**IN THE HIGH COURT OF KARNATAKA AT BANGALORE**

**(ORIGINAL JURISDICTION)**

**W.P. No. \_\_\_\_\_/ 2020 (PIL)**

**BETWEEN**

Ondede and others ....Petitioners

AND

Union of India and others ....Respondents

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**Place:** Bangalore

**Date:** 01.05.2020 **Counsel for Petitioners**

**IN THE HIGH COURT OF KARNATAKA AT BANGALORE**

**(ORIGINAL JURISDICTION)**

**W.P. No. \_\_\_\_\_/ 2020 (PIL)**

**BETWEEN**

Ondede and others ....Petitioners

AND

Union of India and others ....Respondents

**SYNOPIS**

The present Public Interest Litigation has been brought by the Petitioners challenging Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the Transgender Persons (Protection of Rights) Act, 2019 (“2019 Act”) as ultra vires and violative of Articles 14, 15, 16, 19 and 21 of the Constitution of India. The impugned 2019 Act has been passed ostensibly to provide rights to transgender persons, but the provisions in fact are completely in violation of Articles 14, 15, 16, 19 and 21 as upheld by the Hon’ble Supreme Court. Under Section 4, a transgender person shall have a right to be recognized only as ‘transgender’ and not as male, female, transgender or other. In *NALSA v. Union of India* the Hon’ble Supreme Court held that the self determination of one’s gender identity as male, female or transgender is part of one’s most intimate decisions and one that goes to the core of one’s right to life and autonomy. Hence compelling persons to only identify oneself as ‘transgender’ and not have the option to identify oneself as male or female would be completely violation of one’s right to gender identity under Article 21. Sections 5, 6 and 7 require that in order to get a certificate of identity as a transgender person, one is required to make an application to the District Magistrate, accompanied with such documents, as may be prescribed and the Magistrate shall issue the certificate after following prescribed procedure. Medical documents including psychological reports and medical reports are required for such application to be considered which is also in violation of *NALSA v. Union of India* which held that gender self-determination cannot be based on medical reassignment or any other procedure. Section 12 states that no child shall be separated from parents or immediate family on the ground of being transgender, except on an order of a competent court. Section 12 (3) also states that where any parent or a member of his immediate family is unable to take care of a transgender, the court shall direct such person to be placed in rehabilitation centre. This means that even situations where gender non-conforming young persons who are facing violence at home, they would have to either return home to violence or be placed in rehabilitation centres.  Finally, Section 18 which deals with offences states that the acts of compelling or enticing a transgender person to indulge in the act of forced or bonded labour, or harming the life, safety, health or well-being, whether mental or physical, of a transgender person acts of physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term from six months to two years. This section is in violation of the guarantee of equality and non-discrimination under Articles 14 and 15 of the constitution as offences of sexual assault in the IPC against women have a punishment of 7 years and above, whereas similar offences of sexual abuse and rape against a transgender person is only from 6 months to 2 years. On all these grounds, this petition is field challenging the constitutionality of the impugned sections under the 2019 Act seeking to declare these provisions as unconstitutional.

**LIST OF DATES**

|  |  |
| --- | --- |
| **DATE** | **PARTICULARS** |
| 1979 | Petitioner No. 2 was formed to protect and campaign for rights of women |
| 09/11/2006 | Yogyakarta Principles on application of International Human Rights Law in relation to Sexual Orientation and Gender Identity were adopted and published. |
| 27/01/2014 | Expert Committee constituted by Respondent No. 2 to examine the issues relating to transgender persons and to make an in-dept study of the problems faced by the transgender community, submitted a detailed report. |
| 15/05/2014 | Hon’ble Supreme Court of India passed the landmark judgment on transgender rights in National Legal Services Authority(NALSA) vs Union of India and others, (2014) 5 SCC 438, wherein it recognised “third gender”/ Transgender persons for the first time and discussed the concept of “gender identity” at length. |
| 12/12/2014 | The Rights of Transgender Persons Bill, 2014 was tabled as a Private Member’s Bill in the Rajya Sabha. |
| 24/04/2015 | The Rights of Transgender Persons Bill, 2014 was unanimously passed in the Rajya Sabha. |
| 02/08/2016 | The Transgender Persons (Protection of Rights) Bill, 2016 was introduced in Lok Sabha. |
| 08/09/2016 | The Transgender Persons (Protection of Rights) Bill, 2016 was referred to the Standing Committee on Social Justice and Empowerment for examination. |
| 21/07/2017 | The Standing Committee on Social Justice and Empowerment presented its 43rd Report on the 2016 Bill before the Lok Sabha. |
| 10/11/2017 | The Yogyakarta Principles Plus 10 (YP+10) were adopted to supplement the Yogyakarta Principles. |
| 17/12/2018 | The Transgender Persons (Protection of Rights) Bill, 2018, was passed in the Lok Sabha despite strong opposition from the transgender community and society. This Bill however lapsed. |
| 05/12/2019 | The Transgender Persons (Protection of Rights) Bill, 2019 received the assent of the Hon’ble President of India and was published in the official gazette. |
| 24/03/2020 | The Central Government ordered a 21-day national lockdown, starting from 25/03/2020, due to Covid-19. |
| 14/03/2020 | The Central Government ordered the second phase lock down of 19-days, starting from 25/03/2020, due to Covid-19. |
| 18/04/2020 | Respondent Nos. 1 and 2 put out the Transgender Persons (Protection of Rights) Rules, 2020, inviting public comments. |
| 30/04/2020 | The last date assigned by Respondent Nos. 1 and 2 for receipt of public comments on the Transgender Persons (Protection of Rights) Rules, 2020 |

