

# TRANS EQUALITY IN INDIA: AFFIRMATION OF THE RIGHT TO SELF- DETERMINATION OF GENDER

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*In National Legal Services Authority v. Union of India ('NALSA') and Navtej Johar v. Union of India ('Navtej'), the Supreme Court made grand declarations for equal rights for transgender and intersex persons and broadened sex discrimination to prohibit discrimination on the basis of gender identity and sexual orientation. The Supreme Court, most importantly, recognised that gender identity forms the core of one's personal self and is based on self-determination, not on surgical or medical procedure. Despite this, transgender persons face discrimination on a regular basis on the basis of their gender identity. They are deprived of their basic rights and legal recognition unless they can produce proof of sex reassignment surgery through medical certificates. The common argument by the State is that welfare measures and reservations for transgender persons will be misused and the only way in which such fraud can be tackled is by the beneficiary medically proving that they are indeed transgender. This paper discusses the evolution of the constitutional right to self-determination of gender identity in India under Article 21. It examines how the right to life also includes the right to bodily integrity which precludes the reliance of a medical model to decide gender identity and examines Indian and comparative jurisprudence on this issue. It argues for the need to abolish a medical model of gender identity recognition and a re-affirmation of the right to self-determination of gender identity and a rejection of the claim of misuse and fraud which has been used frequently in India without any empirical data. I argue that we need to move towards a transformative equality model which embraces gender variance, based on the affirmation of the right to self-determination of gender identity that is premised on the right to live one's life with dignity, privacy and the recognition of one's right to bodily integrity.*

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## I. INTRODUCTION

In *National Legal Services Authority v. Union of India* ('NALSA') and *Navtej Singh Johar v. Union of India* ('Navtej'), the Supreme Court made grand declarations for equal rights for transgender and intersex persons, recognised their right to self-determination of their gender identity and broadened sex discrimination to prohibit discrimination on the basis of gender identity and sexual orientation. What do these declarations mean on the ground and how do these judgments impact the daily lives of trans persons? Does the trans community experience equal treatment post these decisions and have things changed?

The Supreme Court, in these judgements, has recognised that gender identity forms the core of one's personal self and is based on self-identification, not on surgical or medical procedure and recognised the right to self-determine one's gender identity. Despite this, transgender persons are discriminated on the basis of their gender identity and deprived of their access to basic rights and legal recognition unless they can produce proof of sex reassignment surgery through medical certificates proving their 'trans-ness' or asked to undergo medical examination. The Transgender Persons (Protection of Rights) Act 2019, a law purported to be enacted for the trans and intersex community, also mandates the requirement of medical certification if a transgender person wishes to change their gender to male or female.<sup>1</sup>

The common argument running through all these narratives is the argument of fraud and misuse. While on one hand we see that gender variation becomes increasingly visible, gender regulation in the law is stronger than ever.<sup>2</sup> The constant refrain from government authorities is that welfare measures and reservations meant for transgender persons will be misused and usurped by persons who are not trans and the system has to prevent such fraud. It is claimed that the only way in which such fraud can be tackled is by the beneficiary medically proving that they are indeed transgender.

Part II of the paper gives an overview of the evolution of the right to self-determination of gender identity in India under Article 21 of the Constitution which has been articulated along with the recognition of equality on the basis of gender identity and sex characteristics. The paper moves on to examine how the right to life also includes the right to bodily integrity which precludes the reliance of a medical model to decide gender identity in Part III. This is an important argument in the present context significant reliance is placed on the medicalisation of transgender persons' lives. Part IV of the paper addresses the need to abolish a medical model of gender identity recognition and argues that the reliance on a medical model for gender identity needs to be completely abolished as this would

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<sup>1</sup> Transgender Persons (Protection of Rights) Act, 2019, § 7(1).

<sup>2</sup> Richael A. Faithful, (LAW) BREAKING GENDER: IN SEARCH OF TRANSFORMATIVE GENDER LAW, 18(3) American University Journal of Gender Social Policy and Law 455, 458 (2010).

be a backstep in the path to gender equality. Unlike other countries, India started with the self-determination model, where the Supreme Court guaranteed the right to self-determination of gender identity irrespective of medical reassignment. The argument of misuse and fraud has been used ad nauseum in India without any empirical data. The instances include misuse of welfare measures by SC/ST persons and misuse of women centric laws by women.<sup>3</sup> Even in the case of transgender welfare this argument of fraud is used with no data and hence, such an argument should be rejected.

