

IN THE SUPREME COURT OF INDIA
(ORIGINAL JURISDICTION)
WRIT PETITION (CIVIL) NO. 572/2016

IN THE MATTER OF:

DR. AKKAI PADMASHALI & ORS.

...PETITIONERS

VERSUS

UNION OF INDIA & ANR.

...RESPONDENTS

COMPILATION OF MATERIALS

<u>S.No</u>	<u>DETAILS</u>	<u>Page No.</u>
1	Some Frequently asked questions on Transgender Identity	1 - 2
2	The Criminal Tribes Act 1871	3 - 16
3	<i>Queen Empress vs. Khairati</i> (1884) ILR 6 All 204	17 - 20
4	The Andhra Pradesh (Telangana Area) Eunuchs Act 1329 F	21 - 23
5	The Karnataka Police Act 1963 Extract	24 - 28
6	The Karnataka Police (Amendment) Act 2016	29 - 30
7	The Yogyakarta Principles	31 - 67
8	The Yogyakarta Principles Plus 10	68 - 96
9	<i>P vs. S & Cornwall County Council</i> [1996] ICR 795	97 - 105
10	<i>Muhamad Juzaili bin Mohd Khamis & Ors vs. State Government of Negeri Sembilan & Ors.</i> CIVIL APPEAL NO. N-01-498-11/2012	106 - 140
11	<i>Shafin Jahan v. Asokan K.M. & Ors.</i> 2018 SCC OnLine SC 343	141 - 164
12	<i>Van Kuck vs. Germany</i> No. 35968/97, ECHR 2003-VII	165 - 194
13	<i>Ashish Kumar Misra v. Bharat Sarkar,</i> MANU/UP/0332/2015	195 - 198
14	<i>Shivani Bhat v. State of NCT of Delhi and Ors.,</i> MANU/DE/2912/2015	199 - 203

ADVOCATE FOR THE PETITIONERS

JAYNA KOTHARI

SOME FREQUENTLY ASKED QUESTIONS ON TRANSGENDER IDENTITY

What does it mean to be transgender?

Transgender people are people whose gender identity is different from the gender they were thought to be at birth. When we're born, a doctor usually labels us "male" or "female" based on what our bodies look like. Some people's gender identity – their innate knowledge of who they are – is different from what was initially expected when they were born. Most of these people describe themselves as **transgender**.

Some transgender people identify as neither male nor female, or as a combination of male and female. "**Non-binary**" or "**genderqueer**" are some terms that people who aren't entirely male or entirely female use to describe their gender identity.

What's the difference between sexual orientation and gender identity?

Gender identity refers to your internal knowledge of your own gender—for example, your knowledge that you're a man, a woman, or another gender. Sexual orientation has to do with whom you're attracted to. Transgender people can have any sexual orientation.

What's the difference between being transgender and being intersex?

Intersex people have reproductive anatomy or genes that don't fit typical definitions of male or female, which is often discovered at birth. Being transgender has to do with your internal knowledge of your gender identity. A transgender person is usually born with a body and genes that match a typical male or female, but they know their gender identity to be different.

People whose bodies fall in between "male" and "female" are often known as **intersex** people. There are many different types of intersex conditions. For example, some people are born with XY chromosomes but have female genitals and secondary sex characteristics. Others might have XX chromosomes but no uterus, or might have external anatomy that doesn't appear clearly male or female.

What does "gender transition" mean?

Transitioning is the time period during which a person begins to live according to their gender identity, rather than the gender they were thought to be at birth. While not all transgender people transition, a great many do at some point in their lives. Gender transition looks different for every person. Possible steps in a gender transition may or may not include changing your clothing, appearance, name, or the pronoun people use to refer to you (like "she," "he," or "they"). Some people are able to change their identification documents, like their driver's license or passport, to reflect their gender. And some people undergo hormone therapy or other medical procedures to change their physical characteristics and make their body better reflect the gender they know themselves to be. F2Ms are females who transition into males, and M2Fs are males who transition into females.

Transitioning can help many transgender people lead healthy, fulfilling lives. No specific set of steps is necessary to “complete” a transition—it’s a matter of what is right for each person. All transgender people are entitled to the same dignity and respect, regardless of which legal or medical steps they have taken.

What medical treatments do some transgender people seek when transitioning?

Some, but not all, transgender people undergo medical treatments to make their bodies more congruent with their gender identity and help them live healthier lives. While transition-related care is critical and even life-saving for many transgender people, not everyone needs medical care to transition or live a fulfilling life.

Different transgender people may need different types of transition-related care. Medical procedures can include hair growth or removal treatments, hormone therapy, various surgeries to make one’s face, chest, and anatomy more in line with one’s gender identity. A transsexual individual

What is gender dysphoria?

For some transgender people, the difference between the gender they are thought to be at birth and the gender they know themselves to be can lead to serious emotional distress that affects their health and everyday lives if not addressed. Gender dysphoria is the medical diagnosis for someone who experiences this distress.

Not all transgender people have gender dysphoria. On its own, being transgender is not considered a medical condition. Many transgender people do not experience serious anxiety or stress associated with the difference between their gender identity and their gender of birth, and so may not have gender dysphoria.

Gender dysphoria can often be relieved by expressing one’s gender in a way that the person is comfortable with. That can include dressing and grooming in a way that reflects who one knows they are, using a different name or pronoun, and, for some, taking medical steps to physically change their body.

It’s important to remember that while being transgender is not in itself an illness, many transgender people need to deal with physical and mental health problems because of widespread discrimination and stigma. Many transgender people live in a society that tells them that their deeply held identity is wrong or deviant. Some transgender people have lost their families, their jobs, their homes, and their support, and some experience harassment and even violence. Transgender children may experience rejection or even emotional or physical abuse at home, at school, or in their communities. These kinds of experiences can be challenging for anyone, and for some people, it can lead to anxiety disorders, depression, and other mental health conditions. But these conditions are not *caused* by having a transgender identity: they’re a result of the intolerance many transgender people have to deal with. Many transgender people – especially transgender people who are accepted and valued in their communities – are able to live healthy and fulfilling lives.

Criminal Tribes' Act, 1871. Act XXVII. British Library, Oriental and India Office Collections, shelfmark V/8/42.

The British branded a number of marginalized population groups ('tribals') innately criminal and made elaborate arrangements for their surveillance. This sat well with the larger strategy of imperial governance – the policy of keeping the subject population segregated and sequestered into various strata. When the Bill was introduced in 1871 by T. V. Stephens, stress was laid on ethnological theories of caste which linked profession, upbringing and background. The Act entailed registration of *all* members of notified 'tribes' (irrespective of their criminal precedents) and imposition of restrictions on their movements. In the course of subsequent amendments of the Act, penalties were increased and provisions were made for taking tribal boys (from four to eighteen years old) away from their parents. In 1908, special 'settlements' were constructed for the notified tribes where they had to perform hard labour. In 1936, Nehru denounced the whole system as 'monstrous' and after independence, in 1949, the Committee appointed by the government found the system violating the spirit of the Indian constitution. With the repeal of the Act in 1952, 2,300,000 tribals were decriminalized.

CRIMINAL TRIBES' ACT, 1871.

CONTENTS.

Preamble.

SECTIONS.

1. Short title.
Commencement.
Local extent.

PART I.

CRIMINAL TRIBES.

2. Local Government to report what tribes should be declared criminal.
3. Report to contain certain particulars.
4. Occupation of wandering tribe to be stated; also proposed residence and means of livelihood.
5. Notification declaring tribe to be criminal.
6. Bar of jurisdiction of Courts in questions relating to notification.
7. Register of members of such tribes.
8. Procedure in making register.
9. Penalties for failing to appear, refusing or giving false information.
10. Charge of register.
Reporting desirable alterations.
11. By whom alterations to be made.
Notice to persons affected.
12. Complaints of entries in register.
13. Settlement of tribe in place prescribed by Local Government.
14. Removal to other place.
15. Arrangements to be made prior to settlement or removal.
16. Transfer of register of persons ordered to be removed.
17. Power to place tribe in reformatory settlement.
18. Power to make rules.
19. Penalties for breach of rules.
20. Arrest of registered person found beyond prescribed limits.
21. Duties of Village-Headmen, Village-Watchmen, &c.
22. Penalty

1871.] *Criminal Tribes.* 347

SECTIONS.

- 22. Penalty for breach of such duties.
- 23. Indemnity for past registrations and detentions.

 PART II.

EUNUCHS.

- 24. Registers of eunuchs and their property.
'Eunuch' defined.
- 25. Complaints of entries in register.
- 26. Penalty on registered eunuch appearing in female clothes;
or dancing in public, or for hire.
- 27. Penalty on registered eunuch keeping boy under sixteen.
- 28. Maintenance and education of boys whose parents cannot be found.
- 29. Disabilities of registered eunuchs.
- 30. Power to require information as to registered eunuch's property.
Penalty for refusing such information.
- 31. Rules for making and keeping up registers of eunuchs.

ACT No. XXVII OF 1871.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor General on the 12th October 1871).

An Act for the Registration of Criminal Tribes and Eunuchs.

Preamble.

WHEREAS it is expedient to provide for the registration, surveillance and control of certain criminal tribes and eunuchs; It is hereby enacted as follows:—

Short title.
Commencement.

1. This Act may be called “The Criminal Tribes’ Act, 1871,” and it shall come into force on the passing thereof.

Local extent.

This section and section twenty extend to the whole of British India: the rest of this Act extends only to the territories under the governments of the Lieutenant-Governors of the North-Western Provinces and the Panjáb, respectively, and under the administration of the Chief Commissioner of Oudh.

PART I.

CRIMINAL TRIBES.

Local Government to report what tribes should be declared criminal.

2. If the Local Government has reason to believe that any tribe, gang or class of persons is addicted to the systematic commission of non-bailable offences, it may report the case to the Governor General in Council, and may request his permission to declare such tribe, gang or class to be a criminal tribe.

Report to contain certain particulars.

3. The report shall state the reasons why such tribe, gang or class is considered to be addicted to the systematic commission of non-bailable offences, and, as far as possible, the nature and the circumstances of the offences in which the members of the tribe are supposed to have been concerned; and shall describe the

the

1871.]

Criminal Tribes.

349

the manner in which it is proposed that such tribe, gang or class shall earn its living when the provisions hereinafter contained have been applied to it.

4. If such tribe, gang or class has no fixed place of residence, the report shall state whether such tribe, gang or class follows any lawful occupation, and whether such occupation is, in the opinion of the Local Government, the real occupation of such tribe, gang or class, or a pretence for the purpose of facilitating the commission of crimes, and shall set forth the grounds on which such opinion is based ; and the report shall also specify the place of residence in which such wandering tribe, gang or class is to be settled under the provisions hereinafter contained, and the arrangements which are proposed to be made for enabling it to earn its living therein.

Occupation of wandering tribe to be stated;

also proposed residence and means of livelihood.

5. If, upon the consideration of any such report, the Governor General in Council is satisfied that the tribe, gang or class to which it relates ought to be declared criminal, and that the means by which it is proposed that such tribe, gang or class shall earn its living are adequate, he may authorize the Local Government to publish in the Local Gazette a notification declaring that such tribe, gang or class is a criminal tribe, and thereupon the provisions of this Act shall become applicable to such tribe, gang or class.

Notification declaring tribe to be criminal.

6. No Court of Justice shall question the validity of any such notification on the ground that the provisions hereinbefore contained, or any of them, have not been complied with, or entertain in any form whatever the question whether they have been complied with ; but every such notification shall be conclusive proof that the provisions of this Act are applicable to the tribe, gang or class specified therein.

Bar of jurisdiction of Courts in questions relating to notification.

7. When the notification mentioned in section five has been published, the Local Government may direct the Magistrate of any district in which such tribe, gang or class, or any part thereof, is at the time resident, to make a register of the members of such tribe, gang or class, or of any part thereof.

Register of members of such tribes.

The

The declaration of the Local Government that any such tribe, gang or class, or any part of it, is resident in any district, shall be conclusive proof of such residence.

Procedure in making register.

8. Upon receiving such direction, the said Magistrate shall publish a notice in the place where the register is to be made, calling upon all the members of such tribe, gang or class, or of such portion thereof as is directed to be registered, to appear, at a time and place therein specified, before such persons as he appoints, and to give those persons such information as may be necessary to enable them to make the register.

Penalties for failing to appear, refusing or giving false information.

9. Any member of any such tribe, gang or class who, without lawful excuse, the burthen of proving which shall lie upon him,

shall fail to appear according to such notice,

or who shall intentionally omit to furnish such information,

or who shall furnish, as true, information on the subject which he knows or has reason to believe to be false,

shall be deemed guilty of an offence under the first parts of section one hundred and seventy-four, or one hundred and seventy-six, or one hundred and seventy-seven of the Indian Penal Code, respectively, as the case may be.

Charge of register.

Reporting desirable alterations.

10. The register, when made, shall be kept by the District Superintendent of Police, who shall, from time to time, report to the said Magistrate any alterations which ought to be made therein, either by way of addition or erasure.

By whom alterations to be made.

Notice to persons affected.

11. No alteration shall be made in such register except by or by order of the said Magistrate, and he shall write his initials against every such alteration. Notice shall be given of any such intended alteration, and of the time when, and place where, it is to be made, to every person affected thereby.

Complaints of entries in register.

12. Any person deeming himself aggrieved by any entry made, or proposed to be made, in such register, either when the register is first made or subsequently,

quently, may complain to the said Magistrate against such entry, and the Magistrate shall retain such person's name on the register, or enter it therein, or erase it therefrom, as he may see fit.

Every order for the erasure of any such person's name shall state the grounds on which such person's name is erased.

The Commissioner shall have power to review any order of entry, retention or erasure, passed by the said Magistrate on any such complaint, either on appeal by the person registered or proposed to be registered, or otherwise.

13. Any tribe, gang or class, which has been declared to be criminal, and which has no fixed place of residence, may be settled in a place of residence prescribed by the Local Government. Settlement of tribe in place prescribed by Local Government.

14. Any tribe, gang or class which has been declared to be criminal, or any part thereof, may, by order of the Local Government, be removed to any other place of residence. Removal to other place.

15. No tribe, gang or class, shall be settled or removed under the provisions of this Act until such arrangements as the Local Government shall, with the concurrence of the Governor General in Council, consider suitable, have been made for enabling such tribe, gang or class, or such part thereof as is to be so settled or removed, to earn a living in the place in or to which it is to be settled or removed. Arrangements to be made prior to settlement or removal.

16. When the removal of any persons has been ordered under this Act, the register of such persons' names shall be transferred to the District Superintendent of Police of the district to which such persons are removed, and the Magistrate of the said district and the Commissioner of the division in which it is situated, shall thereupon be empowered to exercise respectively the powers provided in sections eleven and twelve. Transfer of register of persons ordered to be removed.

17. The Local Government may, with the sanction of the Governor General in Council, place any tribe, gang or class, which has been declared to be criminal, or any part thereof, in a reformatory settlement. Power to place tribe in reformatory settlement.

18. The

Power to
make rules.

18. The Local Government may, with the previous consent of the Governor General in Council, make rules to prescribe—

(1) the form in which the register shall be made by the said Magistrate;

(2) the mode in which the said Magistrate shall publish the notice prescribed in section eight, and the means by which the persons whom it concerns, and the Headmen, Village-Watchmen and landowners or occupiers of the village, in which such persons reside, shall be informed of its publication;

(3) the mode in which the notice prescribed in section eleven shall be given;

(4) the limits within which persons whose names are on the register shall reside;

(5) conditions as to holding passes, under which such persons may be permitted to leave the said limits;

(6) conditions to be inserted in any such pass as to

(a) the places where the holder of the pass may go or reside;

(b) the officers before whom, from time to time, he shall be bound to present himself;

(c) and the time during which he may absent himself;

(7) conditions as to answering at roll-call or otherwise, in order to satisfy the said Magistrate or persons authorized by him, that the persons whose names are on the register are actually present at given times within the said limits;

(8) the inspection of the residences and villages of any such tribe, gang or class, and the prevention or removal of contrivances for enabling the residents therein to conceal stolen property, or to leave their place of residence without leave;

(9) the terms upon which registered persons may be discharged from the operation of this Act;

(10) the

1871.1

Criminal Tribes.

353

(10) the mode in which criminal tribes shall be settled and removed ;

(11) the control and supervision of reformatory settlements ;

(12) the works on which, and the hours during which, persons placed in a reformatory settlement shall be employed, the rates at which they shall be paid, and the disposal, for the benefit of such persons, of the surplus proceeds of their labour after defraying the whole or such part of the expenses of their supervision and control as to the Local Government shall seem fit ;

(13) the discipline to which persons endeavouring to escape from any such settlement, or otherwise offending against the rules for the time being in force, shall be submitted ; the periodical visitation of such settlement, and the removal from it of such persons as it shall seem expedient to remove ;

(14) and generally to carry out the purposes of this Act.

19. Any person violating any of the rules made under section eighteen shall be punished with rigorous imprisonment for a term which may extend to six months, or with fine, or with whipping, or with all or any two of those punishments ; and, on any second conviction for a breach of any of the said rules, with rigorous imprisonment which may extend to one year, or with fine, or with whipping to be inflicted in the manner prescribed by any law in force for the time being in relation to whipping, or with all or any two of those punishments.

Penalties for breach of rules.

20. Any person registered under the provisions of this Act, who is found in any part of British India, beyond the limits so prescribed for his residence, without such pass as may be required by the said rules, or in a place or at a time not permitted by the conditions of his pass,

Arrest of registered person found beyond prescribed limits.

or who escapes from a reformatory settlement, may be arrested without warrant by any police-officer or village-watchman, and taken before a Magistrate, who, on proof of the facts, shall order him to

354 *Criminal Tribes.* [ACT XXVII

to be removed to the district in which he ought to have resided, or to the reformatory settlement from which he has escaped (as the case may be), there to be dealt with according to the rules under this Act for the time being in force.

The rules for the time being in force for the transmission of prisoners shall apply to all persons removed under this section: Provided that an order from the Local Government or from the Inspector General of Prisons shall not be necessary for the removal of such persons.

Duties of Village-Headmen, Village-Watchmen, &c.

21. It shall be the duty of every Village-Headman and Village-Watchman in a village in which any persons belonging to a tribe, class or gang which has been declared criminal reside, and of every owner or occupier of land on which any such persons reside, to give the earliest information in his power at the nearest police station of

- (1) the failure of any such person to appear and give information, as directed in section eight;
- (2) the departure of any such person from such village or from such land (as the case may be).

And it shall be the duty of every Village-Headman and Village-Watchman in a village, and of every owner or occupier of land, to give the earliest information in his power at the nearest police station of the arrival at such village or on such land (as the case may be) of any persons who may reasonably be suspected of belonging to any such tribe, class or gang.

Penalty for breach of such duties.

22. Any Village-Headman, Village-Watchman, owner or occupier of land, who shall fail to comply with the requirements of section twenty-one, shall be deemed to have committed an offence under the first part of section one hundred and seventy-six of the Indian Penal Code.

Indemnity for past registrations and detentions.

23. All Magistrates and other persons are hereby indemnified for anything heretofore done under the circular order 18 of 1856 of the Judicial Commissioner of the Panjáb, or under any orders of the Local Governments of the North-Western Provinces or Oudh, relating to the registration or detention of tribes

regarded

1871.]

Criminal Tribes.

355

regarded by such Local Governments as criminal tribes; and no suit or other proceeding shall be maintained against any such Magistrate or other person in respect of anything so done.

PART II.

EUNUCHS.

24. The Local Government shall cause the following registers to be made and kept up by such officer as, from time to time, it appoints in this behalf:—

Registers of eunuchs and their property.

(a) a register of the names and residences of all eunuchs residing in any town or place to which the Local Government specially extends this Part of this Act, who are reasonably suspected of kidnapping or castrating children, or of committing offences under section three hundred and seventy-seven of the Indian Penal Code, or of abetting the commission of any of the said offences; and

(b) a register of the property of such of the said eunuchs as, under the provisions hereinafter contained, are required to furnish information as to their property.

The term 'eunuch' shall, for the purposes of this Act, be deemed to include all persons of the male sex who admit themselves, or on medical inspection clearly appear, to be impotent.

'Eunuch' defined.

25. Any person deeming himself aggrieved by any entry made or proposed to be made in such register, either when the register is first made or subsequently, may complain to the said officer, who shall enter such person's name, or erase it, or retain it, as he sees fit.

Complaints of entries in register.

Every order for erasure of such person's name shall state the grounds on which such person's name is erased.

The Commissioner shall have power to review any order passed by such officer on such complaint, either on appeal by the complainant or otherwise.

26. Any

Penalty on registered eunuch appearing in female clothes;

or dancing in public, or for hire.

26. Any eunuch so registered who appears, dressed or ornamented like a woman, in a public street or place, or in any other place, with the intention of being seen from a public street or place,

or who dances or plays music, or takes part in any public exhibition, in a public street or place or for hire in a private house,

may be arrested without warrant, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Penalty on registered eunuch keeping boy under sixteen.

27. Any eunuch so registered who has in his charge, or keeps in the house in which he resides, or under his control, any boy who has not completed the age of sixteen years, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

Maintenance and education of boys whose parents cannot be found.

28. The Magistrate may direct that any such boy shall be returned to his parents or guardians, if they can be discovered. If they cannot be discovered, the Magistrate may make such arrangements as he thinks necessary for the maintenance and education of such boy, and may direct that the whole or any part of a fine inflicted under section twenty-seven may be employed in defraying the cost of such arrangements.

The Local Government may direct out of what local or municipal fund so much of the cost of such arrangements as is not met by the fine imposed, shall be defrayed.

Disabilities of registered eunuchs.

29. No eunuch so registered shall be capable—

- (a) of being or acting as guardian to any minor,
- (b) of making a gift,
- (c) of making a will, or
- (d) of adopting a son.

Power to require information as to registered eunuch's property.

30. Any officer authorized by the Local Government in this behalf may, from time to time, require any eunuch so registered to furnish information as to all property, whether movable or immovable, of or to which he is possessed or entitled, or which is held in trust for him.

Any

1871.] *Criminal Tribes.* 357

Any such eunuch intentionally omitting to furnish such information, or furnishing, as true, information on the subject which he knows, or has reason to believe, to be false, shall be deemed to have committed an offence under section one hundred and seventy-six or one hundred and seventy-seven of the Indian Penal Code, as the case may be. Penalty for refusing such information.

31. The Local Government may, with the previous sanction of the Governor General in Council, make rules for the making and keeping up and charge of registers made under this Part of the Act. Rules for making and keeping up registers of eunuchs.

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1884.
Hanuman
Singh
v.
Nanak
Chand,

Balwant Singh's general extravagance and the debt incurred by him to the defendant, I yet consider it is so doubtful as to its being open to the objection to it urged in the name of the plaintiff that it would be unsafe for us to give him our judgment. I therefore concur in the order proposed by my colleague, Mr. Justice Straight and the present appeal is dismissed with costs.

CRIMINAL REVISIONAL.

1884
January 31.

Before Mr. Justice Straight.

QUEEN-EMPRESS v KHAIRATI,

Act XLV of 1860 (Penal Code), s. 377—Unnatural offence—Charge—Particulars as to time, place, and person—Criminal Procedure Code, s. 222,

Held where a person was tried for an unnatural offence and convicted on a charge which did not allege the time when, place where, or point to any known or unknown person with whom, the offence was committed, and without any proof of these particulars, the facts proved against him only being that he habitually wore woman's clothes and exhibited physical signs of having committed the offence that the conviction was not sustainable,

THIS was a case called for by the High Court, in which one Khairati had been convicted by Mr. J. L. Denniston, Sessions Judge of Moradabad, of an offence under s. 377 of the Penal Code. The charge on which the appellant was committed and tried was "that he, within four months previously to the 15th June (1883), the exact time it being impossible to state, did in the district of Moradabad abet the offence of sodomy, by allowing some unknown person to commit the offence of sodomy on his person, and was at the time of the commission of the offence present, for which reason he must, under the provisions of s. 114 of the Indian Penal Code, be deemed to have committed the offence itself, and thereby committed an offence punishable under s. 377 of the Indian Penal Code." The grounds of the conviction appear in the following extract from the judgment of the Sessions Judge:—

"This case relates to a person named Khairati, over whom the police seem to have exercised some sort of supervision, whether strictly regular or not, as a eunuch. The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the

women of a certain family. Having been subjected to examination by the civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catanite—the distortion of the orifice of the *onus* into the shape of a trumpet—and also to be affected with *syphilis* in the same region in a manner which distinctly points to unnatural intercourse within the last few months.

1884

 Queen-
Empress
v.
Khairati.

“ The accused admits that he habitually wears woman’s clothes. He says that he was not singing on the occasion in question. He denies that he has ever been the subject of unnatural intercourse ; and he explains the enlargement of the organ by saying he has had piles (or as he possibly means dysentery). He denies that he has ever had *syphilis*.

“ The evidence adduced to show that the accused was singing is sufficient, and the accused, when he has admitted the wearing of female garments, has conceded the most important fact as to his public habits. As to the *syphilis*, the evidence is quite unimpeachable. As to the distorting of the organ, his explanation cannot be admitted. The disease (or diseases) to which he alludes must have been perfectly well known to the medical witnesses, and, in pronouncing the enlargement to be attributable only to sodomy among conceivable causes, they anticipated any suggestions that it might be the result of the common-place disorder (or disorders) alluded to by the accused.

“ The three facts proved against the accused—his appearance as a woman, the misshapement, the venereal disease—irresistibly lead to the conclusion that he has recently subjected himself to unnatural lust. Any one of the facts would not justify this precise conclusion. Any single one of the three might either (as is the case with the venereal disease) be attributed by a stretch of the imagination to some other cause or agency, or might leave the mind in that state of dissatisfaction which follows an isolated, though powerful, argument. But taking the three considerations together, I do not see how a reasonable man can doubt that the accused has recently been the subject of sodomy.

“ The question remains, whether there is anything in the Procedure Code, or in the general spirit of the law, which protects the

1864
Queen-
Empress
v.
Khairati.

accused from punishment, on the ground that neither the individual with whom the offence was committed, nor the time of commission, nor the place is ascertainable.

“S. 222 of the Procedure Code has been before now considered to be unfavorable to convictions in such cases, but, as the committing Magistrate points out the enactment in question does not describe the circumstances which require to be known in order that misconduct may be punishable; it merely details the particulars which, if known, must be set forth for the benefit of the accused in order that he may be able to defend himself. That such particulars should be imperfectly known weakens the defence; and *pro tanto* weakens the prosecution, for the strongest case for the prosecution is one which the accused, on the face of the accusation, ought to, but cannot, rebut. The absence, therefore, of the particulars alluded to in s. 222 of the Criminal Procedure Code weakens the case, but it does not destroy it. To mention an illustration: a man could be convicted of a murder committed on a journey, of which the time and place were totally unknown. Such a case can easily be conceived. As to the *person against whom* the offence has been committed, there is, as the Magistrate observes, no such person in the present case.

“I think, therefore, it is clear that the enactment in question has not any necessary bearing upon the case. The only question which remains relates to the spirit of the law. On this subject I forbear to dogmatize; but it seems to me that distinct misconduct of this sort, within a recent period, cannot reasonably be exempted from punishment, merely because of certain obscurities which do not commonly present themselves. The case is one of an uncommon character, but part of its peculiarity it owes to the peculiarity of the offence in which there is no injured party.

“The Court therefore finds that there is good reason for convicting the accused of participation in sodomy. The Magistrate calls his offence abetment, being present, referred to in s. 114 of the Penal Code. The question is one of terms; but it is conducive to brevity, and also I think accurate to speak of the offence as that of ‘having carnal intercourse,’ rather than as abetment of the same. Two persons are required for intercourse, and both may be spoken

of as holding intercourse, the one with the other. In the matter of ordinary sexual intercourse, that is the phraseology commonly though perhaps not invariably, used”.

The public prosecutor (*Mr. C. H. Hill*), for the Crown.

STRAIGHT, J.—This conviction cannot possibly be sustained. The charge upon which the accused was committed and subsequently tried alleges neither time when, place where, nor points to any known or unknown person with whom, the particular act charged as an offence against s. 377 of the Penal Code was committed, and for aught that appears to the contrary, the suggested unnatural intercourse may have taken place out of the jurisdiction of the Moradabad Court, and at some place where the Penal Code is not in force. At best the case for the prosecution is, that the accused is a habitual sodomite, but at present there is no provision of the law that covers it or renders him amenable to punishment upon evidence of so vague and general a description as that to be found in the present record. I fully appreciate the desire of the authorities at Moradabad to check these disgusting practices; but neither they nor I can set law and procedure at defiance in order to obtain an object, however laudable. The conviction is quashed, and the accused Khairati must be released.

Conviction quashed.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MEDA BIBI (PLAINTIFF) v. IMAMANBIBI AND OTHERS (DEFENDANTS)*
Act XV of 1877 (Limitation Act), sch. ii. No. 91—Suit for cancellation of instrument—Muhammadan Law—Gift—Suit for possession of immovable property.

One of the heirs of a deceased Muhammadan sued for her share under the Muhammadan Law of the estate of the deceased, and to set aside a gift of her share by the deceased, as invalid under that Law, by reason that possession of the property transferred by the gift had not been delivered by the donor to the donee. Held, that because the suit was not brought within three years from date of the gift it did not necessarily follow that the suit was barred by to

* Second Appeal No. 1355 of 1882, from a decree of J.W. Power, Esq., District Judge of Ghazipur, dated the 23rd September, 1882, reversing a decree of Rai Raghu Nath Sahai, Addition Subordinate Judge of Ghazipur, dated the 5th April 1882.

1884.

Queen-
Empress
v.
Khairati.

1884

February 4.

1. Short title, commencement and extent

(1) This Act may be called the Andhra Pradesh (Telangana Area) Eunuchs Act, 1329 F and it shall come into force in Telangana Area of the State of Andhra Pradesh from the date of its publication in the Official Gazette. (2) The Government shall have the power to extend this Act, by notification in the Official Gazette to any other place.

1A. Unless there is anything repugnant in the subject or context the word 'eunuch' shall, for the purpose of this Act, include all persons of the male sex who admit to be impotent or who clearly appear to be impotent on medical inspection.

2. Register of eunuchs

The Government shall cause a register to be kept of the names and place of residence of all eunuchs residing in the City of Hyderabad or at any other place to which the Government may specially extend this Act and who are reasonably suspected of kidnapping or emasculating boys, or of committing unnatural offences or abetting the commission of the said offences; and it shall direct such register to be maintained by the officer appointed for this purpose, from time to time, and the Government shall, from time to time, make rules regarding the responsibility of preparing and maintaining it.

3. Complaint of entry in register

Any person aggrieved by any entry made or proposed to be made in the aforesaid register, may either at a time when the register is first made or subsequently lodge a complaint with the aforesaid officer, who shall either enter, remove or retain the name of such person in the register, as he thinks fit. Every order for removal of the name of such person shall contain the grounds of the removal thereof. The District Magistrate shall have power to review the order passed by such officer on such complaint either on appeal by the petitioner or otherwise.

4. Registered eunuch found in female clothes

Every registered eunuch found in female dress or ornamented in a street or a public place or in any other place with the intention of being seen from a street or public place or who dances or plays music or takes part in any public entertainment in a street or a public place may be arrested without warrant and shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

5. Penalty when boy under sixteen is found with registered eunuch

Any registered eunuch who has with him or in his house under his control a boy of less than sixteen years of age shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

6. Education and training of children whose parents are not discovered

The District Magistrate may direct that any such boy be delivered to his parents or guardian, if they can be discovered, and they are not eunuchs; if they cannot be discovered or they are eunuchs, the Magistrate may make such arrangements as he thinks necessary for the maintenance, education and training of such boy and may direct that the whole or any part of a fine inflicted under Section 5 may be applied

for such arrangement. The Government may direct that out of any Local or Municipal Fund or other amount the cost of such arrangement as is not met by the fine shall be defrayed.

7. Penalty for emasculation or abetting therefor

Any person who emasculates himself or any other person with or without his consent or abets in emasculation shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

24

'[KARNATAKA ACT]' No. 4 OF 1964

(First published in the '[Karnataka Gazette]' on the Thirteenth day of February, 1964.)

THE '[KARNATAKA]' POLICE ACT, 1963.

(Received the assent of the President on the Eighteenth day of January, 1964)

(As Amended by Karnataka Acts 13 of 1965, 7 of 1974, 18 of 1975, 41 of 1981, 14 of 1990, 6 of 1998, 2 of 2003 and 26 of 2011)

An Act to provide for a uniform law for the regulation of the Police Force, the maintenance of public order and other matters in the '[State of Karnataka]'.

WHEREAS it is expedient to provide for a uniform law for the regulation of the Police Force in the '[State of Karnataka]', for the exercise of powers and performance of functions by the State Government and by the members of the said force, for the maintenance of public order, for the prevention of gaming, and for certain other purposes hereinafter appearing;

BE it enacted by the '[Karnataka]' State Legislature in the Fourteenth Year of the Republic of India as follows:—

1. Adapted by the Karnataka Adaptations of Laws Order 1973 w.e.f. 1 11.1973

CHAPTER I**PRELIMINARY**

1. Short title, extent and commencement.—(1) This Act may be called the '[Karnataka]' Police Act, 1963.

(2) It extends to the whole of the '[State of Karnataka]'.

(3) It shall come into force on such ²[date]² as the State Government may, by notification in the Official Gazette, appoint.

1. Adapted by the Karnataka Adaptations of Laws Order 1973 w.e.f. 1 11.1973
2. Act came into force w.e.f. 2 4.1965 vide Notification No HD 21 PEG 65 dt. 1965

2. Definitions.—In this Act, unless the context otherwise requires,—

(1) "cattle" means cows, bullocks, bulls, calves, buffaloes, elephants, camels, horses, mares, geldings, ponies, colts, fillies, asses, mules, pigs, rams, ewes, sheep, lambs, goats and kids;

(2) "City of Bangalore" means the area within the limits of the City of Bangalore as defined for the time being in the City of Bangalore Municipal Corporation Act, 1949 (Mysore Act LXIX of 1949) and includes such other areas adjacent to such limits '[x x x]' as the Government may from time to time by notification in the Official Gazette specify;

(3) "common gaming-house" means a building, room, tent, enclosure, vehicle, vessel or place in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, or keeping such building, room, tent, enclosure, vehicle, vessel or place, or of the person using such building, room, tent, enclosure, vehicle, vessel or place, whether he has a right to use the same or not, such profit or gain being either by way of a charge for the use of the instruments of gaming or of the building, room, tent, enclosure, vehicle, vessel or place, or otherwise howsoever or as subscription or other payment for the use of facilities along with the use of the instruments of gaming or of the building, room, tent, enclosure, vehicle, vessel or place for purposes of gaming;

Explanation.—In this clause "person" includes a company, association, club or other body of persons whether incorporated or not.

written order issue such directions as he may consider necessary to any person for preventing, prohibiting controlling or regulating,—

(a) the incidence or continuance in or upon any premises of,—

(i) any vocal or instrumental music,

(ii) sounds caused by the playing, beating, clashing, blowing or use in any manner whatsoever of any instrument, appliance or apparatus or contrivance which is capable of producing or reproducing sound, or

(b) the carrying on, in or upon, any premises of any trade, avocation or operation resulting in or attended with noise.

