 'Trans Equality in India: Affirmation of the Right to Self-Determination of Gender' (2020) 13(3) *NUJS Law Review* 409; Dipika Jain, 'Right to Health and Gender-Affirmative Procedure in the Transgender Persons Act 2019 in India' (2022) 55 *Indian Journal of Plastic Surgery* 205.

surveillance of transgender persons, policing of their identities, and an institutional indifference that often results in denial of dignity. Despite the authoritative pronouncement in NALSA (supra), the reality of the transgender person remains one of stigma. The workplaces question their capability, educational institutions hesitate to include them and the law, though well-intentioned, falters in its implementation. We have discussed below the day-to-day hurdles faced by the transgender community that stand revealed to us from various judgments and orders of High Court.

i. Surveillance and Hyper-Vigilance.

180. The transgender community in India has a history of being criminalized, which was systematically perpetuated from Section 377 of the IPC and the anti-begging laws in India. The community has been a victim of surveillance and hyper-vigilance for centuries. In ***Jayalakshmi* v. *State of Tamil Nadu*** reported in **2007 SCC OnLine Mad 583**, a transgender/Aravani woman was routinely harassed by police officials for her alleged involvement in case of theft. The police had been physically and sexually harassing her and had been subjecting her entire family to criminal intimidation. As a result of the continuous brute violence and harassment inflicted upon her, the transgender woman had immolated herself in the premises of the police station and subsequently, succumbed

to death. On a *prima facie* case of harassment and violence being made out, the High Court of Judicature at Madras directed a compensation of Rs 5 lakh to the sister of the deceased.

181. Likewise, in ***Pinki Pramanik* v. *State of W.B.*** reported in **2014 SCC OnLine Cal 18832**, the petitioner had preferred a criminal revision application. She was a national female athlete with an intersex anatomy. She was alleged to have committed rape on the false pretext of marriage. Medical tests were performed on the petitioner to establish if she could be deemed to be a "man" for the purpose of the binarised offences. On a consideration of the medical evidence as also other circumstances brought on record, the High Court arrived at the conclusion that the offences as alleged, were not made out and quashed all proceedings pending against the petitioner. This case reflects the humiliation and indignity that intersex and gender non-conforming persons are subjected to in the course of prosecution. The petitioner was also kept in the male prisoner's cell during the course of trial. Transphobic tendencies subjected her to a host of stigmatic responses.

182. Only recently, in ***Vyjayanti Vasanta Mogli* v. *State of Telangana*** reported in **2023 SCC OnLine TS 1688**, the High Court of Telangana declared the Telangana Eunuchs Act, 1329 Fasli to be unconstitutional. The said Act

was enacted in the year 1919 and it permitted the arrest of transgender persons without a warrant and punished them 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. The Act mandated the maintenance of a register of "eunuchs" as they fashioned to be "*suspected of kidnapping or emasculating boys or of committing unnatural offences or abetting the same*".

183. Such has been the nature of historical injustices this community has been subjected to. In ***Navtej*** (*supra*), Her Ladyship Malhotra, J. rightly remarked that "*history owes an apology*" to the LGBTQ+ community for the criminalities that have been imputed upon their identity. We believe that not only does the history owe an apology to this community, but it is the responsibility of the State and the society at large to undo such historic injustices.

184. Discrimination against the transgender community persists at workplaces. Though the 2019 Act has enshrined provisions for job security, the community is rarely accepted in the mainstream, when it comes to substantive access to jobs.

185. Despite more than ten years of this Court's judgment in ***NALSA*** (*supra*), which prompted the Parliament to bring in place a statute in 2019, the transgender community has to preponderantly resort to the writ jurisdiction of the High Courts and this Court to redress their grievances.

ii. Discrimination in Employment and Professional Spaces.