Finally, Part IV of the paper concludes with the need to move towards a transformative equality model which embraces gender variance. Such an all-embracing principle would be based on the affirmation of the right to self-determination of gender identity that is premised on the right to live one's life with dignity, privacy and recognition of one's right to bodily integrity and freedom from discrimination.

## II. THE RIGHT TO SELF-DETERMINATION OF GENDER IDENTITY

The judgement of the Supreme Court in *National Legal Services Authority v. Union of India*<sup>4</sup> in 2014 was a watershed moment for gender rights under the Constitution of India. The Supreme Court expanded the notion of 'sex' under the Constitution to include 'gender'. It held that both gender and biological attributes constitute distinct components of sex. While biological characteristics would include genitals, chromosomes and secondary sexual features, gender would include one's self image and the deep psychological or emotional sense of one's gender identity and character. The Court held that gender identity refers to a person's internal sense of being male, female or transgender and Article 21 of the Constitution which protects the right to life protects one's right of self-determination of the gender to which a person belongs. The Court held that determination of gender to which a person belongs is to be decided by the person concerned and that gender identity is integral to the dignity of an individual and is at the core of "personal autonomy" and "self-determination".

For the first time, the Supreme Court recognised that transgender and intersex persons are equal citizens with full protection of all fundamental rights and held that discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity.

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<sup>3</sup> Nitish Nawsagaray, *Misuse of the Prevention of Atrocities Act*, 53(22) ECONOMIC & POLITICAL WEEKLY 36 (2018); Sthabir Khora, *Misconstruction of the Anti-atrocities Act's Misuse*, 53(15) ECONOMIC & POLITICAL WEEKLY (2018); Flavia Agnes, *Protective Legislations Myth of Misuse*, 30(16) ECONOMIC & POLITICAL WEEKLY (1995).

<sup>4</sup> *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

Most importantly, the Supreme Court held that the right to gender identity is inherent in one's right to life, autonomy and dignity. Justices Radhakrishnan and Justice Sikri held that transgender persons have the right to self-identify their gender as male, female or transgender irrespective of medical sex reassignment and have the right to expression of their chosen gender identity.<sup>5</sup> Justice Sikri held that "If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognise the right of a human being to choose his/her sex/gender identity which is integral to his/her personality and is one of the most basic aspect of self- determination, dignity and freedom."<sup>6</sup> Legal recognition of one's self-determined gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution. Gender identity was held to be at the core of one's personal identity and the Court held that one's gender expression will also be protected under Article 19(1)(a) of the Constitution as it reflects the innate character and identity of persons. It went on to hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to transgender persons under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognise those rights.

This is the core principle that trans persons have been fighting for in their struggle for equality the world over. It is a founding principle that a person has the right to self-determine their gender identity irrespective of medical, hormonal or psychological treatment and this was explicitly laid down in the NALSA judgement. In NALSA, the Supreme Court reiterated and emphasised that such self-identification of gender identity should be without the requirement of any kind of medical intervention, and held as follows:

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 and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity....<sup>7</sup>

82. ...Gender identity as already indicated forms the core of one's personal self, based on self-identification, not on surgical or medical procedure."<sup>8</sup>

The Supreme Court held that gender identity refers to an individual's self-identification as a man, woman, transgender or other identified category and went on to hold that discrimination on the ground of sex under Articles 15 and 16 includes discrimination on the ground of gender identity. It directed that they

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<sup>5</sup> *Id.*, ¶62

<sup>6</sup> *Id.*, ¶99.

<sup>7</sup> *Id.*, ¶22

<sup>8</sup> *Id.*, ¶68

should be provided with special provisions under Article 15(4) for the advancement of the socially and educationally backward classes of citizens and also reservation in public employment under Article 16.