(2) The authority empowered under sub-section (1) may, either on its own motion or on the application of any person aggrieved by an order made under sub-section (1), either rescind, modify or alter any such order:

Provided that before any such application is disposed of, the said authority shall afford the applicant an opportunity of appearing before it either in person or by legal practitioner and showing cause against the order and shall, if it rejects any such application either wholly or in part record its reasons for such rejection.

¹[36A. **Power to regulate eunuchs.**— The Commissioner, may, in order to prevent or suppress or control undesirable activities of eunuchs, in the area under his charge, by notification in the official Gazette, make orders for,—

(a) preparation and maintenance of a register of the names and places of residence of all eunuchs residing in the area under his charge and who are reasonably suspected of kidnapping or emasculating boys or of committing unnatural offences or any other offences or abetting the commission of such offences,

(b) filing objections by aggrieved eunuchs to the inclusion of his name in the register and for removal of his name from the register for reasons to be recorded in writing;

(c) prohibiting a registered eunuch from doing such activities as may be stated in the order.

(d) any other matter he may consider necessary.]¹

¹ inserted by Act 26 of 2011 w.e.f. 26.04 2011

37. Licensing use of loudspeakers, etc.—(1) Subject to the provisions of section 36 and of any orders made under section 31, no person shall use or operate,—

(i) in or upon any premises any loudspeaker or other apparatus for amplifying any musical or other sound, at such pitch or volume as to be audible beyond fifty feet from such premises;

(ii) in any open space any loudspeaker or other apparatus for amplifying any musical or other sound, at such pitch or volume as to be audible beyond two hundred feet from the place at which the musical or other sound is produced or reproduced, except under and in accordance with the conditions of a licence granted by the Superintendent or in such local area by such other officer as the State Government, may, by notification in the official Gazette specify in this behalf.

(2) The provisions of sub-section (1) shall be applicable to such area from such date as the Government may by notification in the official Gazette specify. On the application of sub-section (1) to any area, no local authority shall, notwithstanding anything contained in any

KARNATAKA ACT NO.22 OF 2016

(First Published in the Karnataka Gazette Extra-ordinary on the
Twenty Seventh day of July, 2016)

THE KARNATAKA POLICE (AMENDMENT) ACT, 2016

(Received the assent of the Governor on the Twenty Sixth day of July, 2016)

An Act further to amend the Karnataka Police Act, 1963.

Whereas it is expedient further to amend the Karnataka Police Act, 1963 (Karnataka Act 4 of 1964) for the purposes hereinafter appearing;

Be it enacted by the Karnataka State Legislature in the sixty-seventh year of the Republic of India, as follows:-

1. Short title and commencement.- (1) This Act may be called the Karnataka Police (Amendment) Act, 2016.

(2) It shall come into force at once.

2. Amendment of section 20 D.- In the Karnataka Police Act, 1963 (Karnataka Act 4 of 1964) (herein after referred to as the principal Act), in section 20D in sub-section (1),-

(i) for the words "Regional Commissioner of the Region" the words "Deputy Commissioner of the concerned District" shall be substituted; and

(ii) in clause (i), for the words "Joint Secretary to Government", the words "Assistant Commissioner" shall be substituted;

3. Amendment of section 31.- In the principal Act, in section 31, in sub-section (1), after clause (z), the following shall be inserted, namely:-

"(za) Regulating, controlling and monitoring of safety and security of children".

4. Amendment of section 36A.- In the principal Act, in section 36A,-

(i) in the heading, for the word "eunuchs" the word "undesirable activities" shall be substituted;

(ii) in clauses (a) and (b) for the word "eunuchs" where ever they occur, the word "persons" shall be substituted; and

(iii) in clause (c) for the word "eunuch" the word "person" shall be substituted.

By Order and in the name of
the Governor of Karnataka

K. Dwarakanath Babu

(K. DWARAKANATH BABU)

Secretary to Government

Department of Parliamentary Affairs

THE YOGYAKARTA PRINCIPLES

PRINCIPLES ON THE APPLICATION OF
INTERNATIONAL HUMAN RIGHTS LAW
IN RELATION TO SEXUAL ORIENTATION
AND GENDER IDENTITY

The English version is the authoritative text. Official translations are available in Arabic, Chinese, French, Russian and Spanish.

March 2007

THE YOGYAKARTA PRINCIPLES

Principles on the application of international human rights law
in relation to sexual orientation and gender identity

TABLE OF CONTENTS

	Introduction	6
	Preamble	8
PRINCIPLE 1.	The Right to the Universal Enjoyment of Human Rights	10
PRINCIPLE 2.	The Rights to Equality and Non-Discrimination	10
PRINCIPLE 3.	The Right to Recognition before the Law	11
PRINCIPLE 4.	The Right to Life	12
PRINCIPLE 5.	The Right to Security of the Person	13
PRINCIPLE 6.	The Right to Privacy	14
PRINCIPLE 7.	The Right to Freedom from Arbitrary Deprivation of Liberty	15
PRINCIPLE 8.	The Right to a Fair Trial	15
PRINCIPLE 9.	The Right to Treatment with Humanity while in Detention	16
PRINCIPLE 10.	The Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment	17
PRINCIPLE 11.	The Right to Protection from all Forms of Exploitation, Sale and Trafficking of Human Beings	18
PRINCIPLE 12.	The Right to Work	18
PRINCIPLE 13.	The Right to Social Security and to Other Social Protection Measures	19
PRINCIPLE 14.	The Right to an Adequate Standard of Living	20
PRINCIPLE 15.	The Right to Adequate Housing	20
PRINCIPLE 16.	The Right to Education	21
PRINCIPLE 17.	The Right to the Highest Attainable Standard of Health	22
PRINCIPLE 18.	Protection from Medical Abuses	23
PRINCIPLE 19.	The Right to Freedom of Opinion and Expression	24
PRINCIPLE 20.	The Right to Freedom of Peaceful Assembly and Association	25
PRINCIPLE 21.	The Right to Freedom of Thought, Conscience and Religion	26
PRINCIPLE 22.	The Right to Freedom of Movement	26
PRINCIPLE 23.	The Right to Seek Asylum	27
PRINCIPLE 24.	The Right to Found a Family	27
PRINCIPLE 25.	The Right to Participate in Public Life	28
PRINCIPLE 26.	The Right to Participate in Cultural Life	29
PRINCIPLE 27.	The Right to Promote Human Rights	29
PRINCIPLE 28.	The Right to Effective Remedies and Redress	30
PRINCIPLE 29.	Accountability	31
	Additional Recommendations	32
	Signatories to the Yogyakarta Principles	34

INTRODUCTION TO THE YOGYAKARTA PRINCIPLES

All human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible and interrelated. Sexual orientation¹⁾ and gender identity²⁾ are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse.

Many advances have been made toward ensuring that people of all sexual orientations and gender identities can live with the equal dignity and respect to which all persons are entitled. Many States now have laws and constitutions that guarantee the rights of equality and non-discrimination without distinction on the basis of sex, sexual orientation or gender identity.

Nevertheless, human rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute a global and entrenched pattern of serious concern. They include extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights. These violations are often compounded by experiences of other forms of violence, hatred, discrimination and exclusion, such as those based on race, age, religion, disability, or economic, social or other status.

Many States and societies impose gender and sexual orientation norms on individuals through custom, law and violence and seek to control how they experience personal relationships and how they identify themselves. The policing of sexuality remains a major force behind continuing gender-based violence and gender inequality.

The international system has seen great strides toward gender equality and protections against violence in society, community and in the family. In addition, key human rights mechanisms of the United Nations have affirmed States' obligation to ensure effective protection of all persons from discrimination based on sexual orientation or gender identity. However, the international response to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent.

-
- 1) Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.
 - 2) Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

To address these deficiencies a consistent understanding of the comprehensive regime of international human rights law and its application to issues of sexual orientation and gender identity is necessary. It is critical to collate and clarify State obligations under existing international human rights law, in order to promote and protect all human rights for all persons on the basis of equality and without discrimination.

The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations, have undertaken a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations.

A distinguished group of human rights experts has drafted, developed, discussed and refined these Principles. Following an experts' meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006, 29 distinguished experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law unanimously adopted the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*.

The rapporteur of the meeting, Professor Michael O'Flaherty, has made immense contributions to the drafting and revision of the Principles. His commitment and tireless efforts have been critical to the successful outcome of the process.

The Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation and gender identity. The Principles affirm the primary obligation of States to implement human rights. Each Principle is accompanied by detailed recommendations to States. The experts also emphasise, though, that all actors have responsibilities to promote and protect human rights. Additional recommendations are addressed to other actors, including the UN human rights system, national human rights institutions, the media, non-governmental organisations, and funders.

The experts agree that the Yogyakarta Principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity. They also recognise that States may incur additional obligations as human rights law continues to evolve.

The Yogyakarta Principles affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright.

Sonia Onufer Corrêa
Co-Chairperson

Vitit Muntarhorn
Co-Chairperson

THE YOGYAKARTA PRINCIPLES

**WE, THE INTERNATIONAL PANEL OF EXPERTS IN
INTERNATIONAL HUMAN RIGHTS LAW AND ON
SEXUAL ORIENTATION AND GENDER IDENTITY****PREAMBLE**

RECALLING that all human beings are born free and equal in dignity and rights, and that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

DISTURBED that violence, harassment, discrimination, exclusion, stigmatisation and prejudice are directed against persons in all regions of the world because of their sexual orientation or gender identity, that these experiences are compounded by discrimination on grounds including gender, race, age, religion, disability, health and economic status, and that such violence, harassment, discrimination, exclusion, stigmatisation and prejudice undermine the integrity and dignity of those subjected to these abuses, may weaken their sense of self-worth and belonging to their community, and lead many to conceal or suppress their identity and to live lives of fear and invisibility;

AWARE that historically people have experienced these human rights violations because they are or are perceived to be lesbian, gay or bisexual, because of their consensual sexual conduct with persons of the same gender or because they are or are perceived to be transsexual, transgender or intersex or belong to social groups identified in particular societies by sexual orientation or gender identity;

UNDERSTANDING 'sexual orientation' to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;

UNDERSTANDING 'gender identity' to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms;

THE YOGYAKARTA PRINCIPLES

OBSERVING that international human rights law affirms that all persons, regardless of sexual orientation or gender identity, are entitled to the full enjoyment of all human rights, that the application of existing human rights entitlements should take account of the specific situations and experiences of people of diverse sexual orientations and gender identities, and that in all actions concerning children the best interests of the child shall be a primary consideration and a child who is capable of forming personal views has the right to express those views freely, such views being given due weight in accordance with the age and maturity of the child;

NOTING that international human rights law imposes an absolute prohibition of discrimination in regard to the full enjoyment of all human rights, civil, cultural, economic, political and social, that respect for sexual rights, sexual orientation and gender identity is integral to the realisation of equality between men and women and that States must take measures to seek to eliminate prejudices and customs based on the idea of the inferiority or the superiority of one sex or on stereotyped roles for men and women, and noting further that the international community has recognised the right of persons to decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free from coercion, discrimination, and violence;

RECOGNISING that there is significant value in articulating in a systematic manner international human rights law as applicable to the lives and experiences of persons of diverse sexual orientations and gender identities;

ACKNOWLEDGING that this articulation must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries.

FOLLOWING AN EXPERTS' MEETING
HELD IN YOGYAKARTA, INDONESIA,
FROM 6 TO 9 NOVEMBER 2006,
HEREBY ADOPT THESE PRINCIPLES:

PRINCIPLE

1 THE RIGHT TO THE UNIVERSAL ENJOYMENT OF HUMAN RIGHTS

All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

STATES SHALL:

- A. Embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;
- B. Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;
- C. Undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;
- D. Integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

PRINCIPLE

2 THE RIGHTS TO EQUALITY AND NON-DISCRIMINATION

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition,

THE YOGYAKARTA PRINCIPLES

enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

STATES SHALL:

- A. Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;
- B. Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;
- C. Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;
- D. Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;
- E. In all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;
- F. Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

THE RIGHT TO RECOGNITION BEFORE THE LAW

PRINCIPLE

3

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. 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. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation

THE YOGYAKARTA PRINCIPLES

or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

STATES SHALL:

- A. Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;
- B. Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;
- C. Take all necessary legislative, administrative and other measures to 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;
- D. Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
- E. Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;
- F. Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

PRINCIPLE

4 THE RIGHT TO LIFE

Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

THE YOGYAKARTA PRINCIPLES

STATES SHALL:

- A. Repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;
- B. Remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;
- C. Cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

THE RIGHT TO SECURITY OF THE PERSON PRINCIPLE 5

Everyone, regardless of sexual orientation or gender identity, has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group.

STATES SHALL:

- A. Take all necessary policing and other measures to prevent and provide protection from all forms of violence and harassment related to sexual orientation and gender identity;
- B. Take all necessary legislative measures to impose appropriate criminal penalties for violence, threats of violence, incitement to violence and related harassment, based on the sexual orientation or gender identity of any person or group of persons, in all spheres of life, including the family;
- C. Take all necessary legislative, administrative and other measures to ensure that the sexual orientation or gender identity of the victim may not be advanced to justify, excuse or mitigate such violence;
- D. Ensure that perpetration of such violence is vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished, and that victims are provided with appropriate remedies and redress, including compensation;
- E. Undertake campaigns of awareness-raising, directed to the general public as well as to actual and potential perpetrators of violence, in order to combat the prejudices that underlie violence related to sexual orientation and gender identity.

PRINCIPLE

6 THE RIGHT TO PRIVACY

Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;
- B. Repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;
- C. Ensure that criminal and other legal provisions of general application are not applied to *de facto* criminalise consensual sexual activity among persons of the same sex who are over the age of consent;
- D. Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;
- E. Release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;
- F. Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

THE RIGHT TO FREEDOM FROM ARBITRARY DEPRIVATION OF LIBERTY **7**

PRINCIPLE

No one shall be subjected to arbitrary arrest or detention. Arrest or detention on the basis of sexual orientation or gender identity, whether pursuant to a court order or otherwise, is arbitrary. All persons under arrest, regardless of their sexual orientation or gender identity, are entitled, on the basis of equality, to be informed of the reasons for arrest and the nature of any charges against them, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention, whether or not charged with any offence.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure that sexual orientation or gender identity may under no circumstances be the basis for arrest or detention, including the elimination of vaguely worded criminal law provisions that invite discriminatory application or otherwise provide scope for arrests based on prejudice;
- B. Take all necessary legislative, administrative and other measures to ensure that all persons under arrest, regardless of their sexual orientation or gender identity, are entitled, on the basis of equality, to be informed of the reasons for arrest and the nature of any charges against them, and whether charged or not, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention;
- C. Undertake programmes of training and awareness-raising to educate police and other law enforcement personnel regarding the arbitrariness of arrest and detention based on a person's sexual orientation or gender identity;
- D. Maintain accurate and up to date records of all arrests and detentions, indicating the date, location and reason for detention, and ensure independent oversight of all places of detention by bodies that are adequately mandated and equipped to identify arrests and detentions that may be motivated by the sexual orientation or gender identity of a person.

THE RIGHT TO A FAIR TRIAL **8**

PRINCIPLE

Everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, in the determination of their rights and obligations in a suit at law and of any criminal charge against them, without prejudice or discrimination on the basis of sexual orientation or gender identity.

THE YOGYAKARTA PRINCIPLES

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to prohibit and eliminate prejudicial treatment on the basis of sexual orientation or gender identity at every stage of the judicial process, in civil and criminal proceedings and all other judicial and administrative proceedings which determine rights and obligations, and to ensure that no one's credibility or character as a party, witness, advocate or decision-maker is impugned by reason of their sexual orientation or gender identity;
- B. Take all necessary and reasonable steps to protect persons from criminal prosecutions or civil proceedings that are motivated wholly or in part by prejudice regarding sexual orientation or gender identity;
- C. Undertake programmes of training and awareness-raising for judges, court personnel, prosecutors, lawyers and others regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

PRINCIPLE

9 THE RIGHT TO TREATMENT WITH HUMANITY WHILE IN DETENTION

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

STATES SHALL:

- A. Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;
- B. Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;
- C. Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;
- D. Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

THE YOGYAKARTA PRINCIPLES

- E. Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;
- F. Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;
- G. Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

PRINCIPLE

10

**THE RIGHT TO FREEDOM FROM TORTURE AND
CRUEL, INHUMAN OR DEGRADING TREATMENT
OR PUNISHMENT**

Everyone has the right to be free from torture and from cruel, inhuman or degrading treatment or punishment, including for reasons relating to sexual orientation or gender identity.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to prevent and provide protection from torture and cruel, inhuman or degrading treatment or punishment, perpetrated for reasons relating to the sexual orientation or gender identity of the victim, as well as the incitement of such acts;
- B. Take all reasonable steps to identify victims of torture and cruel, inhuman or degrading treatment or punishment, perpetrated for reasons relating to sexual orientation or gender identity, and offer appropriate remedies including redress and reparation and, where appropriate, medical and psychological support;
- C. Undertake programmes of training and awareness-raising for police, prison personnel and all other officials in the public and private sector who are in a position to perpetrate or to prevent such acts.

PRINCIPLE

11 THE RIGHT TO PROTECTION FROM ALL FORMS OF EXPLOITATION, SALE AND TRAFFICKING OF HUMAN BEINGS

Everyone is entitled to protection from trafficking, sale and all forms of exploitation, including but not limited to sexual exploitation, on the grounds of actual or perceived sexual orientation or gender identity. Measures designed to prevent trafficking shall address the factors that increase vulnerability, including various forms of inequality and discrimination on the grounds of actual or perceived sexual orientation or gender identity, or the expression of these or other identities. Such measures must not be inconsistent with the human rights of persons at risk of being trafficked.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures of a preventive and protective nature regarding the trafficking, sale and all forms of exploitation of human beings, including but not limited to sexual exploitation, on the grounds of actual or perceived sexual orientation or gender identity;
- B. Ensure that any such legislation or measures do not criminalise the behaviour of, stigmatise, or in any other way, exacerbate the disadvantage of those vulnerable to such practices;
- C. Establish legal, educational and social measures, services and programmes to address factors that increase vulnerability to trafficking, sale and all forms of exploitation, including but not limited to sexual exploitation, on the grounds of actual or perceived sexual orientation or gender identity, including such factors as social exclusion, discrimination, rejection by families or cultural communities, lack of financial independence, homelessness, discriminatory social attitudes leading to low self-esteem, and lack of protection from discrimination in access to housing, accommodation, employment and social services.

PRINCIPLE

12 THE RIGHT TO WORK

Everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.

THE YOGYAKARTA PRINCIPLES

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration;
- B. Eliminate any discrimination on the basis of sexual orientation or gender identity to ensure equal employment and advancement opportunities in all areas of public service, including all levels of government service and employment in public functions, including serving in the police and military, and provide appropriate training and awareness-raising programmes to counter discriminatory attitudes.

PRINCIPLE

**THE RIGHT TO SOCIAL SECURITY AND TO OTHER
SOCIAL PROTECTION MEASURES**

13

Everyone has the right to social security and other social protection measures, without discrimination on the basis of sexual orientation or gender identity.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to social security and other social protection measures, including employment benefits, parental leave, unemployment benefits, health insurance or care or benefits (including for body modifications related to gender identity), other social insurance, family benefits, funeral benefits, pensions and benefits with regard to the loss of support for spouses or partners as the result of illness or death;
- B. Ensure that children are not subject to any form of discriminatory treatment within the social security system or in the provision of social or welfare benefits on the basis of their sexual orientation or gender identity, or that of any member of their family;
- C. Take all necessary legislative, administrative and other measures to ensure access to poverty reduction strategies and programmes, without discrimination on the basis of sexual orientation or gender identity.

PRINCIPLE

14 THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

Everyone has the right to an adequate standard of living, including adequate food, safe drinking water, adequate sanitation and clothing, and to the continuous improvement of living conditions, without discrimination on the basis of sexual orientation or gender identity.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to adequate food, safe drinking water, adequate sanitation and clothing.

PRINCIPLE

15 THE RIGHT TO ADEQUATE HOUSING

Everyone has the right to adequate housing, including protection from eviction, without discrimination on the basis of sexual orientation or gender identity.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure security of tenure and access to affordable, habitable, accessible, culturally appropriate and safe housing, including shelters and other emergency accommodation, without discrimination on the basis of sexual orientation, gender identity or marital or family status;
- B. Take all necessary legislative, administrative and other measures to prohibit the execution of evictions that are not in conformity with their international human rights obligations, and ensure that adequate and effective legal or other appropriate remedies are available to any person claiming that a right to protection against forced evictions has been violated or is under threat of violation, including the right to resettlement, which includes the right to alternative land of better or equal quality and to adequate housing, without discrimination on the basis of sexual orientation, gender identity or marital or family status;
- C. Ensure equal rights to land and home ownership and inheritance without discrimination on the basis of sexual orientation or gender identity;
- D. Establish social programmes, including support programmes, to address factors relating to sexual orientation and gender identity that increase vulnerability to homelessness,

THE YOGYAKARTA PRINCIPLES

especially for children and young people, including social exclusion, domestic and other forms of violence, discrimination, lack of financial independence, and rejection by families or cultural communities, as well as to promote schemes of neighbourhood support and security;

- E. Provide training and awareness-raising programmes to ensure that all relevant agencies are aware of and sensitive to the needs of those facing homelessness or social disadvantage as a result of sexual orientation or gender identity.

PRINCIPLE 16 THE RIGHT TO EDUCATION

Everyone has the right to education, without discrimination on the basis of, and taking into account, their sexual orientation and gender identity.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure equal access to education, and equal treatment of students, staff and teachers within the education system, without discrimination on the basis of sexual orientation or gender identity;
- B. Ensure that education is directed to the development of each student's personality, talents, and mental and physical abilities to their fullest potential, and responds to the needs of students of all sexual orientations and gender identities;
- C. Ensure that education is directed to the development of respect for human rights, and of respect for each child's parents and family members, cultural identity, language and values, in a spirit of understanding, peace, tolerance and equality, taking into account and respecting diverse sexual orientations and gender identities;
- D. Ensure that education methods, curricula and resources serve to enhance understanding of and respect for, *inter alia*, diverse sexual orientations and gender identities, including the particular needs of students, their parents and family members related to these grounds;
- E. Ensure that laws and policies provide adequate protection for students, staff and teachers of different sexual orientations and gender identities against all forms of social exclusion and violence within the school environment, including bullying and harassment;
- F. Ensure that students subjected to such exclusion or violence are not marginalised or segregated for reasons of protection, and that their best interests are identified and respected in a participatory manner;
- G. Take all necessary legislative, administrative and other measures to ensure that discipline in educational institutions is administered in a manner consistent with human dignity, without discrimination or penalty on the basis of a student's sexual orientation or gender identity, or the expression thereof;

THE YOGYAKARTA PRINCIPLES

- H. Ensure that everyone has access to opportunities and resources for lifelong learning without discrimination on the basis of sexual orientation or gender identity, including adults who have already suffered such forms of discrimination in the educational system.

PRINCIPLE

17 THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure enjoyment of the right to the highest attainable standard of health, without discrimination on the basis of sexual orientation or gender identity;
- B. Take all necessary legislative, administrative and other measures to ensure that all persons have access to healthcare facilities, goods and services, including in relation to sexual and reproductive health, and to their own medical records, without discrimination on the basis of sexual orientation or gender identity;
- C. Ensure that healthcare facilities, goods and services are designed to improve the health status of, and respond to the needs of, all persons without discrimination on the basis of, and taking into account, sexual orientation and gender identity, and that medical records in this respect are treated with confidentiality;
- D. Develop and implement programmes to address discrimination, prejudice and other social factors which undermine the health of persons because of their sexual orientation or gender identity;
- E. Ensure that all persons are informed and empowered to make their own decisions regarding medical treatment and care, on the basis of genuinely informed consent, without discrimination on the basis of sexual orientation or gender identity;
- F. Ensure that all sexual and reproductive health, education, prevention, care and treatment programmes and services respect the diversity of sexual orientations and gender identities, and are equally available to all without discrimination;
- G. Facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support;
- H. Ensure that all health service providers treat clients and their partners without discrimination on the basis of sexual orientation or gender identity, including with regard to recognition as next of kin;

THE YOGYAKARTA PRINCIPLES

- I. Adopt the policies, and programmes of education and training, necessary to enable persons working in the healthcare sector to deliver the highest attainable standard of healthcare to all persons, with full respect for each person's sexual orientation and gender identity.

PROTECTION FROM MEDICAL ABUSES PRINCIPLE **18**

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;
- B. Take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;
- C. Establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse;
- D. Ensure protection of persons of diverse sexual orientations and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;
- E. Review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;
- F. Ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

PRINCIPLE

19 THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;
- B. Ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;
- C. Take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;
- D. Ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;
- E. Ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;
- F. Ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate.

PRINCIPLE
**THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY
AND ASSOCIATION** **20**

Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure the rights to peacefully organise, associate, assemble and advocate around issues of sexual orientation and gender identity, and to obtain legal recognition for such associations and groups, without discrimination on the basis of sexual orientation or gender identity;
- B. Ensure in particular that notions of public order, public morality, public health and public security are not employed to restrict any exercise of the rights to peaceful assembly and association solely on the basis that it affirms diverse sexual orientations or gender identities;
- C. Under no circumstances impede the exercise of the rights to peaceful assembly and association on grounds relating to sexual orientation or gender identity, and ensure that adequate police and other physical protection against violence or harassment is afforded to persons exercising these rights;
- D. Provide training and awareness-raising programmes to law enforcement authorities and other relevant officials to enable them to provide such protection;
- E. Ensure that information disclosure rules for voluntary associations and groups do not, in practice, have discriminatory effects for such associations and groups addressing issues of sexual orientation or gender identity, or for their members.

PRINCIPLE

21 THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Everyone has the right to freedom of thought, conscience and religion, regardless of sexual orientation or gender identity. These rights may not be invoked by the State to justify laws, policies or practices which deny equal protection of the law, or discriminate, on the basis of sexual orientation or gender identity.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure the right of persons, regardless of sexual orientation or gender identity, to hold and practise religious and non-religious beliefs, alone or in association with others, to be free from interference with their beliefs and to be free from coercion or the imposition of beliefs;
- B. Ensure that the expression, practice and promotion of different opinions, convictions and beliefs with regard to issues of sexual orientation or gender identity is not undertaken in a manner incompatible with human rights.

PRINCIPLE

22 THE RIGHT TO FREEDOM OF MOVEMENT

Everyone lawfully within a State has the right to freedom of movement and residence within the borders of the State, regardless of sexual orientation or gender identity. Sexual orientation and gender identity may never be invoked to limit or impede a person's entry, egress or return to or from any State, including that person's own State.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure that the right to freedom of movement and residence is guaranteed regardless of sexual orientation or gender identity.

THE RIGHT TO SEEK ASYLUM PRINCIPLE **23**

Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.

STATES SHALL:

- A. Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum;
- B. Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity;
- C. Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person's sexual orientation or gender identity.

THE RIGHT TO FOUND A FAMILY PRINCIPLE **24**

Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity;
- B. Ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis

THE YOGYAKARTA PRINCIPLES

- of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration;
- C. Take all necessary legislative, administrative and other measures to ensure that in all actions or decisions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration, and that the sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with such best interests;
 - D. In all actions or decisions concerning children, ensure that a child who is capable of forming personal views can exercise the right to express those views freely, and that such views are given due weight in accordance with the age and maturity of the child;
 - E. Take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners;
 - F. Take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege, obligation or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners;
 - G. Ensure that marriages and other legally-recognised partnerships may be entered into only with the free and full consent of the intending spouses or partners.

PRINCIPLE

25**THE RIGHT TO PARTICIPATE IN PUBLIC LIFE**

Every citizen has the right to take part in the conduct of public affairs, including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, including serving in the police and military, without discrimination on the basis of sexual orientation or gender identity.

STATES SHOULD:

- A. Review, amend and enact legislation to ensure the full enjoyment of the right to participate in public and political life and affairs, embracing all levels of government service and employment in public functions, including serving in the police and military, without discrimination on the basis of, and with full respect for, each person's sexual orientation and gender identity;

THE YOGYAKARTA PRINCIPLES

- B. Take all appropriate measures to eliminate stereotypes and prejudices regarding sexual orientation and gender identity that prevent or restrict participation in public life;
- C. Ensure the right of each person to participate in the formulation of policies affecting their welfare, without discrimination on the basis of, and with full respect for, their sexual orientation and gender identity.

THE RIGHT TO PARTICIPATE IN CULTURAL LIFE

PRINCIPLE
26

Everyone has the right to participate freely in cultural life, regardless of sexual orientation or gender identity, and to express, through cultural participation, the diversity of sexual orientation and gender identity.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure opportunities for the participation in cultural life of all persons, regardless of, and with full respect for, their sexual orientations and gender identities;
- B. Foster dialogue between, and mutual respect among, proponents of the various cultural groups present within the State, including among groups that hold different views on matters of sexual orientation and gender identity, consistently with respect for the human rights referred to in these Principles.

THE RIGHT TO PROMOTE HUMAN RIGHTS

PRINCIPLE
27

Everyone has the right, individually and in association with others, to promote the protection and realisation of human rights at the national and international levels, without discrimination on the basis of sexual orientation or gender identity. This includes activities directed towards the promotion and protection of the rights of persons of diverse sexual orientations and gender identities, as well as the right to develop and discuss new human rights norms and to advocate their acceptance.

THE YOGYAKARTA PRINCIPLES

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure a favourable environment for activities directed towards the promotion, protection and realisation of human rights, including rights relevant to sexual orientation and gender identity;
- B. Take all appropriate measures to combat actions or campaigns targeting human rights defenders working on issues of sexual orientation and gender identity, as well as those targeting human rights defenders of diverse sexual orientations and gender identities;
- C. Ensure that human rights defenders, regardless of their sexual orientation or gender identity, and regardless of the human rights issues they advocate, enjoy non-discriminatory access to, participation in, and communication with, national and international human rights organisations and bodies;
- D. Ensure the protection of human rights defenders, working on issues of sexual orientation and gender identity, against any violence, threat, retaliation, *de facto* or *de jure* discrimination, pressure, or any other arbitrary action perpetrated by the State, or by non-State actors, in response to their human rights activities. The same protection should be ensured, to human rights defenders working on any issue, against any such treatment based on their sexual orientation or gender identity;
- E. Support the recognition and accreditation of organisations that promote and protect the human rights of persons of diverse sexual orientations and gender identities at the national and international levels.

PRINCIPLE

28 THE RIGHT TO EFFECTIVE REMEDIES AND REDRESS

Every victim of a human rights violation, including of a violation based on sexual orientation or gender identity, has the right to effective, adequate and appropriate remedies. Measures taken for the purpose of providing reparation to, or securing adequate advancement of, persons of diverse sexual orientations and gender identities are integral to the right to effective remedies and redress.

STATES SHALL:

- A. Establish the necessary legal procedures, including through the revision of legislation and policies, to ensure that victims of human rights violations on the basis of sexual orientation or gender identity have access to full redress through restitution, compensation, rehabilitation, satisfaction, guarantee of non-repetition, and/or any other means as appropriate;

THE YOGYAKARTA PRINCIPLES

- B. Ensure that remedies are enforced and implemented in a timely manner;
- C. Ensure that effective institutions and standards for the provision of remedies and redress are established, and that all personnel are trained in issues of human rights violations based on sexual orientation and gender identity;
- D. Ensure that all persons have access to all necessary information about the processes for seeking remedies and redress;
- E. Ensure that financial aid is provided to those who are unable to afford the cost of securing redress, and that any other obstacles to securing such redress, financial or otherwise, are removed;
- F. Ensure training and awareness-raising programmes, including measures aimed at teachers and students at all levels of public education, at professional bodies, and at potential violators of human rights, to promote respect for and adherence to international human rights standards in accordance with these Principles, as well as to counter discriminatory attitudes based on sexual orientation or gender identity.

PRINCIPLE
ACCOUNTABILITY 29

Everyone whose human rights, including rights addressed in these Principles, are violated is entitled to have those directly or indirectly responsible for the violation, whether they are government officials or not, held accountable for their actions in a manner that is proportionate to the seriousness of the violation. There should be no impunity for perpetrators of human rights violations related to sexual orientation or gender identity.

STATES SHALL:

- A. Establish appropriate, accessible and effective criminal, civil, administrative and other procedures, as well as monitoring mechanisms, to ensure the accountability of perpetrators for human rights violations related to sexual orientation or gender identity;
- B. Ensure that all allegations of crimes perpetrated on the basis of the actual or perceived sexual orientation or gender identity of the victim, including such crimes described in these Principles, are investigated promptly and thoroughly, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished;
- C. Establish independent and effective institutions and procedures to monitor the formulation and enforcement of laws and policies to ensure the elimination of discrimination on the basis of sexual orientation or gender identity;
- D. Remove any obstacles preventing persons responsible for human rights violations based on sexual orientation or gender identity from being held accountable.

ADDITIONAL RECOMMENDATIONS

All members of society and of the international community have responsibilities regarding the realisation of human rights. We therefore recommend that:

- A. The United Nations High Commissioner for Human Rights endorse these Principles, promote their implementation worldwide, and integrate them into the work of the Office of the High Commissioner for Human Rights, including at the field-level;
- B. The United Nations Human Rights Council endorse these Principles and give substantive consideration to human rights violations based on sexual orientation or gender identity, with a view to promoting State compliance with these Principles;
- C. The United Nations Human Rights Special Procedures pay due attention to human rights violations based on sexual orientation or gender identity, and integrate these Principles into the implementation of their respective mandates;
- D. The United Nations Economic and Social Council recognise and accredit non-governmental organisations whose aim is to promote and protect the human rights of persons of diverse sexual orientations and gender identities, in accordance with its *Resolution 1996/31*;
- E. The United Nations Human Rights Treaty Bodies vigorously integrate these Principles into the implementation of their respective mandates, including their case law and the examination of State reports, and, where appropriate, adopt General Comments or other interpretive texts on the application of human rights law to persons of diverse sexual orientations and gender identities;
- F. The World Health Organization and UNAIDS develop guidelines on the provision of appropriate health services and care, responding to the health needs of persons related to their sexual orientation or gender identity, with full respect for their human rights and dignity;
- G. The UN High Commissioner for Refugees integrate these Principles in efforts to protect persons who experience, or have a well-founded fear of, persecution on the basis of sexual orientation or gender identity, and ensure that no person is discriminated against on the basis of sexual orientation or gender identity in relation to the receipt of humanitarian assistance or other services, or the determination of refugee status;
- H. Regional and sub-regional inter-governmental organisations with a commitment to human rights, as well as regional human rights treaty bodies, ensure that the promotion of these Principles is integral to the implementation of the mandates of their various human rights mechanisms, procedures and other arrangements and initiatives;
- I. Regional human rights courts vigorously integrate those Principles that are relevant to the human rights treaties they interpret into their developing case law on sexual orientation and gender identity;
- J. Non-governmental organisations working on human rights at the national, regional and international levels promote respect for these Principles within the framework of their specific mandates;

THE YOGYAKARTA PRINCIPLES

- K.** Humanitarian organisations incorporate these Principles into any humanitarian or relief operations, and refrain from discriminating against persons on the basis of sexual orientation or gender identity in the provision of aid and other services;
- L.** National human rights institutions promote respect for these Principles by State and non-State actors, and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities;
- M.** Professional organisations, including those in the medical, criminal or civil justice, and educational sectors, review their practices and guidelines to ensure that they vigorously promote the implementation of these Principles;
- N.** Commercial organisations acknowledge and act upon the important role they have in both ensuring respect for these Principles with regard to their own workforces and in promoting these Principles nationally and internationally;
- O.** The mass media avoid the use of stereotypes in relation to sexual orientation and gender identity, and promote tolerance and the acceptance of diversity of human sexual orientation and gender identity, and raise awareness around these issues;
- P.** Governmental and private funders provide financial assistance, to non-governmental and other organisations, for the promotion and protection of the human rights of persons of diverse sexual orientations and gender identities.