**PLACE:** Bangalore

**DATE:** 01.05.2020 **Counsel for Petitioners**

**IN THE HIGH COURT OF KARNATAKA AT BANGALORE**

**(ORIGINAL JURISDICTION)**

**W.P. No. \_\_\_\_\_/ 2020 (PIL)**

**BETWEEN**

1. Ondede

A registered charitable trust

Having its registered address at:

Mahabodhi Arogya Seva Kendra,

Siddapura Main Road, Jayanagar 1st Block,

Opposite Lalbagh

Bangalore - 560011

Represented by its authorised signatory

Dr.AkkaiPadmashali

1. Vimochana

A Society Registered under the Societies Registration Act 1860

Having its registered office at:

#33/1-9, 4th Cross, MaruthiSevanagar,

Bengaluru 560-033,

Represented by its Secretary

Donna Fernandes

1. Sowmya A

Aged 38 years

D/o Anjinappa

Residing at: C/o Christy Raj

#346, St. Peter’s Road

Mariyannapalya, H.A. Farm (Post)

Bangalore - 560024

1. Christy Raj

Aged 34 years

S/o Michael

Residing at: #346, St. Peter’s Road

Mariyannapalya

H.A. Farm (Post)

Bangalore - 560024

…Petitioners

AND

1. Union of India

Ministry of Law and Justice

4th Floor, A Wing

Shastry Bhawan

New Delhi – 110001

Represented by its Secretary

1. Union of India

Ministry of Social Justice and Empowerment

Room No. 622, A Wing

Shastri Bhawan

New Delhi – 110001

Represented by its secretary

1. State of Karnataka

Department of Women and Children

1st floor, M.S. Building,Dr. B.R. Ambedkar Veedhi,

Bangalore-560001

Represented by its Principal Secretary Respondents

**MEMORANDUM OF PETITION UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA 1950**

The Petitioners submit as follows:

1. The present Public Interest Litigation has been brought by the Petitioners challenging Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the Transgender Persons (Protection of Rights) Act, 2019 (“2019 Act”) as ultra vires and violative of Part III of the Constitution of India, 1950, as being in violation of Articles 14, 15, 16, 19 and 21 of the Constitution of India. The impugned 2019 Act has been passed ostensibly to provide rights to transgender persons, but the provisions in fact are completely in violation of Articles 14, 15, 19 and 21 as upheld by the Hon’ble Supreme Court. Under Section 4, a transgender person shall have a right to be recognized only as ‘transgender’ and not as male, female, transgender or other. In NALSA v. Union of India, (2014) 5 SCC 438, the Hon’ble Supreme Court held that the self determination of one’s gender identity as male, female or transgender is part of one’s most intimate decisions and one that goes to the core of one’s right to life and autonomy. Hence compelling persons to only identify oneself as ‘transgender’ and not have the option to identify oneself as male or female would be completely violation of one’s right to gender identity under Article 21. Sections 5, 6 and 7 require that in order to get a certificate of identity as a transgender person, one is required to make an application to the District Magistrate, accompanied with such documents, as may be prescribed and the Magistrate shall issue the certificate after following prescribed procedure. Medical documents including psychological reports and medical reports are required for such application to be considered which is also in violation of NALSA v. Union of India, (2014) 5 SCC 438, which held that gender self-determination cannot be based on medical reassignment or any other procedure. Section 12 states that no child shall be separated from parents or immediate family on the ground of being transgender, except on an order of a competent court. Section 12 (3) also states that where any parent or a member of his immediate family is unable to take care of a transgender, the court shall direct such person to be placed in rehabilitation centre. This means that even situations where gender non-conforming young persons who are facing violence at home are forced to run away, would have to either return home to violence or be placed in rehabilitation centres.  Finally, Section 18 which deals with offences states that the acts of compelling or enticing a transgender person to indulge in the act of forced or bonded labour, or harming the life, safety, health or well-being, whether mental or physical, of a transgender person acts of physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term from six months to two years. This section is in violation of the guarantee of equality and non-discrimination under Articles 14 and 15 of the constitution as offences of sexual assault in the IPC against women have a punishment of 7 years and above, whereas similar offences of sexual abuse and rape against a transgender person is only from 6 months to 2 years. On all these grounds, this petition is field challenging the constitutionality of the impugned sections under the 2019 Act seeking to declare these provisions as unconstitutional.

ARRAY OF PARTIES

1. The Petitioner No.1 Ondede is a registered public charitable trustworking extensively with the transgender community in Bangalore and other parts of Karnataka. Ondede works on transgender rights, child rights, women’s rights, sexual minority rights and for the rights of other vulnerable sections through areas of dialogue, research and action on dignity, voice and sexuality. Itenvisions a society that provides access is non-discriminatory and gender-just and aims to create a space for dialogue and support and strengthen action to visibilize issues in relation to children, women and sexual minorities. The Petitioner No. 1 organisation is founded by Dr. Akkai Padmashali who is an extremely well-renowned [transgender activist](https://en.wikipedia.org/wiki/Transgender_activist). For her work in activism she has received the [Rajyotsava Prashasti](https://en.wikipedia.org/wiki/Rajyotsava_Prashasti" \o "Rajyotsava Prashasti), the second highest civilian honour of the State of Karnataka, and an honorary doctorate from the Indian Virtual University for Peace and Education. She is also the first transgender person in [Karnataka](https://en.wikipedia.org/wiki/Karnataka) to register her marriage. As part of its work, the Petitioner No.1 organizes dialogue not just with the grassroots community but also with various policy stakeholders including the State Government, police, hospitals, the State Human Rights Commission, religious groups, students, lawyers and activists. The Petitioner’s work has brought issues of sexual violence and discrimination against sexual minorities to the fore, giving dignity and voice to a community that has been historically shunned.