The Supreme Court relied on the self-identification of gender identity as reflected in the Yogyakarta Principles. The Yogyakarta Principles, uphold in Principle 3 the Right to Recognition before the Law. It states that each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and that no one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy as a requirement for legal recognition of their gender identity. It also provides that States shall take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity and ensure that procedures exist, whereby, all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity.<sup>9</sup> The Yogyakarta +10 Principles state that States shall ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third-party opinion, shall be a prerequisite to change one's name, legal sex or gender.<sup>10</sup>

This principle of self-determination of gender identity has been incorporated in progressive legislations in many other jurisdictions for legal recognition of gender identity for recognition of trans and intersex persons' rights. The Gender Identity Law, 2012, Argentina provides that all persons who wish to change their birth assigned sex must prove that they have attained the age of 18 years and submit a request that they are covered under the applicable law requesting amendment of their birth certificate and the national identity card.<sup>11</sup> The Gender Identity, Gender Expression and Sex Characteristics Act, 2015, Malta provides in Section 3 (4) that a person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity.<sup>12</sup> In section 5, the details and requirements to be stated in the self-declaratory public deed for reflecting the person's change of gender identity are provided. The law specifically provides that no other evidence apart from the declaratory public

<sup>9</sup> Meeting of the International Panel of Experts In International Human Rights Law and on Sexual Orientation and Gender Identity held in Yogyakarta, Indonesia, November 6-9, 2006, YOGYAKARTA PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY, ¶3 (2007).

<sup>10</sup> *The Yogyakarta Principles Plus 10 – Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, November 10, 2017, available at: <https://www.refworld.org/docid/5c5d4e2e4.html> (last visited on September 24, 2020).

<sup>11</sup> The Gender Identity Law, 2012, Art. 4 (Argentina).

<sup>12</sup> The Gender Identity, Gender Expression and Sex Characteristics Act, 2015, §3(4) (Malta).

deed shall be required.<sup>13</sup> The Gender Recognition Act, 2015, Ireland in Section 10 provides that a person who wishes to obtain a gender recognition certificate is required to furnish basic details about themselves, documents in relation to birth as required under the statute, and a statutory declaration that, *inter alia*, they have a settled and solemn intention to live in the preferred gender for the rest of their life. There is no requirement of undergoing any surgical procedure, proof of undergoing or having undergone any medical treatment and there is no physical examination of the applicant.<sup>14</sup>

This principle of self-determination laid down in NALSA was followed by the Supreme Court in *Navtej* where Justice Dipak Misra in the context of both gender identity and sexual orientation held that,

“At the core of the concept of identity lies self-determination, realization of one’s own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and 11 values or principles that are, to put in a capsule, constitutionally permissible. As long as it is lawful, one is entitled to determine and follow his/her pattern of life”.<sup>15</sup>

Our Supreme Court, therefore, in NALSA and *Navtej*, by recognising the right to self-determination which is based solely on the person’s own choice, has explicitly rejected the medical model of recognition of gender identity. The medical model is the understanding of trans identity as a medical condition – one that requires medical treatment, including gender confirming surgery or hormone therapy. The medical model also seeks to normalise trans persons by fitting them into existing binary gender structures.<sup>16</sup> Both these concepts were explicitly rejected by the Supreme Court in upholding the self-determination model.

### III. THE RIGHT TO BODILY INTEGRITY

The right to self-determination of gender identity, without the need for medical intervention and the rejection of the medical model as described in the section above, has its deep roots in one’s right to bodily integrity. The right to bodily integrity as an aspect of the fundamental right to life includes the freedom to make decisions about one’s body and this includes refusing medical treatment or intervention of any kind. The right to privacy, dignity and bodily integrity is an elaboration of the right to life under Article 21 of the Constitution and has been

<sup>13</sup> *Id.*, §5.

<sup>14</sup> The Gender Recognition Act, 2015, §10 (Ireland).

<sup>15</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶11.