186. Despite of the enforcement of the 2019 Act and the 2020 Rules, the transgender community faces entry barriers in employment and professional spaces. Systemic barriers like the absence of the option of a "third gender" make the entry of transgender persons in organised workforce impossible. Even if they are hired, they are expected to keep their identity hidden, which is grossly violative of one's right to dignity under Article 21. In ***Atri Kar* v. *Union of India*** reported in **2017 SCC OnLine Cal 3196**, the petitioner sought a right to participate in the selection process initiated by the State Bank of India for recruitment of Probationary Officers by an advertisement. The online forms for the said recruitment failed to mention a column for transgender persons, thereby preventing the petitioner from participating in the recruitment process. The writ was allowed by the High Court of Calcutta. This matter represents a classic case of where the transgender persons are denied entry to opportunities at the very threshold. Even though this Court has directed

in ***NALSA*** (*supra*) that all places of employment, education and government institutions must update their forms, etc. to accommodate "third/other gender", the same has not been done effectively.

187. However, in ***Pallabi Chakraborty*** **v.** ***State of W.B.*** reported in **2021 SCC OnLine Cal 299**, the petitioner, a transgender woman, was denied the grant of a writ of *mandamus* by the same High Court against the police authorities to enable participation in the selection process of police constables conducted by the West Bengal Police Directorate. The Petitioner was seeking recruitment opportunities to be provided to the transgender community. Her prayer was denied on the ground that she had joined the public employment as a lady civic volunteer, and hence she could not have turned around and claimed the status of a transgender person. Having observed so, the High Court noticed that the police authorities were not in compliance with Section 11 of the 2019 Act since a grievance redressal mechanism was not created and thereby, directed the police authorities as also the Chief Secretary of the State to take steps to set up a mechanism in that regard.

iii. Practical Denial of Legal Recognition and Identity Documentation

188. One of the biggest hurdles that the transgender persons face is with regard to obtaining a certificate of identity as provided for in the 2019 Act read

with the 2020 Rules. Even though the framework recognises the right of the transgender persons to change their names and gender in their documents, there are several practical hurdles involved. Documentary inconsistency can pose a lot of hurdles in claiming social welfare benefits or even in exercising other rights. We think that this one aspect where the States and its authorities need to strengthen their efforts. The State also has a positive obligation to sensitise its authorities who are responsible for making such changes in documents towards the realities of transgender identity.

189. In ***Christina Lobo* v. *State of Karnataka*** reported in **2020 SCC OnLine Kar 1634**, the petitioner had approached the respondent authorities to change her name and gender in her pre-university and MBBS records, after having undergone gender affirmative surgery. The respondents had rejected her request and hence she approached the High Court of Karnataka. It was observed that Rule 3(3) of the 2020 Rules provides that transgender persons who have officially recorded their change in gender, whether as male, female or transgender, prior to the coming into force of the 2019 Act are not required to submit another application for the certificate of identity under the 2020 Rules. In light of the aforesaid provision and considering that the identity of the petitioner was officially recorded in her Aadhar Card and passport, she was held to not be required

to submit yet another application. As a consequence, the respondents were directed to issue revised certificates. This case is a classic example of the hesitancy that authorities reflect in issuing revised documents to transgender persons.

190. In ***Chinder Pal Singh* v. *State of Rajasthan*** reported in **2023 SCC OnLine Raj 907**, the petitioner was originally assigned female gender at birth, and began service as a Physical Training Instructor (Grade III) under the female category, with service records reflecting female gender. Subsequently, the petitioner consulted a psychiatrist, was diagnosed with a "Gender Identity Disorder," and underwent gender-affirming medical procedures (female-to-male reassignment surgery including phalloplasty and hormone therapy). After surgery, he legally changed his name and had this reflected in some identity documents, including the Aadhaar Card. He then applied for correction of his name and gender in his service records (i.e. from female to male). However, despite repeated requests, the educational/employment authorities failed to update his service record even after a lapse of more than three years. The respondents argued that since he was originally appointed as a female candidate, the change in gender in service records could only follow a civil court's declaration. The High Court held that the petitioner's request must be granted. More particularly, the High Court observed that the petitioner was married and

had two sons. Therefore, if the identity of the petitioner was not corrected in his service record, it would prove difficult for his wife and children to obtain any of the petitioner's service benefits. The High Court recognized that the 2019 Act contemplates a mechanism under Section 7 whereby a transgender person who has undergone surgery may apply to the District Magistrate for a revised certificate of identity, and thereafter seek correction of all official documents, including service records. The High Court directed that the petitioner submit the required application to the District Magistrate, which must be processed within 60 days, and thereafter the service authorities must update his records within one month of receiving the District Magistrate's certificate. The Court also directed the State to implement grievance and corrective mechanisms across districts and to establish oversight to ensure compliance.