THESE PRINCIPLES AND RECOMMENDATIONS reflect the application of international human rights law to the lives and experiences of persons of diverse sexual orientations and gender identities, and nothing herein should be interpreted as restricting or in any way limiting the rights and freedoms of such persons as recognised in international, regional or national law or standards.

ANNEX

SIGNATORIES TO THE YOGYAKARTA PRINCIPLES

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Maxim Anmeghichean (Moldova), European Region of the International Lesbian and Gay Association

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Yakin Ertürk (Turkey), UN Special Rapporteur on Violence against Women, Professor, Department of Sociology, Middle East Technical University, Ankara, Turkey

Elizabeth Evatt (Australia), Former member and chair of the UN Committee on the Elimination of Discrimination Against Women, former member of the UN Human Rights Committee and Commissioner of the International Commission of Jurists

Paul Hunt (New Zealand), UN Special Rapporteur on the right to the highest attainable standard of health and Professor, Department of Law, University of Essex, United Kingdom

Asma Jahangir (Pakistan), Chairperson, Human Rights Commission of Pakistan

Maina Kiai (Kenya), Chairperson, Kenya National Commission on Human Rights

Miloon Kothari (India), UN Special Rapporteur on the right to adequate housing

Judith Mesquita (United Kingdom), Senior Research Officer, Human Rights Centre, University of Essex, United Kingdom

Alice M. Miller (United States of America), Assistant Professor, School of Public Health, Co-Director, Human Rights Program, Columbia University, USA

Sanji Mmasenono Monageng (Botswana), Judge of the High Court (The Republic of the Gambia), Commissioner of the African Commission on Human and Peoples' Rights, Chairperson of the Follow Up Committee on the implementation of the Robben Island Guidelines on prohibition and prevention of Torture and other Cruel, Inhuman or Degrading Treatment (African Commission on Human and Peoples' Rights)

Vitit Muntarbhorn (Thailand), UN Special Rapporteur on the human rights situation in the Democratic People's Republic of Korea and Professor of Law at Chulalongkorn University, Thailand, (Co-Chair of the experts' meeting)

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THE YOGYAKARTA PRINCIPLES

Manfred Nowak (Austria), UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, member of the International Commission of Jurists, Professor of Human Rights at Vienna University, Austria and Director of the Ludwig Boltzmann Institute of Human Rights

Ana Elena Obando Mendoza (Costa Rica), feminist attorney, women's human rights activist, and international consultant

Michael O'Flaherty (Ireland), Member of the UN Human Rights Committee and Professor of Applied Human Rights and Co-Director of the Human Rights Law Centre at the University of Nottingham, United Kingdom (Rapporteur for the development of the Yogyakarta Principles)

Sunil Pant (Nepal), President of the Blue Diamond Society, Nepal

Dimitrina Petrova (Bulgaria), Executive Director, The Equal Rights Trust

Rudi Mohammed Rizki (Indonesia), UN Special Rapporteur on international solidarity and Senior Lecturer and Vice Dean for Academic Affairs of the Faculty of Law at the University of Padjadjaran, Indonesia

Mary Robinson (Ireland), Founder of Realizing Rights: The Ethical Globalization Initiative and former President of Ireland and former United Nations High Commissioner for Human Rights

Nevena Vuckovic Sahovic (Serbia), Member of the UN Committee on the Rights of the Child and President of the Child Rights Centre, Belgrade, Serbia

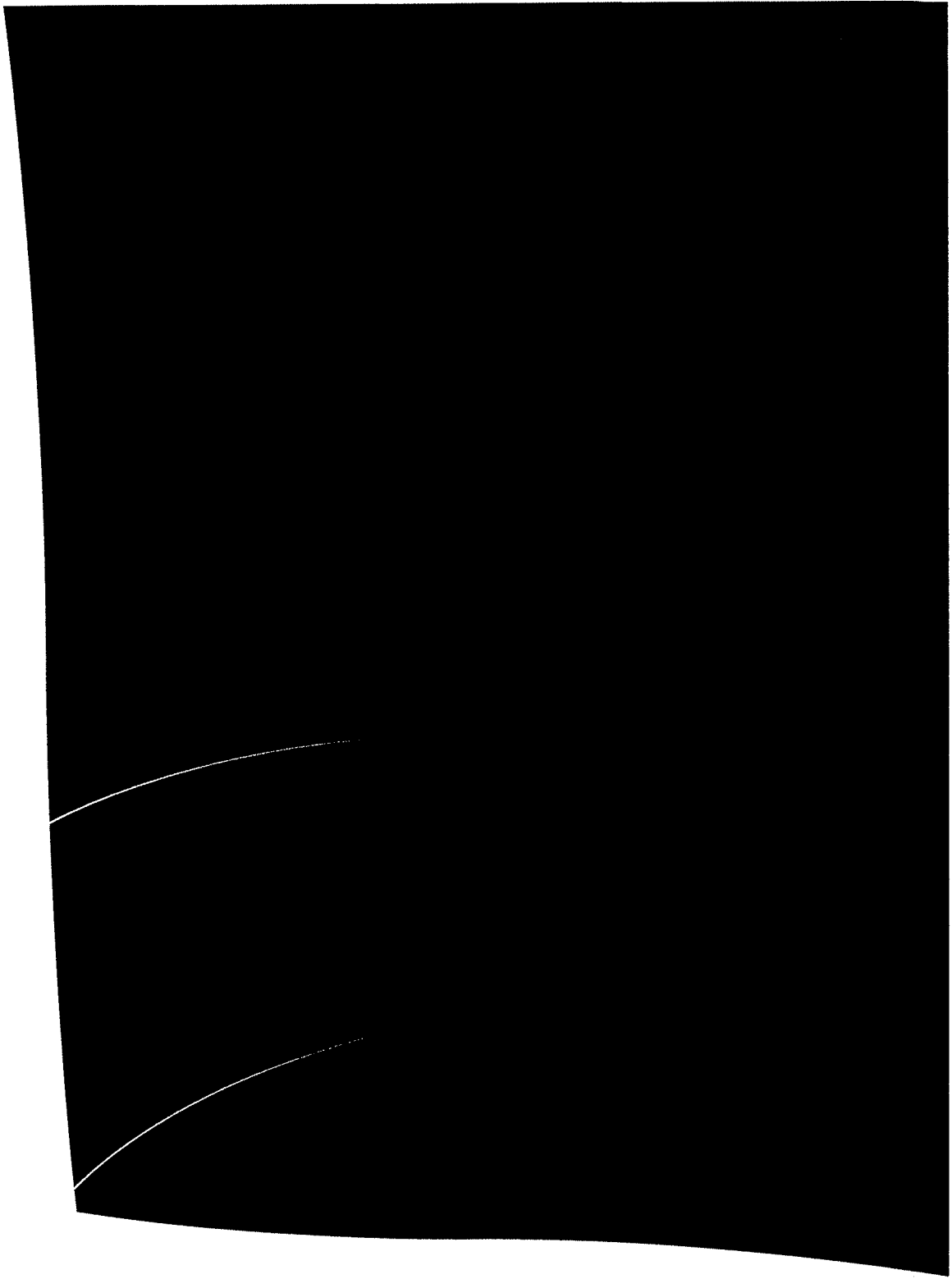
Martin Scheinin (Finland), UN Special Rapporteur on human rights and counter-terrorism, Professor of Constitutional and International Law and Director of the Institute for Human Rights, Åbo Akademi University, Finland

Wan Yanhai (China), Founder of the AIZHI Action Project and director of Beijing AIZHIXING Institute of Health Education

Stephen Whittle (United Kingdom), Professor in Equalities Law at Manchester Metropolitan University, United Kingdom

Roman Wieruszewski (Poland), Member of the UN Human Rights Committee and head of Poznan Centre for Human Rights, Poland

Robert Wintemute (Canada and United Kingdom), Professor of Human Rights Law, School of Law, King's College London, United Kingdom



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THE YOGYAKARTA PRINCIPLES *plus 10*

**ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS
ON THE APPLICATION OF INTERNATIONAL HUMAN
RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION,
GENDER IDENTITY, GENDER EXPRESSION AND
SEX CHARACTERISTICS TO COMPLEMENT THE
YOGYAKARTA PRINCIPLES**

As adopted on 10 November 2017, Geneva

TABLE OF CONTENTS

Introduction	4
Preamble	6
ADDITIONAL PRINCIPLES	
PRINCIPLE 30 The Right to State Protection	8
PRINCIPLE 31 The Right to Legal Recognition	9
PRINCIPLE 32 The Right to Bodily and Mental Integrity	10
PRINCIPLE 33 The Right to Freedom from Criminalisation and Sanction on the Basis of Sexual Orientation, Gender Identity, Gender Expression or Sex Characteristics	11
PRINCIPLE 34 The Right to Protection from Poverty	12
PRINCIPLE 35 The Right to Sanitation	12
PRINCIPLE 36 The Right to the Enjoyment of Human Rights in Relation to Information and Communication Technologies	13
PRINCIPLE 37 The Right to Truth	14
PRINCIPLE 38 The Right to Practise, Protect, Preserve and Revive Cultural Diversity	16
ADDITIONAL STATE OBLIGATIONS	
Relating to the Rights to Equality and Non-Discrimination (Principle 2)	17
Relating to the Right to Privacy (Principle 6)	18
Relating to the Right to Treatment with Humanity while in Detention (Principle 9)	18
Relating to the Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment (Principle 10)	19
Relating to the Right to Education (Principle 16)	19
Relating to the Right to the Highest Attainable Standard of Health (Principle 17)	20
Relating to the Right to Freedom of Opinion and Expression (Principle 19)	21
Relating to the Right to Freedom of Peaceful Assembly and Association (Principle 20)	21
Relating to the Right to Seek Asylum (Principle 23)	22
Relating to the Right to Found a Family (Principle 24)	24
Relating to the Right to Participate in Public Life (Principle 25)	24
Relating to the Right to Promote Human Rights (Principle 27)	24
Additional Recommendations	25
Signatories to the Additional Principles and State Obligations	26

INTRODUCTION

Since the Yogyakarta Principles were adopted in 2006, they have developed into an authoritative statement of the human rights of persons of 'diverse sexual orientations and gender identities'. The period since then, has seen significant developments both in the field of international human rights law and in the understanding of violations affecting persons of 'diverse sexual orientations and gender identities', as well as a recognition of the often distinct violations affecting persons on grounds of 'gender expression' and 'sex characteristics'.

The Yogyakarta Principles plus 10 (YP+10) aims to document and elaborate these developments through a set of Additional Principles and State Obligations. YP+10 should be read alongside the original 29 Yogyakarta Principles. Together, these documents provide an authoritative, expert exposition of international human rights law as it currently applies to the grounds of sexual orientation, gender identity, gender expression and sex characteristics.

The YP+10 document supplements the original 29 Yogyakarta Principles and, in fact, derives its *raison d'être* from preambular paragraph 9 of those Principles:

"ACKNOWLEDGING that this articulation must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries."

This set of nine Additional Principles and 111 Additional State Obligations cover a range of rights whose articulation has emerged from the intersection of the developments in international human rights law with the emerging understanding of violations suffered by persons on grounds of sexual orientation and gender identity and the recognition of the distinct and intersectional grounds of gender expression and sex characteristics.

On the occasion of the tenth anniversary of the Yogyakarta Principles, the International Service for Human Rights and ARC International in consultation with experts and civil society stakeholders, established a Drafting Committee tasked with developing the YP+10 document.

THE YOGYAKARTA PRINCIPLES PLUS 10

The entire process was aided by a Secretariat comprised of civil society representatives and institutions. The Drafting Committee, once constituted, put out an open call for submissions in order to ensure that the output would be informed both by developments in international human rights law and by lived experience. Drawing both on the submissions received, as well as relevant research and expertise, the Drafting Committee prepared a Draft Document which was then discussed, substantially elaborated and adopted following an Experts' Meeting held in Geneva from 18-20 September 2017. The experts included persons from all regions, from multiple legal traditions, and of diverse sexual orientations, gender identities, gender expressions and sex characteristics.

The YP +10 document was thus informed by an open consultation among multiple stakeholders in the field and hence reflects some of the key issues and developments relating to the specific forms of rights violations experienced by persons on grounds of sexual orientation, gender identity, gender expression and sex characteristics.

The YP+10 document is an affirmation of existing international legal standards as they apply to all persons on grounds of their sexual orientation, gender identity, gender expression and sex characteristics. States must comply with these principles both as a legal obligation and as an aspect of their commitment to universal human rights.

Members of the Drafting Committee:

Mauro Cabral Grinspan

Morgan Carpenter

Julia Ehrt

Sheherezade Kara

Arvind Narrain

Pooja Patel

Chris Sidoti

Monica Tabengwa

**WE, THE SECOND INTERNATIONAL PANEL OF
EXPERTS IN INTERNATIONAL HUMAN RIGHTS LAW,
SEXUAL ORIENTATION, GENDER IDENTITY, GENDER
EXPRESSION AND SEX CHARACTERISTICS**

PREAMBLE

RECALLING that the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, adopted in November 2006, provided in a preambular paragraph that the Yogyakarta Principles must rely on the current state of international law and will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries;

NOTING that there have been significant developments in international human rights law and jurisprudence on issues relating to sexual orientation, gender identity, gender expression and sex characteristics, since the adoption of the Yogyakarta Principles;

RECALLING the Yogyakarta Principles' definitions of 'sexual orientation' and 'gender identity';

UNDERSTANDING 'gender expression' as each person's presentation of the person's gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person's gender identity;

NOTING that 'gender expression' is included in the definition of gender identity in the Yogyakarta Principles and, as such, all references to gender identity should be understood to be inclusive of gender expression as a ground for protection;

UNDERSTANDING 'sex characteristics' as each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty;

NOTING that 'sex characteristics' as an explicit ground for protection from violations of human rights has evolved in international jurisprudence, and recognising that the Yogyakarta Principles apply equally to the ground of sex characteristics as to the grounds of sexual orientation, gender identity and gender expression;

INCLUDING, in sexual orientation, gender identity, gender expression and sex characteristics, actual, perceived and attributed sexual orientation, gender identity, gender expression and sex characteristics as the case may be;

RECOGNISING that the needs, characteristics and human rights situations of persons and populations of diverse sexual orientations, gender identities, gender expressions and sex characteristics are distinct from each other;

NOTING that sexual orientation, gender identity, gender expression and sex characteristics are each distinct and intersectional grounds of discrimination, and that they may be, and commonly are, compounded by discrimination on other grounds including race, ethnicity, indigeneity, sex, gender, language, religion, belief, political or other opinion, nationality, national or social origin, economic and social situation, birth, age, disability, health (including HIV status), migration, marital or family status, being a human rights defender or other status;

NOTING that violence, discrimination, and other harm based on sexual orientation, gender identity, gender expression and sex characteristics manifests in a continuum of multiple, interrelated and recurring forms, in a range of settings, from private to public, including technology-mediated settings, and in the contemporary globalised world it transcends national boundaries;

RECOGNISING that violence, discrimination and other harm based on sexual orientation, gender identity, gender expression and sex characteristics have an individual as well as a collective dimension and that acts of violence and discrimination which target the individual person are also an attack on human diversity, and on the universality and indivisibility of human rights;

ACKNOWLEDGING that the following Additional Principles, State Obligations and Recommendations are based on the current state of international human rights law and will require revision on a regular basis in order to take account of legal, scientific and societal developments and their application to the particular lives and experiences of persons of diverse sexual orientations, gender identities, gender expressions and sex characteristics over time and in diverse regions and countries.

FOLLOWING CONSULTATION WITH EXPERTS AND AN EXPERTS' MEETING HELD IN GENEVA, SWITZERLAND, FROM 18 TO 20 SEPTEMBER 2017, HEREBY ADOPT THESE PRINCIPLES AND, IN DOING SO:

AFFIRM the continuing validity of the original 29 Yogyakarta Principles of 2006;
DECLARE these Additional Principles, State Obligations and Recommendations as supplementary to the original Yogyakarta Principles.

ADDITIONAL PRINCIPLES

PRINCIPLE

30

THE RIGHT TO STATE PROTECTION

Everyone, regardless of sexual orientation, gender identity, gender expression or sex characteristics, has the right to State protection from violence, discrimination and other harm, whether by government officials or by any individual or group.

STATES SHALL:

- A. Exercise due diligence to prevent, investigate, prosecute, punish and provide remedies for discrimination, violence and other harm, whether committed by State or non-State actors;
- B. Take appropriate and effective measures to eradicate all forms of violence, discrimination and other harm, including any advocacy of hatred that constitutes incitement to discrimination, hostility, or violence on grounds of sexual orientation, gender identity, gender expression or sex characteristics, whether by public or private actors;
- C. Compile statistics and research on the extent, causes and effects of violence, discrimination and other harm, and on the effectiveness of measures to prevent, prosecute and provide reparation for such harm on grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- D. Identify the nature and extent of attitudes, beliefs, customs and practices that perpetuate violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression and sex characteristics, and report on the measures undertaken, and their effectiveness, in eradicating such harm;
- E. Develop, implement and support education and public information programmes to promote human rights and to eliminate prejudices on grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- F. Ensure sensitivity training of judicial and law enforcement officers and other public officials on issues relating to sexual orientation, gender identity, gender expression and sex characteristics;
- G. Ensure that laws against rape, sexual assault and sexual harassment protect all persons regardless of their sexual orientation, gender identity, gender expression and sex characteristics;
- H. Establish support services for victims of rape, sexual assault and harassment, and other forms of violence and harm on grounds of sexual orientation, gender identity, gender expression, and sex characteristics;

- I. Ensure that human rights violations are vigorously investigated and, where evidence is found, those responsible are prosecuted and, if convicted, punished as appropriate;
- J. Ensure access to effective complaints procedures and remedies, including reparation, for victims of violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression and sex characteristics.

THE RIGHT TO LEGAL RECOGNITION

PRINCIPLE 31

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.

STATES SHALL:

- A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;
- B. Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;
- C. While sex or gender continues to be registered:
 - i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;
 - ii. Make available a multiplicity of gender marker options;
 - iii. 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;
 - iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

PRINCIPLE

32 THE RIGHT TO BODILY AND MENTAL INTEGRITY

Everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression and sex characteristics. No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.

STATES SHALL:

- A. Guarantee and protect the rights of everyone, including all children, to bodily and mental integrity, autonomy and self-determination;
- B. Ensure that legislation protects everyone, including all children, from all forms of forced, coercive or otherwise involuntary modification of their sex characteristics;
- C. Take measures to address stigma, discrimination and stereotypes based on sex and gender, and combat the use of such stereotypes, as well as marriage prospects and other social, religious and cultural rationales, to justify modifications to sex characteristics, including of children;
- D. Bearing in mind the child's right to life, non-discrimination, the best interests of the child, and respect for the child's views, ensure that children are fully consulted and informed regarding any modifications to their sex characteristics necessary to avoid or remedy proven, serious physical harm, and ensure that any such modifications are consented to by the child concerned in a manner consistent with the child's evolving capacity;
- E. Ensure that the concept of the best interest of the child is not manipulated to justify practices that conflict with the child's right to bodily integrity;
- F. Provide adequate, independent counselling and support to victims of violations, their families and communities, to enable victims to exercise and affirm rights to bodily and mental integrity, autonomy and self-determination;
- G. Prohibit the use of anal and genital examinations in legal and administrative proceedings and criminal prosecutions unless required by law, as relevant, reasonable, and necessary for a legitimate purpose.

THE RIGHT TO FREEDOM FROM
CRIMINALISATION AND SANCTION ON
THE BASIS OF SEXUAL ORIENTATION,
GENDER IDENTITY, GENDER EXPRESSION,
OR SEX CHARACTERISTICS

PRINCIPLE
33

Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.

STATES SHALL:

- A. Ensure that legal provisions, including in customary, religious and indigenous laws, whether explicit provisions, or the application of general punitive provisions such as acts against nature, morality, public decency, vagrancy, sodomy and propaganda laws, do not criminalise sexual orientation, gender identity and expression, or establish any form of sanction relating to them;
- B. Repeal other forms of criminalisation and sanction impacting on rights and freedoms on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including the criminalisation of sex work, abortion, unintentional transmission of HIV, adultery, nuisance, loitering and begging;
- C. Pending repeal, cease to apply discriminatory laws criminalising or applying general punitive sanctions on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
- D. Expunge any convictions and erase any criminal records for past offences associated with laws arbitrarily criminalising persons on the basis of sexual orientation, gender identity, gender expression and sex characteristics;
- E. Ensure training for the judiciary, law enforcement officers and healthcare providers in relation to their human rights obligations regarding sexual orientation, gender identity, gender expression and sex characteristics;
- F. Ensure that law enforcement officers and other individuals and groups are held accountable for any act of violence, intimidation or abuse based on the criminalisation of sexual orientation, gender identity, gender expression and sex characteristics;
- G. Ensure effective access to legal support systems, justice and remedies for those who are affected by criminalisation and penalisation on grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- H. Decriminalise body modification procedures and treatments that are carried out with prior, free and informed consent of the person.

PRINCIPLE
34

THE RIGHT TO PROTECTION FROM POVERTY

Everyone has the right to protection from all forms of poverty and social exclusion associated with sexual orientation, gender identity, gender expression and sex characteristics. Poverty is incompatible with respect for the equal rights and dignity of all persons, and can be compounded by discrimination on the grounds of sexual orientation, gender identity, gender expression and sex characteristics.

STATES SHALL:

- A. Take all necessary legislative, administrative, budgetary and other measures, including economic policies, to ensure the progressive reduction and elimination of all forms of poverty associated with or exacerbated by sexual orientation, gender identity, gender expression or sex characteristics;
- B. Promote social and economic inclusion of persons marginalised on the basis of sexual orientation, gender identity, gender expression and sex characteristics;
- C. Ensure the participation and inclusion of those experiencing poverty on grounds of sexual orientation, gender identity, gender expression and sex characteristics in the adoption and implementation of legislative, administrative, budgetary and other measures to combat poverty;
- D. Ensure appropriate institutional arrangements and data collection with the view to reduce poverty and social exclusion related to sexual orientation, gender identity, gender expression and sex characteristics;
- E. Ensure access to effective remedies for violations of human rights, including those caused by non-State actors, that result in poverty and exclusion, and that adversely affect persons on the grounds of sexual orientation, gender identity, gender expression and sex characteristics.

PRINCIPLE
35

THE RIGHT TO SANITATION

Everyone has the right to equitable, adequate, safe and secure sanitation and hygiene, in circumstances that are consistent with human dignity, without discrimination, including on the basis of sexual orientation, gender identity, gender expression or sex characteristics.

STATES SHALL:

- A. Ensure that there are adequate public sanitation facilities which can be accessed safely and with dignity by all persons regardless of their sexual orientation, gender identity, gender expression or sex characteristics;

- B. Ensure that all schools and other institutional settings provide safe access to sanitation facilities to staff, students and visitors without discrimination on grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- C. Ensure that both public and private employers provide safe access to sanitation without discrimination on grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- D. Ensure that entities offering services to the public provide adequate sanitation without discrimination, including on grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- E. Ensure that places of detention have adequate sanitation facilities which can be accessed safely and with dignity by all detainees, staff and visitors without discrimination on grounds of sexual orientation, gender identity, gender expression or sex characteristics.

THE RIGHT TO THE ENJOYMENT OF HUMAN RIGHTS IN RELATION TO INFORMATION AND COMMUNICATION TECHNOLOGIES

PRINCIPLE 36

Everyone is entitled to the same protection of rights online as they are offline. Everyone has the right to access and use information and communication technologies, including the internet, without violence, discrimination or other harm based on sexual orientation, gender identity, gender expression or sex characteristics. Secure digital communications, including the use of encryption, anonymity and pseudonymity tools are essential for the full realisation of human rights, in particular the rights to life, bodily and mental integrity, health, privacy, due process, freedom of opinion and expression, peaceful assembly and association.

STATES SHALL:

- A. Take all necessary measures to ensure that all persons enjoy universal, affordable, open, safe, secure and equal access to information and communication technologies, including the internet, without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics;
- B. Ensure the right of all individuals, without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics, to seek, receive and impart information and ideas of all kinds, including those concerning sexual orientation, gender identity, gender expression and sex characteristics, through information and communication technologies;

THE YOGYAKARTA PRINCIPLES PLUS 10

- C. Ensure that any restrictions to the right to access and use information and communication technologies and the internet are provided for by law and are necessary and proportionate to protect the human dignity, equality and freedoms of others, without discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
- D. Respect and protect the privacy and security of digital communications, including the use by individuals of encryption, pseudonyms and anonymity technology;
- E. Ensure that any restrictions on the right to privacy, including through mass or targeted surveillance, requests for access to personal data, or through limitations on the use of encryption, pseudonymity and anonymity tools, are on a case specific basis, and are reasonable, necessary and proportionate as required by the law for a legitimate purpose and ordered by a court;
- F. Take measures to ensure that the processing of personal data for individual profiling is consistent with relevant human rights standards including personal data protection and does not lead to discrimination, including on the grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- G. Take all necessary legislative, administrative, technical and other measures, including ensuring private sector accountability, as outlined by relevant international standards, in consultation with relevant stakeholders, to seek to prevent, remedy and eliminate online hate speech, harassment and technology-related violence against persons on the basis of sexual orientation, gender identity, gender expression or sex characteristics under the framework of international human rights law.

PRINCIPLE

37**THE RIGHT TO TRUTH**

Every victim of a human rights violation on the basis of sexual orientation, gender identity, gender expression or sex characteristics has the right to know the truth about the facts, circumstances and reasons why the violation occurred. The right to truth includes effective, independent and impartial investigation to establish the facts, and includes all forms of reparation recognised by international law. The right to truth is not subject to statute of limitations and its application must bear in mind its dual nature as an individual right and the right of the society at large to know the truth about past events.

STATES SHALL:

- A. Adopt legal provisions to provide redress to victims of violations on the basis of sexual orientation, gender identity, gender expression and sex characteristics, including public apology, expungement of relevant criminal convictions and records, rehabilitation and recovery services, adequate compensation and guarantees of non-recurrence;

- B. Ensure, in cases of violations of the right to mental and bodily integrity, effective access to remedies, redress, reparation and, where appropriate, psychological support and restorative treatments;
- C. Protect individuals' right to know the truth about their medical histories, including through full access to accurate medical records;
- D. Adopt and fully implement procedures to establish the truth concerning violations based on sexual orientation, gender identity, gender expression and sex characteristics;
- E. Establish a truth-seeking mechanism and process in regard to human rights violations based on sexual orientation, gender identity, gender expression and sex characteristics;
- F. Ensure that, in addition to individual victims and their families, communities and society at large can realise the right to the truth about systemic human rights violations based on sexual orientation, gender identity, gender expression and sex characteristics, while respecting and protecting the right to privacy of individuals;
- G. Preserve documentary evidence of human rights violations based on sexual orientation, gender identity, gender expression and sex characteristics, and ensure adequate access to archives with information on violations based on sexual orientation, gender identity, gender expression and sex characteristics;
- H. Ensure that the facts and truth of the history, causes, nature and consequences of discrimination and violence on grounds of sexual orientation, gender identity, gender expression and sex characteristics are disseminated and added to educational curricula with a view to achieving a comprehensive and objective awareness of past treatment of persons on grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- I. Commemorate the suffering of victims of violations on the basis of sexual orientation, gender identity, gender expression and sex characteristics through public events, museums and other social and cultural activities.

PRINCIPLE

38 THE RIGHT TO PRACTISE, PROTECT, PRESERVE AND REVIVE CULTURAL DIVERSITY

Everyone, individually or in association with others, where consistent with the provisions of international human rights law, has the right to practise, protect, preserve and revive cultures, traditions, languages, rituals and festivals, and protect cultural sites of significance, associated with sexual orientation, gender identity, gender expression and sex characteristics. Everyone, individually or in association with others, has the right to manifest cultural diversity through artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used, without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics. Everyone, individually or in association with others, has the right to seek, receive, provide and utilise resources for these purposes without discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics.

STATES SHALL:

- A . Ensure the right to practice, protect, preserve and revive the diversity of cultural expressions of persons of all sexual orientations, gender identities, gender expressions and sex characteristics on the basis of the equal dignity of and respect for all.

ADDITIONAL STATE OBLIGATIONS

RELATING TO THE RIGHTS TO EQUALITY AND NON-DISCRIMINATION (PRINCIPLE 2)

STATES SHALL:

- G. Take all appropriate steps to ensure that reasonable accommodation is provided, where needed, in order to promote equality and eliminate discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including in education, employment, and access to services;
- H. Ensure that HIV status is not used as a pretext to isolate, marginalise or exclude persons of diverse sexual orientations, gender identities, gender expressions or sex characteristics, or prevent them from accessing goods, commodities and services;
- I. Ensure that all individuals can participate in sport in line with the gender with which they identify, subject only to reasonable, proportionate and non-arbitrary requirements;
- J. Ensure that all individuals can participate in sport without discrimination on the grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- K. Adopt legislative, policy and other measures in line with international human rights norms and standards to eliminate bullying and discriminatory behaviour at all levels of sports, on the basis of sexual orientation, gender identity, gender expression and sex characteristics;
- L. Combat the practice of prenatal selection on the basis of sex characteristics, including by addressing the root causes of discrimination against persons on the basis of sex, gender, sexual orientation, gender identity, gender expression and sex characteristics, and by carrying out awareness-raising activities on the detrimental impact of prenatal selection on these grounds;
- M. Take measures to address discriminatory attitudes and practices on the basis of sex, gender, sexual orientation, gender identity, gender expression and sex characteristics in relation to the application of prenatal treatments and genetic modification technologies.

RELATING TO THE RIGHT TO PRIVACY (PRINCIPLE 6)

STATES SHALL:

- G. Ensure that requirements for individuals to provide information on their sex or gender are relevant, reasonable and necessary as required by the law for a legitimate purpose in the circumstances where it is sought, and that such requirements respect all persons' right to self-determination of gender;
- H. Ensure that changes of the name or gender marker, as long as the latter exists, is not disclosed without the prior, free, and informed consent of the person concerned, unless ordered by a court.

RELATING TO THE RIGHT TO TREATMENT WITH HUMANITY WHILE IN DETENTION (PRINCIPLE 9)

STATES SHALL:

- H. Adopt and implement policies to combat violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression or sex characteristics faced by persons who are deprived of their liberty, including with respect to such issues as placement, body or other searches, items to express gender, access to and continuation of gender affirming treatment and medical care, and "protective" solitary confinement;
- I. Adopt and implement policies on placement and treatment of persons who are deprived of their liberty that reflect the needs and rights of persons of all sexual orientations, gender identities, gender expressions, and sex characteristics and ensure that persons are able to participate in decisions regarding the facilities in which they are placed;
- J. Provide for effective oversight of detention facilities, both with regard to public and private custodial care, with a view to ensuring the safety and security of all persons, and addressing the specific vulnerabilities associated with sexual orientation, gender identity, gender expression and sex characteristics.

RELATING TO THE RIGHT TO FREEDOM FROM TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (PRINCIPLE 10)

STATES SHALL:

- D. Recognise that forced, coercive and otherwise involuntary modification of a person's sex characteristics may amount to torture, or other cruel, inhuman or degrading treatment;
- E. Prohibit any practice, and repeal any laws and policies, allowing intrusive and irreversible treatments on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including forced genital-normalising surgery, involuntary sterilisation, unethical experimentation, medical display, "reparative" or "conversion" therapies, when enforced or administered without the free, prior, and informed consent of the person concerned.

RELATING TO THE RIGHT TO EDUCATION (PRINCIPLE 16)

STATES SHALL:

- I. Ensure inclusion of comprehensive, affirmative and accurate material on sexual, biological, physical and psychological diversity, and the human rights of people of diverse sexual orientations, gender identities, gender expressions and sex characteristics, in curricula, taking into consideration the evolving capacity of the child;
- J. Ensure inclusion of comprehensive, affirmative and accurate material on sexual, biological, physical and psychological diversity, and the human rights of people of diverse sexual orientations, gender identities, gender expressions and sex characteristics, in teacher training and continuing professional development programmes.

RELATING TO THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH (PRINCIPLE 17)

STATES SHALL:

- J. Protect all persons from discrimination, violence and other harm on the basis of sexual orientation, gender identity, gender expression and sex characteristics in healthcare settings;
- K. Ensure access to the highest attainable standard of gender affirming healthcare, on the basis of an individual's free, prior and informed consent;
- L. Ensure that gender affirming healthcare is provided by the public health system or, if not so provided, that the costs are covered or reimbursable under private and public health insurance schemes;
- M. Take all necessary measures to eliminate all forms of sexual and reproductive violence on the basis of sexual orientation, gender identity, gender expression and sex characteristics, including forced marriage, rape and forced pregnancy;
- N. Ensure access, without discrimination on the grounds of sexual orientation, gender identity, gender expression, or sex characteristics, to pre and post-exposure prophylaxis (PrEP and PEP);
- O. Ensure access to a range of safe, affordable and effective contraceptives, including emergency contraception, and to information and education on family planning and sexual and reproductive health, without discrimination based on sexual orientation, gender identity, gender expression and sex characteristics;
- P. Take all necessary legislative and other measures to ensure access to quality post abortion care, and remove any barriers that may hinder timely access to affordable and quality abortion services, without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics;
- Q. Prevent the disclosure of HIV status, as well as personal health and medical information related to sexual orientation, gender identity, gender expression and sex characteristics, such as gender affirming treatment, without the free, prior and informed consent of the person;
- R. Ensure that legal provisions, regulations or any other administrative measures on the donation of blood, gametes, embryos, organs, cells or other tissues do not discriminate on grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- S. Ensure inclusion of affirmative material on sexual, biological, physical and psychological diversity and the human rights of people of diverse sexual orientations, gender identities, gender expressions and sex characteristics in medical curricula and continuing professional development programmes.

RELATING TO THE RIGHT TO INFORMATION (PRINCIPLE 19)

STATES SHALL:

- G. Take legislative, administrative, and other appropriate measures to ensure that all persons have access to information about their civil, political, economic, social and cultural rights, including how these rights apply in relation to sexual orientation, gender identity, gender expression and sex characteristics;
- H. Make freely available and accessible, both online and otherwise, international and regional treaties and instruments; the national constitution, national laws and regulations; research studies, reports, data, archives; reports and information submitted by the State to international and regional bodies and mechanisms; and all other information as may be necessary to secure or enable the exercise of any human rights or fundamental freedoms or access to remedy for a violation of any such right;
- I. Recognise that the needs, characteristics and human rights situations of populations of diverse sexual orientations, gender identities, gender expressions and sex characteristics are distinct from each other, and ensure that data on each population is collected and managed in a manner consistent with ethical, scientific and human rights standards and made available in a disaggregated form.