<sup>16</sup> Jonathan L. Koegnick, DISTRIBUTIVE CONSEQUENCES OF THE MEDICAL MODEL, 46 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 619 (2011).

elaborated to include the right to refuse participation in any medical treatment or method.<sup>17</sup>

In *K.S. Puttaswamy v. Union of India*, the most exhaustive judgment on the right to privacy, the Supreme Court affirmed that the right to bodily integrity is an incident of one's privacy.<sup>18</sup> In the context of gender identity, the Court held that the privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination which is crucial to gender identity. Above all, the privacy of the individual recognises an inviolable right to determine how their freedom shall be exercised.<sup>19</sup>

A person's right to legal recognition of one's gender identity therefore cannot be dependent on the person having to undergo medical treatment such as sex reassignment surgeries, hormonal treatment or even psychiatric treatment. Compelling a person to undergo such treatments in order to get legal recognition of their gender identity would amount to a violation of one's right to bodily integrity and privacy as it would interfere with their physical and mental well-being. Transgender and intersex persons have the right to decide whether or not they want to undergo any invasive medical treatment. Many trans persons decide not to undergo medical treatment as these surgeries are risky and expensive.<sup>20</sup> If the right to legal recognition of one's gender identity is dependent on medical treatment, such a requirement would amount to a violation of the right to bodily integrity.

Internationally as well, there is a move towards recognising that the right to one's gender identity and the right to legal recognition of one's gender identity should not be based on any medical intervention. In *Goodwin v. United Kingdom*, which was one of the early trans rights cases that went to the European Court of Human Rights ('ECHR'), though the petitioner was a post-operative trans person, the ECHR held that "The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals."<sup>21</sup>

<sup>17</sup> *Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1 (Here the Supreme Court held that a woman's right to privacy, dignity and bodily integrity should be respected and this means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. The Court also recognised that the victim's pregnancy cannot be terminated without her consent and the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority).

<sup>18</sup> *K. S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, ¶52.

<sup>19</sup> *Id.*, ¶169.

<sup>20</sup> Elizabeth Soumya, *INDIAN TRANSGENDER HEALTHCARE CHALLENGES*, June 18, 2014, available at <https://www.aljazeera.com/indepth/features/2014/06/healthcare-distant-india-transgenders-201461882414495902.html> (Last visited on September 18, 2020).

<sup>21</sup> *Goodwin v. United Kingdom*, Application No. 17488/90, ¶83, European Court of Human Rights (Grand Chamber).

The most important case internationally on the right to physical bodily integrity in the context of recognition of one's gender identity is the judgement of the ECHR in *Garçon and Nicot v. France*.<sup>22</sup> This was an appeal that went up to the ECHR and was filed by three transgender persons who sought a change of name and gender in their birth certificates which was rejected as the law in France required that they undergo irreversible medical surgery (or sterilization) for change of gender and it was argued that this requirement was a violation of their rights.

The Court held that this was a case that dealt with an essential aspect of an individual's intimate identity because the issue of sterilization goes directly to an individual's physical integrity and their gender identity.<sup>23</sup> While personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 and that the right to gender identity and personal development is a fundamental aspect of the right to respect for private life, the Court noted that numerous European and international institutional actors involved in the promotion and defense of human rights have adopted a very clear position in favour of abolishing medical criteria, which they regard as an infringement of fundamental rights for transgender persons.<sup>24</sup>

The ECHR held that in order to obtain recognition of their identity, the applicants had no choice but to first undergo difficult medical treatment, or surgery, which, under French positive law as it existed at the time of the events in the present case, had to result in an irreversible change of appearance.<sup>25</sup> This meant that in all probability they had to be sterilized. However, not all transgender persons wish to – or can – undergo treatment or surgery leading to such consequences. Some people who did not wish to have recourse to such treatment or operations nevertheless agreed to this constraint in the hope of securing a successful outcome in the proceedings concerning the amendment of their civil status.

Medical treatments and operations of this kind go to the root of an individual's physical integrity, which is protected by Article 3 and Article 8 of the Convention.<sup>26</sup>

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<sup>22</sup> *Garçon & Nicot v. France*, Applications Nos. 79885/12, 52471/13 and 52596/13, European Court of Human Rights (Fifth Section).

<sup>23</sup> *Id.*

<sup>24</sup> These include the Commissioner for Human Rights of the Council of Europe, the Parliamentary Assembly of the Council of Europe, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the World Health Organisation, the United Nations Children's Fund, the United Nations High Commissioner for Human Rights and the OHCHR, UN Women, UNAIDS, the United Nations Development Programme and the United Nations Population Fund.