1. The Petitioner No.1 organization has done a lot of work around the rights of transgender and intersex persons and sexual minorities. It has authored reports on the human rights and societal challenges faced by sexual minorities in Karnataka, including police violence, domestic violence, sex reassignment surgery and intersectional approaches to gender. In 2017, the Petitioner No.1, jointly with NIMHANS (National Institute of Mental Health and Neuro-Sciences) authored a report titled, “Socio-Medical Status of Transgender Persons in India – Sex Reassignment Surgery”, which documents the challenges faced by the transgender community in accessing Sex Reassignment Surgery (SRS) and the right to “self-identification” of gender. In April 2018, the Petitioner No.1 published the report titled “*Domestic and Sexual Violence; Claiming Voice, Rights and Dignity”* which documents instances of violence faced by the LBGTIQ community across Karnataka in order to understand sexual violence, domestic violence, sexuality rights and transgender rights from the perspectives and experiences of these communities. The Petitioner No.1 has been at the forefront of advocacy on issues such as Section 377 of the Indian Penal Code, Section 36A of the Karnataka Police Act, the Karnataka State Transgender Policy and the Transgender Persons (Protection of Rights) Bill, 2016, organizing workshops, panel discussions and community meetings, effectively spotlighting the transgender perspective. The Petitioner No. Trust also led efforts to support transgender voter registration, working with the Election Commission to raise awareness among the community. The activities of the Petitioner No. 1 have regularly been reported in the press and media. Dr. Padmashali was an intervenor in the PIL filed by the Karnataka Sexual Minorities Forum challenging Section 36A of the Karnataka Police Act where the term “eunuch” was successfully removed by a judgment of this Hon’ble High Court. In 2018, Dr. Padmashali filed a Writ Petition before the Hon’ble Supreme Court challenging Section 377 of the Indian Penal Code on grounds of discrimination against transgender persons, resulting in the landmark judgment delivered by the Apex Court which struck down the provision as unconstitutional.

(A copy of the online article titled, “Voices Heard: Registered Transgender Voters Double in Karnataka Polls!”, dated April 25, 2018 published in thebetterindia.com at <https://www.thebetterindia.com/139118/registered-transgender-voters-double-karnataka-polls/>is annexed herein and marked as **ANNEXURE – A**)

(A copy of the article titled, Atrocities on transgenders must be brought under ambit of Domestic Violence Act : Akkai Padmashali, dated July 13, 2018 in Mangalore Today is annexed herein and marked as **ANNEXURE – B**)

(A copy of the article titled, “Many Policies, but transgender community yet to reap benefits”, dated February 27, 2019 in The Hindu is annexed herein and marked as **ANNEXURE – C**)

(A Copy of the article titled, “The one with many “Firsts”” in the Bangalore Mirror, dated 1.11.2015 is annexed herein and marked as **ANNEXURE – D**)

(True copy of the online article titled, “At 12 she wanted to Die. Today she is inspiring Hundreds to fight for Transgender Rights and Justice”, on www.betterindia.com, dated 14th April 2015 is annexed herein and is marked as **ANNEXURE – E**)

1. The Petitioner No.2 Vimochana is a society registered under the Societies Registration Act, 1860 and was formed in 1979 to protect and campaign for the rights of women. It was formed with an aim to seek a just and humane society by highlighting the need for a public forum that would stand for organised resistance to the increasing violence against women and would be assertive in challenging the pervading apathy to gender related problems in the context of larger structures of violence and power.Vimochana’s interventions for the protection of women’s rights have been at multiple levels. It works at the deeply personal level of listening to women who have been victims of various kinds of violence speak about their pain and trauma, and responding to them through the provision of shelter, counsel, legal, social and moral support. These interventions enable women to make choices that will allow them to live a life of dignity, free from violence. Vimochana also initiates negotiations with the family and community to harness their support in resolving the problem, and try to facilitate justice through the police stations and courts when all other options have been exhausted. Vimochana has worked with the law and judiciary, the media, religious institutions, family and the community on issues of domestic violence and violence against women. While they are based in the city of Bangalore, Vimochana also networks with other women’s and human rights groups at the local, national and international levels to extend their political vision and to encourage more effective interventions at a broader level. As part of its campaigns on women’s rights, Vimochana also supports transgender rights and has been working for the promotion of the rights and entitlements of transgender, intersex and gender non-conforming persons in India.
2. The Petitioner Nos. 3 and 4 are transgender activists working on gender rights in Karnataka. The Petitioner No. 4 is the first transgender journalist in India who has been voicing the concerns of the transgender community. The efforts put in by both Petitioner Nos. 3 and 4 have developed awareness among the entire community of transgender persons and among people working on social justice on transgender rights.
3. The Respondent Nos.1 and 2 are the Union of India and the Ministries that have passed the 2019 Act which is under challenge in this Petitioner. The Respondent No.3 is the State of Karnataka through the Department of Women and Child Development. Although the State government has not passed the impugned Act, Respondent No.3 would be a necessary party as it would be the appropriate authority to operationalize the impugned Act in Karnataka and a stay of the said impugned Act is sought for before this Hon’ble Court.

**Brief Facts:**

1. It is submitted that this petition has been filed challenging the constitutionality of sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the Rights of Transgender Persons Act 2019 and completely against all accepted principles on the rights relating to gender identity and self-determination of one’s gender.
2. The first time that the rights to gender identity were recognised internationally, was with the adoption of the Yogyakarta Principles. In 2006, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating sexual orientation and gender identity. Following the experts meeting, the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity were adopted and published on 09.11.2006. The Yogyakarta Principles illustrate the rights of transgender and intersex persons and state as follows:
3. **Principle 3:** The right to recognition before the law states that each person’s self-defined gender identity and sexual orientation is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.
4. **Principle 18:** The right to Protection from Medical Abuse states that 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.
5. **Principle 6: T**he 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.