RELATING TO THE RIGHT TO THE FREEDOM OF PEACEFUL ASSEMBLY AND ASSOCIATION (PRINCIPLE 20)

STATES SHALL:

- F. Respect, protect and facilitate the formation of associations for the purpose of promoting the rights of all persons, including on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
- G. Ensure that associations which seek to promote human rights related to sexual orientation, gender identity, gender expression or sex characteristics can seek, receive and use funding and other resources from individuals, associations, foundations or other civil society organisations, governments, aid agencies, the private sector, the United Nations and other entities, domestic or foreign;
- H. Ensure that requirements and procedures to register associations, where they exist, are not burdensome or impose unjustifiable limitations, including on grounds of morality and public order;

THE YOGYAKARTA PRINCIPLES PLUS 10

- I. Ensure that the right to freedom of association applies equally to associations that are not registered, including associations working on issues related to sexual orientation, gender identity, gender expression or sex characteristics;
- J. Take positive measures, including affirmative action measures, to overcome specific challenges to the enjoyment of the freedom of association of groups that are marginalised and made vulnerable on grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- K. Take positive measures to protect the right to association of service providers working with those discriminated against on grounds of sexual orientation, gender identity, gender expression or sex characteristics.

RELATING TO THE RIGHT TO SEEK ASYLUM (PRINCIPLE 23)

STATES SHALL:

- D. Ensure that a well-founded fear of persecution on the basis of sexual orientation, gender identity, gender expression or sex characteristics is accepted as a ground for the recognition of refugee status, including where sexual orientation, gender identity, gender expression or sex characteristics are criminalised and such laws, directly or indirectly, create or contribute to an oppressive environment of intolerance and a climate of discrimination and violence;
- E. Ensure that persons seeking asylum are protected from violence, discrimination and other harm committed on grounds of sexual orientation, gender identity, gender expression or sex characteristics, including during the determination of their claims and in reception conditions;
- F. Ensure that no person is denied asylum on the basis that a person may conceal or change their sexual orientation, gender identity, gender expression or sex characteristics in order to avoid persecution;
- G. Accept the self-identification of a person seeking asylum on the basis of sexual orientation, gender identity, gender expression or sexual characteristics as the starting point for consideration of their asylum claim;
- H. Ensure that persons seeking asylum are not refused asylum because they did not set out their sexual orientation, gender identity, gender expression or sexual characteristics as a ground for persecution on the first occasion they were given to do so;
- I. Ensure sensitive and culturally appropriate guidelines and training on sexual orientation, gender identity, gender expression and sexual characteristics for agents involved in the process of determination of refugee status and in managing reception conditions;

THE YOGYAKARTA PRINCIPLES PLUS 10

- J. Ensure respect for the dignity and privacy of persons seeking asylum at all times, including by recording information about a person's sexual orientation, gender identity, gender expression and sex characteristics only where it is lawful, reasonable, necessary and proportionate to do so, by storing it securely and by prohibiting its release to any person other than a person directly involved in the refugee determination process;
- K. Develop and implement guidelines on assessing credibility in relation to establishing a person's sexual orientation, gender identity, gender expression and sex characteristics when seeking asylum, and ensure such assessments are determined in an objective and sensitive manner, unhindered by stereotyping and cultural bias;
- L. Ensure that inappropriate, invasive, unnecessary or coercive medical or psychological testing or evidence is not utilised to assess a person's self-declared sexual orientation, gender identity, gender expression or sex characteristics when seeking asylum;
- M. Provide access to medical care and counselling appropriate to those seeking asylum, recognising any particular needs of persons on the basis of their sexual orientation, gender identity, gender expression or sex characteristics, including with regard to reproductive health, HIV information and therapy, hormonal or other therapy, and gender affirming treatment;
- N. Ensure that the detention of asylum seekers is avoided, and is only used as a measure of last resort and for the shortest possible time;
- O. Ensure that placement in detention, where used, avoids further marginalising persons on the basis of sexual orientation, gender identity, gender expression or sex characteristics or subjecting them to violence, discrimination or other harm;
- P. Ensure that solitary confinement is not used to manage or to protect persons at risk of discrimination, violence or other harm on the basis of sexual orientation, gender identity, gender expression or sex characteristics, and release or refer asylum seekers to alternatives to detention, if effective protection cannot be provided.

RELATING TO THE RIGHT TO FOUND A FAMILY (PRINCIPLE 24)

STATES SHALL:

- H. Protect children from discrimination, violence or other harm due to the sexual orientation, gender identity, gender expression or sex characteristics of their parents, guardians, or other family members;
- I. Issue birth certificates for children upon birth that reflect the self-defined gender identity of the parents;
- J. Enable access to methods to preserve fertility, such as the preservation of gametes and tissues for any person without discrimination on grounds of sexual orientation, gender identity, gender expression, or sex characteristics, including before hormonal treatment or surgeries;
- K. Ensure that surrogacy, where legal, is provided without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics.

RELATING TO THE RIGHT TO PARTICIPATE IN PUBLIC LIFE (PRINCIPLE 25)

STATES SHALL:

- D. Take measures to ensure that sexual orientation, gender identity, gender expression and sex characteristics are not used as grounds to prevent a person from exercising their right to vote;
- E. Develop and implement affirmative action programmes to promote public and political participation for persons marginalised on the basis of sexual orientation, gender identity, gender expression or sex characteristics.

RELATING TO THE RIGHT TO PROMOTE HUMAN RIGHTS (PRINCIPLE 27)

STATES SHALL:

- F. Enact a law, including to establish, designate or maintain an adequately resourced mechanism, for the protection of defenders of the rights of persons who experience or are at risk of violations on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
- G. Ensure the participation of individuals and organisations working on human rights issues related to sexual orientation, gender identity, gender expression or sex characteristics in public and political decision-making processes that affect them.

ADDITIONAL RECOMMENDATIONS

All members of society and of the international community have responsibilities regarding the realisation of human rights. We therefore further recommend that:

- Q. National human rights institutions ensure that in their programmes and activities they take action on human rights issues relating to sexual orientation, gender identity, gender expression and sex characteristics, mainstream those issues in all their functions, including complaint handling and human rights education, and promote the inclusion of persons of diverse sexual orientation, gender identity, gender expression and sex characteristics in their leadership and staff;
- R. Sporting organisations integrate the Yogyakarta Principles (2006) and these Additional Principles (2017), as well as all relevant human rights norms and standards, in their policies and practices, in particular:
- i. Take practical steps to create welcoming spaces for participation in sport and physical activity, including installation of appropriate changing rooms, and sensitisation of the sporting community on the implementation of anti-discrimination laws in the sporting context for persons of diverse sexual orientations, gender identities, gender expressions, and sex characteristics;
 - ii. Ensure that all individuals who wish to participate in sport are supported to do so irrespective of sexual orientation, gender identity, gender expression and sex characteristics, and that all individuals are able to participate, without restriction, subject only to reasonable, proportionate and non-arbitrary requirements to participate in line with their self-declared gender;
 - iii. Remove, or refrain from introducing, policies that force, coerce or otherwise pressure women athletes into undergoing unnecessary, irreversible and harmful medical examinations, testing and/or procedures in order to participate as women in sport;
 - iv. Take measures to encourage the general public to respect diversity based on sexual orientation, gender identity, gender expression and sex characteristics in sports, including measures to eliminate hate speech, harassment, and violence at sports events.

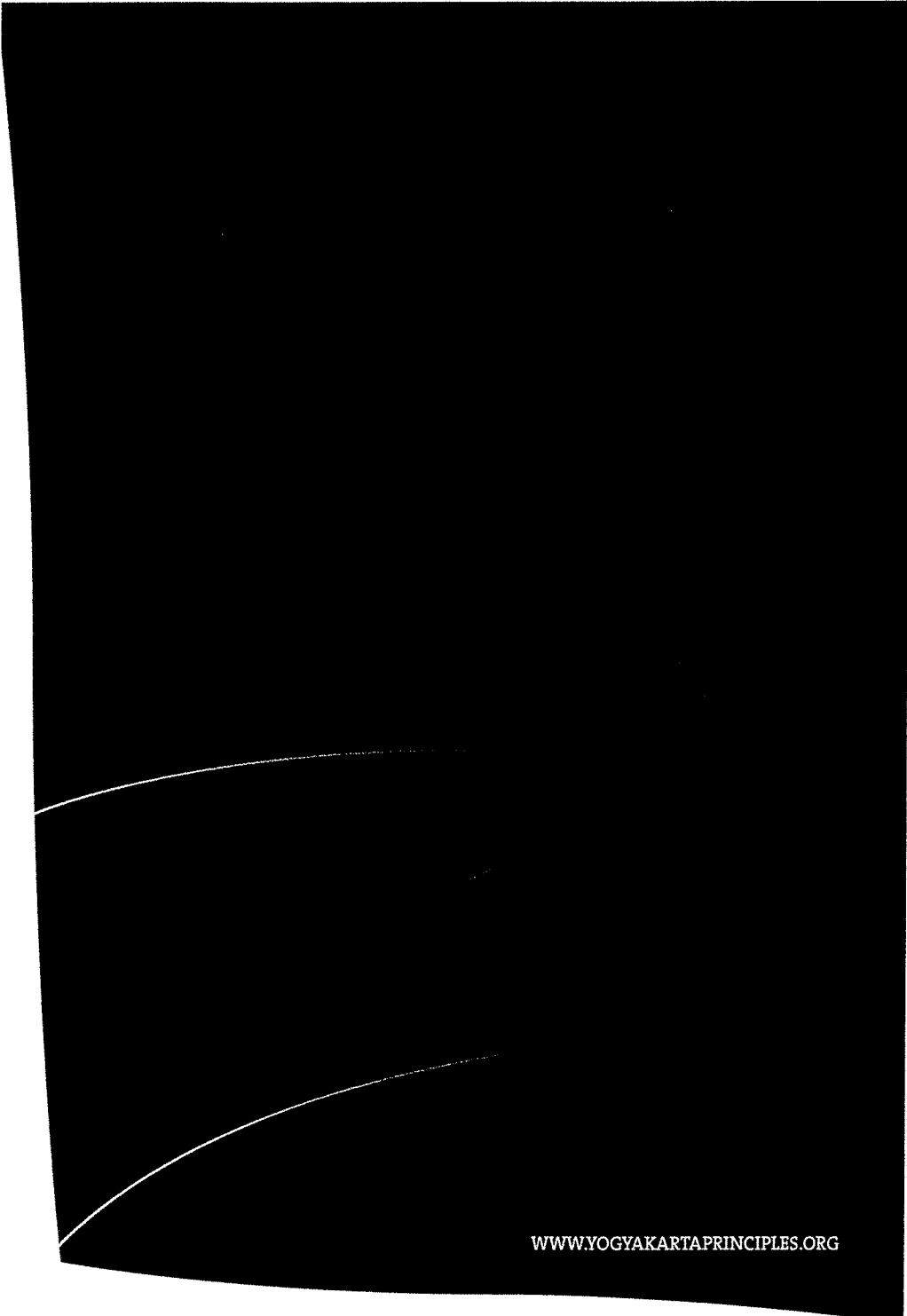
THESE ADDITIONAL PRINCIPLES, STATE OBLIGATIONS AND RECOMMENDATIONS reflect the application of international human rights law to the lives and experiences of persons of diverse sexual orientations, gender identities, gender expressions and sex characteristics, and nothing herein should be interpreted as restricting or in any way limiting the rights and freedoms of such persons as recognised in international, regional or national laws or standards.

SIGNATORIES TO THE ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS

Philip Alston (*Australia*), UN Special Rapporteur on extreme poverty and human rights
 Ilze Kehris Brands (*Latvia and Sweden*), Member, UN Human Rights Committee; Senior research fellow, Raoul Wallenberg Institute of Human Rights and Humanitarian Law
 Deborah Brown (*United States of America*), Association for Progressive Communications
 Mauro Cabral Grinspan (*Argentina*), Executive Director, GATE
 Edwin Cameron (*South Africa*), Judge, Constitutional Court of South Africa
 Morgan Carpenter (*Australia*), Founder, Intersex Day Project; Co-executive director, Organisation Intersex International Australia; Consultant, GATE
 Kamala Chandrakirana (*Indonesia*), Urgent Action Fund for Women's Human Rights - Asia-Pacific; member of the UN Working Group on the issue of discrimination against women in law and practice (2011-2017)
 Sonia Onufer Corrêa (*Brazil*), Research Associate, Brazilian Interdisciplinary AIDS Association (ABIA); Co-chair, Sexuality Policy Watch
 Paul Dillane (*United Kingdom*), Executive Director, Kaleidoscope Trust
 Julia Ehrt (*Germany*), Executive Director, Transgender Europe (TGEU)
 Sheherezade Kara (*United Kingdom and Zimbabwe*), International Human Rights Law Expert, Advocate and Consultant
 David Kaye (*United States of America*), UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
 Maina Kiai (*Kenya*), InformAction and Human Rights Defender; UN Special Rapporteur on the rights to freedom of peaceful assembly and association (2011-2017)
 Eszter Kismodi (*Hungary and Switzerland*), International human rights lawyer
 Eleanora Lamm (*Argentina*), Human Rights Director at the Supreme Court of Justice of Mendoza; Member of the National Committee on Ethics in Science and Technologies
 Victor Madrigal-Borloz (*Costa Rica*) Secretary- General of the International Rehabilitation Council for Torture Victims (IRCT)
 Monica Mbaru (*Kenya*), Judge, Employment and Labour Relations Court
 Sanji Mmasenono Monageng (*Botswana*), Judge, International Criminal Court, The Hague; Commissioner, International Commission of Jurists
 Vitit Muntarbhorn (*Thailand*), Professor Emeritus, Chulalongkorn University; UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (2016-2017)
 Arvind Narrain (*India*), Geneva Director, ARC International; Alternative Law Forum (2000-2014)

THE YOGYAKARTA PRINCIPLES PLUS 10

Sunil Pant (*Nepal*), Member of Parliament (2008-2012), Nepal
Pooja Patel (*India and Switzerland*), LGBT & Women's Rights Programme Manager, International Service for Human Rights (ISHR)
Dainius Puras (*Lithuania*), UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health
Alecs Recher (*Switzerland*), Head legal advice service, Transgender Network Switzerland; Researcher, Swiss Centre of Expertise in Human Rights
Cianán B. Russell (*United States of America and Thailand*), Human Rights & Advocacy Officer, Asia Pacific Transgender Network
Macarena Saez (*United States of America*), Centre for Human Rights & Humanitarian Law, American University Washington College of Law
Meena Saraswati Seshu (*India*), General Secretary, Sampada Grameen Mahila Sanstha (SANGRAM)
Ajit Prakash Shah (*India*), Chief Justice (2008-2010), High Court of Delhi
Chris Sidoti (*Australia*), International human rights specialist; Australian Human Rights Commissioner (1995-2000)
Monica Tabengwa (*Botswana*), Executive Director, Pan-Africa ILGA
Sylvia Tamale (*Uganda*), Makerere University Law School
Frans Viljoen (*South Africa*); Professor of International Human Rights Law and Director, Centre for Human Rights, Faculty of Law, University of Pretoria
Kimberly Zieselman (*United States of America*), Executive Director, interACT: Advocates for Intersex Youth



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P. v S. AND CORNWALL COUNTY COUNCIL

JUDGMENT OF THE COURT
30 April 1996 *

In Case C-13/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Industrial Tribunal, Truro (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

P.

and

S. and Cornwall County Council,

on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissechet and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, P. J. G. Kapteyn (Rapporteur), J. L. Murray, H. Ragnemalm and L. Sevón, Judges,

* Language of the case: English.

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- P., by Helena Kennedy QC and Rambert De Mello, Barrister, instructed by Tyndallwoods & Millichip, Solicitors,
- the United Kingdom, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and David Pannick QC,
- the Commission of the European Communities, by Nicholas Khan, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of P., represented by Madeleine Rees and Vereena Jones, Solicitors, Helena Kennedy QC, and Rambert De Mello and Ben Emmerson, Barristers; the United Kingdom, represented by John E. Collins and David Pannick QC, and the Commission, represented by Nicholas Khan, at the hearing on 21 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 14 December 1995,

gives the following

Judgment

- 1 By order of 11 January 1994, received at the Court on 13 January 1994, the Industrial Tribunal, Truro, referred to the Court for a preliminary ruling under Article

P. v S. AND CORNWALL COUNTY COUNCIL

177 of the EC Treaty two questions on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40 hereinafter 'the directive').

2 Those questions were raised in proceedings brought by P. against S. and Cornwall County Council.

3 P., the applicant in the main proceedings, used to work as a manager in an educational establishment operated at the material time by Cornwall County Council (hereinafter 'the County Council'), the competent administrative authority for the area. In early April 1992, a year after being taken on, P. informed S., the Director of Studies, Chief Executive and Financial Director of the establishment, of the intention to undergo gender reassignment. This began with a 'life test', a period during which P. dressed and behaved as a woman, followed by surgery to give P. the physical attributes of a woman.

4 At the beginning of September 1992, after undergoing minor surgical operations, P. was given three months' notice expiring on 31 December 1992. The final surgical operation was performed before the dismissal took effect, but after P. had been given notice.

5 P. brought an action against S. and the County Council before the Industrial Tribunal on the ground that she had been the victim of sex discrimination. S. and the County Council maintained that the reason for her dismissal was redundancy.

JUDGMENT OF 30. 4. 1996 — CASE C-13/94

- 6 It appears from the order for reference that the true reason for the dismissal was P.'s proposal to undergo gender reassignment, although there actually was redundancy within the establishment.

- 7 The Industrial Tribunal found that such a situation was not covered by the Sex Discrimination Act 1975, inasmuch as it applies only to cases in which a man or woman is treated differently because he or she belongs to one or the other of the sexes. Under English law, P. is still deemed to be male. If P. had been female before her gender reassignment, the employer would still have dismissed her on account of that operation. However, the Industrial Tribunal was uncertain whether that situation fell within the scope of the directive.

- 8 According to Article 1(1), the purpose of the directive is to put into effect in the Member States the principle of equal treatment for men and women, in particular as regards access to employment, including promotion, and to vocational training, and as regards working conditions. Article 2(1) of the directive provides that the principle of equal treatment means that there is to be 'no discrimination whatsoever on grounds of sex, either directly or indirectly'.

- 9 Furthermore, the third recital in the preamble to the directive states that equal treatment for men and women constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement is to be furthered.

P. v S. AND CORNWALL COUNTY COUNCIL

10 Considering that there was doubt as to whether the scope of the directive is wider than that of the national legislation, the Industrial Tribunal decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Having regard to the purpose of Directive No 76/207/EEC which is stated in Article 1 to put into effect the principle of equal treatment for men and women as regards access to employment etc ... does the dismissal of a transsexual for a reason related to a gender reassignment constitute a breach of the Directive?

(2) Whether Article 3 of the Directive which refers to discrimination on grounds of sex prohibits treatment of an employee on the grounds of the employee's transsexual state.'

11 Article 3 of the directive, to which the Industrial Tribunal refers, is concerned with application of the principle of equal treatment for men and women to access to employment.

12 A dismissal, such as is in issue in the main proceedings, must be considered in the light of Article 5(1) of the directive, which provides that:

'Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

- 13 The Industrial Tribunal's two questions, which may appropriately be considered together, must therefore be construed as asking whether, having regard to the purpose of the directive, Article 5(1) precludes dismissal of a transsexual for a reason related to his or her gender reassignment.
- 14 The United Kingdom and the Commission submit that to dismiss a person because he or she is a transsexual or because he or she has undergone a gender-reassignment operation does not constitute sex discrimination for the purposes of the directive.
- 15 In support of that argument, the United Kingdom points out in particular that it appears from the order for reference that the employer would also have dismissed P. if P. had previously been a woman and had undergone an operation to become a man.
- 16 The European Court of Human Rights has held that 'the term "transsexual" is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group' (judgment of 17 October 1986, in *Rees v United Kingdom*, paragraph 38, Series A, No 106).
- 17 The principle of equal treatment 'for men and women' to which the directive refers in its title, preamble and provisions means, as Articles 2(1) and 3(1) in particular indicate, that there should be 'no discrimination whatsoever on grounds of sex'.

P. v S. AND CORNWALL COUNTY COUNCIL

18 Thus, the directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law.

19 Moreover, as the Court has repeatedly held, the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure (see, to that effect, Case 149/77 *Defrenne v Sabena* [1978] ECR 1365, paragraphs 26 and 27, and Joined Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509, paragraph 16).

20 Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

21 Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

22 To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.

- 23 Dismissal of such a person must therefore be regarded as contrary to Article 5(1) of the directive, unless the dismissal could be justified under Article 2(2). There is, however, no material before the Court to suggest that this was so here.
- 24 It follows from the foregoing that the reply to the questions referred by the Industrial Tribunal must be that, in view of the objective pursued by the directive, Article 5(1) of the directive precludes dismissal of a transsexual for a reason related to a gender reassignment.

Costs

- 25 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Industrial Tribunal, Truro, by order of 11 January 1994, hereby rules:

P. v S. AND CORNWALL COUNTY COUNCIL

In view of the objective pursued by Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 5(1) of the directive precludes dismissal of a transsexual for a reason related to a gender reassignment.

Rodríguez Iglesias

Kakouris

Edward

Puissochet

Hirsch

Mancini

Schockweiler

Kapteyn

Murray

Ragnemalm

Sevón

Delivered in open court in Luxembourg on 30 April 1996.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President

**IN THE COURT OF APPEAL, MALAYSIA
(APPELLATE JURISDICTION)
PALACE OF JUSTICE, PUTRAJAYA**

CIVIL APPEAL NO. N-01-498-11/2012

Appellants

- (1) MUHAMAD JUZAILI BIN MOHD KHAMIS
- (2) SHUKUR BIN JANI
- (3) WAN FAIROL BIN WAN ISMAIL

v.

Respondents

- (1) STATE GOVERNMENT OF NEGERI SEMBILAN
- (2) DEPARTMENT OF ISLAMIC RELIGIOUS AFFAIRS, NEGERI SEMBILAN
- (3) DIRECTOR OF ISLAMIC RELIGIOUS AFFAIRS, NEGERI SEMBILAN
- (4) CHIEF ENFORCEMENT OFFICER, ISLAMIC RELIGIOUS AFFAIRS, NEGERI SEMBILAN
- (5) CHIEF SYARIE PROSECUTOR, NEGERI SEMBILAN

[In the matter of the High Court of Malaya at Seremban, Negeri Sembilan,
Civil Suit No. 13-1-11]

[Plaintiffs

- (1) Muhamad Juzaili bin Mohd Khamis
- (2) Shukur bin Jani
- (3) Wan Fairol bin Wan Ismail
- (4) Adam Shazrul bin Mohd Yusoff

v.

Defendants

- (1) State Government of Negeri Sembilan
- (2) Department of Islamic Religious Affairs, Negeri Sembilan
- (3) Director of Islamic Religious Affairs, Negeri Sembilan
- (4) Chief Enforcement Officer, Islamic Religious Affairs, Negeri Sembilan
- (5) Chief Syarie Prosecutor, Negeri Sembilan]

Coram:

MOHD HISHAMUDIN YUNUS, JCA

AZIAH ALI, JCA

LIM YEE LAN, JCA

BRIEF JUDGMENT OF THE COURT

Introduction

This is only a brief judgment. A full judgment will be issued in due course.

This appeal is against the decision of the High Court of Seremban of 11 October 2012 that had dismissed the appellants' application for judicial review.

The application for judicial review is for a declaration that section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan) (section 66) is void by reason of being inconsistent with the following Articles of the Federal Constitution, namely, □

- (a) Art. 5(1);
- (b) Art. 8(1);
- (c) Art. 8(2);
- (d) Art. 9(2); and
- (e) Art. 10(1)(a).

The High Court of Seremban had dismissed the judicial review application; hence, the present appeal to this Court.

Background Facts

The three appellants are Muslim men. Medically, however, they are not normal males. This is because they have a medical condition called [Gender Identity Disorder] (GID). Because of this medical condition, since a young age the appellants have been expressing themselves as women and showing the mannerisms of the feminine gender such as wearing women's clothes and using makeups. Indeed, they feel natural being such.

That the appellants are sufferers of GID is confirmed by a psychiatrist from the Kuala Lumpur Hospital; as well as by a psychologist. The evidence of these experts remains unrebutted.

In 1992 the legislature of the State of Negeri Sembilan enacted the Syariah Criminal Enactment 1992 (Negeri Sembilan). Section 66 of this Enactment makes it an offence for any Muslim male person to do any of the following in a public place: to wear a woman's attire, or to pose as a woman. Those convicted can be liable to a fine not exceeding RM1,000.00 or to

imprisonment for a term not exceeding six months or to both. This section makes no exception for sufferers of GID like the appellants. No explanation has been given by the State for this unfortunate omission.

Hence, as a consequence, the appellants have been repeatedly detained, arrested, and prosecuted by the religious authority of Negeri Sembilan acting pursuant to section 66 for cross-dressing.

The injustice and humiliation that they are subject to moved them to apply to the Court for this declaration.

Leave to apply for judicial review was granted on 4th November 2011 by Rosnaini Saub J.

Gender Identity Disorder: Medical Evidence

Diagnosis of appellants by psychiatrist Dr. Ang Jin Kiat

The appellants had been medically examined by one Dr. Ang Jin Kiat, a psychiatrist from the Kuala Lumpur Hospital, a Government hospital.

Dr. Ang's medical reports confirm that the appellants suffer from a medical condition known as Gender Identity Disorder (GID). According to Dr. Ang's reports, the "desire to dress as a female and to be recognized as a female is in keeping with this condition" and there is no "scientifically proven pharmacological treatment or psychological therapy". In other words, cross-dressing is intrinsic to the appellants' nature; and that this abnormal condition is incurable.

Dr. Ang Jin Kiat's medical reports are unrebutted by the respondents.

Consultant Psychiatrist's Opinion, by Dr. Deva Dass

Dr. Deva Dass, a Consultant Psychiatrist, by an affidavit, provides further opinion on GID. Dr. Deva Dass states that GID is also referred to as "Transsexualism" and those who suffer from it are called "Transsexuals". He states that GID is not a preference and is ineradicable, and that wearing clothing of the opposite sex occurs among sufferers of GID.

Dr. Deva Dass's affidavit also exhibits excerpts from a medical authority, namely, the **Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM IV-TR)**, published by the American Psychiatric

Association, Washington DC. These excerpts explain the diagnostic features of GID. Gender Identity Disorders are characterized by strong and persistent cross-gender identification accompanied by persistent discomfort with one's assigned sex.

The following excerpts are illustrative:

In boys, the cross-gender identification is manifested by a marked preoccupation with traditionally feminine activities. They may have a preference for dressing in girls' or women's clothes or may improvise such items from available materials when genuine articles are unavailable... There is a strong attraction for the stereotypical games and pastimes of girls..... They avoid rough-and-tumble play and competitive sports and have little interest in cars and trucks or other nonaggressive but stereotypical boys' toys..... More rarely, boys with Gender Identity Disorder may state that they find their penis or testes disgusting, that they want to remove them, or that they have, or wish to have, a vagina.

Adults with Gender Identity Disorder are preoccupied with their wish to live as a member of the other sex. This preoccupation may be manifested as an intense desire to adopt the social role of the other sex or to acquire the physical appearance of the other sex through hormonal or surgical manipulation. Adults with this disorder are uncomfortable being regarded by others as, or functioning,

in society as, a member of their designated sex. In private, these individuals may spend much time cross-dressed and working on the appearance of being the other sex. Many attempt to pass in public as the other sex. With cross-dressing and hormonal treatment (and for males, electrolysis) many individuals with this disorder may pass convincingly as the other sex.

According to Dr. Dass □

The sufferer from this anomaly feels he should have been the other gender – “a female spirit trapped in a male body” – and is quite unconvinced by scientific tests that show him to be indisputably male.

Clinical Psychologist's Report

Besides the two psychiatrists' evidence/reports above, the appellants have also tendered a report by one Ms. Vizla Kumaresan; a Clinical Psychologist.

The report confirms that the appellants psychologically identify themselves as women.

Likewise, Ms. Kumaresan's psychological reports, exhibited in the respective affidavits of the appellants, have not been rebutted by the respondents.

Sociologist's evidence

In further support of the appellants' case, affidavits are also filed by one Professor Teh Yik Koon, a renowned Malaysian sociologist, explaining that a law like section 66 has adverse effects on transsexuals and on Malaysian society.

What the appellants' evidence established

The evidence furnished by the appellants, therefore, establish that GID is an attribute of the appellants' nature that they did not choose and cannot change; and that much harm would be caused to them should they be punished for merely exhibiting a manifestation of GID i.e. cross-dressing.

The legislative competence of the State Legislature of Negeri Sembilan on matters pertaining to the religion of Islam

Article 74(2) of the Federal Constitution read with List II (State List), item 1, of the Ninth Schedule empowers State Legislatures to legislate on matters pertaining to the religion of Islam. The present legislation comes under the sub-item □

... creation and punishment of offences by persons professing the religion of Islam against precepts of that religion ...

However, the exercise of this legislative power is not without constitutional limitations; for, Article 74(3) of the Federal Constitution stipulates that the legislative powers of the States are exercisable subject to any conditions or restrictions imposed with respect to any particular matter by the Federal Constitution.

Laws inconsistent with the Federal Constitution are void.

Article 4(1) of the Federal Constitution declares that the Federal Constitution is the supreme law of the Federation and any law passed which is inconsistent with the Federal Constitution shall, to the extent of the inconsistency, be void.

Part II (Arts. 5 to 13) of the Federal Constitution guarantees the fundamental liberties of all Malaysians.

Reading Art. 74(3) and Art. 4(1) together, it is clear (and this legal position is not disputed) that all State laws, including Islamic laws passed by State

legislatures, must be consistent with Part II of the Federal Constitution (which guarantees the fundamental liberties of all Malaysians).

Section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan)

Section 66 is a State enacted Islamic law made pursuant to List II (State List), Item 1, of the Ninth Schedule of the Federal Constitution. The State Enactment was passed by the State Legislative Assembly of Negeri Sembilan on 3rd August 1992 and came into force on 1st June 1993. Section 66 reads:

Bahasa Malaysia version

Mana-mana orang lelaki yang memakai pakaian perempuan atau berlagak seperti perempuan di mana-mana tempat awam adalah melakukan satu kesalahan dan hendaklah apabila disabitkan dikenakan hukuman denda tidak melebihi satu ribu ringgit atau penjara selama tempoh tidak melebihi enam bulan atau kedua-duanya.

English Version

Any male person who, in any public place wears a woman's attire or poses as a woman shall be guilty of an offence and shall be liable on conviction to

a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

Mufti's Opinion

The State in response to the appellants' constitutional challenge, have filed an affidavit by the learned Mufti of the State of Negeri Sembilan. In his affidavit the learned Mufti opines that the prohibition of a male Muslim dressing or posing as a woman is a precept of Islam (the Mufti's Opinion).

The Mufti's Opinion is tendered to explain that the offence prescribed by section 66 is in accordance with the precepts of Islam.

We wish to make it clear here that whether or not section 66 is consistent with the precepts of Islam is not in issue in the present case. Indeed, this is conceded by Mr. Aston Paiva, the learned counsel for the appellants.

But Mr. Paiva makes a pertinent point, and that is that, the Mufti's Opinion, remarkably, fails to address the issue that is crucial for the purpose of the present constitutional challenge: what is the position in Islam as to the

appropriate dress code for male Muslims who are sufferers of GID, like the appellants?

Whether section 66 is in breach of art. 5(1) of the Federal Constitution

Art. 5(1) of the Federal Constitution guarantees that no person shall be deprived of his life and personal liberty save in accordance with law.

The Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 has held that □

- (i) other freedoms may be found embedded in the □life□and □personal liberty□limbs of art. 5(1); (at [13])
- (ii) □in accordance with law□in art. 5(1) refers to a law that is fair and just and not merely any enacted law however arbitrary or unjust it may be; (at [20]) and
- (iii) when a law is challenged as violating a fundamental right under art 5(1), art 8(1) will at once be engaged: (at [19]) .

Infringement of the right to live with dignity

In ***Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumah*** [2000] 3 CLJ 224 Gopal Sri Ram JCA (as he then was) in delivering the decision of the Court of Appeal explained that the word "life" in Art. 5(1) includes the right to live with dignity. In his words, (at p. 239) □

... it is the fundamental right of every person within the shores of Malaysia to live with common human dignity.

The learned Judge quotes what Bhagwati J said in the Indian Supreme Court case of ***Francis Coralie v. Union of India*** AIR [1981] SC 746 at p. 753:

But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and commingling with fellow human beings.

Section 66 prohibits the appellants and all other male Muslim sufferers of GID from cross-dressing, and punishes them for any breach of the prohibition. The learned counsel for the appellants argues that the profound effect of section 66 is that the appellants and other GID sufferers are perpetually at risk of arrest and prosecution simply because they express themselves in a way which is part of their experience of being human. The very core identity of the appellants is criminalized solely on account of their gender identity. The learned counsel submitted that section 66 is irreconcilable with the existence of the appellants and all other GID sufferers. A more disturbing effect of section 66 is that it builds insecurity and vulnerability into the lives of the appellants and other Muslim male persons with GID. The existence of a law that punishes the gender expression of transsexuals, degrades and devalues persons with GID in our society. As such, section 66 directly affects the appellants' right to live with dignity, guaranteed by Art. 5(1), by depriving them of their value and worth as members of our society.

We find merit in this argument. As long as section 66 is in force the appellants will continue to live in uncertainty, misery and indignity. They now come

before this Court in the hope that they may be able to live with dignity and be treated as equal citizens of this nation.

We, therefore, hold that section 66 is inconsistent with Art. 5(1) of the Federal Constitution in that the section deprives the appellants of their right to live with dignity.

Therefore, section 66 is unconstitutional and void.

Infringement of right to livelihood/work

There is yet another reason as to why section 66 is inconsistent with Art. 5(1). It has also been established by judicial authorities that the word "life" in Art. 5(1) means more than mere animal existence: it also includes such rights as livelihood and the quality of life (see ***Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor.*** [1996] 2 CLJ 771 and ***Lee Kwan Woh v. PP*** [2009] 5 CLJ 631 at p. 643 para [14]).

The effect of section 66 is that it prohibits the appellants and other sufferers of GID who cross-dress from moving in public places to reach their respective places of work.

The appellants submit that section 66 has the inevitable effect of rendering their right to livelihood/work illusory, for they will never be able to leave their homes, cross-dressed, to go to their respective places of work without being exposed to being arrested and punished under section 66. Section 66 is therefore inconsistent with Art. 5(1).

Whether section 66 contravenes Art. 8(1) of the Federal Constitution

Article 8(1) of the Federal Constitution guarantees equality before the law and equal protection of the law.

In the present appeal, the object of section 66 is to prohibit all male Muslims from cross-dressing or appearing as a woman in a public place.

But the appellants are male Muslims suffering from Gender Identity Disorder (GID), where the desire to dress as a female and to be recognized as a female is part of the said medical condition; and that there is no scientifically proven pharmacological treatment or psychological therapy for such medical condition.