<sup>25</sup> *Garçon & Nicot v. France*, Applications Nos. 79885/12, 52471/13 and 52596/13, European Court of Human Rights (Fifth Section).

<sup>26</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, November 4, 1950, ETS 5, Arts. 3, 8.



Since sterilization concerns an essential human bodily function, it has implications for multiple aspects of individuals' bodily integrity, including their physical and mental well-being as well as their emotional, spiritual and family life.<sup>27</sup> The ECHR specified that, while sterilisation may be performed legitimately at the request of the person concerned, for instance as a means of contraception, or for therapeutic purposes where a case of medical necessity has been convincingly established, the situation is different where it is imposed on a mentally competent adult without his or her consent. The ECHR further held that medical treatment cannot be considered to be the subject of genuine consent, when not submitting to it deprives the person concerned of the full exercise of his or her right to gender identity and personal development, which is a fundamental aspect of the right to respect for private life.<sup>28</sup>

Making the recognition of transgender persons' gender identity conditional on sterilization surgery or treatment – or surgery or treatment very likely to result in sterilization – which they do not wish to undergo, therefore, amounts to making the full exercise of their right to respect for their private life under Article 8 of the Convention conditional on their relinquishing full exercise of their right to respect for their physical integrity as protected by that provision and also by Article 3 of the Convention. In the Court's view, such a course of action is incompatible with respect for human freedom and dignity, which constitute the core principles of the Convention.

The Court held that French positive law, as it stood at the material time, presented transgender persons not wishing to undergo full gender reassignment with an impossible dilemma. Either they underwent sterilization surgery or treatment against their wishes, thereby relinquishing full exercise of their right to respect for their physical integrity, which forms part of the right to respect for private life under Article 8 of the Convention; or they waived recognition of their gender identity and hence full exercise of that same right. Thus, the Court held that the refusal to the applicants' requests for a change in their civil or legal status, on the grounds that they had not provided proof of the irreversible nature of the change in their appearance and demonstrated that they had undergone sterilization surgery/medical treatment, was a violation by the State to fulfil its positive obligation to secure their right to respect for their private lives.<sup>29</sup>

In the Indian context, the right to physical and mental bodily integrity have been used interchangeably with the right to privacy. The judicial understanding of privacy in India has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State within the framework of

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<sup>27</sup> *Garçon & Nicot v. France*, Applications Nos. 79885/12, 52471/13 and 52596/13, European Court of Human Rights (Fifth Section).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

'personal liberty' under Article 21.<sup>30</sup> The right to privacy and bodily integrity has been upheld with respect to invasive tests of other kinds. In *Selvi v. State of Karnataka*, the Supreme Court had to decide whether compelling a person to undergo a narco-analysis test with or without consent would amount to a violation of one's right to privacy and bodily integrity.<sup>31</sup> The Court held that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy and even when an individual freely consents to undergo the tests in question, the resulting testimony cannot be readily characterised as voluntary in nature. Thus, forcing an individual to undergo any of the impugned techniques violates the standard of 'substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose and the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual and would also amount to 'cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms and amount to an unwarranted intrusion into personal liberty.<sup>32</sup>

#### IV. THE NEED TO ABOLISH THE MEDICAL MODEL AND THE FRAUD ARGUMENT FOR GENDER IDENTITY RECOGNITION

In *NALSA*, not only was the right of transgender persons to self-determine their gender upheld, the Court also directed the Centre and State Governments to grant legal recognition of their gender identity such as male, female or as third gender and directed the government to ensure their access to reservation in public jobs and entitlements to welfare schemes.<sup>33</sup> Therefore, gender identification became an essential component for enjoying civil rights by the trans and intersex community. It is only with the legal recognition of their gender identity that many civil rights would be available to trans persons such as the right to claim a legal identity through a passport or voter identity card, the right to access food through a ration card, a driver's license, the right to education, reservation in public employment among other rights.

Although the Supreme Court has laid down the self-determination model for recognition of gender identity in *NALSA* as an integral part of the right to life and autonomy under Article 21, this is not being implemented in practice. Despite the judgements of the Supreme Court, government authorities still demand that transgender persons produce medical certificates to prove that they have undergone reassignment surgeries to affirm their gender identity and to grant them legal recognition or access to basic fundamental rights and welfare measures.