(A copy of the Yogyakarta Principles are annexed herein and are marked as **ANNEXURE – F)**

1. In India, the demands for recognition of transgender rights started in 2014. On 27.01.2014 The Ministry of Social Justice & Empowerment constituted an Expert Committee to examine issues relating to transgender persons and to make an in-depth study of the problems being faced by the transgender community and suggest suitable measures that can be taken by the Government to ameliorate those problems and the Expert Committee submitted a detailed Report. The Expert Committee after referring to several papers, laws and policies, suggested that the legal recognition of gender identity of transgender people should be based on their choice to identify as a woman, man or a separate gender (‘third gender’ or ‘transgender’). The Expert Committee Report further suggested affirmative action or reservation as a means to ensure equal access to educational opportunities.

(A copy of Chapter 13 of Expert Committee Report is annexed herein and is marked as **ANNEXURE – G**)

1. Subsequently on 15.05.2014, the Hon’ble Supreme Court passed the landmark judgement in ***National Legal Services Authority (NALSA) vs Union of India &Ors***, (2014) 5 SCC 438 (“*NALSA*”) wherein it recognized transgender persons for the first time and discussed the concept of gender identity at length. The Hon’ble Supreme Court held that self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21. The Hon’ble Supreme Court interpreted Article 19(1)(a) to include the freedom to express one’s chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc. Gender identity, therefore, lies at the core of one’s personal identity, gender expression and presentation and, therefore, is to be protected under Article 19(1)(a) of the Constitution of India. The Hon’ble Supreme Court recognized the Yogyakarta Principles as applicable to protect the interests of transgender persons in absence of a domestic law existing in India in this regard holding that,*“…Principles discussed hereinbefore on TGs and the International Conventions, including Yogyakarta principles, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country. ”*The Hon’ble Supreme Court directed the Central and State Governments to take several steps for the advancement of the transgender community, including inter alia:
2. To make provisions for the legal recognition of “third gender” in all documents.
3. To recognize transgender persons as a “socially and educationally backward class of citizens”, entitled to reservations in educational institutions and public employment.
4. Taking steps to frame social welfare schemes for the community.
5. Thereafter on 10.11.2017 The Yogyakarta Principles Plus 10 (YP+10) were adopted, to supplement the Yogyakarta Principles. These Principles aim to document and elaborate the developments made in the field of international human rights law regarding diverse sexual orientations and gender identities, gender expression and sex characteristics. The YP+10 supplement the original 29 Yogyakarta Principles of 2006 and added the following principles:
6. **Principle 31:** The right to legal recognition, which provides 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.
7. **Principle 32:** The Right to Bodily and Mental integrity, which states that everyone has the right to self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics.

(A copy of the Yogyakarta Plus 10 is annexed herein and is marked as **ANNEXURE – H)**

**Recognition of Fundamental Rights of Transgender Persons**

1. The recognition of fundamental rights of transgender persons in India was led by Hon’ble Supreme Court in its landmark judgment in NALSA where it was specifically held that the transgender community has the right to self-identify their gender identity and gender orientation as an integral part of their right to life guaranteed under Article 21; the right to equality under Article 14, 15 and 16, and the right to freedom of expression under Article 19. In *NALSA*, the Hon’ble Supreme Court recognized the violence and discrimination faced by transgender persons.
2. In *NALSA*, the Hon’ble Supreme Court made specific directions to the Central and State Governments to enforce the rights of transgender persons and particularly the right to self-identification of gender identity. Crucially, the Hon’ble Supreme Court reiterated and emphasised that such self-identification of gender identity should be without the requirement of any kind of medical examination or intervention, and held as follows:

“22. …*Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom* and ***no one shall be forced to undergo medical procedures, including SRS, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.***

***82. …Gender identity as already indicated forms the core of one’s personal self, based on self-identification, not on surgical or medical procedure.”***

1. The world over it has been recognized that for the rights of transgender and intersex persons to be recognized, one of the first things needed is legislation that would recognize their right to gender identity without medical or psychological documents. A transgender or intersex person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity. Some of the recent jurisdictions where gender identity legislations have been enacted are as follows:
2. **GENDER IDENTITY LEGISLATIONS IN OTHER JURISDICTIONS:**

It is submitted that many new legislations have been enacted in other jurisdictions, recognising the right to gender identity. Some of these are as follows:

1. The Gender Identity Law, 2012, Argentina: This provides that all persons who wish to change their recorded sex must prove that they have attained the age of 18 years and submit a request that they are covered under the applicable law requesting amendment of their birth certificate and the national identity card.

(A True Copy of the English Translation of the Gender Identity Law, 2012, Argentina is annexed herein and is marked as **ANNEXURE – J)**

1. The Gender Identity, Gender Expression and Sex Characteristics Act, 2015, Malta: This provides in section 3 (4) that a person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity. In Section 5, the details and requirements to be stated in the self-declaratory public deed for reflecting the person’s change of gender identity are provided. The law specifically provides that no other evidence apart from the declaratory public deed shall be required.