In this appeal, we accept the appellants' argument that they, as male Muslims suffering from GID, are in a different situation as compared to normal male Muslims. They and the normal male Muslims are not under like circumstances and are thus unequals. Being unequals, the appellants should not be treated similarly as the normal male Muslims. Yet section 66 provides for equal treatment. It does not provide for any exception for sufferers of GID like the appellants. The State, although does not dispute the existence of sufferers of GID among male Muslims such as the appellants, yet does not explain for such a serious legislative omission. In other words, the State and the impugned section simply ignore GID sufferers such as the appellants, and unfairly subject them to the enforcement of the law. As a consequence, section 66 places the GID sufferers in an untenable and horrible situation. They could not dress in public in the way that is natural to them. They will commit the crime of offending section 66 the very moment they leave their homes to attend to the basic needs of life, to earn a living, or to socialize; and be liable to arrest, detention and prosecution. This is degrading, oppressive and inhuman. Thus the inclusion of persons suffering from GID in the section 66 prohibition discriminates against them. Therefore, section 66 is inconsistent with Art. 8(1) of the Federal Constitution as it is

discriminatory and oppressive, and denies the appellants the equal protection of the law.

The Indian Supreme Court has in a number of cases laid down the proposition that Art. 14 of the Indian Constitution (our Art. 8(1)) guarantees that unequal objects, transactions or persons should not be treated equally. Just as a difference in treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequals, that is to say, are differently placed, are treated similarly: ***Venkateshwara Theatre v State of Andra Pradesh and Ors*** [1993] 3 SCR 616 at p 637A.

Section 66 is therefore unconstitutional as it offends Art. 8(1) of the Federal Constitution, and is therefore void.

Whether section 66 contravenes Art. 8(2) of the Federal Constitution

Art. 8(2) of the Federal Constitution states that in any law there shall be no discrimination against citizens on the ground of gender.

It is submitted by the learned counsel for the appellants that section 66 is inconsistent with Art. 8(2). The appellants are male Muslims. Section 66 only

prohibits male Muslims from cross-dressing or from posing as a woman in public. But this section does not prohibit female Muslims from cross-dressing as a man or from posing as a man. It is argued that section 66 thus subjects male Muslim persons like the appellants to an unfavourable bias vis-à-vis female Muslim persons. Therefore, section 66 is discriminatory on the ground of gender, and is inconsistent with Art. 8(2).

With respect, we find that there is merit in this argument. We therefore rule that section 66 also violates Art. 8(2) of the Federal Constitution □ and is void.

With respect, we are unable to accept the argument of Encik Iskandar Dewa, the learned State Legal Adviser of Negeri Sembilan, that section 66 is □personal law□ for the purpose of Clause (5) of Art. 8. This Clause (5) of Art. 8 permits the making of personal laws that discriminate on account of gender or other factors that are enumerated in Clause (2) of Art. 8. It must be appreciated that section 66 is not enacted pursuant to the particular sub-item of Item 1 of List II of the Ninth Schedule that refers to personal law:

... Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;

Section 66 is in fact enacted pursuant to that particular sub-item of Item 1 of List II that states □

... creation and punishment of offences by persons professing the religion of Islam against precepts of that religion ...

Whether section 66 is inconsistent with Art. 9(2) of the Federal Constitution

Article 9(2) of the Federal Constitution guarantees freedom of movement within the Federation.

Section 66 is explicit in criminalizing any Muslim man who in any public place wears a woman's attire or poses as a woman.

Thus, section 66 cannot be said to merely *restrict* the appellants' freedom of movement. The impact of section 66 is more severe than that: it has the effect of *denying* the appellants and sufferers of GID of the right to move

freely in public places. In effect, the appellants and other Muslim sufferers of GID will never be able to leave their homes and move freely in the State of Negeri Sembilan without being exposed to being arrested and punished under section 66. In other words, section 66 *denies* the appellants and other male Muslim sufferers of GID of their right to freedom of movement.

As such, we accept the argument that section 66 is inconsistent with Art. 9(2) of the Federal Constitution.

However, even if we were to regard section 66 as a *restriction* and not as a *denial* of the right to move freely within the country, still, such restriction, according to judicial authorities (see ***Sivarasa Rasiah***; ***Dr. Mohd Nasir Hashim*** and ***Muhammad Hilman***), must be subject to the test of reasonableness. However, we hold that section 66 is an unreasonable restriction of the appellants' right to freedom of movement and hence unconstitutional as being inconsistent with Art. 9(2) of the Federal Constitution.

Whether section 66 is in breach of Art. 10(2) of the Federal Constitution

Art. 10(1)(a) of the Federal Constitution guarantees freedom of expression.

A person's dress, attire or articles of clothing are a form of expression, which in our view, is guaranteed under Art. 10(1)(a).

Professor Shad Saleem Faruqi in his book **Document of Destiny, the Constitution of the Federation of Malaysia**, expresses the view that even "symbolic speech" like the manner of one's dressing and grooming can be treated as part of one's freedom of expression.

We find support for the above view from the landmark American Supreme Court case of ***Tinker v Des Moines Independent Community School District*** 393 U.S. 503 (1969) [IAP(2), Tab 73]. In ***Tinker***, it was held that a school regulation which prohibited students from wearing black armbands to silently protest against the United State's Government's policy in Vietnam was violative of the First Amendment to the United States Constitution, which guaranteed free speech: (pg 513 - 514)

Section 66 directly affects the appellants' right to freedom of expression, in that they are prohibited from wearing the attire and articles of clothing of their choice.

Art. 10(2)(a) states that only Parliament may restrict freedom of expression in limited situations; and so long as such restrictions are reasonable.

The State Legislative Assemblies in Malaysia (and this includes the State legislature of Negeri Sembilan) have no power to restrict freedom of speech and expression. Only Parliament has such power. This is confirmed by the Supreme Court in *Dewan Undangan Negeri Kelantan & Anor. v Nordin Salleh & Anor* [1992] 1 CLJ 72 (Rep) at 82.

Section 66 is a State law that criminalizes any male Muslim who wears a woman's attire or who poses as a woman in a public place. Hence, section 66 is unconstitutional.

Moreover, any restriction on freedom of expression must be reasonable (see *Sivarasa Rasiah; Dr. Mohd Nasir Hashim and Muhammad Hilman*). Clearly, the restriction imposed on the appellants and other GID sufferers by section 66 is unreasonable. Thus, also from the aspect of reasonableness, section 66 is unconstitutional.

National Legal Services Authority v Union of India and others

We accept the submission of learned counsel for the appellants that the issues in the Indian Supreme Court case of ***National Legal Services Authority v Union of India and others***, Writ Petition (Civil) No. 400 of 2012 (decided on 15-4-2014) are directly on point with most of the issues herein. On 15-4-2014, the Indian Supreme Court in ***National Legal Services Authority v Union of India and others***, Writ Petition (Civil) No. 400 of 2012 [IAP(4), Tab 124] decided on a writ petition filed by the National Legal Services Authority on behalf of the transgender community of India (transgender community), who sought a legal declaration of their gender identity than the one assigned to them, male or female, at the time of birth; and their prayer is that non-recognition of their gender identity violates Art. 14 (our Art. 8(1)) and Art. 21 (our Art. 5(1)) of the Constitution of India (at [2]).

In this case cited the Indian Supreme Court begins by defining transgenders as [persons whose gender identity, gender expression or behavior does not conform to their biological sex] (at [11]). The Supreme Court considers the nature of [gender identity] as being [a person's intrinsic sense of being male, female or transgender or transsexual person] (at [19]). The Court explores a

myriad of international human rights conventions and norms (at [21] □[24]), case laws on transsexuals, and legislation in other countries on transgenders (at [35] □[42]) and rules as follows:

□ any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions □ ..of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee (at [53]);

The Court then considers the stigmatization and discrimination faced by transgenders in society (at [55]) before finding that □

(a) the word "sex" in Art. 15 (our Art. 8(2)) of the Indian Constitution includes "gender identity" (at [59]);

(b) the guarantee under Art. 19(1)(a) (our Art. 10(1)(a)) of the Indian Constitution includes the right to expression of one's gender through dress, and that "[n]o restriction can be placed on one's personal appearance or choice of dressing" ..□ (at [62] □[66]); and

(c) Art. 21 (our Art. 5(1)) protects the dignity of human life and one's right to privacy, and that [r]ecognition of one's gender identity lies at the heart of the fundamental right to dignity (at [67] □ [68]).

The Indian Supreme Court, in granting the appropriate directions (at [129]), said:

discrimination on the basis of ...gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution. (at [77]).

In this appeal, we are inclined to adopt the Indian Supreme Court's decision in this case that we have cited.

The learned High Court Judge's Grounds of Judgment

At paragraph 19 of her grounds of Judgment, the learned Judge erroneously speculates as follows:

Sek. 66 ..adalah bagi mengelakkan kesan negative kepada masyarakat iaitu mengelakkan perbuatan homoseksual dan lesbian yang menjadi punca merebaknya HIV.

At paragraph 22 of her grounds of judgment the learned Judge makes the further disturbing remarks. She said section 66 was enacted □

digubal untuk digunapakai kepada pemohon-pemohon bagi mencegah kemudaran yang lebih besar. Apabila transeksual berpakaian wanita tetapi secara biology adalah lelaki dan mempunyai kelamin lelaki dan oleh kerana mempunyai nafsu, mereka akan terjebak dalam hubungan homoseksual, satu punca HIV (at [22]).

In our judgment, the above remarks and findings of the learned High Court Judge, with respect, are unsupported by, and contrary to, evidence and is tainted by unscientific personal feelings or personal prejudice.

Whilst on our disturbing observation about prejudice, perhaps it is relevant to highlight here the Malaysian Government's 2010 UN General Assembly (UNGASS) Country Progress Report on HIV/AIDs states:-

(R/P 2(4), p. 667) *“Transgendered person or transsexuals are labelled as sexual deviants and often shunned by society in Malaysia. As a result of such stigmatization and discrimination, the majority of those in this community are unable to obtain employment and thus end up doing sex work”.*

In the present case, we note with much disquiet that the learned Judge seemed particularly transfixed with *hubungan homoseksual* in her reasoning. We wish to stress here that such reasoning is without basis and is grossly unfair to the appellants and other male Muslim sufferers of GID. The present case has absolutely nothing to do with homosexuality. As what we have said earlier, this case is about male Muslim persons with a medical condition called Gender Identity Disorder (GID). But, unfortunately, there was a complete failure on the part of the learned Judge to appreciate the unrebutted medical evidence before her.

In paragraph 24 of the grounds of judgment the learned High Court Judge concludes that □

Falsafah Peruntukkan Sek. 66 adalah untuk mencegah kemudaratan yang lebih besar kepada masyarakat, maka ianya mengatasi kepentingan peribadi atau kebebasan peribadi tertuduh .

With great respect, we accept the submission of the learned counsel of the appellants that such a conclusion renders constitutional adjudication and the role of the Judiciary as protectors of the Constitution illusory. As well put by Mr. Aston Paiva □

The Constitution exists precisely so that the minority cannot be subject to the tyranny of the majority.

Whether male Muslim GID sufferers are persons of unsound mind

With respect, we are unable to accept the submission of Encik Iskandar Ali, the learned State Legal Advisor of Negeri Sembilan, that section 66 is not prejudicial to the appellants as they are persons of unsound mind and hence entitled to the defence accorded by section 11 of the Syariah Criminal Enactment 1992 (Negeri Sembilan) the wordings of which are similar to section 84 of the Penal Code. Our short answer to this is that in the absence of medical evidence it is absurd and insulting to suggest that the appellants and other transgenders are persons of unsound mind.

Conclusion

We hold that section 66 is invalid as being unconstitutional. It is inconsistent with Arts. 5(1), Art. 8(1) and (2), Art. 9(2), and Art. 10(1)(a) of the Federal Constitution.

The appeals are allowed.

We, therefore, grant the declaration sought in prayer B (1) of the Judicial Review application but in the following terms: that section 66 of the Syariah Criminal Enactment 1992 (Enactment 4 of 1992) of Negeri Sembilan is inconsistent with Art. 5(1), Art. 8(1) and (2), Art. 9(2), and Art. 10(1)(a); and is therefore void.

(Appellants' counsel not asking for costs.)

Each party to bear own costs.

[Appeal allowed; application for judicial review granted; costs to the appellants.]

□ t.t□

(Dato□Mohd Hishamudin Yunus)

Judge, Court of Appeal

Palace of Justice

Putrajaya

Date of decision and brief grounds of judgment: 7 November 2014

Aston Paiva and Fahri Azzat (Messrs Kanesalingam & Co.) for the appellants

Iskandar Ali bin Dewa (State Legal Adviser, Negeri Sembilan) and

Muhammad Fairuz Iskandar (Asst. State Legal Adviser, Negeri Sembilan

(State Legal Adviser's Office, Negeri Sembilan) for the respondents

Suzana Atan, Senior Federal Counsel, for the Attorney-General's Chambers,

as amicus curiae

Farez Jinnah for the Bar Council, as amicus curiae

Nizam Bashir for Human Rights Watch, as amicus curiae

The following are on watching briefs:

PS Ranjan (Malaysian Mental Health Association and Pertubuhan Wanita dan Kesihatan)

Honey Tan Lay Ean (Malaysian Aids Council; PT Foundation Bhd; Women's Aid Organisation (WAO); SIS Forum Bhd-Sisters in Islam; All Women's Action Society (AWAM); Persatuan Kesedaran Komuniti Selangor (EMPOWER)

New Sin Yew (Malaysian Centre for Constitutionalism and Human Rights)

Criminal Appeal No. 366 of 2018

Shafin Jahan v. Asokan K.M.

2018 SCC OnLine SC 343

In the Supreme Court of India

CRIMINAL APPELLATE JURISDICTION

(BEFORE DIPAK MISRA, C.J. AND A.M. KHANWILKAR AND D.Y. CHANDRACHUD, JJ.)

Shafin Jahan Appellant(s)

v.

Asokan K.M. & Ors. Respondent(s)

Criminal Appeal No. 366 of 2018

[Arising out of S.L.P. (Cri.) No. 5777 of 2017]

Decided on April 9, 2018

The Judgment of the Court was delivered by

DIPAK MISRA, C.J. [for himself and A.M. Khanwilkar, J.]:— Rainbow is described by some as the autograph of the Almighty and lightning, albeit metaphorically, to be the expression of cruelty of otherwise equanimous "Nature". Elaborating the comparison in conceptual essentiality, it can be said that when the liberty of a person is illegally smothered and strangled and his/her choice is throttled by the State or a private person, the signature of life melts and living becomes a bare subsistence. That is fundamentally an expression of acrimony which gives indecent burial to the individuality of a person and refuses to recognize the other's identity. That is reflection of cruelty which the law does not countenance. The exposé of facts in the present case depicts that story giving it a colour of different narrative. It is different since the State that is expected to facilitate the enjoyment of legal rights of a citizen has also supported the cause of a father, an obstinate one, who has endeavoured immensely in not allowing his daughter to make her own choice in adhering to a faith and further making Everestine effort to garrotte her desire to live with the man with whom she has entered into wedlock. The thought itself is a manifestation of the idea of patriarchal autocracy and possibly self-obsession with the feeling that a female is a chattel. It is also necessary to add here that the High Court on some kind of assumption, as the impugned judgment and order would reflect, has not been appositely guided by the basic rule of the highly valued writ of habeas corpus and has annulled the marriage. And that is why the order becomes a sanctuary of errors.

2. On 08.03.2018, this Court had allowed the appeal passing the following order:—
"Leave granted.

Heard Mr. Kapil Sibal and Ms. Indira Jaising, learned senior counsel along with Mr. Haris Beeran, learned counsel for the appellant, Mr. Maninder Singh, learned Additional Solicitor General for the National Investigation Agency (NIA) and Mr. Shyam Divan, learned senior counsel along with Ms. Madhavi Divan, learned counsel for respondent No. 1.

The reasoned judgment will follow. The operative part of the order reads as follows:—

Considering the arguments advanced on both sides, in the facts of the present case, we hold that the High Court should not have annulled the marriage between appellant No. 1, Shafin Jahan and respondent No. 9, Hadiya alias Akhila Asokan, in a Habeas Corpus petition under Article 226 of the Constitution of

India. We say so because in the present appeal, by special leave, we had directed the personal presence of Hadiya alias Akhila Asokan; she appeared before this Court on 27th November, 2017, and admitted her marriage with appellant No. 1.

In view of the aforesaid, the appeal stands allowed. The judgment and order passed by the High Court is set aside. Respondent No. 9, Hadiya alias Akhila Asokan is at liberty to pursue her future endeavours according to law. We clarify that the investigations by the NIA in respect of any matter of criminality may continue in accordance with law."

3. Presently, we proceed to state the reasons.

4. The facts which are necessary to be stated are that Ms. Akhila alias Hadiya, respondent No. 9 herein, aged about 26 years at present, the only child of Sh. Asokan K.M., respondent No. 1 herein, and Smt. Ponnamma, had completed a degree in Homeopathic Medicine, BHMS (Bachelor of Homeopathic Medicine and Surgery) from Shivaraj Homeopathic Medical College, Salem in Tamil Nadu. While pursuing the said course, she was initially residing in the college hostel and later she started staying in a rented house near her college together with five other students among whom were Jaseena and Faseena, daughters of one Aboobacker. During the college holidays, Hadiya used to visit the house of Aboobacker and there was also an occasion when both Jaseena and Faseena came to reside with Hadiya at the house of Asokan, respondent No. 1 herein. On 6th December, 2015, Hadiya's paternal grandfather breathed his last. Hadiya on that day came back to her house and it is alleged that at that time, the family members and relatives of Asokan noticed some changes in her behaviour as she was showing reluctance to participate in the rituals performed in connection with the funeral of her grandfather. Thereafter, she went to Salem for her internship along with Jaseena and Faseena. Till 5th January, 2016, she was in constant touch with her family. Thereafter, on the next day, i.e., 6th January, 2016, Asokan received a telephone call from one of the friends of Hadiya informing that Hadiya had gone to the college on that day wearing a 'Pardah'. The respondent No. 1 was further informed that Hadiya was inspired by someone to change her faith.

5. Upon receiving the information, Asokan fell ill. Smt. Ponnamma, wife of Asokan, called Hadiya and informed her about the illness of her father. Jaseena and Hadiya left for Salem about 8 p.m. on 6th January, 2016 but Hadiya did not reach her father's house. Later Asokan went in search of Hadiya and came to know from one Ms. Archana that Hadiya was living at the house of Aboobacker. Thereupon, Asokan contacted Aboobacker for meeting his daughter Hadiya. Aboobacker promised Asokan that he would bring Hadiya to the house of Ms. Archana, a friend of Hadiya, but this never happened and later Asokan was informed that Hadiya had escaped from the house of Aboobacker and had run away somewhere. Disgusted and disgruntled, as he was, Asokan filed a complaint before S.P. Malapuram District, but as there was no progress made by the police in the investigation of the matter, Asokan filed a Writ Petition of Habeas Corpus before the Division Bench of the High Court of Kerala being W.P. (Criminal) No. 25 of 2016.

6. On 14.01.2016, when the case came up for admission, the Division Bench directed the Government pleader to get instructions regarding the action, if any, taken on the aforesaid complaint of Asokan. Thereafter, on 19.01.2016, when the case was taken up for further consideration, Hadiya appeared through a lawyer and filed an application for impleadment being I.A. No. 792 of 2016. The said application for impleadment was allowed and Hadiya was impleaded as a respondent. An affidavit dated 26.11.2016 was filed on her behalf stating, inter alia, the facts and circumstances under which she had left her house. The aforesaid affidavit mentioned that she had communicated to her father as well as Director General of Police by

registered letter regarding the actual state of affairs. Further, she along with one Sainaba filed Writ Petition being W.P. (C) No. 1965 of 2016 seeking protection from police harassment.

7. The Division Bench in W.P. (Criminal) No. 25 of 2016 persuaded Hadiya to go along with her father, Asokan, to her parental house but the said persuasions were all in vain as Hadiya was not willing to go with her father. The Division Bench, thereafter, interacted with Sainaba who expressed her unequivocal willingness to the Division Bench to accommodate Hadiya in "Satyasarani" institution and that Sainaba would render all necessary help to Hadiya to pursue her internship in BHMS degree course. As Hadiya had taken a stand that she wanted to join Satyasarani and she was not, in any case, willing to go back to her parental home along with Asokan, the Division Bench permitted Hadiya to stay with Sainaba at her house till she joined Satyasarani. The Division Bench thereafter adjourned the case for further hearing directing to produce proof regarding admission of Hadiya in Satyasarani.

8. The case was taken up for consideration by the Division Bench where the counsel appearing on behalf of Hadiya produced documents to show that Hadiya had got admission on 20.01.2016 in an institution, namely, 'Markazul Hidayah Sathyasarani Educational & Charitable Trust' at Karuvambram, Manjeri in Malappuram District. The counsel for Hadiya also submitted before the writ court that Hadiya was staying in the hostel of the said institution.

9. The Division Bench, vide judgment dated 25.01.2016, directed as follows:—

"8. Under the above mentioned circumstances, we are convinced that the alleged detinue is not under any illegal confinement. She is at present staying in the above said institution on her own wish and will. She is not under illegal confinement. Therefore, there exists no circumstances warranting interference for issuance of any writ of Habeas Corpus. Hence the original petition is hereby disposed of by recording the fact that the alleged detinue is staying in the above said institution on her own free will. It will be left open to the petitioner and her family members to make visit to her at the above institution, subject to regulations if any regarding visiting time."

10. In view of the aforesaid order, the writ petition filed by Hadiya was withdrawn.

11. When the matter stood thus, the 1st respondent filed a second Writ Petition (Criminal) No. 297 of 2016 alleging that his daughter was likely to be transported out of the country and the High Court, vide interim order, directed the respondent to keep her under surveillance and to ensure that she was not taken out of the country without further orders of the Court. The averments made by the father in the writ petition need not be stated in detail. Suffice it to say that Hadiya alias Akhila categorically declined to go with her parents and stated in the affidavit filed by her that she was not being permitted to interact with anyone. Hadiya further stated that she wanted to reside at a place of her choice and that she had not been issued a passport and, therefore, there was no likelihood of her being taken to Syria. The High Court, considering the affidavit, passed the following order:—

"After hearing learned counsel on both sides, we are of the opinion that in the light of the finding entered by this court in the earlier round of litigation that this Court cannot compel the petitioner's daughter to go and reside with her parents and that she is not in the illegal custody of anyone, this court cannot any longer direct that the petitioner's daughter should continue to reside at Santhinikethan Hostel, Pachalam. When we asked the petitioner's daughter as to whether she is willing to appear on another day, she submitted that she will appear on the next hearing date. Learned counsel for the detinue also submitted that the detinue will be present in person on the next hearing date. We accordingly permit the detinue to reside at a place of her choice. We also record the statement of Ms. Akhila that

she proposes to reside with the seventh respondent, Smt. A.S. Sainaba, whose address is mentioned in the instant writ petition. Sri. P.K. Ibrahim, learned counsel appearing for the seventh respondent submitted that the seventh respondent will cause production of the petitioner's daughter on the next hearing date, if she proposes to reside with her. If the petitioner's daughter proposes to shift her residence and to reside elsewhere, we shall inform that fact to the Deputy Superintendent of Police, Perinthalmanna in writing and furnish her full residential address and the telephone number if any over which she can be contacted. Call on 24.10.2016. The Deputy Superintendent of Police, Perinthalmanna shall cause production of the petitioner's daughter on that day. It will be open to the parents of Ms. Akhila to meet and interact with her."

12. On the basis of the aforesaid order passed by the High Court, Hadiya was permitted to reside with the 7th respondent. On 14.11.2016, the counsel for the writ petitioner before the High Court expressed serious apprehension regarding the continued residence of his daughter in the house of the 7th respondent therein. On 19.12.2016, the High Court noted that she had not completed her course and acquired competence to practise homeopathy and, accordingly, expressed the opinion that she should complete her House Surgeoncy without delay and obtain eligibility to practice. A statement was made on her behalf that she has to complete her House Surgeoncy at the Shivaraj Homeopathic Medical College, Salem which has a hostel for women where she was willing to reside for the purpose of completing her House Surgeoncy. On the basis of the aforesaid, the High Court passed the following order:—

"We have heard the learned Senior counsel Sri. S. Sreekumar, who appears for the detinue. We have perused the affidavit dated 26.11.2016 filed by the detinue producing documents, Exts. R8(d) and R8(e). We are not prepared to rely on Ext.R8 (d) which purports to make it clear as though a registered Homeopathic Medical Practitioner has permitted the detinue to work as a trainee in Homeopathic Medicine on a remuneration of Rs. 2000/- per month for her day today expenses. We fail to understand how the detinue, who has not obtained a degree in Homeopathy can be permitted to train under him. The detinue has admittedly not completed her House Surgeoncy or obtained eligibility to practice. Therefore, it is only appropriate that she completes her House Surgeoncy without further delay and obtains eligibility to practice Homeopathic Medicine. Her Senior counsel Sri. S. Sreekumar informs us that, the detinue is desirous of completing her House Surgeoncy. However, we place on record our dissatisfaction at the continued residence of the detinue with the 7th respondent, who is a stranger. The counsel for the petitioner also expresses anxiety and concern at her continued residence with the 7th respondent. He is anxious about the safety and well being of the detinue. His anxiety and concern as the parent of an only daughter is understandable. Therefore, it is necessary that the detinue shifts her residence to a more acceptable place, without further delay. According to the learned Senior counsel Sri. S. Sreekumar, she has to complete her House Surgeoncy at the Shivaraj Homeopathic Medical College, Salem. The college has a hostel for girl students where she is willing to reside and complete her House Surgeoncy. The petitioner offers to bear the expenses for her education and stay at the Medical College Hostel. He offers to escort her to the Medical College and to admit her into the Hostel there. The detinue is also, according to the learned Senior counsel, willing to accompany her.

2. In view of the above, there shall be a direction to the detinue to appear before this Court at 10.15 a.m. on 21.12.2016. The petitioner shall also be present in person in Court on the said date. The petitioner who is stated to be in possession of the certificates of the detinue shall bring such certificates also to Court. We shall pass further orders in the matter, regarding the manner in which the detinue is to

be taken to the Medical College and admitted to the ladies hostel, on 21.12.2016.

Post on 21.12.2016.”

13. On 21.12.2016, Hadiya appeared before the High Court and a statement was made that she had entered into marriage with Shafin Jahan, the appellant herein. The High Court, at that juncture, as the order would reflect, noted that her marriage was totally an unexpected event and proceeded to ascertain the veracity of the statement made. It has recorded its displeasure as to the manner in which the entire exercise was accomplished. It passed a detailed order on 21.12.2016. The relevant part of the order reads thus:—

“This court exercising its *Parens Patriae* jurisdiction is anxious and concerned about the safety of the detinue and her well being, viewed especially in the light of the allegations made in the Writ Petition and the continued obstinance of the detinue to return to her parents. The person who is stated to have got married to the detinue has appeared before us today, for the first time. He claims to be a graduate and a person who is employed in the Gulf. It is stated that, he is desirous of taking the detinue out of the country. It was precisely the said apprehension that was expressed by her father in the proceedings before this Court on the earlier occasion. This Court has on the said occasion recorded the fact that since she was not possessed of a Passport, there was no likelihood of her being taken to Syria. The question that crops up now is whether the marriage that has been allegedly performed is not a device to transport her out of this country. We are not aware of the identity of the person who is alleged to have got married to the detinue. We are not aware of the antecedents of the said person or his family background. The address mentioned in the marriage certificate produced shows that he is from Kollam. In what manner he has come into contact with detinue and under what circumstances, the detinue has agreed to get married to a stranger like him are matters that require to be probed thoroughly. The marriage certificate shows that the marriage was performed by the Khazi at the house of the 7th respondent, Srambikal House, Puthur. Why the marriage was conducted at her house is not clear. Unless the above questions are answered, it cannot be accepted that the detinue is in safe hands. This Court exercising *Parens Patriae* jurisdiction has a duty to ensure that young girls like the detinue are not exploited or transported out of the country. Though the learned Senior Counsel has vociferously contended that the detinue is a person who has attained majority, it is necessary to bear in mind the fact that the detinue who is a female in her twenties is at a vulnerable age. As per Indian tradition, the custody of an unmarried daughter is with the parents, until she is properly married. We consider it the duty of this Court to ensure that a person under such a vulnerable state is not exposed to further danger, especially in the circumstances noticed above where even her marriage is stated to have been performed with another person, in accordance with Islamic religious rites. That too, with the connivance of the 7th respondent with whom she was permitted to reside, by this Court. 8. We place on record our absolute dissatisfaction at the manner in which the marriage if at all one has been performed, has been conducted. The 7th respondent having been a party to these proceedings had a duty to at least inform this Court of the same, in advance. This Court had relying on her credentials and assurance, permitted the detinue to accompany her and to live with her. We would have expected a reasonable litigant, which includes the detinue also who as we have noticed earlier, is represented through an eminent Senior Counsel of this Court, to have informed this Court and obtained permission from this Court before such a drastic course was undertaken. Considering the manner in which the marriage has been conducted, the secrecy surrounding the said transaction and also the hurried manner in which the whole exercise was completed, the entire episode

is shrouded in suspicion. Unless the suspicion is cleared the detinue cannot be permitted to go with the person who is seen to be accompanying her now. In view of the above, the following directions are issued.

1) The first respondent is directed to escort the detinue and to have her accommodated at the S.N.V. Sadanam Hostel, Chittoor Road, Ernakulam, until further orders. The first respondent shall ensure that she is not provided the facility of possessing or using a mobile phone. The petitioner and the mother shall be at liberty to meet her according to the rules and regulations of the hostel. No other person is permitted to meet her.

2) The first respondent shall cause an investigation to be conducted into the education, family background, antecedents and other relevant details of Sri. Shafin Jahan who is stated to be the bridegroom of the alleged marriage that is stated to have been conducted on 19.12.2016 as evidenced by the certificate dated 20.12.2016 produced before us. The first respondent shall also enquire into the circumstances surrounding the conduct of such marriage, the persons who were involved in the conduct of the same the organization that has issued the marriage certificate, as well as their antecedents. A report of such investigation shall be placed before us before the next posting date of this case. The 4th respondent shall oversee the investigation and see that all relevant details are unearthed and placed before us including any links with extremist organizations, of which allegations are made in the Writ Petition.

3) The Secretary, Othukkungal Grama Panchayat is directed not to issue the marriage certificate sought for by the applicants Shafine Jahan and Hadiya as per receipt dated 20.12.2016, without further orders from this Court. The petitioner shall bear the expenses for the accommodation of the detinue at the hostel.

4) Post on 6.1.2017."

14. Thereafter, the matter was taken up on various dates by the High Court and eventually, by the impugned judgment and order, it opined that a girl aged 24 years is weak and vulnerable and capable of being exploited in many ways and thereafter, the Court, exercising the *parens patriae* jurisdiction, observed that it was concerned with the welfare of the girl of her age. It has been further observed by the High Court that the duty is cast on it to ensure the safety of at least the girls who are brought before it and the said duty can only be discharged by ensuring that the custody of Akhila alias Hadiya should be given to her parents. The High Court further directed to the following effect:—

"She shall be cared for, permitted to complete her House Surgeoncy Course and made professionally qualified so that she would be in a position to stand independently on her own two legs. Her marriage being the most important decision in her life, can also be taken only with the active involvement of her parents. The marriage which is alleged to have been performed is a sham and is of no consequence in the eye of law. The 7th respondent and her husband had no authority or competence to act as the guardian of Ms. Akhila and to give her in marriage. Therefore, the alleged marriage is null and void. It is declared to be so."

15. The High Court also directed that a police officer of the rank of Sub-Inspector should escort Akhila alias Hadiya from the hostel to her father's house and the Superintendent of Police, Respondent No. 2 therein, should maintain surveillance over them to ensure their continued safety. That apart, the High Court issued the following directions:—

"iii) The 4th respondent shall take over the investigation of Crime No. 21 of 2016 of Perinthalmanna Police Station and shall have a comprehensive investigation conducted coordinating the investigation in Crime No. 510 of 2016 of Cherpulassery Police Station which has been registered into the forcible conversion of Ms. Athira

which is the subject matter of W.P.(Crl.) No. 235 of 2016 of this Court. The 4th respondent shall also investigate the activities of the organizations that are involved in this case of which reference has been made by us above. Such investigation shall be completed as expeditiously as possible and the persons who are found to be guilty shall be brought to the book.

iv) The 4th respondent shall conduct a full-fledged enquiry into the lapses on the part of the Investigating Officer in this case and shall, if necessary, pursue departmental proceedings against the Officer concerned."

16. Against the aforesaid order, the present appeal, by special leave, was filed by Shafin Jahan seeking permission to file the special leave which is granted by this Court.

17. This Court, vide order dated 4.8.2017, asked Mr. Maninder Singh, learned Additional Solicitor General, to accept notice on behalf of the Respondent No. 6, the National Investigating Agency (NIA). Thereafter, various orders were passed by this Court with regard to investigation which are not necessary to narrate. It is worthy to mention that on 30.10.2017, this Court directed the 1st respondent to produce his daughter before this Court on 27.11.2017. On the date fixed, Hadiya was produced before this Court and a prayer was made to interact with Hadiya in camera and not in open Court but repelling the said submission, the following order was passed:—

"After due deliberation, we thought it appropriate to interact with Akhila @ Hadiya and we have accordingly interacted with her in Court. We were told that though she can communicate in English, she may not be able to effectively articulate in that language. Hence, we requested Mr. V. Giri, learned senior counsel, who also represents the State of Kerala to assist in translating the questions posed to her in Court and the answers given by her.

The range of questions that we posed basically pertained to her qualifications, interest in studies, perception of life and what she intends to do in future. In response to our queries, she responded by stating that she has passed Class X from Higher Secondary School in K.V. Puram, Vaikom in Kottayam District and thereafter she was prosecuting her BHMS course in Shivaraj Homeopathy Medical College in Salem in the State of Tamil Nadu. She has also stated that she intends to continue her internship/housemanship which she had left because of certain reasons and her ambition is to become a full-fledged homeopathic doctor. She has expressed her desire to stay in the hostel and complete the course in the said college, if a seat is made available.

In the above view, we direct, as desired by her, that she be taken to Salem so as to enable her to pursue her internship/housemanship. We also direct the college to admit her and to allow the facility of a room or a shared room in the hostel as per practice to enable her to continue her internship/housemanship afresh. Be it stated, she herself has stated that the duration of the internship/housemanship is likely to be for 11 months. If any formality is to be complied with, the college shall communicate with the university and the university shall accede to the same. Our directions are to be followed in letter and spirit by all concerned. Needless to say, when she stays in the hostel, she will be treated like any other student and will be guided by the hostel rules. If necessary, the expenses for pursuing the course and for the hostel shall be borne by the State of Kerala. The Dean of the College shall approach this Court if there is any problem with regard to any aspect. 'Any problem' does not mean, admission in the hostel or continuance in the course.