<sup>30</sup> *Selvi v. State of Karnataka*, (2010) 7 SCC 263, ¶ 5.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

The Transgender Persons Protection of Rights Act, 2019, which is the law enacted for the benefit of the trans and intersex community and for the protection of their rights, is also unfortunately based on a medical model of gender identity recognition, and not the gender self-determination model. Section 6 of the Act allows any person to receive a certificate of identity only as a “transgender person” without medical examination.<sup>34</sup> Section 7 states that if a transgender person wishes to change their gender to male or female and undergoes surgery, such gender recognition can only be granted after producing a medical certificate to show the same. The law, therefore, implies that for being ‘transgender’ one can get a certificate without medical treatment, but if a transgender person chooses their gender identity as male or female, this can only be done after undergoing medical treatment. Section 7 states that:

- (1) After the issue of a certificate under sub-section (1) of section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed.
- (2) The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.
- (3) The person who has been issued a certificate of identity under section 6 or a revised certificate under sub-section (2) shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person:

Provided that such change in gender and the issue of revised certificate under sub-section (2) shall not affect the rights and entitlements of such person under this Act.<sup>35</sup>

Such a provision in the 2019 Act negates the core principle that a person has the right to self-determination of their gender identity and that their self-identified gender can be either male or female or a third gender. Even with the NALSA judgement in place, the response of the State has been to defeat the right

<sup>34</sup> The Transgender Persons (Protection of Rights) Act, 2019, §6.

<sup>35</sup> The Transgender Persons (Protection of Rights) Act, 2019, §7.

to self-determination of gender and to insist on a medical model for legal recognition of one's gender identity. The Transgender Persons Protection of Rights Act, 2019 and all government welfare schemes still require medical proof of reassignment to be provided by trans persons in order to get benefits.

In cases filed before courts for violation of the NALSA judgement, the constant argument raised by government authorities is that medical reassignment and proof of gender identity is required so as to ensure that there is no misuse or fraud played by persons to receive benefits or reservations meant for transgender persons. Following the NALSA judgement and its emphasis on providing welfare measures and reservations for transgender persons, a few State governments have introduced welfare schemes such as social security pensions for trans persons, housing sites, and other benefits.<sup>36</sup> The Tamil Nadu State Government has included transgender persons under the MBC (Most Backwards Castes) category for reservation in public employment.<sup>37</sup> In all these instances, benefits are not issued without a requirement of a medical certificate or examination and the argument of fraud being played by transgender persons is used as a justification.

An example of this is a case from Tamil Nadu. In *G. Nagalakshmi v. State of T.N.*, a trans person who was from a Scheduled Caste background and identified as a woman, was appointed as a woman police constable. She was forced to resign after being coerced into undergoing medical tests which stated that the "petitioner is not a woman, according to the medical opinion and she is only a transsexual". It was alleged that the petitioner was not a woman and had fraudulently tried to pretend to be a woman to get the reservation meant for women. In this case, the Madras High Court rejected this finding of the medical examination on the ground that it cannot be accepted and that the petitioner who identified as a woman had the right to her gender identity as a woman by relying on the NALSA judgement. The Madras High Court even went ahead and declared her gender to be female! The Court while setting aside the findings of the medical examination seemed to reject the medical model but took a contrary position and held that the petitioner has liberty to choose a different sexual/gender identity as a third gender in future based on a medical declaration, thus once again re-iterating that to change one's gender identity, medical reassignment is needed.<sup>38</sup>

The medical model needs to be rejected because it fails to describe a vast portion of the trans community, and thereby precludes many gender-non-conforming individuals getting access to legal rights. The medical model is also faulty because it advances the myth that all trans people desire medical treatment, while in fact, many trans people have no desire to undergo hormone therapy or

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<sup>36</sup> Sweekruti (Scheme for Promotion of Transgender Equality and Justice), Social Securities and Empowerment of Persons with Disabilities Department, Government of Odisha, 2018.