A True Copy of the Gender Identity, Gender Expression and Sex Characteristics Act, 2015, Malta is annexed herein and is marked as **ANNEXURE – K)**

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

A True Copy of the Gender Recognition Act 2015 is annexed herein and is marked as **ANNEXURE – L)**

1. **LEGISLATIVE HISTORY RECOGNIZING RIGHTS OF TRANSGENDER PERSONS IN INDIA**

It is submitted that prior to the 2019 Act, there were many Bills introduced for the protection of rights of transgender persons. An overview of all these legislative efforts is given below:

1. 2014 Bill: The Rights of Transgender Persons Bill, 2014 (hereinafter referred to as the ‘2014 Bill’) was tabled as a Private Member’s Bill in the Rajya Sabha on 12th December 2014.It was unanimously passed in the Rajya Sabha on 24th April, 2015, but it was never debated in the Lok Sabha. The Bill was the first effort at framing legislation for rights of transgender persons. In line with the decision of the Hon’ble Supreme Court in *NALSA vs. Union Of India*, the 2014 Bill defined transgender persons to refer to persons whose sense of gender does not match with the gender assigned at birth and includes trans-men, trans-women, gender queers and socio-cultural identities such as kinnars, hijras, aravanis and jogtas. It also provided for two percent reservation for transgender community in all primary, secondary, higher government aided educational institutions and in employment in public establishments under the State.

(A copy of the Transgender Persons Bill 2014 is annexed herein and is marked as **ANNEXURE – M**)

1. **2016 Bill:**  Subsequently The Transgender Persons (Protection of Rights) Bill, 2016 (hereinafter referred to as the ‘2016 Bill’) was introduced in the Lok Sabha on 2nd August, 2016.In contrast to the 2014 Bill, the 2016 Bill defines the term ‘transgender persons’ in medical terms as follows – *““transgender person” means a person who is—*

*(A) neither wholly female nor wholly male; or*

*(B) a combination of female or male; or*

*(C) neither female nor male;*

*and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.”*

Under Section 5 of the 2016 Bill, a transgender person may make an application to a District Magistrate for issuing a certificate of identity as a transgender person. On receipt of an application under Section 5 of the 2016 Bill, the District Magistrate ‘shall’ refer such application to a District Screening Committee to be constituted by the appropriate Government and consisting of the Chief Medical Officer, the District Social Welfare Officer, a psychologist or psychiatrist, a representative from the transgender community and an officer of the appropriate government. As per Section 7 of the 2016 Bill, the District Magistrate shall issue a transgender person a certificate of identity as such on the basis of the recommendation made by the District Screening Committee, and the certificate so issued will be official proof of an individual’s identity as a transgender person. A similar procedure is prescribed for obtaining a revised certificate reflecting change of gender under Section 8 of the 2016 Bill.

(A copy of the 2016 Bill is annexed herein and is marked as **ANNEXURE – N**)

1. **Standing Committee Report**: On 08.09.2016 The Transgender Persons (Protection of Rights) Bill, 2016 was referred to the Standing Committee on Social Justice and Empowerment for examination. The Standing Committee on Social Justice and Empowerment presented its 43rd Report on the 2016 Bill before the Lok Sabha on 21.07.2017 with inter alia the following recommendations and suggestions as to the contents of The Transgender Persons (Protection of Rights), Bill 2016:

*“1.27 …a transgender person should have the option to choose either 'man', 'woman' or 'transgender' as well as have the right to choose any of the options independent of surgery/hormones. The Committee, therefore, recommend that Clause 2(i) of the Bill may be reframed as under : "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-men and trans-women (whether or not they have undergone sex reassignment surgery or hormone therapy or laser therapy etc.), gender-queers and a number of sociocultural identities such as - kinnars, hijras, aravanis, jogtas etc.*

*…*

*3.10 The Committee after examining the provisions of Clause 4(1) and 4(2) thoroughly are of the firm view that it is essential in the Bill to explicitly define the terms 'gender identity' and 'gender expression' since the right to self-determination has been recognised and upheld in the directions given in NALSA judgement. NALSA judgement also upholds the right to self-identified gender i.e. male, female or third gender in absolute terms. The Committee, therefore, recommend that such key definition of 'gender identity' may be adopted in the Bill as "'gender identity' refers to each person's 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 and/or functions by medical, surgical or other means) and other expressions of gender such as dress, mannerisms, speech patterns and social interactions".*

*…*

*5.16 Further, the Committee feel that it is imperative that alternative family structures are recognized, especially in the context of transgender persons. Accordingly, there is a need to recognize alternate support structures in the transgender community. The Committee desire that there is a need to define the word 'family' so that the Hijra or Aravani community elders, who adopt young transgender children are not put under risk and the Hijra family system is not criminalized. The Committee, therefore, recommend that a sub-clause may be added in Clause 2 of Chapter-I of the Bill giving appropriate definition of the word 'family', viz., a group of people related by blood, marriage or by adoption of a transgender person.*

*5.17 The Committee further recommend that Clause 13(3) may be reworded as under: "Where any parent or a member of his immediate family is unable to take care of a transgender child or the child does not want to live with them, the competent court shall make every effort, if need be, by an order, to place such child with his or her extended family, or in the Community in a family setting or rehabilitation centre".*

*…*

*8.8 As Clause 19 provides for the same/similar punishment for offences that are varied in nature and in the harm caused, which violates the principle of proportionality under Article 14 of the Constitution, the Committee recommend that there should be graded punishment for different offences and those involving physical and sexual assault must be met with higher punishment. Further, the Indian Penal Code may be used as a guideline while determining penalties of such abuses/crimes so that principle of proportionality is also preserved.*

*…*

*8.9 The Committee further recommend that the Bill should also specifically recognize, and provide appropriate penalties for, violence that transgender persons face from officials in educational institutions, healthcare institutions, police stations, jails, shelter and remand homes and other places of custody.*

*…*

*9.1 The Committee further recommend that the Ministry should consider suitably incorporating the following suggestions in "The Transgender Persons (Protection of Rights) Bill, 2016". which the Committee feel are equally important and will have a direct bearing on the welfare of transgender persons:*