191. The commonality in both ***Christina Lobo*** (*supra*) and ***Chinder Pal Singh*** (*supra*), was that despite the respective petitioners having undergone SRS and having effected changes in their legal documents prior to the commencement of the 2019 Act and Rule 3(3) of the 2020 Rules respectively, the refusal by the concerned respondents to change the details in their official records reflects a gross failure to comply with the provisions of the 2019 Act. Such is the routine impediment faced by the transgender community. In these two cases, the petitioners were educated

members of the society. As a court of conscience, we also record our resentment to the pangs of those transgender persons who are not aware of their rights and who cannot access the courts to get appropriate relief.

192. Another hurdle that we have identified is that persons who are in the workforce and wish to undergo SRS or change their documents in line with their self-perceived identity are forced to not undergo the same. They are put in fear of their employment being terminated, or they are asked to seek permission from superior authorities. In ***Neha Singh* v. *State of U.P.*** reported in **2023 SCC OnLine All 701**, the petitioner was working as a constable in the U.P. Police. He identified himself as a transgender man and expressed his desire to undergo SRS. The petitioner presented an application to the Director General of Police which stood withheld. While acknowledging that a person suffering from gender dysphoria does possess a constitutionally recognised right to get his/her gender changed through surgical intervention, the High Court directed the DGP to dispose of the pending application of the petitioner. The High Court also directed the State Government to frame such rules at par with the Central legislation and to file a comprehensive affidavit as to what steps had been taken in compliance. We have no hesitation in saying that no transgender or gender diverse person is bound to take permission from their employer to undergo surgical intervention, unless the nature of their work is such

that it is based on one's gender identity. Of course, the employers must be given a reasonable notice, but that should purely be to make the requisite changes and modifications in documents, etc.

iv. Exclusion from Educational Institutions.

193. Educational institutions are also spaces which remain heavily binarised and one does not see transgender attendance. In fact, ensuring equal access to these institutions could prove to be a portal for transgender persons to lead a normal life. The High Court of Kerala in ***National Cadet Corps* v. *Hina Haneefa***, reported in **2024 SCC OnLine Ker 931**, held that the refusal to allow the petitioner to participate in the selection process of the Girls' Division of the NCC because of her being a transwoman was violative to the provisions of the 2019 Act.

v. Social and Political Exclusion

194. Akin to the systemic barriers that transgender persons face at entry levels in employment, similar barriers are also faced in their social and political life. In ***Anjali Guru Sanjana Jaan* v. *State of Maharashtra*** reported in **2021 SCC OnLine Bom 11**, the petitioner, a transwoman, was aggrieved by the rejection of her nomination in the Panchayat Elections as she had filled up her nomination form from a ward reserved for the women category. The Returning Officer rejected the form on the ground that she was a

transgender woman and there was no reservation for the transgender category in the elections. The High Court of Bombay allowed the writ petition and quashed the order of the Returning Officer, thereby allowing the petitioner to contest in the election.

vi. Safety, Protection and Social Prejudice

195. We have also come across cases where transgender persons are unable to enjoy the service benefits of their family members, because they do not conform to the rules of 'male' or 'female' binary. Such service laws are also lacking in accommodating transgender persons as beneficiaries. In ***Kantaro Kondagari* v. *State of Odisha*** reported in **2022 SCC OnLine Ori 1960**, the petitioner was an unmarried transgender woman and her father was in service in a State Department. The petitioner being an "unmarried daughter" had requested for a claim of pension benefits after the death of her father and later, her mother. The Principal Accountant General, Odisha did not disburse the pension amount despite the competent authority recommending the case of the petitioner for grant of pension. The High Court of Orissa recognized the petitioner's right to claim family pension as an unmarried daughter and held that no discrimination could be made against a transwoman in this regard.