We direct the State of Kerala to make all necessary arrangements so that she can travel to Salem at the earliest. She has made a request that she should be accompanied by policewomen in plainclothes. The State shall attend to the prayer

appropriately. If any security problem arises, the State of Tamil Nadu shall make local arrangements for the same. We have been told that she is presently staying in Kerala Bhawan at New Delhi. Mr. V. Giri, learned senior counsel assures this Court that she shall be permitted to stay in Kerala Bhawan till she moves to Salem.

We make it clear that the NIA investigation shall continue in accordance with law."

18. The aforesaid adumbration calls for restatement of the law pertaining to writ of habeas corpus which has always been considered as 'a great constitutional privilege' or 'the first security of civil liberty'. The writ is meant to provide an expeditious and effective remedy against illegal detention, for such detention affects the liberty and freedom of the person who is in confinement.

19. In *P. Ramanatha Aiyar's Law Lexicon* (1997 Edn.), while defining "habeas corpus", apart from other aspects, the following has been stated:—

"The ancient prerogative writ of habeas corpus takes its name from the two mandatory words habeas corpus, which it contained at the time when it, in common with all forms of legal process, was framed in Latin. The general purpose of these writs, as their name indicates, was to obtain the production of an individual."

20. In *Cox v. Hakes*¹, Lord Halsbury observed as under:—

"For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed."

21. In *Secretary of State for Home Affairs v. O'Brien*², it has been observed that:—

"... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by the courts of law as a check upon the illegal usurpation of power by the executive at the cost of the liege."

22. In *Ranjit Singh v. State of Pepsu (now Punjab)*³, after referring to *Greene v. Secy. of States for Home Affairs*⁴, this Court ruled:—

"4. ... the whole object of proceedings for a writ of habeas corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible."

23. The Bench quoted Lord Wright who, in *Greene's case*, had stated:—

"... The incalculable value of habeas corpus is that it enables the immediate determination of the right to the applicant's freedom."

24. In *Kanu Sanyal v. District Magistrate, Darjeeling*⁵, a Constitution Bench, after adverting to the brief history of the writ of habeas corpus, opined that it is essentially a procedural writ that deals with the machinery of justice and not a substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The Court further elaborated:—

"... The writ of habeas corpus is one of the most ancient writs known to the common law of England. It is a writ of immemorial antiquity and the first threads of its origin are woven deeply within the "seamless web of history" and they are

concealed and perhaps untraceable among countless incidents that constituted the total historical pattern.”

25. Tracing the history, the Court proceeded to explicate:—

“The writ of habeas corpus cum causa made its appearance in the early years of the fourteenth century. It not merely commanded the Sheriff to “have the body” of the person therein mentioned like its predecessor but added the words “with the cause of the arrest and detention”. The person who had the custody of a prisoner was required by this writ to produce him before the Court together with the ground for the detention. The writ thus became a means of testing the legality of the detention and in this form it may be regarded as the immediate ancestor of the modern writ of habeas corpus. The writ of habeas corpus cum causa was utilised by the common law courts during the fifteenth century as an accompaniment of the writs of certiorari and privilege to assert their jurisdiction against the local and franchise courts.”

26. In *Ware v. Sanders*⁶, a reference was made to the **Law of Habeas Corpus** by James A Scott and Charles C. Roe of the Chicago Bar (T.H. Flood & Company, Publishers, Chicago, Illinois, 1923) where the authors have dealt with the aspect of Habeas Corpus. It reads as under:—

“A writ of habeas corpus is a writ of right of very ancient origin, and the preservation of its benefit is a matter of the highest importance to the people, and the regulations provided for its employment against an alleged unlawful restraint are not to be construed or applied with over technical nicety, and when ambiguous or doubtful, should be interpreted liberally to promote the effectiveness of the proceeding.”

(See *Ummu Sabeena v. State of Kerala*⁷)

27. In *Ummu Sabeena*, the Court further ruled that the principle of habeas corpus has been incorporated in our constitutional law and in a democratic republic like India where judges function under a written Constitution and which has a chapter of fundamental rights to protect individual liberty, the judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India; and the same exercise of power can be done in the most effective manner by issuing a writ of habeas corpus.

28. Thus, the pivotal purpose of the said writ is to see that no one is deprived of his/her liberty without sanction of law. It is the primary duty of the State to see that the said right is not sullied in any manner whatsoever and its sanctity is not affected by any kind of subterfuge. The role of the Court is to see that the detenu is produced before it, find out about his/her independent choice and see to it that the person is released from illegal restraint. The issue will be a different one when the detention is not illegal. What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees. It is so as the expression of choice is a fundamental right under Articles 19 and 21 of the Constitution, if the said choice does not transgress any valid legal framework. Once that aspect is clear, the enquiry and determination have to come to an end.

29. In the instant case, the High Court, as is noticeable from the impugned verdict, has been erroneously guided by some kind of social phenomenon that was frescoed before it. The writ court has taken exception to the marriage of the respondent No. 9 herein with the appellant. It felt perturbed. As we see, there was nothing to be taken exception to. Initially, Hadiya had declined to go with her father and expressed her desire to stay with the respondent No. 7 before the High Court and in the first writ it had so directed. The adamant attitude of the father, possibly impelled by obsessive parental love, compelled him to knock at the doors of the High Court in another

Habeas Corpus petition whereupon the High Court directed the production of Hadiya who appeared on the given date along with the appellant herein whom the High Court calls a stranger. But Hadiya would insist that she had entered into marriage with him. True it is, she had gone with the respondent No. 7 before the High Court but that does not mean and can never mean that she, as a major, could not enter into a marital relationship. But, the High Court unwarrantably took exception to the same forgetting that parental love or concern cannot be allowed to fluster the right of choice of an adult in choosing a man to whom she gets married. And, that is where the error has crept in. The High Court should have, after an interaction as regards her choice, directed that she was free to go where she wished to.

30. The High Court further erred by reflecting upon the social radicalization and certain other aspects. In a writ of habeas corpus, especially in the instant case, it was absolutely unnecessary. If there was any criminality in any sphere, it is for the law enforcing agency to do the needful but as long as the detenué has not been booked under law to justify the detention which is under challenge, the obligation of the Court is to exercise the celebrated writ that breathes life into our constitutional guarantee of freedom. The approach of the High Court on the said score is wholly fallacious.

31. The High Court has been swayed away by the strategy, as it thought, adopted by the respondent No. 7 before it in connivance with the present appellant and others to move Hadiya out of the country. That is not within the ambit of the writ of Habeas Corpus. The future activity, if any, is required to be governed and controlled by the State in accordance with law. The apprehension was not within the arena of jurisdiction regard being had to the lis before it.

32. Another aspect which calls for invalidating the order of the High Court is the situation in which it has invoked the *parens patriae* doctrine. *Parens Patriae* in Latin means "parent of the nation". In law, it refers to the power of the State to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection. "The *parens patriae* jurisdiction is sometimes spoken of as 'supervisory'"⁸.

33. The doctrine of *Parens Patriae* has its origin in the United Kingdom in the 13th century. It implies that the King as the guardian of the nation is under obligation to look after the interest of those who are unable to look after themselves. Lindley L.J. in *Thomasset v. Thomasset*⁹ pointed out that in the exercise of the *Parens Patriae* jurisdiction, "the rights of fathers and legal guardians were always respected, but controlled to an extent unknown at common law by considering the real welfare." The duty of the King in feudal times to act as *Parens Patriae* has been taken over in modern times by the State.

34. *Black's Law Dictionary* defines 'Parens Patriae' as:—

- "1. The State regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.
2. A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, especially on behalf of someone who is under a legal disability to prosecute the suit. The State ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit."

35. In *Charan Lal Sahu v. Union of India*¹⁰, the Constitution Bench, while delving upon the concept of *parens patriae*, stated:—

"35. ... In the "Words and Phrases" Permanent Edition, Vol. 33 at page 99, it is stated that *parens patriae* is the inherent power and authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words *parens patriae* meaning thereby 'the father of the country', were applied originally to the King and are used

to designate the State referring to its sovereign power of guardianship over persons under disability. (emphasis supplied) Parens patriae jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term parens patriae differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the parens patriae theory is the obligation of the State to protect and takes into custody the rights and the privileges of its citizens for discharging its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. ..."

36. In *Anuj Garg v. Hotel Association of India*¹¹, a two-Judge Bench, while dealing with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or intoxicating drug is consumed by the public, opined thus in the context of the parens patriae power of the State:—

"29. One important justification to Section 30 of the Act is parens patriae power of State. It is a considered fact that use of parens patriae power is not entirely beyond the pale of judicial scrutiny.

30. Parens patriae power has only been able to gain definitive legalist orientation as it shifted its underpinning from being merely moralist to a more objective grounding i.e. utility. The subject-matter of the parens patriae power can be adjudged on two counts:

- (i) in terms of its necessity, and
- (ii) assessment of any trade-off or adverse impact, if any.

This inquiry gives the doctrine an objective orientation and therefore prevents it from falling foul of due process challenge. (See *City of Cleburne v. Cleburne Living Center*¹²)"

37. Analysing further, the Court ruled that the parens patriae power is subject to constitutional challenge on the ground of right to privacy also. It took note of the fact that young men and women know what would be the best offer for them in the service sector and in the age of internet, they would know all pros and cons of a profession. The Court proceeded to state:—

"31. ... It is their life; subject to constitutional, statutory and social interdicts—a citizen of India should be allowed to live her life on her own terms."

38. Emphasizing on the right of self-determination, the Court held:—

"34. The fundamental tension between autonomy and security is difficult to resolve. It is also a tricky jurisprudential issue. Right to self-determination is an important offshoot of gender justice discourse. At the same time, security and protection to carry out such choice or option specifically, and state of violence-free being generally is another tenet of the same movement. In fact, the latter is apparently a more basic value in comparison to right to options in the feminist matrix."

39. In *Aruna Ramachandra Shanbaug v. Union of India*¹³, the Court, after dealing with the decision in *State of Kerala v. N.M. Thomas*¹⁴ wherein it has been stated by Mathew, J. that "the Court also is 'State' within the meaning of Article 12 (of the Constitution) ...", opined:—

"130. In our opinion, in the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as parens

patriae, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight."

40. Constitutional Courts in this country exercise *parens patriae* jurisdiction in matters of child custody treating the welfare of the child as the paramount concern. There are situations when the Court can invoke the *parens patriae* principle and the same is required to be invoked only in exceptional situations. We may like to give some examples. For example, where a person is mentally ill and is produced before the court in a writ of habeas corpus, the court may invoke the aforesaid doctrine. On certain other occasions, when a girl who is not a major has eloped with a person and she is produced at the behest of habeas corpus filed by her parents and she expresses fear of life in the custody of her parents, the court may exercise the jurisdiction to send her to an appropriate home meant to give shelter to women where her interest can be best taken care of till she becomes a major.

41. In *Heller v. Doe*¹⁵, Justice Kennedy, speaking for the U.S. Supreme Court, observed:—

"The State has a legitimate interest under its *Parens Patriae* powers in providing care to its citizens who are unable to care for themselves."

42. The Supreme Court of Canada in *E. (Mrs.) v. Eve*¹⁶ observed thus with regard to the doctrine of *Parens Patriae*:—

"The *Parens Patriae* jurisdiction for the care of the mentally incompetent is vested in the provincial superior courts. Its exercise is founded on necessity. The need to act for the protection of those who cannot care for themselves. The jurisdiction is broad. Its scope cannot be defined. It applies to many and varied situations, and a court can act not only if injury has occurred but also if it is apprehended. The jurisdiction is carefully guarded and the courts will not assume that it has been removed by legislation.

While the scope of the *parens patriae* jurisdiction is unlimited, the jurisdiction must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not for the benefit of others. It must at all times be exercised with great caution, a caution that must increase with the seriousness of the matter. This is particularly so in cases where a court might be tempted to act because failure to act would risk imposing an obviously heavy burden on another person."

43. The High Court of Australia in *Secretary, Department of Health and Community Service v. J.W.B. and S.M.B.*¹⁷, speaking through Mason C.J., Dawson, Toohey and Gaudron JJ., has made the following observations with regard to the doctrine:—

"71. No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the *Parens Patriae* jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind."

44. Deane J. in the same case stated the following:—

"4... Indeed, in a modern context, it is preferable to refer to the traditional *Parens Patriae* jurisdiction as "the welfare jurisdiction" and to the "first and paramount consideration" which underlies its exercise as "the welfare principle"."

45. Recently, the Supreme Court of New South Wales, in the case of *AC v. OC (a minor)*¹⁸, has observed:—

"36. That jurisdiction, protective of those who are not able to take care of

themselves, embraces (via different historical routes) minors, the mentally ill and those who, though not mentally ill, are unable to manage their own affairs: *Re Eve* [1986] 2 SCR 388 at 407-417; Court of Australia in *Secretary, Department of Health and Community Services v. JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258; *PB v. BB* [2013] NSWSC 1223 at [7]-[8], [40]-[42], [57]-[58] and [64]-[65].

37. A key concept in the exercise of that jurisdiction is that it must be exercised, both in what is done and what is left undone, for the benefit, and in the best interest, of the person (such as a minor) in need of protection."

46. Thus, the Constitutional Courts may also act as *Parens Patriae* so as to meet the ends of justice. But the said exercise of power is not without limitation. The courts cannot in every and any case invoke the *Parens Patriae* doctrine. The said doctrine has to be invoked only in exceptional cases where the parties before it are either mentally incompetent or have not come of age and it is proved to the satisfaction of the court that the said parties have either no parent/legal guardian or have an abusive or negligent parent/legal guardian.

47. Mr. Shyam Divan, learned senior counsel for the first respondent, has submitted that the said doctrine has been expanded by the England and Wales Court of Appeal in a case *DL v. A Local Authority*¹⁹. The case was in the context of "elder abuse" wherein a man in his 50s behaved aggressively towards his parents, physically and verbally, controlling access to visitors and seeking to coerce his father into moving into a care home against his wishes. While it was assumed that the elderly parents did have capacity within the meaning of the Mental Capacity Act, 2005 in that neither was subject to "an impairment of, or a disturbance in the functioning of the mind or brain", it was found that the interference with the process of their decision making arose from undue influence and duress inflicted by their son. The Court of Appeal referred to the judgment in *Re: SA (Vulnerable Adult with Capacity : Marriage)*²⁰ to find that the *parens patriae* jurisdiction of the High Court existed in relation to "vulnerable if 'capacitous' adults". The cited decision of the England and Wales High Court (Family Division) affirmed the existence of a "great safety net" of the inherent jurisdiction in relation to all vulnerable adults. The term "great safety net" was coined by Lord Donaldson in the Court of Appeal judgment which was later quoted with approval by the House of Lords in *In Re F (Mental Patient: Sterilisation)*²¹. In paragraph 79 of *Re: SA (Vulnerable Adult with Capacity : Marriage)*, Justice Munby observes:—

"The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors."

48. In relation to Article 8 of the European Convention on Human Rights (ECHR), Justice Munby observes in paragraph 66:—

"In terms of the ECHR, the use of the inherent jurisdiction in this context is compatible with Article 8 in just the same manner as the MCA 2005 is compatible. Any interference with the right to respect for an individual's private or family life is justified to protect his health and or to protect his right to enjoy his Article 8 rights as he may choose without the undue influence (or other adverse intervention) of a third party. Any orders made by the court in a particular case must be only those which are necessary and proportionate to the facts of that case, again in like

manner to the approach under the MCA 2005.”

49. However, in paragraph 76, he qualifies the above principle with the following comment:—

“It is, of course, of the essence of humanity that adults are entitled to be eccentric, entitled to be unorthodox, entitled to be obstinate, entitled to be irrational. Many are.”

50. The judgment of *Re: SA (Vulnerable Adult with Capacity : Marriage)* (supra) authored by Justice Munby and cited in the above Court of Appeal case was in the context of the exercise of *parens patriae* to protect an eighteen year old girl from the risk of an unsuitable arranged marriage on the ground that although the girl did not lack capacity, yet she was undoubtedly a “vulnerable adult”.

51. Interestingly, in another case, namely, *A Local Authority v. HB, MB, ML and BL (By their Children's Guardian)*²², the High Court's inherent jurisdiction was invoked to protect children who were allegedly going to be taken by their mother to Syria where they were at a risk of radicalization. Although the High Court dismissed the applications on facts for want of evidence, yet it made certain observations regarding extremism and radicalization.

52. Mr. Divan has drawn our attention to the authority in *A Local Authority v. Y*²³ wherein the High Court (Family Division) invoked its inherent jurisdiction to protect a young person, the defendant Y, from radicalization.

53. Relying upon the aforesaid decisions, he emphasized on the concept that when the major is a vulnerable adult, the High Court under Article 226 of the Constitution of India can exercise the *parens patriae* doctrine which has been exercised in this case. The aforesaid judgments, in our considered opinion, are not applicable to the facts of the present case. We say so without any hesitation as we have interacted with the respondent No. 9 and there is nothing to suggest that she suffers from any kind of mental incapacity or vulnerability. She was absolutely categorical in her submissions and unequivocal in the expression of her choice.

54. It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the realization of a right is more important than the conferment of the right. Such actualization indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.

55. Non-acceptance of her choice would simply mean creating discomfort to the constitutional right by a Constitutional Court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripodal value of liberty should allow an individual to write his/her script. The individual signature is the insignia of the concept.

56. In the case at hand, the father in his own stand and perception may feel that there has been enormous transgression of his right to protect the interest of his

daughter but his view point or position cannot be allowed to curtail the fundamental rights of his daughter who, out of her own volition, married the appellant. Therefore, the High Court has completely erred by taking upon itself the burden of annulling the marriage between the appellant and the respondent no. 9 when both stood embedded to their vow of matrimony.

57. Resultantly, we allow the appeal and set aside the impugned order. However, as stated in the order dated 08.03.2018, the investigation by the NIA in respect of any matter of criminality may continue in accordance with law. The investigation should not encroach upon their marital status.

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL No 366 OF 2018
[Arising out of SLP (Crl) No. 5777 of 2017]

Shafin Jahan.....Appellant

v.

Asokan K.M. and Others.....Respondents

JUDGMENT

D.Y. CHANDRACHUD, J.:— While re-affirming the conclusions set out in the operative order, I agree with the erudite judgment of the learned Chief Justice. I have added my own thoughts on the judicial parchment to express my anguish with the grievous miscarriage of justice which took place in the present case and to formulate principles in the expectation that such an injustice shall not again be visited either on Hadiya or any other citizen. The High Court of Kerala has committed an error of jurisdiction. But what to my mind, is disconcerting, is the manner in which the liberty and dignity of a citizen have been subjected to judicial affront. The months which Hadiya lost, placed in the custody of her father and against her will cannot be brought back. The reason for this concurring judgment is that it is the duty of this Court, in the exercise of its constitutional functions to formulate principles in order to ensure that the valued rights of citizens are not subjugated at the altar of a paternalistic social structure.

58. Asokan, the father of Akhila *alias* Hadiya moved a habeas corpus petition before the High Court of Kerala. His apprehension was that his daughter was likely to be transported out of the country. The Kerala High Court was informed during the course of the hearing that she had married Shafin Jahan. The High Court allowed the petition for habeas corpus and directed that Hadiya shall be escorted from a hostel in which she resided in Ernakulam to the house of her father holding that:

“A girl aged 24 years is weak and vulnerable, capable of being exploited in many ways. This Court exercising *parens patriae* jurisdiction is concerned with the welfare of a girl of her age. The duty cast on this Court to ensure the safety of at least the girls who are brought before it can be discharged only by ensuring that Ms. Akhila is in safe hands.”

59. With these directions, the Division Bench of the Kerala High Court declared that the marriage between Hadiya and Shafin Jahan is null and void and ordered “a comprehensive investigation” by the police. Hadiya continued to remain, against her will, in compulsive confinement at the home of her father in pursuance of the directions of the Kerala High Court. On 27 November 2017, this Court interacted with Hadiya and noted that she desires to pursue and complete her studies as a student of Homeopathy at a college where she was a student, in Salem. Accepting her request, this Court directed the authorities of the State to permit her to travel to Salem in order to enable her to pursue her studies.

60. The appeal filed by Shafin Jahan has been heard finally. Hadiya is a party to these proceedings.

61. This Bench of three judges pronounced the operative part of its order on 8 March 2018 and allowed the appeal by setting aside the judgment of the High Court annulling the marriage between Shafin Jahan and Hadiya. The Court has underscored that Hadiya is at liberty to pursue her endeavours in accordance with her desires.

62. Hadiya is a major. Twenty four years old, she is pursuing a course of studies leading up to a degree in Homoeopathic medicine and surgery at a college in Salem in Tamil Nadu. She was born to parents from the Ezhava Community. In January 2016, Asokan instituted a habeas corpus petition, stating that Hadiya was missing. During the course of the proceedings, Hadiya appeared before the Kerala High Court and asserted that she had accepted Islam as a faith of choice. From 7 January 2016, she resided at the establishment of Sathyasarani Education Charitable Trust at Malappuram. On 19 January 2016, the Kerala High Court categorically observed that Hadiya was not under illegal confinement after interacting with her and permitted her to reside at the Sathyasarani Trust premises. Nearly seven months later, Asokan filed another petition in the nature of habeas corpus alleging that Hadiya had been subjected to forced conversion and was likely to be transported out of India.

63. During the course of the proceedings, the High Court interacted with Hadiya. She appeared in the proceedings represented by an advocate. Hadiya, as the High Court records, declined to accompany her parents and expressed a desire to continue to reside at Sathyasarani. The High Court initially issued a direction that she should be "accommodated in a ladies' hostel at the expense of her father". On 27 September 2016, Hadiya made a serious grievance of being in the custody of the court for thirty five days without being able to interact with anyone. She stated that she had no passport and the allegation that she was likely to go to Syria was incorrect. Based on her request, the High Court directed her to reside at the Sathyasarani establishment. The High Court heard the case on 24 October 2016, 14 November 2016 and 19 December 2016. On 21 December 2016, the High Court was informed that Hadiya had entered into a marriage on 19 December 2016. The High Court recorded its "absolute dissatisfaction at the manner in which the marriage if at all one has been performed has been conducted".

64. Confronted with the undisputed fact that Hadiya is a major, the High Court still observed:

"This Court exercising *Parens Patriae* jurisdiction has a duty to ensure that young girls like the detinue are not exploited or transported out of the country. Though the learned Senior Counsel has vociferously contended that the detinue is a person who has attained majority, it is necessary to bear in mind the fact that the detinue who is a female in her twenties is at a vulnerable age. As per Indian tradition, the custody of an unmarried daughter is with the parents, until she is properly married. We consider it the duty of this Court to ensure that a person under such a vulnerable state is not exposed to further danger, especially in the circumstances noticed above where even her marriage is stated to have been performed with another person, in accordance with Islamic religious rites. That too, with the connivance of the 7th respondent with whom she was permitted to reside, by this Court."

65. Hadiya was under judicial order transported to a hostel at Ernakulam, with a direction that:

"she is not provided the facility of possessing or using a mobile phone."

66. Save and except for her parents no one was allowed to meet her. An investigation was ordered into the "education, family background, antecedents and other relevant details" of Shafin Jahan together with others involved in the 'conduct' of the marriage. The High Court continued to monitor the case on 6 January 2017, 31 January 2017, 7 February 2017 and 22 February 2017. Eventually, by its judgment

and order dated 24 May 2017, the High Court allowed the petition for habeas corpus and issued the directions noted above.

67. The principal findings which have been recorded by the High Court need to be visited and are summarised below:

- (i) This was "not a case of a girl falling in love with a boy of a different religion and wanting to get married to him" but an "arranged marriage" where Hadiya had no previous acquaintance with Shafin Jahan;
- (ii) Hadiya met Shafin Jahan on an online portal called "Way to Nikah";
- (iii) During the course of the proceedings, Hadiya had stated before the court that she desired to complete her studies as a student of Homeopathy and "nobody had a case at that time that she wanted to get married";
- (iv) Though on 19 December 2016, the High Court adjourned the hearing to 21 December 2016 to enable her to proceed to her college, the marriage took place on the same day;
- (v) The marriage was "only a make-believe intended to take the detinue out of reach of the hands of this court";
- (vi) The conduct of the parties in conducting the marriage without informing the court was unacceptable;
- (vii) There is no document evidencing the conversion of Hadiya to Islam; the antecedents of Shafin Jahan and his Facebook posts show a radical inclination; and
- (viii) No prudent parent would decide to get his daughter married to a person accused in a criminal case.

68. The High Court concluded that the marriage "is only a sham and is of no consequence", a charade to force the hands of the court.

69. During the course of the present proceedings, this Court by its order dated 30 October 2017 directed the First respondent to ensure the presence of his daughter on 27 November 2017. On 27 November 2017, Hadiya stated before this Court, in the course of the hearing, that she intends to pursue further studies towards the BHMS degree course at Salem, where she was admitted. Directions were issued by the Court to ensure that Hadiya can pursue her course of studies without obstruction. We clarified that while she could stay in the hostel of the college as she desired, she would be "treated like any other student".

70. Hadiya has filed an affidavit expressly affirming her conversion to Islam and her marriage to Shafin Jahan.

71. There are two serious concerns which emerge from the judgment of the Kerala High Court. The first is that the High Court transgressed the limits of its jurisdiction in issuing a declaration annulling the marriage of Shafin Jahan and Hadiya in the course of the hearing of a habeas corpus petition.

72. Undoubtedly, the powers of a constitutional court are wide, to enable it to reach out to injustice. Mr. Shyam Divan, learned senior counsel appearing on behalf of First respondent emphasised the plenitude of the inherent powers of the High Court. The width of the domain which is entrusted to the High Court as a constitutional court cannot be disputed. **Halsbury's Laws of England** postulates:

"In the ordinary way the Supreme Court, as a superior court of record, exercise the full plenitude of judicial power in all matters concerning the general administration of justice within its territorial limits, and enjoys unrestricted and unlimited powers in all matters of substantive law, both civil and criminal, except insofar as that has been taken away in unequivocal terms by statutory enactment. The term "inherent jurisdiction" is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court,

for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rule of court. The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law."

73. Dealing with the ambit of the powers under Article 226, Gajendragadkar, CJ in *State of Orissa v. Ram Chandra Dev and Mohan Prasad Singh Deo*²⁴ observed thus:

"Under Article 226 of the Constitution, the jurisdiction of the High Court is undoubtedly very wide. Appropriate writs can be issued by the High Court under the said Article even for purposes other than the enforcement of the fundamental rights and in that sense, a party who invokes the special jurisdiction of the High Court under Article 226 is not confined to case of illegal invasion of this fundamental right alone. But though the jurisdiction of the High Court under Article 226 is wide in that sense, the concluding words of that Article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. The existence of a right is thus the foundation of a petition under Article 226."

74. While dealing with the powers and privileges of the state legislatures, in *Keshav Singh*²⁵, a Bench of seven learned judges held thus:

"136...in the case of a superior Court of Record, it is for the court to consider whether any matter falls within its jurisdiction or not. Unlike a Court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own jurisdiction. "Prima facie", says Halsbury, "no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court [*Halsbury's Law of England*, Vol. 9, p. 349]".

75. The High Court is vested with an extra-ordinary jurisdiction in order to meet unprecedented situations (*T K Rangarajan v. Government of T.N.*²⁶). Several decisions have noted the inherent and plenary powers of the High Court. Their purpose is to advance substantial justice. (i) *Roshan Deen v. Preeti Lal*²⁷; (ii) *Dwarka Nath v. ITO, Special Circle D-ward, Kanpur*²⁸; (iii) *Naresh Shridhar Nirajkar v. State of Maharashtra*²⁹; and (iv) *M V Elisabeth v. Harwan Investment and Trading (P) Ltd.*³⁰

76. These principles which emerge from the precedent are well-settled. Equally the exercise of all powers by a constitutional court must ensure justice under and in accordance with law.

77. The principles which underlie the exercise of the jurisdiction of a court in a habeas corpus petition have been reiterated in several decisions of the Court. In *Gian Devi v. Superintendent, Nari Niketan, Delhi*³¹, a three-judge Bench observed that where an individual is over eighteen years of age, no fetters could be placed on her choice on where to reside or about the person with whom she could stay:

"...Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is **sui juris** no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter."

78. The ambit of a habeas corpus petition is to trace an individual who is stated to be missing. Once the individual appears before the court and asserts that as a major, she or he is not under illegal confinement, which the court finds to be a free expression of will, that would conclude the exercise of the jurisdiction. In *Girish v.*

*Radhamony K*³² a two judge Bench of this Court observed thus:

"3...In a habeas corpus petition, all that is required is to find out and produce in court the person who is stated to be missing. Once the person appeared and she stated that she had gone of her own free will, the High Court had no further jurisdiction to pass the impugned order in exercise of its writ jurisdiction under Article 226 of the Constitution."

79. In *Lata Singh v. State of U P*³³, Bench of two judges took judicial notice of the harassment, threat and violence meted out to young women and men who marry outside their caste or faith. The court observed that our society is emerging through a crucial transformational period and the court cannot remain silent upon such matters of grave concern. In the view of the court:

"17...This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law."

80. Reiterating these principles in *Bhagwan Dass v. State (NCT OF DELHI)*³⁴, this Court adverted to the social evil of honour killings as being but a reflection of a feudal mindset which is a slur on the nation.

81. In a more recent decision of a three judge Bench in *Soni Gerry v. Gerry Douglas*³⁵, this Court dealt with a case where the daughter of the appellant and respondent, who was a major had expressed a desire to reside in Kuwait, where she was pursuing her education, with her father. This Court observed thus:

"9...She has, without any hesitation, clearly stated that she intends to go back to Kuwait to pursue her career. In such a situation, we are of the considered opinion that as a major, she is entitled to exercise her choice and freedom and the Court cannot get into the aspect whether she has been forced by the father or not. There may be ample reasons on her behalf to go back to her father in Kuwait, but we are not concerned with her reasons. What she has stated before the Court, that alone matters and that is the heart of the reasoning for this Court, which keeps all controversies at bay.

10. It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/He is entitled to make her/his choice. The courts cannot, as long as the choice remains, assume the role of *parens patriae*. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father. We say so without any reservation."

82. These principles emerge from a succession of judicial decisions. Fundamental to them is the judgment of a Constitution bench of this Court in *Kanu Sanyal v. District Magistrate, Darjeeling*³⁶.

83. The High Court was seized of the grievance of Asokan that his daughter was under illegal confinement and was likely to be transported out of the country. In the

course of the hearing of an earlier petition for habeas corpus, the High Court by its order dated 19 January 2016 expressly noticed that Hadiya was not willing to return to her parental home. Taking note of the desire of Hadiya to reside at Sathyasarani, the High Court observed that "the alleged detainee needs to be given liberty to take her own decision with respect to her future life."

84. With the passing of that order the writ petition was withdrawn on 25 January 2016. Yet, again, when a second petition was filed, it was evident before the High Court that Hadiya had no desire to stay with her parents. She is a major. The Division Bench on this occasion paid scant regard to the earlier outcome and to the decision of a coordinate Bench. The High Court inexplicably sought to deviate from the course adopted in the earlier proceeding.

85. The schism between Hadiya and her father may be unfortunate. But it was no part of the jurisdiction of the High Court to decide what it considered to be a 'just' way of life or 'correct' course of living for Hadiya. She has absolute autonomy over her person. Hadiya appeared before the High Court and stated that she was not under illegal confinement. There was no warrant for the High Court to proceed further in the exercise of its jurisdiction under Article 226. The purpose of the habeas corpus petition ended. It had to be closed as the earlier Bench had done. The High Court has entered into a domain which is alien to its jurisdiction in a habeas corpus petition. The High Court did not take kindly to the conduct of Hadiya, noting that when it had adjourned the proceedings to issue directions to enable her to pursue her studies, it was at that stage that she appeared with Shafin Jahan only to inform the court of their marriage. How Hadiya chooses to lead her life is entirely a matter of her choice. The High Court's view of her lack of candour with the court has no bearing on the legality of her marriage or her right to decide for herself, whom she desires to live with or marry.

86. The exercise of the jurisdiction to declare the marriage null and void, while entertaining a petition for habeas corpus, is plainly in excess of judicial power. The High Court has transgressed the limits on its jurisdiction in a habeas corpus petition. In the process, there has been a serious transgression of constitutional rights. That is the second facet to which we now turn.

87. Hadiya and Shafin Jahan are adults. Under Muslim law, marriage or Nikah is a contract. Muslim law recognises the right of adults to marry by their own free will. The conditions for a valid Muslim marriage are:

- (i) Both the individuals must profess Islam;
- (ii) Both should be of the age of puberty;
- (iii) There has to be an offer and acceptance and two witnesses must be present;
- (iv) Dower and Mehar; and
- (v) Absence of a prohibited degree of relationship.

88. A marriage can be dissolved at the behest of parties to it, by a competent court of law. Marital status is conferred through legislation or, as the case may be, custom. Deprivation of marital status is a matter of serious import and must be strictly in accordance with law. The High Court in the exercise of its jurisdiction under Article 226 ought not to have embarked on the course of annulling the marriage. The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one's personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme. The law prescribes conditions for a valid marriage. It provides remedies

when relationships run aground. Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution. In deciding whether Shafin Jahan is a fit person for Hadiya to marry, the High Court has entered into prohibited terrain. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognising them. Indeed, the Constitution protects personal liberty from disapproving audiences.

89. Article 16 of the Universal Declaration of Human Rights underscores the fundamental importance of marriage as an incident of human liberty:

"Article 16. (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

90. The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.

91. In *Justice K S Puttaswamy v. Union of India*³⁷, this Court in a decision of nine judges held that the ability to make decisions on matters close to one's life is an inviolable aspect of the human personality:

"The autonomy of the individual is the ability to make decisions on vital matters of concern to life... 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... The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual."

92. A Constitution Bench of this Court, in *Common Cause (A Regd. Society) v. Union of India*³⁸, held:

"Our autonomy as persons is founded on the ability to decide: on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives."

93. The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage.

94. The High Court, in the present case, has treaded on an area which must be out of bounds for a constitutional court. The views of the High Court have encroached into

a private space reserved for women and men in which neither law nor the judges can intrude. The High Court was of the view that at twenty four, Hadiya "is weak and vulnerable, capable of being exploited in many ways". The High Court has lost sight of the fact that she is a major, capable of taking her own decisions and is entitled to the right recognised by the Constitution to lead her life exactly as she pleases. The concern of this Court in intervening in this matter is as much about the miscarriage of justice that has resulted in the High Court as much as about the paternalism which underlies the approach to constitutional interpretation reflected in the judgment in appeal. The superior courts, when they exercise their jurisdiction *parens patriae* do so in the case of persons who are incapable of asserting a free will such as minors or persons of unsound mind. The exercise of that jurisdiction should not transgress into the area of determining the suitability of partners to a marital tie. That decision rests exclusively with the individuals themselves. Neither the state nor society can intrude into that domain. The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the state. Courts as upholders of constitutional freedoms must safeguard these freedoms. The cohesion and stability of our society depend on our syncretic culture. The Constitution protects it. Courts are duty bound not to swerve from the path of upholding our pluralism and diversity as a nation.

95. Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms. Others are dissuaded to exercise their liberties for fear of the reprisals which may result upon the free exercise of choice. The chilling effect on others has a pernicious tendency to prevent them from asserting their liberty. Public spectacles involving a harsh exercise of State power prevent the exercise of freedom, by others in the same milieu. Nothing can be as destructive of freedom and liberty. Fear silences freedom.