*(1) In NALSA, the Supreme Court directed the Central Government and the State Governments to take steps to treat transgender persons as socially and educationally backward classes of citizens and extend all kinds of reservation for admission in educational institutions and for public appointments. The Bill is silent on granting reservations to transgender persons under the category of socially and educationally backward classes of citizens.*

*…*

*(8) A provision providing penal action against abortions of intersex foetuses and forced surgical assignment of sex of intersex infants should be there in the Bill.”*

(A Copy of the 43rd Report of The Standing Committee on Social Justice and Empowerment on The Transgender Persons (Protection of Rights), Bill 2016 presented before the Lok Sabha 21.07.2017 is annexed herewith and marked as **ANNEXURE - P**)

1. **The 2018 Bill:** The Transgender Persons (Protection of Rights), Bill, 2018, which is same as the 2016 Bill was passed in Lok Sabha after incorporating some suggestions from the Standing Committee Report, despite a lot of opposition from the transgender community and society.

1. **The 2019 Act:** The Transgender Persons (Protection of Rights) Bill, 2019 (hereinafter referred to as the ‘2019 Bill’) was introduced in Lok Sabha on 19.07.2019 to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto. The 2019 Bill was unanimously passed by the Lok Sabha on 05.08.2019, and the Rajya Sabha passed it on 26.11.2019. The 2019 Bill received the Presidents assent on 05.12.2019 and was published as the Transgender Persons (Protection of Rights) Act, 2019 in the official gazette on the same day.

(A Copy of the Transgender Persons (Protection of Rights) Act, 2019 is annexed herewith and marked as **ANNEXURE – Q)**

1. It is submitted that The Transgender Persons (Protection of Rights) Act, 2019 (hereinafter referred to as the ‘2019 Act’) was passed by the Parliament of India and has received the assent of the President of India on 5th December, 2019. The 2019 Act was enacted with an objective to provide for the protection of rights of transgender persons, but in reality it violates their fundamental rights and goes against the judgements of the Hon’ble Supreme Court in *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, *K.S. Puttuswamy and another v. Union of India and Other*s (2017) 10 SCC 1 and *Navtej Singh Johar and others v. Union of India* (2018) 10 SCC 1, all of which guarantee that the right to self-determine one’s gender identity is an integral part of one’s right to life, dignity and autonomy and this basic guarantee is violated in the 2019 Act. Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the 2019 Act as they violate their fundamental rights to life, liberty, privacy, autonomy and dignity guaranteed under Article 21, their right to equality under Article 14, and their right to gender identity and their fundamental freedoms under Article 19 of the Constitution of India, 1950.
2. Sections 4, 5 and 6 of the 2019 Act all relate to the right of transgender persons to be recognized as ‘a transgender person. The sections are reproduced below:

***4. (1) A transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act.***

***(2) A person recognised as transgender under sub-section (1) shall have a right to self-perceived gender identity.***

***5. A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person, in such form and manner, and accompanied with such documents, as may be prescribed:***

***Provided that in the case of a minor child, such application shall be made by a parent or guardian of such child.***

***6. (1) The District Magistrate shall issue to the applicant under section 5, a certificate of identity as transgender person after following such procedure and in such form and manner, within such time, as may be prescribed indicating the gender of such person as transgender.***

***(2) The gender of transgender person shall be recorded in all official documents in accordance with certificate issued under sub-section (1).***

***(3) A certificate issued to a person under sub-section (1) shall confer rights and be a proof of recognition of his identity as a transgender person.***

1. It is submitted that in NALSA vs. Union of India, (2014) 5 SCC 438. The Hon’ble Supreme Court held that, a person has the right to be identify their gender as male, female or transgender and that the right to self-determine one’s gender identity is an integral part of one’s right to life, dignity and autonomy in Article 21 of the constitution. Hence the provisions of Section 4 of the 2019 Act mandating that a transgender person shall have a right to be recognized as such, is limiting their rights and is unconstitutional, as it only provides for the right to recognition as a transgender person, and not as male or female which may be self–determined gender identity of the transgender person. The Hon’ble Supreme Court in NALSA also held that: “Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and ***no one shall be forced to undergo medical procedures, including SRS, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.***

***. …Gender identity as already indicated forms the core of one’s personal self, based on self-identification, not on surgical or medical procedure.”***

This has also been held in the Yogyakarta Principles and the Yogyakarta Plus 10 principles and there can be no requirement of any procedures for transgender persons to affirm their gender identity. The requirements in Section 5 and 6 that identity cards would be issued based on documents as may be required, is therefore unconstitutional as transgender persons cannot be subjected to any further documentary requirements, which may include document relating to medical or psychological tests or reports.

1. Section 7 states as follows:

***7. (1) After the issue of a certificate under sub-section (1) of section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed.***

***(2) The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.***

***(3) The person who has been issued a certificate of identity under section 6 or a revised certificate under sub-section (2) shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person: Provided that such change in gender and the issue of revised certificate under sub-section (2) shall not affect the rights and entitlements of such person under this Act.***

1. Section 7 requires transgender persons to undergo medical surgery in order to identify with a gender of their choice. This violates the decision of the Hon’ble Supreme Court in NALSA vs. Union of India, which declared that transgender persons have a right to self-identify their gender as an aspect of their right to personal liberty and personal autonomy under Article 21 of the Constitution, and, to express their self-identified gender through dressing, words and behaviour in exercise of their right to freedom of speech and expression under Article 19(1)(a). The provisions of Section 7 of the 2019 Act violate the right to bodily integrity, privacy and personal autonomy guaranteed to transgender persons as per the decisions of this Hon’ble Supreme Court.
2. It is submitted that Section 4, 5 and 6 of the 2019 Act are in direct contravention of these fundamental rights, insofar as they provide that a transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person. The identity certificate issued under these provisions of the 2019 Act will only identify people as transgender, and not as male or female unless the person has undergone sex reassignment surgery and can duly prove the same as provided in Section 7 of the 2019 Act. This goes against the decision of the Hon’ble Supreme Court in NALSA vs Union of India, to allow persons to self-identify either as male, female or transgender in exercise of their right to personal autonomy and liberty under Article 21 of the Constitution of India, 1950.
3. Section 12 of the 2019 Act states as follows:

***12. (1) No child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such child.***

***(2) Every transgender person shall have—***

***(a) a right to reside in the household where parent or immediate family members reside;***

***(b) a right not to be excluded from such household or any part thereof; and***

***(c) a right to enjoy and use the facilities of such household in a non-discriminatory manner.***

***3) Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre.***

1. This Section compels a transgender person to either continue living with their birth family even if they face violence within the home or be placed in a rehabilitation centre upon the orders by a competent court are violative of the rights of transgender persons under the right to life. Section 12(3) does not make any distinction in treatment between minors and adult transgender persons and is an intrusive manner of regulating the choice of where individuals who may be adults can choose to live. Denying transgender persons, the choice to live in any third alternative arrangement, say for instance the choice of living as a family within a transgender community, could be seen as an instance of interference with their decisional autonomy recognized as part of one’s right to privacy and right to life.
2. Section 18(a) of the 2019 Act makes it an offence to compel or entice a transgender person to indulge in the act of forced or bonded labour and which is punishable with imprisonment for a term which shall not be less than six months but which may extend to two years with fine. This provision has the potential to target and attack the alternative family structures developed by the transgender community. The provision is vague as it does not define what is meant by forced/bonded labour and when an act amounts to ‘indulging’ a transgender person in forced/bonded labour and it can therefore be applied against the interests of the transgender community in an arbitrary manner so as to violate the guarantee of equality under Article 14 of the Constitution of India, 1950.
3. Section 18(d) of the 2019 Act makes it an offence to harm or injure or endanger the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, and which is punishable with imprisonment for a term which shall not be less than six months but which may extend to two years with fine. It is submitted that this provision violates Article 14’s guarantee of equality as the maximum penalty for sexual abuse committed against transgender persons is capped at two years’ imprisonment, whereas, for similar offences committed against women under the Indian Penal Code, 1860 ranges between three years to life imprisonment. Transgender persons are not covered by the sexual offences against women made punishable under the Indian Penal Code, 1860, which are gender specific provisions where the perpetrator of the offence is a male and the victim is a female. Thus, the distinction in punishment for sexual abuse when committed against transgender persons in contrast to cis women is arbitrary and violative of Article 14 of the Constitution of India, 1950, which mandates equality before law and equal protection of laws.
4. Finally, the Hon’ble Supreme Court in NALSA vs. Union of India recognised the right of transgender persons under Articles 15(4) and 16(4) to access reservations in public education and public employment to ensure that there is representation from the transgender community and that they are able to participate in mainstream society. The Hon’ble Supreme Court accordingly directed the Centre and the State Governments to treat transgender persons as socially and educationally backward classes of citizens and to provide them with reservations in educational institutions and in public employment. However, the 2019 Act is silent on this aspect and fails to adhere to the guidelines issued by the Hon'ble Supreme court.
5. After the 2019 Act was passed, suddenly on 18th April 2020, during the nation-wide lockdown due to the COVID-19 pandemic, the Respondent Nos. 1 and 2 put out the Draft Transgender Persons (Protection of Rights) Rules 2020, inviting public comments on or before 30th April 2020. These Draft Rules have been published on 18th April 2020 right in the middle of a nation-wide lockdown and during the unprecedented and ongoing global pandemic. During this time, the transgender community is one of the worst hit, and has been struggling to get access to food, healthcare and basic livelihood. Members of the trans community have their livelihoods taken away and have not been able to get access to even basic rations and food grains. Most the NGOs also working on transgender rights have been busy trying to provide food and basic rations. With all these emergencies for basic livelihood, it is impossible for members of the transgender community to review the Draft Rules put out by the Ministry, when they have more urgent and pressing issues of food and health to address. Many of them do not have access to the internet right now and are unable to even mobilize any collective response to the Draft Rules. Further, even the minimum 30 day period for public consultation to be provided as per the Pre-Legislative Consultative Policy, 2014 even for subordinate legislation and Rules has not been given. The Draft Rules have not been widely disseminated and it is clear that the Respondents Nos.1 and 2 are attempting to hurriedly pass the Rules without any proper consultation with the real beneficiaries of the law, which are transgender persons.

(A copy of the Draft Rules are annexed herein and marked as **ANNEXURE - R** )

(A copy of the Call for Comments on the Rules is annexed herein and is marked as **ANNEXURE - S**)

(A copy of the Pre-Legislative Consultative Policy 2014 is annexed herein and is marked as **ANNEXURE – T**)

1. The clear constitutional protections set out by the Hon’ble Supreme Court in NALSA vs. Union Of India protecting the fundamental rights of the Petitioners as transgender persons under Articles 14, 15, 16, 19 and 21, are violated by Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the 2019 Act. The 2019 Act is in complete violation of all the rights recognized for transgender persons, under NALSA and the Yogyakarta Principles and does not seek to protect transgender persons from discrimination or provide full equality.
2. Having no other alternative and equally efficacious remedy, the Petitioners have filed the present Public Interest Litigation before this Hon’ble High Court under its original jurisdiction. The Petitioners have not filed any other petition before this Hon’ble Court in respect of this cause of action. The petition is filed on the following, among the other grounds.