196. Similarly, the State and non-State actors must also ensure the safety of transgender persons. Recently, R. Mahadevan, J., speaking for this very Bench in ***Rajib Kalita* v. *Union of India and Others***, reported in **2025 INSC 75**, highlighted the need for separate toilets for women, transgender persons and disabled persons in courts to makes these places more accessible. This Court directed the State Governments to allocate funds for the construction, cleanliness and maintenance of toilets in all court premises.

197. We are dismayed to take notice of all the aforesaid instances where the transgender persons have been subject to unfair and dehumanising treatment.

E. SOME MEANINGFUL SUGGESTIONS

198. Before we close this judgment, we would like to say something as regards the litigation that has unfolded before us. This matter has been an eye opener for one and all and therefore, we deem it necessary to bring to light certain deficiencies that we came across in the 2019 Act which require immediate attention of the Parliament and the Union of India**.**

(i) One of the issues arising under the 2019 Act is the accessibility and effective availment of the benefits it guarantees. While the Act takes

significant steps towards securing a slew of benefits for the transgender persons, these benefits are made dependent on the possession of an identification card. In this context, the MoSJE may consider simplifying and streamlining the process of issuance of identification cards to the transgender persons.

(ii) During the course of hearing, our attention was drawn to the inadequate condition of 'Garima Grehs,' the State-funded and operated shelter homes for transgender persons, which have been established to provide a safe and inclusive living environment across the country. While the initiative of the Union of India is commendable, merely setting up these shelters is insufficient. We urge, the Union of India, particularly the MoSJE, together with all State Governments, to earnestly take proactive steps in ensuring adequate funding for the effective functioning of these homes and to further expand their reach, with the aim of establishing such shelters in every district.

(iii) One of the significant challenges faced by the transgender community, particularly within public institutions such as educational establishments, hospitals, transport hubs and government offices, is the lack of effective measures ensuring

reasonable accommodation. In this regard, it is, therefore, suggested that: -

a. Gender-neutral or gender-diverse washrooms be provided within the premises of all public as-well as private establishments.

b. All establishments, including workplaces, may endeavour towards cultivating an environment that is gender-inclusive and conducive to the free expression of identity by transgender persons, without fear or stigma.

c. All personnel at these establishments, particularly the employers, be urged to maintain strict confidentiality with regard to the gender identity of transgender employees.

d. All establishments under the 2019 Act, especially the educational institutions and workplaces, must also strive to update their forms for admissions and examinations, especially at the application and entry level, to include and accommodate the category of 'Third Gender', to ensure the maximum participation of transgender persons in such institutions.

e. All educational institutions may ensure that they respect the gender identity and right to recreation and participation of transgender persons. They may be inclusively accommodated in the academic, cultural and physical environment of the institution.

(iv) Raising awareness about the realities of the plight of transgender persons can further help in promoting a safe, conducive and inclusive environment for transgender people. Schools, particularly play a crucial role in this regard, as it helps create awareness for generations to come by shaping the perceptions of students from a very young age. It is, therefore, suggested that the Ministry of Education undertake comprehensive programmes aimed at fostering inclusivity and sensitisation towards gender diversity. An inclusive curriculum following the model given by the National Council of Educational Research and Training (NCERT) in its training material on 'Inclusion of Transgender Children in School Education: Concerns and Roadmap' (2021) may be devised. The curriculum must ideally foster understanding and respect, along with promoting a positive representation and recognition of transgender persons.

(v) The University Grants Commission (UGC), the Central Board of Secondary Education (CBSE), and all State Education Boards may earnestly consider adopting comprehensive policies in institutions under their recognition or affiliation to promote inclusion and equality for transgender, intersex, and gender non-conforming students. Such policies may, *inter alia*, provide for the modification

of application forms, records, and registers to reflect the chosen gender identity; ensure equal access to opportunities in admission, learning, evaluation, extracurricular activities, and student representation; promote the use of gender-sensitive language and recognition of preferred names and pronouns; and facilitate participation in sports and other activities in accordance with students' self-identified gender.

(vi) Security check-ins at airports, metro stations, bus stands, sea ports, workplaces, shopping complexes, malls, cinema halls, and other public spaces may create special gender diverse screening points for transgender persons along with the sensitization of security personnels at such security-checks.