96. We have not been impressed with the submission of Mr. Shyam Divan, learned senior counsel that it was necessary for the High Court to nullify, what he describes as a fraud on the Court, as an incident of dealing with conduct obstructing the administration of the justice. Whether or not Hadiya chose to marry Shafin Jahan was irrelevant to the outcome of the habeas corpus petition. Even if she were not to be married to him, all that she was required to clarify was whether she was in illegal confinement. If she was not, and desired to pursue her own endeavours, that was the end of the matter in a habeas corpus petition. The fact that she decided to get married during the pendency of the proceedings had no bearing on the outcome of the habeas corpus petition. Constitutionally it could have no bearing on the outcome.

97. During the course of the proceedings, this Court by its interim order had allowed the National Investigation Agency to assist the Court. Subsequently, NIA was permitted to carry out an investigation. We clarify that NIA may exercise its authority in accordance with the law within the bounds of the authority conferred upon it by statute. However, the validity of the marriage between Shafin Jahan and Hadiya shall not form the subject matter of the investigation. Moreover, nothing contained in the interim order of this Court will be construed as empowering the investigating agency to interfere in the lives which the young couple seeks to lead as law abiding citizens.

98. The appeal stands allowed in terms of our order dated 8 March 2018. The judgment of the High Court is set aside.

¹ (1890) 15 AC 506

² [1923] AC 603 : [1923] ALL E.R. Rep. 442 (HL)

³ AIR 1959 SC 843

- ⁴ [1942] AC 284 : [1941] 3 All ER 388 (HL)
- ⁵ (1973) 2 SCC 674
- ⁶ 146 Iowa 233 : 124 NW 1081 (1910)
- ⁷ (2011) 10 SCC 781
- ⁸ P.W. Yong, C Croft and ML Smit, On Equity.
- ⁹ [1894] P 295
- ¹⁰ (1990) 1 SCC 613
- ¹¹ (2008) 3 SCC 1
- ¹² 473 US 432, 439-41 : 105 S Ct 3249 : 87 L Ed 2d 313 (1985)
- ¹³ (2011) 4 SCC 454
- ¹⁴ (1976) 2 SCC 310
- ¹⁵ 509 US 312 (1993)
- ¹⁶ [1986] 2 SCR 388
- ¹⁷ [1992] HCA 15 (*MARION's Case*) : (1992) 175 CLR 218
- ¹⁸ [2014] NSWSC 53
- ¹⁹ [2012] 3 All ER 1064
- ²⁰ [2005] EWHC 2942 (FAM)
- ²¹ [1990] 2 AC 1
- ²² [2017] EWHC 1437 (Fam)
- ²³ [2017] EWHC 968 (Fam)
- ²⁴ AIR (1964) SC 685
- ²⁵ (1965) 1 SCR 413
- ²⁶ (2003) 6 SCC 581
- ²⁷ (2002) 1 SCC 100
- ²⁸ (1965) 3 SCR 536
- ²⁹ (1966) 3 SCR 744
- ³⁰ 1993 Supp (2) SCC 433
- ³¹ (1976) 3 SCC 234
- ³² (2009) 16 SCC 360
- ³³ (2006) 5 SCC 475
- ³⁴ (2011) 6 SCC 396
- ³⁵ (2018) 2 SCC 197

³⁶ (1973) 2 SCC 674

³⁷ (2017) 10 SCC 1

³⁸ Writ Petition (Civil) No. 215 of 2005

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COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF VAN KÜCK v. GERMANY

(Application no. 35968/97)

FINAL

12/09/2003

JUDGMENT

STRASBOURG

12 June 2003

In the case of Van Kück v. Germany,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr I. CABRAL BARRETO, *President*,

Mr G. RESS,

Mr L. CAFLISCH,

Mr R. TÜRMEŦ,

Mr B. ZUPANČIĆ,

Mr J. HEDIGAN,

Mrs H.S. GREVE, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 20 June 2002 and 22 May 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 35968/97) against the Federal Republic of Germany lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Ms Carola van Kück, on 6 May 1997.

2. The German Government ("the Government") were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*, Federal Ministry of Justice.

3. The applicant alleged that German court decisions refusing her claims for reimbursement of gender reassignment measures and also the related proceedings were in breach of her right to a fair trial and of her right to respect for her private life and that they amounted to discrimination on the ground of her particular psychological situation. She relied on Articles 6 § 1, 8, 13 and 14 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 18 October 2001, the Chamber declared the application admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1948 and lives in Berlin. At birth, she was registered as male, with the forenames Bernhard Friedrich.

A. The proceedings for the change of the applicant's forenames

9. In 1990 the applicant instituted proceedings before the Schöneberg District Court, asking it to change her forenames to Carola Brenda.

10. On 20 December 1991 the District Court granted the applicant's request. The court found that the conditions under section 1 of the Transsexuals Act (*Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen*) were met in the applicant's case.

11. The District Court, having heard the applicant and having regard to the written opinions of the psychiatric experts Prof. R. and Dr O. of 28 August 1991, and of the psychological expert Prof. D. of 1 September 1991, considered that the applicant was a male-to-female transsexual. It noted that, although Prof. R. and Dr O. had indicated that the applicant was not a typical transsexual, the Transsexuals Act required only that the condition of transsexuality be met, irrespective of the particular form it took. Moreover, the court found that the experts had convincingly shown that the applicant had been for at least the last three years under the constraint of living according to these tendencies and that there was a high probability that she would not change these tendencies in the future.

B. The civil proceedings against the health insurance company

12. In 1992 the applicant, represented by counsel, brought an action with the Berlin Regional Court against a German health insurance company. Having been affiliated to this company since 1975, she claimed reimbursement of pharmaceutical expenses for hormone treatment. She further requested a declaratory judgment to the effect that the defendant company was liable to reimburse 50% of the expenses for gender reassignment operations and further hormone treatment. As an employee of the Berlin *Land*, she was entitled to allowances covering half of her medical expenses; the private health insurance was to cover the other half.

13. On 20 October 1992 the Berlin Regional Court decided to take expert evidence on the questions of whether or not the applicant was a male-to-female transsexual; whether or not her kind of transsexuality was a disease; whether or not the gender reassignment operation was the necessary medical treatment for the transsexuality; and whether or not this treatment was generally recognised by medical science.

14. The psychiatrist Dr H., having examined the applicant in January 1993, delivered his opinion in February 1993. In his conclusions, he confirmed that the applicant was a male-to-female transsexual and that her transsexuality had to be regarded as a disease. He further indicated that gender reassignment surgery was not the only possible medical treatment in cases of transsexuality. In the applicant's case, he recommended such an operation from a psychiatric-psychotherapeutic point of view, as it would improve her social situation. He noted that gender reassignment surgery was not generally recognised by medical science and that there were several comments in the specialised literature questioning whether the operation was effective; however, it could be assumed that the fact that transsexuals accepted themselves and their bodies contributed to their stabilisation. According to him, many transsexuals reached such stability only after an operation. In his view, this was the case for the applicant and an operation should therefore be approved. The expert concluded that the gender reassignment operation formed part of the curative treatment of a mental disease.

15. On 3 August 1993 the Regional Court, following an oral hearing, dismissed the applicant's claims. The court considered that under the relevant provisions of the General Insurance Conditions (*Allgemeine Versicherungsbedingungen*) governing the contractual relations between the applicant and her private health insurance company, the applicant was not entitled to reimbursement of medical treatment regarding her transsexuality.

16. In its reasoning, the court, having regard to the opinion prepared by Dr H. and to the expert opinions prepared in the proceedings before the Schöneberg District Court, considered that the applicant was a male-to-female transsexual and that her condition had to be regarded as a disease. The question whether the treatment in question was recognised by medical science was irrelevant. In the court's view, hormone treatment and gender reassignment surgery could not reasonably be considered as necessary medical treatments. Having regard to the relevant case-law of the Federal Social Court, the court found that the applicant ought first to have had recourse to less radical means, namely an extensive course of 50 to 100 psychotherapy sessions, as proposed by the psychiatric expert Prof. D. and terminated by the applicant after two sessions (according to the Government, the original manuscript decision referred to twenty-four sessions). The court was not convinced that, on account of the applicant's resistance to therapy, the intended operation was the only possible treatment.

17. Moreover, the Regional Court found that the evidence did not show conclusively that the gender reassignment measures would relieve the applicant's physical and mental difficulties, a further criterion for assuming their medical necessity. The expert Dr H. had merely recommended the operation from a psychiatric-psychotherapeutic point of view, as it would improve the applicant's social situation. His submissions, according to which the effect of gender reassignment surgery was often overrated, did

not show that the gender reassignment measures were necessary for medical reasons. The court had not, therefore, been required, of its own motion, to summon the expert to explain his opinion orally.

18. On 11 October 1993 the applicant lodged an appeal with the Berlin Court of Appeal. In the written appeal submissions, the applicant objected to the findings of the Regional Court in so far as they denied the necessity of gender reassignment measures. The applicant also submitted that she had unsuccessfully attended between twenty-four and thirty-five psychotherapy sessions. In this connection, she referred to the written expert opinions and also mentioned the possibility of taking evidence from these experts.

19. In November 1994 the applicant underwent gender reassignment surgery. According to her, having been unfit for work since February 1994, she had agreed with the physician treating her that her suffering would not permit her to await the outcome of the appeal proceedings.

20. On 27 January 1995 the Court of Appeal, following an oral hearing, dismissed the applicant's appeal. The Court of Appeal valued the claims at stake at 28,455.92 German marks.

21. The Court of Appeal noted that the applicant was a male-to-female transsexual and that, according to the opinion of the expert Dr H., her transsexuality constituted a disease, a matter not in dispute between the parties to the proceedings.

22. Referring to clause 1 of the General Insurance Conditions, the Court of Appeal upheld the Regional Court's conclusions that the expert Dr H. had not confirmed the necessity of gender reassignment measures. The Court of Appeal had regard to various passages of the expert opinion. Thus, it noted that the expert had considered gender reassignment surgery as one possible medical treatment; however, the question of necessity could not be clearly affirmed given the diverging scientific opinions and results. In his view, consensus existed on the improved psycho-social situation following the change of the sexual role, although the effect of the operation as such was often overrated. In the applicant's case, the advantages of an operation would, in the expert's view, prevail, while psychotherapy could not cure the transsexuality on account of the applicant's chronic narcissistic character structure; even extended psychotherapy was not likely to result in any changes. Turning to the expert's statement that gender reassignment was not the only possible curative treatment, but recommendable from a psychiatric-psychotherapeutic point of view in order to improve the applicant's social situation, the Court of Appeal found that, with this cautious formulation, the expert had not clearly affirmed the necessity of an operation. The applicant had therefore failed to prove that the conditions for reimbursement of medical treatment were met in her case. The Court of Appeal added that, while the expert had mentioned that the gender reassignment operation "formed part of the curative treatment of a mental disease", taking his other statements into account, he had regarded success as rather uncertain. Such a vague hope could not justify the necessity of medical treatment, bearing the aim of health insurance in mind. Thus, the health insurance had to bear only

costs of treatment suitable to cure a disease. In the applicant's case, the expert had explained that gender reassignment measures could not be expected to cure the applicant's transsexuality, but at best to improve her psycho-social situation. This result was insufficient, as such an improvement did not affect the applicant's transsexuality as such. With regard to these remaining doubts, the Court of Appeal concluded that the applicant had failed to prove the necessity of her treatment.

23. The Court of Appeal further considered that, in any event, the applicant was not entitled to reimbursement under clause 5.1(b) of the General Insurance Conditions on the ground that she had herself deliberately caused the disease, as argued by the defendant in earlier submissions.

24. Referring to the details of her case history as contained in the expert opinion of Dr O. of August 1991, the Court of Appeal found in particular that the applicant was born as a male child and did not claim that she was a female on account of chromosomal factors. Initially, she had not adopted female behaviour. On account of her male orientation, she had been able to resist feelings that she would have preferred to be a girl and that this would have been more appropriate, and had controlled her emotional life at an early stage.

25. The Court of Appeal considered that the applicant had continued to live as a man. In its view, the applicant's "fear of bigger boys" at school was not gender-specific. Furthermore, applying to join the armed forces did not indicate female feelings, and she had left the armed forces not because of the feeling that she was a "woman" but because she had experienced degrading treatment. The applicant had married in November 1972, likewise a sign of her male orientation at that time. As from 1981, the spouses had wished to have a child.

26. According to the Court of Appeal, the "turning-point", as stated by the applicant, had been the moment when, after an unsuccessful operation in 1986, she had realised that she was infertile. The Court of Appeal quoted the following passage from the expert opinion of 1991:

"The recognition that he was infertile is a decisive factor confirming the subsequent transsexual development."

27. It continued in the following terms:

"Fully aware of this position, the plaintiff concluded for herself: 'If you cannot have children, you are not a man', and as a consequence she went one step further and wanted to be a woman from then on. She had never otherwise felt that she was, or that she had to become, a woman, but was merely making a statement that she could do without a penis and still have satisfying relations with his [*sic*] wife ... Doing without the one is not the same as an irresistible desire for the other. In furtherance of the self-imposed goal of wishing to be a woman, from December 1986 – without medical advice, assistance or instruction – she took female hormones ...

That was deliberate. Having recognised – no doubt painfully – that she could not have children, she decided to distance herself from her past as a man ... It was this deliberate act of self-medication that led the plaintiff ever more to her decision that

she wanted to be a woman and to look like one, although it was biologically impossible. This was based on her limited preparedness or ability to reflect critically ... but was wrongfully deliberate because the plaintiff was at all events at that stage in a position to see what the consequences of her 'self-medication' would be, and to act accordingly.

..."

28. On 25 October 1996 the Federal Constitutional Court refused to admit the applicant's constitutional complaint.

II. RELEVANT DOMESTIC LAW AND PRACTICE AND OTHER MATERIAL

A. The status of transsexuals

29. The German Transsexuals Act (*Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen*) of 10 September 1980 (Federal Gazette I, p. 1654) was adopted following the decision of 11 October 1978 of the Federal Constitutional Court according to which the refusal to change the sex of a post-operative transsexual in the register of births was an unjustified interference with human dignity and everyone's fundamental right to develop his personality freely (Reports of the Decisions of the Federal Constitutional Court, BVerfGE 49, pp. 286 et seq.).

30. Sections 1 to 7 of the Transsexuals Act govern the conditions, procedures and legal consequences of a change of a transsexual's forenames without gender reassignment surgery. Under section 1, persons may request that their forenames be changed if, on account of their transsexual orientation, they no longer feel they belong to the sex recorded in the register of births, they have been for at least three years under the constraint of living according to these tendencies, and if there is a high probability that they will not change this orientation in the future. The competent civil courts have to obtain two medical expert opinions in order to establish whether the medical conditions are met (section 4).

31. Following gender reassignment surgery, section 8 provides for a change of the sex entered in the register of births, if, in addition to the conditions laid down in section 1, the persons concerned are not married and are not able to procreate. The forenames will be changed, if proceedings under section 1 have not yet taken place.

B. Gender reassignment surgery

1. The general health insurance system

32. Since 1989 the German health insurance system, which previously formed part of the *Reich* Insurance Code (*Reichsversicherungsordnung*) of 1911 has been governed by the Social Security Act, Book V, Health

Insurance (*Sozialgesetzbuch, Fünftes Buch, Gesetzliche Krankenversicherung*), on the basis of the Health (Reform) Act (*Gesetz zur Strukturreform im Gesundheitswesen*) of 20 December 1988. Subsequently, further reform legislation was enacted. Under the relevant provisions, persons insured under the health system are entitled to medical treatment which is necessary in order to diagnose or to cure a disease, in order to prevent its aggravation or to offer relief for its symptoms.

33. The Federal Social Court, in a decision of 6 August 1987 (Reports of Decisions, BSGE 62, pp. 83 et seq.), confirmed the lower social courts' decisions that the cost of gender reassignment surgery had to be reimbursed if, in the circumstances of the individual case, the psychophysical state of the transsexual amounted to a disease and if gender reassignment was the sole means of finding relief, psychiatric and psychotherapeutic treatment having remained unsuccessful.

2. Private health insurance

34. The basic rules for private health insurance, as for any other private insurance, are laid down in the Insurance Contract Act (*Gesetz über den Versicherungsvertrag*) of 1908, as amended. According to section 178.b, private health insurance covers expenses for curative treatment which is medically necessary on account of a disease or injuries suffered as a result of an accident or for other medical services for illness, as far as stipulated in the contract. The insurer is exempted from liability if the insured person has deliberately caused his or her own disease or accident (section 178.l). The contractual relations are standardised in general insurance conditions.

35. The Federal Court of Justice, in a decision of 11 April 1994 (*Versicherungsrecht* 1995, pp. 447 et seq.), endorsed the lower court's finding that gender reassignment surgery had to be considered as necessary medical treatment of a disease if the insured person's change of gender had been recognised under sections 8 et seq. of the Transsexuals Act.

C. Other relevant material

36. In its judgment of 30 April 1996 in *P. v. S. and Cornwall County Council* (C-13/94, Rec. 1996, p. I-2143), the European Court of Justice (ECJ) found that discrimination arising from gender reassignment constituted discrimination on grounds of sex and, accordingly, Article 5 § 1 of Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, precluded dismissal of a transsexual for a reason related to a gender reassignment. It held, rejecting the argument of the United Kingdom Government that the employer would also have dismissed P. if P. had previously been a woman and had undergone an operation to become a man, that

“... [w]here a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard.” (paragraphs 21-22)

37. In its judgment of 17 February 1998, in *Lisa Jacqueline Grant v. South-West Trains Ltd* (C-249/96, Rec. 1998, p. I-621), the ECJ clarified the resulting position as follows

“... That reasoning, which leads to the conclusion that such discrimination is to be prohibited just as is discrimination based on the fact that a person belongs to a particular sex, is limited to the case of a worker’s gender reassignment and does not therefore apply to differences of treatment based on a person’s sexual orientation.

...

... Community law as it stands at present does not cover discrimination based on sexual orientation, such as that in issue in the main proceedings.

It should be observed, however, that the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997, provides for the insertion in the EC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered into force, will allow the Council under certain conditions (a unanimous vote on a proposal from the Commission after consulting the European Parliament) to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.”

The ECJ concluded that the refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker’s spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the Treaty or Directive 75/117.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

38. The applicant complained about the alleged unfairness of German court proceedings concerning her claims for reimbursement of medical expenses against a private health insurance company. She relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Arguments of the parties

1. The applicant

39. The applicant maintained that the German courts had arbitrarily interpreted the notion of “necessary medical treatment” in a narrow sense. In her view, the expert had recommended her operation without hesitation. However, the Court of Appeal in particular had transposed general views on transsexuality in the medical opinion of Dr H. and had required the operation to be the only possible treatment.

40. She also considered that the Court of Appeal should not have drawn conclusions from a written expert opinion prepared in the context of a previous set of court proceedings without hearing the expert Dr O. She had only agreed to the consultation of these files in order to avoid repeated taking of evidence on her sexual orientation. The experts had never situated the biographical information concerned in the context of the question whether she had herself deliberately caused her transsexuality. Moreover, in her expert opinion, Dr O. had only stated that the applicant’s infertility had contributed to its development. The Court of Appeal’s conclusion, without an expert medical report, that her hormone treatment had brought about her transsexuality was arbitrary.

2. The Government

41. According to the Government, the proceedings as a whole had been fair. In their view, the applicant had had the opportunity to put forward all relevant arguments and to adduce evidence. Moreover, the Berlin Regional Court had taken evidence on the question whether the operation was a necessary medical treatment and had duly taken the conclusions of the expert Dr H. into account. Likewise, the Court of Appeal had fully considered the expert medical opinion and, at an oral hearing, it had given the applicant a further opportunity to comment on the matter.

42. The German courts’ interpretation of the insurance contract between the applicant and the health insurance company, and in particular of the necessity of the gender reassignment surgery as medical treatment, could not be objected to under the Convention. The burden of proof had been on the applicant as the insured person. The expert had not unequivocally affirmed the medical necessity of an operation, but had recommended the operation from a psychiatric-psychotherapeutic point of view. The Court of Appeal had concluded therefrom that the operation was not necessary as a medical treatment, even though the applicant’s social situation could be improved. The courts also had regard to the proceedings concerning the change of the applicant’s forenames.

43. Furthermore, as the written expert opinion had been conclusive, the Regional Court and the Court of Appeal had not been obliged to summon the expert.

44. Moreover, the Court of Appeal, taking into account the defendant’s submissions, had to take evidence on the question whether the applicant had herself deliberately caused the disease. The court had assessed this matter

on the basis of an expert opinion, prepared by Dr O. in the context of the proceedings before the Schöneberg District Court concerning the change of forenames. In the first-instance proceedings, the applicant had agreed that these files be consulted.

45. According to the Government, this expert opinion contained sufficient elements concerning, *inter alia*, her early youth, her military service and her marriage to support the conclusion that the applicant had herself deliberately caused her transsexuality. In this respect, the Court of Appeal had correctly noted that the applicant had started hormone medication without first consulting a medical practitioner.

B. The Court's assessment

1. The Court's general approach

46. The Court reiterates that it is in the first place for the national authorities, and notably the courts, to interpret domestic law and that it will not substitute its own interpretation for theirs in the absence of arbitrariness (see, *mutatis mutandis*, *Ravnsborg v. Sweden*, judgment of 23 March 1994, Series A no. 283-B, pp. 29-30, § 33; *Bulut v. Austria*, judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-II, pp. 355-56, § 29; and *Tejedor García v. Spain*, judgment of 16 December 1997, *Reports* 1997-VIII, p. 2796, § 31).

47. Moreover, it is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced. The Court has nevertheless to ascertain whether the proceedings considered as a whole were fair as required by Article 6 § 1 (see *Mantovanelli v. France*, judgment of 18 March 1997, *Reports* 1997-II, pp. 436-37, § 34, and *Elsholz v. Germany* [GC], no. 25735/94, § 66, ECHR 2000-VIII).

48. In particular, Article 6 § 1 places the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288, p. 19, § 59).

49. As to the issue of transsexualism, the Court observes that, in the context of its case-law on the legal status of transsexuals, it has had regard, *inter alia*, to developments in medical and scientific thought.

50. In *Rees v. the United Kingdom* (judgment of 17 October 1986, Series A no. 106, pp. 15-16, § 38), the Court noted:

"Transsexualism is not a new condition, but its particular features have been identified and examined only fairly recently. The developments that have taken place in consequence of these studies have been largely promoted by experts in the medical and scientific fields who have drawn attention to the considerable problems experienced by the individuals concerned and found it possible to alleviate them by means of medical and surgical treatment. The term 'transsexual' is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to

the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group.”

51. In *Cossey v. the United Kingdom* (judgment of 27 September 1990, Series A no. 184, p. 16, § 40), it considered that there had been no noteworthy scientific developments in the area of transsexualism in the period since the date of adoption of its judgment in *Rees*, cited above, which would compel it to depart from the decision reached in the latter case. This view was confirmed subsequently in *B. v. France* in which it observed that there still remained uncertainty as to the essential nature of transsexualism and that the legitimacy of surgical intervention in such cases was sometimes questioned (judgment of 25 March 1992, Series A no. 232-C, p. 49, § 48; see also *Sheffield and Horsham v. the United Kingdom*, judgment of 30 July 1998, *Reports* 1998-V, pp. 2027-28, § 56).

52. However, in recent judgments (see *I. v. the United Kingdom* [GC], no. 25680/94, §§ 61-62, 11 July 2002, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §§ 81-82, ECHR 2002-VI), the Court came to different conclusions. In *Christine Goodwin*, the Court noted:

“81. It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain. The expert evidence in the domestic case of *Bellinger v. Bellinger* was found to indicate a growing acceptance of findings of sexual differences in the brain that are determined pre-natally, although scientific proof for the theory was far from complete. The Court considers it more significant however that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief (for example, the *Diagnostic and Statistical Manual*, 4th edition (DSM-IV) replaced the diagnosis of transsexualism with ‘gender identity disorder’; see also *The International Classification of Diseases*, 10th edition (ICD-10)). The United Kingdom National Health Service, in common with the vast majority of Contracting States, acknowledges the existence of the condition and provides or permits treatment, including irreversible surgery. The medical and surgical acts which in this case rendered the gender reassignment possible were indeed carried out under the supervision of the national health authorities. Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment. In those circumstances, the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance.

82. While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex (see *Sheffield and Horsham*, cited above, p. 2028, § 56), the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst

all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals ...”

2. Assessment of the “medical necessity” of gender reassignment measures.

53. The Court notes that, in the civil proceedings against her private health insurance company, the applicant, who changed her forenames after recognition of her transsexuality in court proceedings under the Transsexuals Act in 1991, claimed reimbursement of medical expenses in respect of gender reassignment measures, namely hormone treatment and gender reassignment surgery. In 1992 the Regional Court ordered an expert opinion on the questions of the applicant’s transsexuality and the necessity of gender reassignment measures. The Regional Court and the Court of Appeal concluded that the expert had not clearly affirmed the medical necessity of gender reassignment surgery. In this respect, the Regional Court considered two points, namely, prior recourse to extensive psychotherapy as a less radical measure and the lack of a clear affirmation of the necessity of gender reassignment measures for medical purposes, the expert’s recommendation being limited to an improvement in the applicant’s social situation. The Court of Appeal endorsed the second aspect of the Regional Court’s reasoning and concluded that, as there remained doubts, the applicant had failed to prove the medical necessity of the gender reassignment surgery.

54. The Court, bearing in mind the complexity of assessing the applicant’s transsexuality and the need for medical treatment, finds that the Regional Court rightly decided to obtain an expert medical opinion on these questions. However, notwithstanding the expert’s unequivocal recommendation of gender reassignment measures in the applicant’s situation, the German courts concluded that she had failed to prove the medical necessity of these measures. In their understanding, the expert’s finding that gender reassignment measures would improve the applicant’s social situation did not clearly assert the necessity of such measures from a medical point of view. The Court considers that determining the medical necessity of gender reassignment measures by their curative effects on a transsexual is not a matter of legal definition. In *Christine Goodwin* (see paragraph 52 above), the Court referred to the expert evidence in the British case of *Bellinger v. Bellinger*, which indicated “a growing acceptance of findings of sexual differences in the brain that are determined pre-natally, although scientific proof for the theory was far from complete”. The Court considered it more significant “that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief”.

55. In the present case, the German courts’ evaluation of the expert opinion and their assessment that improving the applicant’s social situation as part of psychological treatment did not meet the requisite condition of medical necessity does not seem to coincide with the above findings of the

Court (see *Christine Goodwin*, cited above). In any case, it would have required special medical knowledge and expertise in the field of transsexualism. In this situation, the German courts should have sought further, written or oral, clarification from the expert Dr H. or from any other medical specialist.

56. Furthermore, considering recent developments (see *I. v. the United Kingdom and Christine Goodwin*, both cited above, § 62, and § 82, respectively), gender identity is one of the most intimate areas of a person's private life. The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate.

57. In these circumstances, the Court finds that the interpretation of the term "medical necessity" and the evaluation of the evidence in this respect were not reasonable.

3. Assessment of the cause of the applicant's transsexuality

58. The Court of Appeal further based its decision on the consideration that, under the insurance conditions, the defendant was exempted from payment on the ground that the applicant had deliberately caused her transsexuality. In this respect, the Court of Appeal found that it was only after having had to recognise that, as a man, she was infertile that the applicant had decided to become a woman, and had forced this development by self-medication with female hormones.

59. The Court reaffirms its statement in *I. v. the United Kingdom and Christine Goodwin* (see paragraph 52 above) that, given the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment.

60. The Court observes at the outset that the applicant had obtained recognition of her transsexuality in court proceedings under the Transsexuals Act in 1991. Furthermore, she had undergone gender reassignment surgery at the time of the Court of Appeal's decision.

61. The Court notes that the issue of the cause of the applicant's transsexuality did not appear in the Regional Court's order for the taking of expert evidence and was not, therefore, covered by the opinion prepared by Dr H. The Court of Appeal did not itself take evidence from Dr H. on this question, nor did it examine the experts involved in the earlier proceedings in 1990 and 1991, respectively, as the applicant had requested. Rather, the Court of Appeal analysed personal data recorded in a case history which was contained in the opinion prepared by Dr O. in 1991 in the context of the proceedings under the Transsexuals Act. This opinion had been limited to the questions whether the applicant was a male-to-female transsexual and had been for at least the last three years under the constraint of living according to these tendencies, which were answered in the affirmative.

62. In the Court's opinion, the Court of Appeal was not entitled to take the view that it had sufficient information and medical expertise for it to be able to assess the complex question of whether the applicant had deliberately caused her transsexuality (see, *mutatis mutandis*, *H. v. France*, judgment of 24 October 1989, Series A no. 162-A, pp. 25-26, § 70).

63. Moreover, in the absence of any conclusive scientific findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain (see again *I. v. the United Kingdom* and *Christine Goodwin*, loc. cit.), the approach taken by the Court of Appeal in examining the question whether the applicant had deliberately caused her condition appears inappropriate.

4. Conclusion

64. Having regard to the determination of the medical necessity of gender-reassignment measures in the applicant's case and also of the cause of the applicant's transsexuality, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair hearing.

65. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

66. The applicant further considered that the impugned court decisions had infringed her right to respect for her private life within the meaning of Article 8 of the Convention, the relevant parts of which read:

“1. Everyone has the right to respect for his private ... life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Arguments of the parties

67. The applicant considered that the Court of Appeal had failed to respect her sexual identity in projecting an image of her personality which was based on misconstrued facts. When looking at her male past, the Court of Appeal had regarded various episodes as disclosing a male orientation without taking into account the efforts to repress the feeling of having a different identity. It had thereby disregarded the development of her personality and sexual identity.

68. The Government maintained that the Court of Appeal had duly considered an expert opinion prepared in the context of previous court proceedings. They repeated that the applicant had agreed to the consultation of these files. The Court of Appeal had highlighted some elements in the

said expert opinion in order to show that the applicant had herself deliberately caused her transsexuality. It had not criticised the applicant's sexual orientation, nor had it regarded this orientation as reprehensible or unacceptable. Rather, the fact that the Court of Appeal had referred to the circumstance that the applicant was meanwhile living as a woman showed that it had accepted and respected her sexual identity. However, the Court of Appeal had been obliged to consider the applicant's personal development in deciding whether her claim against the insurance company was valid.

B. The Court's assessment

1. General principles

69. As the Court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 22). It can sometimes embrace aspects of an individual's physical and social identity (see *Mikulic v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, for example, *B. v. France*, cited above, pp. 53-54, § 63; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, Reports 1997-I, p. 131, § 36; and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI). Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz*, cited above, opinion of the Commission, p. 37, § 47; and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45). Likewise, the Court has held that although no previous case has established as such any right to self-determination as being contained in Article 8, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees (see *Prety v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). Moreover, the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security (see *I v. the United Kingdom*, § 70, and *Christine Goodwin*, § 90, both cited above).

70. The Court further reiterates that, while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These

obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, cited above, p. 11, § 23; *Botta v. Italy*, judgment of 24 February 1998, *Reports* 1998-I, p. 422, § 33; and *Mikulić*, cited above, § 57).

71. However, the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation (see, for instance, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49; *B. v. France*, cited above, p. 47, § 44; and, as recent authorities, *Sheffield and Horsham*, cited above, p. 2026, § 52, and *Mikulić*, cited above, § 57).

72. For the balancing of the competing interests, the Court has emphasised the particular importance of matters relating to a most intimate part of an individual's life (see *Dudgeon*, cited above, p. 21, § 52, and *Smith and Grady*, cited above, § 89).

2. Application of these principles to the present case

73. In the present case, the civil court proceedings touched upon the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination. The applicant complained in substance that, in the context of the dispute with her private health insurance company, the German courts, in particular the Berlin Court of Appeal, had failed to give appropriate consideration to her transsexuality.

74. The Court observes that the applicant's submissions under Article 8 § 1 are focused on the German courts' taking and evaluation of evidence as regards her transsexuality, a matter which has already been examined under Article 6 § 1. However, the Court points to the difference in the nature of the interests protected by Article 6, namely procedural safeguards, and by Article 8 § 1, ensuring proper respect for, *inter alia*, private life, a difference which justifies the examination of the same set of facts under both Articles (see *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 57, § 91; *Buchberger v. Austria*, no. 32899/96, § 49, 20 December 2001; and *P., C. and S. v. the United Kingdom*, no. 56547/00, § 120, ECHR 2002-VI).

75. In the present case, the facts complained of not only deprived the applicant of a fair hearing as guaranteed under Article 6 § 1, but also had repercussions on a fundamental aspect of her right to respect for private life, namely her right to gender identity and personal development. In these circumstances, the Court considers it appropriate to examine under Article 8 also the applicant's submission that the German courts, in dealing with her

claims for reimbursement of medical expenses, had failed to discharge the State's positive obligations.

76. The Court notes at the outset that the proceedings in question took place between 1992 and 1995 at a time when the condition of transsexualism was generally known (see the references to the German legislation and case-law, paragraphs 29 to 31, 33 and 35 above, and the Court's considerations in its case-law, cited in paragraphs 50 to 52 above). In this connection, the Court likewise notes the remaining uncertainty as to the essential nature and cause of transsexualism and the fact that the legitimacy of surgical intervention in such cases is sometimes questioned (see the Court's observations of 1992, 1998 and 2002 in *B. v. France*, in *Sheffield and Horsham*, in *I v. the United Kingdom*, and in *Christine Goodwin*, all cited above – paragraphs 50-52).

77. The Court has also previously held that the fact that the public health services did not delay the giving of medical and surgical treatment until all legal aspects of transsexuals had been fully investigated and resolved, benefited the persons concerned and contributed to their freedom of choice (see *Rees*, cited above, p. 18 § 45). Moreover, manifest determination has been regarded as a factor which is sufficiently significant to be taken into account, together with other factors, with reference to Article 8 (see *B. v. France*, cited above, p. 51, § 55).

78. In the present case, the central issue is the German courts' application of the existing criteria on reimbursement of medical treatment to the applicant's claim for reimbursement of the cost of gender reassignment surgery, not the legitimacy of such measures in general. Furthermore, what matters is not the entitlement to reimbursement as such, but the impact of the court decisions on the applicant's right to respect for her sexual self-determination as one of the aspects of her right to respect for her private life.

79. The Court notes that the Regional Court referred the applicant to the possibility of psychotherapy as a less radical means of treating her condition, contrary to the statements contained in the expert opinion.

80. Furthermore, both the Regional Court and the Court of Appeal, notwithstanding the expert's unequivocal recommendation, questioned the necessity of gender reassignment for medical reasons without obtaining supplementary information on this point.

81. The Court of Appeal also reproached the applicant with having deliberately caused her transsexuality. In evaluating her sexual identity and development, the Court of Appeal analysed her past prior to the taking of female hormones and found that she had only shown male behaviour and was thus genuinely male orientated. In doing so, the Court of Appeal, on the basis of general assumptions as to male and female behaviour, substituted its views on the most intimate feelings and experiences for those of the applicant, and this without any medical competence. It thereby required the applicant not only to prove that this orientation existed and amounted to a disease necessitating hormone treatment and gender reassignment surgery,

but also to show the 'genuine nature' of her transsexuality although, as stated above (see paragraph 75 above), the essential nature and cause of transsexualism are uncertain.