<sup>37</sup> Government of Tamil Nadu, Backward Classes, Most Backward Classes and Minorities Welfare Department (BCC Department), G.O. (Ms) No. 28 (April 6, 2015).

<sup>38</sup> *G. Nagalakshmi v. State of T.N.*, 2014 SCC Online Mad 2536.

surgery.<sup>39</sup> Some trans persons may desire medical intervention but are precluded from accessing treatment which may be unavailable, or due to financial constraints and not being publicly funded, a common problem among the most marginalised trans people. Thus, the medical model leaves many trans persons behind.<sup>40</sup> The medical model is also stigmatising. As Judith Butler argues that the Gender Identity Dysphoria (GID) diagnosis makes many assumptions that undercut trans-autonomy indicating that to be diagnosed with GID is to be found, in some way, to be ill, sick, wrong, out of order, abnormal.<sup>41</sup> The medical model ultimately gives medical ‘experts’ (who are generally not trans) the power to decide whether they have ‘really’ transitioned to the “nominated sex”.<sup>42</sup>

As the Nagalakshmi case exemplifies, the persons whose gender identities are most often doubted are the poor, marginalised, from Scheduled caste and Adivasi backgrounds, who are not privileged enough to be able to access health care or gender reassignment surgery if they want to. Marginalised and low-income transgender persons are placed in a particularly precarious situation: while their lives are more likely to be entangled within systems that strictly regulate their gender presentation, they are significantly less likely to be able to access medical reassignment and will have limited recourse to legal protections based on their gender identity.<sup>43</sup> The result of a reliance by government institutions on the medical model of gender is that only those instances of gender non-conformity which are recognised by the medical establishment are considered as real and legitimate and therefore worthy of at least some legal protections while other transgressive experiences of gender are viewed as unreal, fraudulent or illegitimate.<sup>44</sup> Hence in this case, Nagalakshmi was viewed as being fraudulent for portraying herself as a woman and getting a job as a Woman Police Constable, when the medical examination stated that she was not a woman but ‘just a transsexual’.

In a few recent judgements, courts have taken the bold step to reject the medical model where it is being insisted upon by State authorities. Upholding transgender persons’ right to marry, Justice G.S. Swaminathan in *Arun Kumar v. Inspector General of Registration*, held that the second petitioner had chosen to express her gender identity as that of a woman, can do so, as this falls within the domain of her personal autonomy and involves her right to privacy and dignity and it is not for the State authorities to question this self-determination of the second

<sup>39</sup> Franklin H. Romeo, *Beyond A Medical Model: Advocating for a new Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 736 (2005).

<sup>40</sup> Koegnig, *supra* note 16.

<sup>41</sup> Judith Butler, *Undiagnosing Gender* in Paisley Currah, RICHARD M. JUANG AND SHANNON PRICE MINTER (eds.), *Transgender Rights* (University of Minnesota Press Minneapolis 2006).

<sup>42</sup> Emily Blincoe, *Sex Markers on Birth Certificates: Replacing the Medical Model with Self-Identification*, 46(1) Victoria University of Wellington Law Review 57 (2015).

<sup>43</sup> Franklin H. Romeo, *Beyond A Medical Model: Advocating for a new Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 736 (2005).

<sup>44</sup> *Id.*, 733.

petitioner.<sup>45</sup> The Court upheld the petitioners' right to marry and to have their marriage registered under the Special Marriage Act 1954.

In the case of *Mulla Faizal v. State of Gujarat*, which was much before NALSA, the request for a change in the birth certificate by the Petitioner, without medical surgery was allowed.<sup>46</sup> In this case, the Petitioner was an inter-sex person whose sex had been recorded in his birth certificate as female and he sought for it to be changed to male, without undergoing any medical surgery or reassignment. The Gujarat High Court rejected the claim of the authorities that a medical certificate should be provided and directed them to hold an enquiry on the application made by the appellant for change of entry of sex in the Register of Births and to pass orders of granting change in the entry regarding sex in the Register of Births and issue certificate on the said entry to the appellant.