(vii) In view of Section 15(d) of the 2019 Act, the National Medical Commission may consolidate their efforts and come up with a revamped course curriculum with pragmatic pedagogic approach towards equipping the medical students and doctors with knowledge pertaining to gender reaffirming surgeries and specific health issues faced by transgender persons.

(viii) The Ministry of Home Affairs, Government of India, may also consider formulating and issuing specific directions to ensure that no transwoman is arrested without the presence of a lady officer.

F. DIRECTIONS

199. Having gone through the statutory framework, we are disheartened to note that there are several provisions in both the 2019 Act and the 2020 Rules respectively which remain as mere aspirations on paper despite the same being couched in a mandatory language. Thus, we find it appropriate to exercise our plenary powers under Article 142 of the Constitution to direct the following:

(i) That the appellate authority before which a transgender person may exercise their right to appeal against the decision of the District Magistrate be designated as per Rule 9 of the 2020 Rules in every State/UT.

(ii) That a Welfare Board for the transgender persons as envisaged under Rule 10(1) of the 2020 Rules be created in every State/UT for the purpose protecting their rights and interests and also facilitating access to schemes and welfare measures.

(iii) That a Transgender Protection Cell under the charge of the District Magistrate in each District and under the Director General of Police of the State be set up in each State/UT in accordance with Rule 11(5) of the 2020 Rules, in order to monitor cases of offences against transgender persons and to ensure timely registration, investigation and prosecution of such offences.

(iv) That all States/UTs ensure that every "establishment" designates a complaint officer in accordance with Section 11 of the 2019 Act and Rule 13(1) of the 2020 Rules respectively.

(v) In the absence of a forum before which an objection can be raised by a transgender person, who is aggrieved with the decision taken by the head of the establishment under Rule 13(3) of the 2020 Rules, the State Human Rights Commission (SHRC) shall be designated as the appropriate authority to look into such objections.

(vi) A dedicated nation-wide toll-free helpline number be set up to address the contravention of any provision of the 2019 Act and the 2020 Rules respectively. If any such information regarding the violation of the provisions of the 2019 Act and 2020 Rules

respectively, is received by the helpline, it shall immediately report such information to the Transgender Protection Cells under the charge of the District Magistrate in each District and under the Director General of Police of the State, as the case may require. This nation-wide toll-free helpline number would have a wider scope than the grievance redressal mechanism envisioned under Rule 13(5) of the 2020 Rules.

200. The Union of India and all the State respectively shall ensure that the aforesaid directions are strictly complied with within a period of three months from the date of the pronouncement of this judgment.

G. ADVISORY COMMITTEE TO ADDRESS THE CONCERNS OF THE TRANSGENDER COMMUNITY

201. We are also conscious of the polyvocal nature of the issue at hand. Although, we have issued some binding directions along with broad guidelines, yet we are acknowledge this Court's limitations to address issues which may have a largely legislative or policy dimension. We remain cognizant that the issue at hand requires a more incisive study by a dedicated committee, well-equipped to recommend a viable equal opportunity policy that ought to be introduced by the Union and State

governments as well as provide insightful suggestions on other aspects affecting the lives of the transgender community. In such view of the matter, we direct the formation of an Advisory Committee comprising of the following members:

i. Hon'ble Ms. Justice Asha Menon, Former Judge of the Delhi High Court, as the Chairperson;
ii. Ms. Akkai Padmashali, Karnataka based Trans-rights Activist;
iii. Ms. Grace Banu, Dalit rights and Trans-rights Activist;
iv. Ms. Vyjayanti Vasanta Mogli, Telangana based Trans-rights Activist;
v. Mr. Sourav Mandal, Associate Professor, Jindal Global Law School, Sonepat;
vi. Ms. Nithya Rajshekhar, Senior Research Associate, Centre for law and Policy Research, Bengaluru;
vii. Air Cmde (Dr.) Sanjay Sharma (Retd.), Chief Executive Officer, Association for Transgender Health in India, Gurugram; and
viii. Ms. Jayna Kothari, Senior Advocate, as *Amicus Curiae*.