82. In the light of recent developments (see *I. v. the United Kingdom* and *Christine Goodwin*, cited above, § 62 and § 82, respectively), the burden placed on a person to prove the medical necessity of treatment, including irreversible surgery, in one of the most intimate areas of private life, appears disproportionate.

83. In this context, the Court notes that, at the relevant time, the applicant, in agreement with the doctor treating her, had undergone the gender reassignment surgery in question.

84. In the light of these various factors, the Court reaches the conclusion that no fair balance was struck between the interests of the private health insurance company on the one side and the interests of the individual on the other.

85. In these circumstances, the Court considers that the German authorities overstepped the margin of appreciation afforded to them under paragraph 2 of Article 8.

86. Consequently, there has been a violation of Article 8 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLES 6 § 1 AND 8

87. The applicant also complained that the Court of Appeal's decision amounted to discrimination against her on the ground of her transsexuality. She relied on Article 14 of the Convention, which reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

88. In the applicant's submission, the findings of the Court of Appeal were arbitrary and infringed her personal integrity. In that connection, she noted that her transsexuality had been established in the context of the proceedings before the District Court.

89. The Government submitted that the German courts had not discriminated against the applicant on account of her transsexuality. Any person arguing that the costs of surgical operations should be borne by a health insurance company had to show a valid claim and, in the case of a dispute, adduce relevant evidence. In respect of the medical treatment of transsexuals, evidence had to be furnished for this sexual orientation and the

reasons therefor. The need to determine whether or not a disease had been deliberately caused applied to all insured persons. For a transsexual, hormone treatment was relevant circumstantial evidence. The Court of Appeal's evaluation and assessment of evidence did not disclose any discrimination.

90. The Court reiterates that where domestic courts base their decisions on general assumptions which introduce a difference of treatment on the ground of sex, a problem may arise under Article 14 of the Convention (see *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, pp. 21-22, § 67). Similar considerations apply with regard to discrimination on any other ground or status, that is, also on the ground of an individual's sexual orientation.

91. The Court considers, however, that, in the circumstances of the present case, the applicant's complaint that she was discriminated against on account of her transsexuality amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 6 § 1 and, more particularly, Article 8 of the Convention (see *Smith and Grady*, cited above, § 115).

92. Accordingly, the Court considers that the applicant's complaints do not give rise to any separate issue under Article 14 of the Convention taken in conjunction with Articles 6 § 1 and 8.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

94. The applicant, referring to practical difficulties in quantifying the damage sustained as a result of the Berlin court decisions refusing her claims for reimbursement of the cost of gender reassignment measures, in particular as far as the consequential negative impact on her life was concerned, claimed payment of 14,549 euros (EUR), that being the equivalent of the value fixed by the Court of Appeal (see paragraph 20 above).

95. The Government did not comment on the applicant's claim.

96. The Court cannot speculate as to what the outcome of the impugned proceedings would have been if the Convention had not been violated. However, it considers that the applicant undeniably sustained non-pecuniary damage as a result of the unfairness of the court proceedings and the lack of respect for her private life. Having regard to the circumstances of the case

and ruling on an equitable basis as required by Article 41, the Court awards her compensation in the sum of EUR 15,000.

B. Costs and expenses

97. The applicant's claim for costs and expenses was broken down as follows:

(i) EUR 1,916 representing the costs awarded against her by the Berlin Regional Court (1,730 German marks (DEM)) and by the Berlin Court of Appeal (an advance payment of DEM 567 and an overall award of DEM 1,449); and

(ii) EUR 807 (DEM 1,578.37) for legal expenses in the proceedings before the Federal Constitutional Court.

98. The Government did not raise any objections to the claims.

99. If the Court finds that there has been a violation of the Convention, it may award the applicant not only the costs and expenses incurred before the Strasbourg institutions, but also those incurred before the national courts for the prevention or redress of the violation (see, in particular, *Zimmermann and Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66, p. 14, § 36).

100. In the Court's view, reimbursement of the court costs relating to the proceedings before the Regional Court on the merits of her claims for reimbursement of medical expenses cannot be ordered, there being no sufficient connection between those costs and the violation found. On the other hand, the applicant is entitled to be paid the costs of the proceedings before the Court of Appeal since the ground of appeal was the Regional Court's determination of the medical necessity of gender reassignment measures in her case, which was one element in the Court's finding of a violation of Articles 6 and 8. As to the quantum of these costs, the Court, having regard to the court bills filed by the applicant, notes that the advance payment was deducted from the overall award of costs. Furthermore, the applicant's legal expenses in the proceedings before the Federal Constitutional Court must be reimbursed.

101. Ruling on an equitable basis, the Court decides to award the applicant the sum of EUR 2,500.

C. Default interest

102. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* by four votes to three that there has been a violation of Article 8 of the Convention;
3. *Holds* unanimously that no separate issue arises under Article 14 of the Convention taken in conjunction with Articles 6 § 1 and 8;
4. *Holds* by four votes to three
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 June 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

- (a) concurring opinion of Mr Ress;
- (b) dissenting opinion of Mr Cabral Barreto, Mr Hedigan and Mrs Greve.

I.C.B.
V.B.

CONCURRING OPINION OF JUDGE RESS

I fully agree with the judgment of the Chamber and would like to add the following.

1. Even though the case concerns the interpretation of the terms of a contract negotiated between the applicant and her private insurance company and related litigation, three factors must be taken into account: firstly, the parallelism between private health insurance and the social-security system in Germany; secondly, the impact of Article 8 on private-law relations between individuals or between individuals and companies; and, thirdly, respect ultimately for the free will of transsexuals and the choices made by them.

2. There exists a close legal relationship between the social-security system in Germany and, as an alternative or addition for certain groups of people, private insurance. The conditions of private insurance must, *mutatis mutandis*, be the same as those of the public system. As is clear from the judgment of the Chamber, gender-related operations are covered by the social-security system and by private health insurance although, it would appear, the conditions laid down by administrative courts and civil courts are, at least in their tendency, different (see paragraph 33 of the judgment).

3. According to German constitutional law, fundamental rights have a direct impact on relations between private persons. The same is true with the rights of the Convention. Under the Convention, Contracting States have to ensure (Article 1) that individuals can enjoy their private life and one of the requirements, as the Court stressed in *Christine Goodwin v. the United Kingdom* ([GC], no. 28957/95, ECHR 2002-VI), is respect for gender identity. The terms of the contract between the applicant and her private insurers must be interpreted in the light of these requirements of Article 8. The term “necessary” in relation to gender reassignment surgery must therefore be interpreted with a view not only to respecting the difficult situation of potential transsexuals but also to taking into account the findings of science which were set out in the recent judgment in *Christine Goodwin*. According to those findings, the situation is one which is dominated by the brain and is characterised by both objective and subjective elements. In the light of these requirements, did the German courts approach the question with due regard to Article 8? Despite the fact that the doctor who had seen the applicant concluded, after weighing the advantages and disadvantages in the applicant’s case, that the advantages outweighed the disadvantages and that an operation was therefore to be *recommended*, the German courts held that that was not a clear affirmation of the *necessity* of the operation. The Court of Appeal’s reasoning would be quite acceptable and, as is said in the dissenting opinion, reasonable if it did not fall to be judged from the standpoint of whether the requirements of Article 8 –

respect for the specific private-life circumstances of the applicant – had been observed.

4. This leads me to my third and last consideration. In cases where the question arises whether a gender reassignment operation is necessary and the doctor who examined the person concerned came to the conclusion, as in the instant case, that the applicant was a transsexual and that transsexuality constituted a disease and accordingly, after weighing up the drawbacks and advantages, recommended the operation, the decision of the applicant should always be the final and decisive factor to indicate that the operation was necessary. I think that this type of case, following the reasoning in *Christine Goodwin*, can be clearly distinguished from other medical cases. Where a transsexual, after lengthy treatment, has been told by his or her doctor that in that doctor's view, the advantages of an operation outweigh the disadvantages, it cannot be said that the transsexual caused the "disease" deliberately. This does not mean that in the case of every transsexual surgery should be assumed to be necessary, but if a transsexual has, over quite a long period, undergone treatments of a different kind, such as psychotherapy (see paragraph 16 of the judgment), the individual has done everything necessary to come finally to the conclusion, which has to be respected, that only a gender reassignment operation would be helpful and thus necessary in his or her case. The applicant had already had recourse to less drastic means, such as hormonal treatments. To prolong her situation, which had already lasted quite a time (see paragraphs 11 and 26 of the judgment), would, in my view, have amounted to treatment not in keeping with "respect" for private life under Article 8. It is a most intimate and private aspect of a person's life whether to undergo a gender reassignment operation, and therefore the courts, in considering the necessity of an operation should take into account, as one of the decisive factors, the wishes of the transsexual. I cannot see any arbitrary element in the applicant's decision finally, after quite lengthy treatment, to undergo the reassignment operation, when even her doctor had recommended it.

DISSENTING OPINION OF JUDGES CABRAL BARRETO,
HEDIGAN AND GREVE

1. We regret that we must disagree with the majority in this case.

For us, this case is not about the rights of transsexuals to respect for their private life, dignity and gender self-identification. These rights we consider now clearly established in the jurisprudence of the European Court of Human Rights, most recently in *Christine Goodwin v. United Kingdom* ([GC], no. 28957/95, ECHR 2002-VI) with which we are in full agreement. In our view, this case deals with the adjudication at the applicant's request, by the German courts, on two of the terms of her private contract of medical insurance. We fear that the judgment overly restricts the ability of one of the parties, in this case the defendant insurance company, to litigate the terms of a contract negotiated with the other party, in this case, the applicant.

2. The facts of the case are outlined in the judgment and need no repetition. Suffice it to note that the history of the case is somewhat unusual. The German courts were obliged to determine whether, pursuant to the General Insurance Conditions, the applicant's private insurers were obliged to reimburse her 50% of the cost of certain pharmaceutical expenses connected with hormone treatment and her gender reassignment operation.

3. The issue before the German courts was whether the operation and attendant treatment were necessary and whether the disease had been self-inflicted. The terms of the insurance contract were such that, were the operation not necessary or the disease self-inflicted, the insurer would not be obliged to pay out on the policy.

4. The case was heard initially by the Berlin Regional Court. It decided to take expert evidence on the following matters:

- (a) Was the applicant a male-to-female transsexual?
- (b) Was her kind of transsexuality a disease?
- (c) Was the gender reassignment operation the necessary medical treatment for the transsexuality?
- (d) Was this treatment generally recognised by medical science?

In the Regional Court, the applicant failed. That court considered that the hormonal and surgical course intended by the applicant could not reasonably be considered as necessary at that time and on its own and therefore in this case. It was of the view that the applicant ought *first* to have had recourse to less radical means, namely an extensive course of 50 to 100 psychotherapy sessions as recommended by the psychiatrist Dr H., the author of the expert opinion in question. The applicant had in fact refused to continue after 24 sessions (confusion as to whether there were 2 or 24 sessions is resolved, with the agreement of the Government, in favour of the applicant's case, as 24 sessions). It seems to us from reading Dr H.'s report that it was his firm view that a full course of psychotherapy was to be, at the very least, one of the components of a comprehensive treatment possibly

including surgery, and an essential part of a successful gender reassignment. In the light of this report and of the somewhat unusual background to the applicant's condition together with the irreversible nature of the surgery, the Regional Court's above view seems to us to be not unreasonable.

The Regional Court further found that the evidence did not show conclusively that the gender reassignment measures would relieve the applicant's physical and mental difficulties and that this was a further criterion for determining their medical necessity. The expert had recommended the operation from a psychiatric-psychotherapeutic point of view, as it would improve the applicant's social situation.

According to the court's assessment of the evidence, this expert report did not establish that the operation was the necessary medical treatment in this case but had expressed the view that the applicant ought first to complete the extensive course of psychotherapy recommended by the psychiatrist. This assessment does not appear to us to be either arbitrary or unreasonable and we do not find any reason therefore to criticise it.

It is to be noted that at the time of the Regional Court's hearing, the applicant had not yet had the surgery in question.

5. The applicant appealed to the Berlin Court of Appeal. She objected to the finding of non-necessity. She submitted that she had attended between twenty-four and thirty-five psychotherapy sessions. She refused to attend any more. She referred to the written expert opinions and referred to the possibility of hearing these experts.

6. In November 1994 the applicant went ahead with the surgery without completing the course of psychotherapy which had been advised as an essential part of a gender reassignment including possible surgery.

7. On 27 January 1995 the Court of Appeal, following an oral hearing, dismissed the appeal. The reasons are set out in paragraphs 21 to 28 of the present judgment.

8. For the purposes of this dissenting opinion, we consider the following findings of the Court of Appeal of note:

(a) the applicant was a transsexual;
(b) according to Dr H., her transsexuality constituted a disease;
(c) the Court of Appeal confirmed the Regional Court's conclusions as follows:

- (i) Dr H. had not confirmed the necessity of the operation;
- (ii) in Dr H.'s view, such surgery was a possible medical treatment but the question of necessity could *not be clearly affirmed*;
- (iii) weighing up the limitations and advantages in the applicant's case, Dr H. was of the view that the advantages prevailed and therefore he recommended the operation;
- (iv) the Court of Appeal found Dr H.'s formulation to be cautious and not therefore a clear affirmation of the necessity of the operation;
- (v) in the Court of Appeal's view, Dr H.'s report showed that he regarded the success of surgery in the applicant's case as rather

uncertain. The Court of Appeal described this as “a vague hope” and concluded that such could not justify the necessity of surgery bearing in mind the aim of health insurance.

We find all the above conclusions to be reasonable in the circumstances.

9. The Court of Appeal then went on to consider clause 5.1(b) of the contract and whether the applicant had in fact caused her own disease as had been argued by the defendant insurance company.

The Court of Appeal referred to the case history contained in the expert opinion of Dr O. in 1991. It quoted from this as set out in paragraphs 26 and 27 of the present judgment and, as a result, the Court of Appeal found that the applicant had caused the disease deliberately. Again we are of the view that it was open to the Court of Appeal on any reading of this report reasonably to come to such a conclusion and we note that all it needed to rely on were the strictly factual details of the applicant’s case history as contained therein.

10. We agree that it is for the national courts to assess the evidence they have obtained but that it is for the European Court to ascertain whether the proceedings considered as a whole were fair. We further agree that the national courts are under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties. As noted above, we are also in agreement with the decision of this Court in *Christine Goodwin*.

11. We cannot agree with the characterisation of Dr H.’s recommendation for surgery as “unequivocal” (see paragraph 54 of the judgment). As noted above, we take the view that the conclusions of both the Regional Court and the Court of Appeal in this respect were reasonable. Their characterisation of his report was “cautious”, “not a clear affirmation of the necessity of the operation”. They also noted that “success of the operation was uncertain” and that the recommendation was based on a “vague hope” of success.

12. We are in agreement that gender identity is one of the most intimate and private aspects of any person’s life. We cannot, however, agree as outlined in the second sentence of paragraph 56 of the judgment that this means that there is anything disproportionate about requiring a person such as the applicant to prove the medical necessity of treatment, including irreversible surgery. This case involves an action by the applicant to force her private insurers on foot of her contract with them to reimburse her 50% of the cost of such treatment. One of the terms of that contract as outlined above was that such treatment must be medically necessary. The insurance company took the view that it was not. Not unnaturally, the applicant took the view that it was. The issue therefore was the very question of necessity. Nothing in our view in *Christine Goodwin* prohibits or should prohibit a party to such a contract of insurance from litigating any term of that contract including the term requiring the medical necessity of the relevant treatment. To find otherwise, we fear, means that the medical necessity of surgery

would have to be assumed in every case involving a transsexual. This in our view cannot be correct. Indeed, the likely consequence would be the exclusion of such cover from medical insurance policies to the great disadvantage of transsexuals in general.

13. In relation to the question of causation, our opinion differs also from that of the majority for the same reasons as outlined above. In this regard, we note the most unusual historical background to this case. We note that the applicant herself had agreed to the use of the reports in the earlier proceedings. The factual history contained therein is quite striking on the issue of causation and, in the context of the action on the contract in question we do not consider the decision of the Court of Appeal in this regard to be arbitrary or unreasonable and, as noted above, save as provided, it is for the national courts to assess the evidence. In our view, for the reasons outlined, the proceedings taken as a whole were fair.

14. For the above reasons we regretfully disagree with the majority in this judgment and find no breach of Article 6 § 1 of the Convention.

Alleged violation of Article 8 of the Convention

15. We agree with the general principles as outlined in paragraphs 69 to 72 of the judgment. We cannot agree with the statement in paragraph 79 that the Regional Court referred the applicant to the possibility of psychotherapy as a less radical means of treating her condition “*contrary to the statements contained in the expert opinion*”. As outlined in paragraph 16 of the judgment, the Regional Court found that the applicant ought to have *first* had recourse to less radical means. Such a view was very significant in the context of necessity. We have above expressed our disagreement with the characterisation of Dr H.’s view on the necessity for surgery as an “*unequivocal recommendation*”. We further disagree with the description of the Court of Appeal’s judgment in relation to causation as a reproach.

16. The task of the German courts at the request of the applicant in this case was to adjudicate upon her contract of insurance in respect of two issues:

- (a) the necessity of surgical gender reassignment;
- (b) the causation of the applicant’s condition.

In order to do so it was inevitable that a painful and intrusive analysis of the applicant’s case history was required. A proper respect for the undoubted right of transsexuals to respect for their dignity, private life and gender self-determination demands that such an adjudication be carried out with all appropriate respect and decorum, but does not prevent such an analysis being carried out at all. It seems to us that this judgment provides otherwise and that, in order to follow it, domestic courts would never be able to carry out such an adjudication in any meaningful manner.

It is for these reasons that, in respect of the Article 8 and Article 6 complaints, we respectfully beg to differ.

MANU/UP/0332/2015

IN THE HIGH COURT OF ALLAHABAD (LUCKNOW BENCH)

Misc. Bench No. 2993 of 2015

Decided On: 15.04.2015

Appellants: **Ashish Kumar Misra**
Vs.
Respondent: **Bharat Sarkar****Hon'ble Judges/Coram:**

Dr. D.Y. Chandrachud, C.J. and Narayan Shukla, J.

Counsel:For Appellant/Petitioner/Plaintiff: Satish Kumar Misra, Prabuddh Tripathi, Prashant Tripathi,
Vineet Kumar Chaurasia

For Respondents/Defendant: C.S.C., A.S.G. and Anand Dwivedi

Subject: Constitution**Relevant Section:**

NATIONAL FOOD SECURITY ACT, 2013 - Section 13

Acts/Rules/Orders:

Constitution Of India - Article 21; National Food Security Act, 2013 - Section 13

Cases Referred:

National Legal Services Authority vs. Union of India (UOI) and Ors. MANU/SC/0309/2014

Disposition:

Disposed off

Citing Reference:

Discussed

1

JUDGMENT

1. The petition has been filed in the public interest by a practising Advocate in order to raise two concerns relating to the issuance of ration cards under the National Food Security Act, 2013 the Act. The first issue relates to the validity of the provisions of Section 13 of the Act on the ground that the statutory provision while recognizing the eldest woman member as the head of the household does not contemplate a situation where there may be no woman in the family.

2. In order to appreciate this grievance, we extract hereinbelow the provisions of Section 13 of the Act:

"13. Women of eighteen years of age or above to be head of household for purpose of issue of ration cards.--(1) The eldest woman who is not less than eighteen years of age, in every eligible household, shall be head of the household for the purpose of issue of ration cards.

(2) Where a household at any time does not have a woman or a woman of eighteen years of age or above, but has a female member below the age of eighteen years, then, the eldest male member of the household shall be the head of the household for the purpose of issue of ration card and the female member, on attaining the age of eighteen years, shall become the head of the household for such ration cards in place of such male member."

3. Section 13 forms part of Chapter VI of the Act which has a provision for the empowerment of women. Stipulating that the eldest woman of every eligible household, above the age of eighteen, shall be the head of the household for the purpose of the issue of ration cards is intended to recognize and strengthen the dignity, role and status of women. Parliament gave legal recognition to the significant responsibilities which women as decision makers have in a family. This includes those having a bearing on food security. In enacting Section 13, Parliament recognized the roles and responsibilities which are discharged by women. That role has been conferred with a statutory status and recognition by providing that the eldest woman, above the age of eighteen in a household, shall be regarded as the head of the household. For too long in our history and even today, women have been burdened with the obligation of maintaining home and family without a corresponding recognition or acceptance of their role as decision makers. Subjected to discrimination and domestic violence, a woman is left with no social security. Something as primary as the equal distribution of food within the family for male and female members of the family is a casualty. Recognizing the central role of the woman in issues of food security is an integral part of the constitutional right to gender equality. Some of the worst forms of discrimination against women originate in the home and the kitchen. It was time that the law made an effort to remedy it. The submission that the statute does not account for a situation where there may be no woman in a family, is incorrect. Sub-section (2) of Section 13 of the Act contemplates a situation where a household either does not have a woman at all or where a woman member of an eligible household is yet to attain the age of eighteen. In such a situation, sub-section (2) of Section 13 of the Act provides that the eldest male member of the household shall be the head of the household for the issuance of ration cards. Where a female member of the household is below the age of eighteen, her status as the head of the household, shall upon attaining the age of eighteen, be recognized in terms of sub-section (2) of Section 13 of the Act. In view of these statutory requirements, we find no merit in the first submission.

4. The second submission raises an important issue pertaining to the availability of food security for transgenders. In *National Legal Services Authority v. Union of India* MANU/SC/0309/2014 : (2014) 5 SCC 438, the Supreme Court recognized the fundamental right of the transgender population as citizens of the country to possess an equal right to realise their full potential as human beings. Incidental to the fundamental right to live in dignity under Article 21 of the Constitution, is a right of access to all facilities for development of the personality including education, social accumulation, access to public places and employment opportunities. The Supreme Court observed that since transgenders are neither male nor female, treating them as belonging to either of these categories, will be a denial of their constitutional rights. The recognition of transgenders as the third gender in law has thus become an intrinsic part of the right to life protected by Article 21 of the Constitution. It is a part of and incidental to the fundamental expression of the human personality. The full expression of gender is what the Constitution embodies. Among the directions which have been issued by the Supreme Court are the following:

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

135.2. Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

135.3. We direct the Centre and the State Governments to take steps to treat them as Socially and Educationally Backward Classes of citizens and extend all kinds of

reservation in cases of admission in educational institutions and for public appointments.

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

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

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

5. A ration card is an important document issued by public authorities to enable the holder and her family to gain access to subsidized foodgrain. That is why the objective and transparent administration of schemes for the issuance of ration cards are a critical element in enhancing access to food security. Food security means no less to a transgender than to other segments of society. Impoverishment and marginalization have been endemic to the transgender population. Preventing discrimination in all walks of life is one facet of the right of transgenders to live in dignity, with the confidence that they can lead their lives on their own terms in realisation of gender identity. But the law needs to travel beyond non discrimination, by recognising an affirmative obligation of the State to provide access to social security. Food security lies at the foundation of it. Transgenders must have both.

6. The form which has been prescribed by the State Government for submitting applications under the Act contains an enumeration of several items on which a disclosure of information has been sought from the applicant. One of them requires a disclosure of the name of the woman who is the head of the household. That however cannot be read as an exclusion of a transgender to apply for the issuance of a ration card and must be read in the context of serial number twelve of the application form. Serial number twelve refers to the gender of the applicant. In parenthesis, the reference to gender is construed to mean 'female/male/other'. The expression 'other' would necessarily include a transgender. Section 13 of the Act, may not have specifically incorporated a provision that would be inclusive of a head of a household as a transgender to apply for the issuance of a ration card. The object and purpose of Section 13 of the Act was to bring about a sense of empowerment for women. The purpose of enacting Section 13 of the Act was to recognize the status of a woman in every household and it was in that context that the statute has enacted that the head of the household would be deemed to be eldest woman member who is above the age of eighteen. The recognition of the eldest woman as the head of the household is in contradistinction to a male member since as we have already noted above, sub-section (2) of Section 13 of the Act enables a male member of the household to be recognized as the head of the household only in the absence of a woman or if the sole woman is below the age of eighteen, until she attains the age of majority. The object and purpose of Section 13 of the Act in other words was not to exclude transgenders though in view of the judgment of the Supreme Court in National Legal Services Authority (supra) Parliament may, if we may respectfully so say, consider the appropriateness of a suitable provision to meet the situation. This is entirely within the purview of the legislating body and a matter which lies in the province of the enacting authority. The salutary public purpose, underlying the enactment of Section 13 of the Act can be furthered by incorporating a situation where a transgender can be recognized as a head of an eligible household.

7. For the purposes of these proceedings, we are of the view that the form which has been prescribed by the State Government, duly takes into account the concerns of the transgender population by recognizing their entitlement to seek access to food security and to avail of the status of the head of a household.

8. We are of the view that the clarification, which we have issued above, would sufficiently subserve the important public purpose, which is served by the institution of the writ petition by a member of the Bar. The effort which has been made by the learned counsel must be duly

appreciated by the Court.

9. The petition is, accordingly, disposed of. There shall be no order as to costs.

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MANU/DE/2912/2015

IN THE HIGH COURT OF DELHI

W.P. (CrI) 2133/2015

Decided On: 05.10.2015

Appellants: **Shivani Bhat****Vs.**Respondent: **State of NCT of Delhi and Ors.****Hon'ble Judges/Coram:**

Siddharth Mridul, J.

Counsel:

For Appellant/Petitioner/Plaintiff: Maneka Guruswamy, Arundhati Katju, Ali Chaudhary, Himanshu Aggarwal, Advocates and Party-in-Person

For Respondents/Defendant: Rakesh Khanna, Sr. Advocate, Avninder Singh, Addl. Standing Counsel (CrI.), Sumi Anand, Rajesh Punj, Ritu Punj, Shefali Jain, Advocates and Pawan Kumar, SI

Subject: Human Rights**Subject: Criminal****Acts/Rules/Orders:**

Indian Penal Code 1860, (IPC) - Section 364

Cases Referred:

National Legal Services Authority vs. Union of India (UOI) and Ors. MANU/SC/0309/2014

Disposition:

Disposed off

Citing Reference:

Discussed

1

Case Note:

Miscellaneous - Right to protection - Petitioner/transgender was subjected to illegal confinement, harassment and rebuke by officers of Respondent No. 2/State - Writ Petition filed for direction to Respondent No. 2/State and police officials not to harass or illegally confine to Petitioner - Whether Petitioner/transgender was illegally confined and was entitled to protection under law from harassment - Held, transgenders have right to dignity and self-determination - Petitioner's parents have expressed love, understanding and support and have readily undertaken to finance Petitioner's education - It appeared that Petitioner had already been provided adequate protection which shall continue to be afforded to her till she leaves shores of country - Delhi Police did not intend to take any coercive steps either against Petitioner or against those who offered her support - All prayers sought in petition had been satisfied - Direction issued to Respondent No. 2/State not to harass or illegally confine anybody from within jurisdiction of Court except in accordance with procedure established by law - Writ Petition disposed of. [11],[14],[23],[24] and [25]

JUDGMENT

200.

Siddharth Mridul, J.

"Go not to the temple to put flowers
upon the feet of God,
First fill your own house with the
Fragrance of love and kindness.

Go not to the temple to light candles
before the altar of God,
First remove the darkness of sin,
pride and ego,
From your heart.....

Go not to the temple to bow down
your head in prayer,
First learn to bow in humility before
your fellowmen.
And apologise to those you have
wronged.

Go not to the temple to pray on
bended knees,
First bend down to lift someone who is down-trodden.
And strengthen the young ones.
Not crush them.

Go not to the temple to ask for forgiveness for your sins,
First forgive from your heart those
who have hurt....."

- Rabindranath Tagore

1. Shivani is a brave-heart.

2. The present petition highlights and brings to the fore the socio- economic marginalization and exclusion of those whose behaviour is considered "inappropriate" by society. It clearly demonstrates that those who do not conform, render themselves vulnerable to harassment and violence not just by the Police but also by society that ridicules them. Transgenders have long lived on the fringes of society, often in poverty, ostracised severely, because of their gender identity. They have for too long had to endure public ridicule and humiliation; have been socially marginalized and excluded from society, their basic human rights have been severely denuded.

3. Despite the decision of the Hon'ble Supreme Court in National Legal Services Authority v. Union of India and Ors: MANU/SC/0309/2014 : (2014) 5 SCC 438, the trauma, agony and pain, which members of the transgender community have to undergo continues unabated.

4. In National Legal Services Authority (supra) the Supreme Court observed as follows:-

"The spirit of the Constitution is to provide equal opportunity to every citizen to create and achieve their potential irrespective of caste, religion or gender".

5. The Supreme Court in its infinite wisdom took into consideration the role played by the members of the third gender in Indian culture. The Supreme Court noticed that transgenders were always been treated with great respect and find notable mention in the ancient Hindu scriptures as well as the greatest epics of India, namely, the Ramayana and the Mahabharata.

The Supreme Court took notice of the circumstances which led to the fall of transgenders from the onset of Colonial rule. The Criminal Tribes Act, 1871, categorized the entire transgender community as innately "criminal" and profiled them as being "addicted" to committing serious crimes.

6. The Supreme Court lamented that even after the said law was repealed transgenders remain socially excluded, living on the fringes of society in ghettoised communities, harassed by the Police and abused by the public.

7. It is common knowledge that the Rajya Sabha has already passed a Private Bill to promote the rights of transgenders.

8. Kabir, famously said:

"Hari se tu mat het kar, Kar harijan se het, Maal mulk hari det hai, Harijan hari hi det."

9. In this connection, the words of Swami Vivekanand also assume great importance. He said and I quote,

"All the powers in the universe are already ours. It is we who have put our hands before our eyes and cry that it is dark"

10. Every human being has certain inalienable rights. This is a doctrine that is firmly enshrined in our Constitution. Gender identity and sexual orientation are fundamental to the right of self-determination, dignity and freedom. These freedoms lie at the heart of personal autonomy and freedom of individuals. A transgender's sense or experience of gender is integral to their core personality and sense of being. Insofar as, I understand the law, everyone has a fundamental right to be recognized in their chosen gender. This view is buttressed by the landmark decision of the Supreme Court in National Legal Services Authority (supra).

11. There is, thus, no gainsaying the fact that transgenders enjoy basic human rights including protection from violence and discrimination. They have the right to dignity and self-determination.

12. The time has come for us to mainstream the transgender community. Prejudice is so rampant, so authoritatively practiced that even families fall prey to its all pervasive pressure.

13. Shivani Bhat has triumphed. The indomitable spirit that she has demonstrated may not yet have brought society to its senses, but has definitely persuaded her family to alter its view.

14. Shivani's parents, who are present in person have expressed the love, understanding and support that one has naturally come to expect from all parents. They have readily undertaken to finance Shivani's education for the next three years so long as she pursues a Bachelor's Degree in Neurobiology. In this behalf they have assured this court that in addition to her tuition fee they will provide Shivani with US \$500 per mensem for her personal expenses.

15. Shivani's Passport and Green Card have been returned to her. Shivani has been given a ticket to San Francisco via New York on Flight No. UA83 departing at 11.35 p.m. tonight from Delhi.

16. It is made clear that Shivani shall travel unaccompanied and will not be subjected to any harassment by the extended family upon arrival in the United States of America.

17. All's well that ends well.

18. Before I part with the present order there is yet another aspect that has to be considered.

Worried at her absence without information and fearing the worst, her mother, Seema Bhat, instituted a complaint before the New Agra Police Station. I am informed at the bar that FIR No. 899/2015 dated 17.09.2015 has been registered by the concerned Police Station in Uttar Pradesh, inter alia, under Section 364 of the India Penal Code against unknown persons. Ms. Seema Bhat, who is present in person, informs this court that in view of the rapprochement between the parents and Shivani, she is no longer keen to pursue the complaint that fructified into the said FIR No. 899/2015.

19. Ms. Guruswamy and Ms. Katju, learned counsel appearing on behalf of the petitioner state that unknown persons claiming to be officers of the respondent No. 2 (State of Uttar Pradesh) along with persons claiming to be from the Police Station- Kalkaji came to the house of certain individuals who had provided shelter and support to Shivani in her time of need, ostensibly to ascertain the whereabouts of Shivani.

20. It has been averred in the petition that these individuals have been subjected to illegal confinement, harassment and rebuke by persons claiming to be officers of respondent No. 2.

21. Despite service of notice none appears on behalf of the respondent No. 2.

22. Mr. Avi Singh, learned Additional Standing Counsel (Crl.), has filed a status report in the present petition, which reads as follows:-

"Most respectfully, it is submitted that on 21/09/2015 a team head by SI Nitya Nand and comprising of SI Lalit Bhati, Ct./38 Pramod Kumar, Ct./1545 Jitender Kumar, Ct.52 Sushil Kumar (DIG Agra Surveillance team) from Police Station New Agra, Uttar Pradesh approached the Police Station-Kalkaji and sought assistance for investigation in case FIR No. 899/15, u/s 364 IPC, PS New Agra, UP. Accordingly, D.D No. 45B time 3:40 PM dated 21.09.2015 was lodged at Police Station-Kalkaji and Lady Constable Santosh NO.3148/SE and HC. Ram Kishore was sent along with them for their assistance.

The U.P. police officials conducted investigation at F-26, 1st floor, F-Block, Kalkaji, where the office of NGO Nazariya is located. Ms. Devi Banerjee was found present who informed that Ms. Shivani Bhatt, the petitioner is not residing there. She has further informed that she may be residing with Ms. Leslie Esteves, at 182, Mandakani Enclave, New Delhi.

Thereafter, above police Team went to the above address, which falls in the jurisdiction of Police Station- C.R. Park. Hence, the information was conveyed to PS C.R. Park telephonically and SI Avinash Kumar along staff from PS C.R. Park also reached there. As the above place falls under the jurisdiction of PS C.R. Park, hence the Police official of PS Kalkaji had not entered the above premises. In this regard, an information was also lodged by SI Avinash Kumar at PS C.R. Park vide DD No. 74B dated 21.09.2015. According to which, the lady Shivani Bhatt, the petitioner was not found there.

Thereafter, the U.P police officials came back to Police Station-Kalkaji and departed to their destination vide D.D No. 58B at 08:10PM.

The local Police was provided to above UP Police Team only for assistance in the investigation. Neither Ms. Devi Banerjee was detained nor taken to PS Kalkaji by the UP Police officials. She was relieved of investigation at her place of stay. The allegations with regard to illegal detention are false and denied. The undersigned is duty bound to abide by any directions passed by which this Hon'ble court."

23. Mr. Singh, assures this court that Shivani Bhat has already been provided with adequate protection which shall continue to be afforded to her till she leaves the shores of this country.

24. Mr. Singh lastly assures this court that the Delhi Police does not intend to take any coercive steps either against Shivani or against those who offered her support.

25. In this view of the matter, all the prayers sought in the present petition have been satisfied. The only thing that remains to be done is to issue a direction to the respondent No. 2 (State of Uttar Pradesh) not to harass or illegally confine anybody from within the territorial jurisdiction of this court except in accordance with the procedure established by law. Ordered accordingly.

26. The writ petition is disposed of accordingly.

27. A copy of this order be given dasti under signature of Court Master to counsel for the parties.

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