The claims of fraud, in the trans context, are often raised - not only in India but in other jurisdictions as well- but have been rejected. Specifically, the argument of fraud was rejected by the New York Supreme Court in dealing with an application for change of name by a transgender person. In the *Matter of Leah Uri Winn-Ritzenberg, for Leave to Change His/Her Name To Olin Yuri Winn-Ritzenberg*, the NY Supreme Court allowed the Petitioner's application for change of name without medical requirements.<sup>47</sup> The Court granted the petitioner's application for a name change corresponding with the petitioner's male gender identity and held that the petitioner had satisfied the requirements for a name change by specifying the grounds for the application and disclosing pertinent background information and in the absence of evidence of fraud, misrepresentation, or interference with the rights of others, the name change petition should be granted. It held that there is no sound basis in law or policy to engraft upon the statutory provisions, an additional requirement that a transgender petitioner present medical substantiation for the desired name change. "Apart from the prevention of fraud or interference with the rights of others, there is no reason and no legal basis for courts to appoint themselves the guardians of orthodoxy in such matters."<sup>48</sup>

Thus, we see that where there is no evidence provided of any fraud being played out, the medical model is rejected and legal recognition of one's gender identity on the basis of self-determination is upheld.

## V. CONCLUSION

The above arguments show that while our courts have clearly accepted that one's gender identity is self-determined and is a deep, personal and intimate decision made by a person, our State authorities have not. The medical

<sup>45</sup> Arunkumar v. Inspector General of Registration, 2019 SCC OnLine Mad 8779.

<sup>46</sup> Mulla Faizal v. State of Gujarat, 2000 SCC Online Guj 31.

<sup>47</sup> Matter of Win-Ritzenberg, 891 NYS 2d 220, 221 (NY App, 2009) (New York Supreme Court).

<sup>48</sup> *Id.*

model for proving a person's transgender status is found creeping into all State disbursed benefits and welfare measures. This medical requirement is condoned under the guise of curbing misuse and fraud. During the first year after the passage of Argentina's legislation, it was reported that 3000 people changed their gender identity documents based on a self-declaration and there were no reported cases of fraud.<sup>49</sup> Hence the fraud and misuse argument is clearly without evidence.

It is important to ensure that this creeping entry of the medical model into our strong trans rights jurisprudence is cut at the roots. Even the allegations made in the context of caste that SC/ST Prevention of Atrocities Act is being misused has been rejected and the Supreme Court has held that there cannot be a presumption that the members of the Scheduled Castes and Scheduled Tribes may misuse the provisions of law as a class, as there was no data to show misuse of the said legislation.<sup>50</sup> Using this analogy, with a view to object apprehended misuse of the law, directions for seeking medical examination or medical records of treatment cannot be sought from transgender and intersex persons.

It is important that the right to self-determine one's gender identity which has been put in place by the Supreme Court is strengthened and implemented at all levels adopting a self-identification model of gender. This would not only reduce barriers for trans persons to get legal recognition of gender identity, it would also ensure that they have consistency in records and allow trans persons the important affirmation of their identity. The Transgender Persons (Protection of Rights) Act 2019 is the first legislation that has to be amended to embody the right to self-determination of gender identity and it cannot allow for any medical requirements for change of gender. Such an amendment would not only be a recognition of the right to life, dignity, bodily integrity and privacy under Article 21 of the Constitution.

Making trans equality real in India would mean moving towards an understanding of gender that is inclusive of all gender variance and strongly affirming the gender self-determination model. As Richael Faithful argues, if our equality model has to be transformative, it should weaken gender regulation instead of strengthening it and our legal regime should be one that presumes difference and responds to difference with fairness and this transformative vision of equality is possible if we re-focus our analysis on gender outsiders who every day resist injustice.<sup>51</sup> We need a transformative gender law, which does not begin with a focus on misuse and fraud on the part of the beneficiary, but one which aims to embrace difference and which aims to enable people of all genders to access their legal rights equally. Such a transformative gender law would be one which embodies the principle of self-determination of gender identity and the freedom to each person to be who they want to be and to be treated equally.

<sup>49</sup> Blincoe, *supra* note 42.

<sup>50</sup> Union of India v. State of Maharashtra, (2018) 6 SCC 450.

<sup>51</sup> Richael Faithful, *(Law) Breaking Gender: In Search of Transformative Gender Law*, 18(3) American University Journal of Gender Social Policy and Law 455, 469 (2010).