202. The following shall be the *ex-officio* members of the Committee:

i. Secretary, Department of Social Justice & Empowerment, Ministry of Social Justice & Empowerment, Government of India;
ii. Secretary, Ministry of Women and Child Development, Government of India;
iii. Secretary, Ministry of Health and Family Welfare, Government of India;
iv. Secretary, Ministry of Education, Government of India;
v. Secretary, Ministry of Labour and Employment, Government of India;

vi. Secretary, Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions, Government of India; and

vii. Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India.

203. The Joint Secretary, Department of Social Justice & Empowerment, Ministry of Social Justice & Empowerment, shall act as the convenor of the Advisory Committee. The Committee is tasked with formulating a practical policy draft and/or a report for the consideration of the Union of India, so as to further the transgender rights discourse and give effect to the beneficial provisions of the 2019 Act.

204. We direct the MoSJE to fund the Committee we have constituted. We request the Committee to come up with a reasonable quotation of funds, which it deems would be requisite to perform such exercise. We also request the Committee to complete its deliberations and submit the draft policy or the report, as it deems appropriate, within a period of 6 months from the date of the pronouncement of this judgment. Further, the Union of India, after due consideration of the policy recommendation or the report so received from the Committee, is directed to come up with its own draft subsequent thereto. We find it apposite to mention that the Union ought to take a firm policy decision in this regard preferably within a

further period of 3 months from the date on which the report is submitted by the Advisory Committee to this Court.

205. With a view to obviate any confusion, we clarify that the *ex-officio* members shall have only advisory jurisdiction in the Committee, in so far as the contents and scope of the report/policy draft are concerned.

206. The remit of the Committee shall be to prepare a comprehensive report and/or policy draft addressing the following major points:

i. **Formulation of an Equal Opportunity Policy**: The Committee is tasked with formulating a viable and comprehensive equal opportunity policy for the transgender community in the arenas of employment and education which may serve as a model for adoption by all establishments.

ii. **Study of the 2019 Act and 2020 Rules**: The Committee should highlight gaps in the 2019 Act and 2020 Rules respectively and also suggest adequate measures to best address such lacunae.

iii. **Reasonable Accommodation**: What best can be done to accommodate transgender persons reasonably in public spaces and workplaces, without them being forced to keep their identity a secret. With such accommodations we would also need to keep in mind that

this should not act as measures which reveal the identity of the person, violating their right to privacy.

iv. **Grievance Redressal Mechanism**: The Committee must explore what can be a proper mechanism, starting from registration of complaints to the scope for appeals.

v. **Gender and Name Change**: The Committee must identify what are the various documents that require changes in record, and as to how the mechanism for this change can be created, so that no humiliation is caused to the persons seeking changes.

vi. **Inclusive Medical Care for Transgender and Gender Diverse Persons**: The Report must also deliberate upon how hospitals and places of medical aid can be made inclusive for transgender persons.

vii. **Protections for Gender Non-Conforming and Gender Diverse Persons**: The 2019 Act focuses on the aspect of "medicalisation" of gender, and does not give preponderance to the right to self-perceived identity. The Commission must look into how the State, without excessive bureaucratization, can guarantee rights provided under the 2019 Act to genderqueer and non-binary persons, especially those who do not undergo gender affirmative surgeries.

207. Though these points must be addressed, yet the Committee shall be at a liberty to make further recommendations beyond the specified mandate

wherever necessary, to ensure a holistic and effective approach towards addressing the issues faced by the transgender and genderqueer community. The Committee is requested to take into account the views and concerns of stakeholders. To do so, it may consider obtaining the views of the different stakeholders by way of circulating a questionnaire and seeking written responses thereupon.

208. The Committee is also requested to seek representation from and consult the governments of all the States and Union Territories. To facilitate the same, we direct the Chief Secretaries of all the States/Union Territories to nominate a high ranking officer, not below the rank of Joint Secretary in the Department of Social Justice & Empowerment of the respective State/Union Territory, to act as the nodal officer on behalf of the respective State/Union Territory. We further direct all the concerned departments/authorities of the respective State/Union Territory to cooperate with the nodal officer concerned and furnish necessary information, data and assistance as may be sought by such nodal officer.

209. The Secretary, Department of Social Justice & Empowerment, Ministry of Social Justice & Empowerment; the Secretary, Ministry of Women and Child Development; the Secretary, Ministry of Health and Family Welfare; the Secretary, Ministry of Labour and Employment; the Secretary,

Ministry of Education; the Secretary, Department of Personnel and Training, Ministry of Personnel; and the Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India, shall collaborate with the Advisory Committee and extend full cooperation by providing all the necessary information, documents, and resources required by the Committee to effectively carry out its mandate.

210. The Ministry of Social Justice & Empowerment, Government of India, shall be responsible for providing all necessary logistical support to facilitate the functioning of the Committee. This shall include making arrangements for travel, accommodation, and secretarial assistance, as well as covering all related expenses that the Committee members may incur. The Ministry shall provide a sufficiently large office space to the Committee for holding its meetings and also to enable the officials to carry on its day-to-day activities. Additionally, the Ministry shall provide an appropriate honorarium to the members in recognition of their contributions.

211. We further reiterate and direct that the Central Government and the Governments of all the States/Union Territories and agencies thereof, shall extend their full and meaningful cooperation to the Committee and provide the requisite data, information and assistance, as may be necessary. In case of any delay, reluctance or neglect on the part of the

aforesaid bodies, the Committee will be at liberty to approach this Court through the *amicus curiae* seeking remedial actions.

212. The Chairperson of the Advisory Committee shall be at liberty to engage the services of any person for the purpose of providing secretarial assistance in coordinating with the other members of the Committee, preparation of the policy draft and/or final report and for the smooth and effective discharge of any other responsibilities as may arise during the course of carrying out the remit of the Committee. This shall include the engagement of services of Data Analysts and Research Assistants as may be necessary for the effective discharge of the mandate of the Committee.

213. We direct the Union of India to deposit an amount of Rupees Ten Lacs (Rs 10,00,000/-) with the Registry within two weeks from the date of this order as an outlay for the initial operations of the Committee. The amicus curiae shall be at liberty to move an appropriate application seeking orders for disbursement of any additional funds, whenever necessary. We clarify that this amount shall be in addition to the financial and administrative responsibility of the Ministry of Social Justice & Empowerment as described aforesaid.

H. CONCLUSION

214. In the result, the petition stands disposed of in the following terms:

i. The respondent nos. 1, 2 and 3 respectively are directed to pay Rs 50,000/- each by way of compensation to the petitioner for their inaction and lethargy which resulted in lack of redressal mechanisms for the petitioner to avail.

ii. The respondent no. 4 is directed to pay Rs 50,000/- as compensation to the petitioner.

iii. These payments of compensation are directed to be made within four weeks from the date of pronouncement of this judgment.

215. The respondent no. 1 is also directed to deposit a sum of Rs 10,00,000/- with the Registry of this Court within two weeks from the date of pronouncement of this judgment, for the initial operations of the Committee.

216. The Committee is requested to prepare its report and/or draft policy, as the case may be, within six months from the date of pronouncement of this judgment. The Chairperson, after consultation with the members of the Committee, shall be at liberty to request the *amicus* to put an application praying for extension of the time period in which the report/policy draft has to be submitted.

217. The Union of India shall bring forth its own Equal Opportunity Policy in place, within three months from the date the Committee submits its report and/or policy draft. In case, any establishment does not have a policy of its own, the policy that the Union would be bringing in place shall be enforceable at such an establishment.

218. Considering the nature of the case, the Union will have to satisfy us on substantial compliance. In this regard, we, therefore, issue a continuing *mandamus*. The Union shall also ensure upon the compliance of our directions and guidelines in all States. It will be for the Union to also apprise us on the compliance by all the States.

219. Pending applications, if any, stand disposed of.

220. Registry shall circulate one copy each of this judgment to the following:

i. All the High Courts.
ii. Secretary, Ministry of Social Justice & Empowerment, Union of India
iii. All State Governments through Secretary, Department of Social Justice & Empowerment.

221. The Registry shall notify this matter after six months along with the policy draft and/or report of the Committee that may be placed on record before this very Bench.

.....J.
(J.B. Pardiwala)

.....J.
(R. Mahadevan)

New Delhi:
17th October, 2025.