**Grounds**

1. **THAT** Section 4 of the 2019 Act which states that a transgender person shall have a right to be recognised “as such” in accordance with the provisions of this Act is in complete violation of their right to life, dignity and autonomy and gender self-determination which is not limited to be recognized as “transgender” but also as male or female or other gender. In ***NALSA,*** the Hon’ble Supreme Court clearly held that self-identification is the basis of gender identity: “*Gender identity refers 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 a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual’s self-identification as a man, woman, transgender or other identified category.”*

Hence the requirement under Section 4 that a transgender person can only be recognised as ‘transgender’ is therefore in violation of Article 21 of the constitution.

1. **THAT** Section 5 of the Transgender Persons (Protection of Rights) Act, 2019 which requires that in order to get a certificate of identity a transgender person has to make an application to the District Magistrate in such form and manner, and accompanied with such documents, as may be prescribed. Such a legal provision which would make an identity certificate dependent on production of documents would amount to a violation of a person’s right to gender identity and autonomy guaranteed under Article 21 of the constitution, as one’s right to get recognition of legal identity should not be dependent on any documents to be provided.
2. **THAT** the proviso under Section 5 of the 2019 Act by giving the discretion to the parents or guardian to apply for the certificate of identity for the child violates Principle 18 and Principle 32 of the Yogyakarta Principles where States are mandated to ensure that the child has the right to choose one’s own gender identity after having maturity and understanding of one’s identity. By allowing the parents or guardians to apply for certification, the state is giving the power to choose the gender of the child to the parents. This will mean that the parents can determine and choose a gender, which might not align with the self-identified gender of the child at a later point in time.
3. **THAT** Section 6 of the 2019 Act which provides that the District Magistrate shall issue to the applicant a certificate of identity as transgender person after following such procedure and in such form and manner, within such time, as may be prescribed indicating the gender of such person as transgender is in violation of the right to dignity and self-determination of gender identity, because one’s certificate of identity should not be dependent on any procedure and a self-declaration of gender identity should be sufficient for the same.
4. **THAT** Section 6 of the 2019 Act is in violation of Article 14 of the constitution for being excessively vague as it does not state what procedures may be prescribed for obtaining such a certificate and such procedures could include body and physical screening requirements or medical testing and examination or even psychological examination, all of which are prohibited by the Hon’ble Supreme Court in ***NALSA v. Union of India*** and hence would be unconstitutional.
5. **THAT** Section 7 of the 2019 Act which mandates if a transgender person wishes to change their gender identity to male or female, it can be done only after medical reassignment, is a complete violation of the right to self-determination of one’s gender identity upheld by the Hon’ble Supreme Court in ***NALSA*** which held that transgender persons have a right to self-identify their gender as an aspect of personal autonomy and personal liberty under Articles 19(1)(a) and 21 of the Constitution.
6. THAT under the Yogyakarta Plus 10 Principles, Principle 31 mandates that no medical and psychological tests can be required for the legal recognition of one’s gender identity. Principle 31 of the Yogyakarta Principles reads as under:

“Principle 31 – *The Right To Legal Recognition: 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.”*

Hence, in light of these internationally accepted principles, section 7 of the 2019 Act which requires the submission of a medical report and even the requirement of a psychological report under section 6 as stated in the Draft Rules, would be violative on a person’s right to self-determine their gender identity.

1. **THAT** Section 12 of the 2019 Act which states that where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation center compels a transgender person to either continue living with their birth family or be placed in a rehabilitation centers upon the orders by a competent court, is violative of the rights of transgender persons guaranteed under Article 19 of the Constitution of India, 1950.
2. ***THAT*** Section 12(3) of the 2019 Act which does not make any distinction in treatment between a minor and an adult transgender person is an intrusive manner of regulating the choice of where these individuals can choose to live. Denying transgender persons the choice to live in any third alternative arrangement, say for instance the alternative family structures that exist within the transgender community, could be seen as an instance of interference with their personal autonomy recognized by the Hon’ble Supreme Court in ***K.S. Puttuswamy and Another vs. Union of India****,* **(2017) 10 SCC 1.**
3. **THAT** the provision of Section 18(a) is in violation of Article 14 of the constitution as it is vague for failing to define the ingredients of the offence of compelling or enticing a transgender person into bonded labour and is capable of arbitrary application against the interests of the transgender community itself and is therefore unconstitutional as per the doctrine of void for vagueness, which is recognized as a part of Article 14 of the Constitution of India, 1950.
4. **THAT** the provision of Section 18(d) of the 2019 Act, which inter alia makes it an offence for a person who “tends to do acts including causing…sexual abuse” and makes the said offence punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine, is violative of Article 14 of the Constitution as it provides a lower punishment for sexual offences against transgender persons than the punishment provided under Section 376 of the Indian Penal Code for rape and sexual assault against women. Such a distinction is only on the basis of gender identity implying that the transgender identity is unequal to other gender identities and would amount to a violation of the core guarantee of equality under Article 14 and non-discrimination on the basis of gender under Article 15 of the constitution.
5. **THAT** Section 18(d) of the 2019 Act which makes the act of committing ‘sexual abuse’ against transgender persons an offence is vague and arbitrary as it does not define the term ‘sexual abuse’ and hence amounts to a violation of the guarantee of non-arbitrariness under Article 14. By not defining what constitutes sexual abuse for the purposes of the 2019 Act, Section 18(d) is vague in material terms. Further, the words “tends to do acts” as used in Section 18(d) create confusion as a person can either do an act amounting to sexual abuse or not do it and the key terms defining the offence created under Section 18(d) of the 2019 Act are vague and uncertain as to their meaning, the provision offends the doctrine of void for vagueness and is therefore violative of the right protected under Article 14 of the Constitution.
6. **THAT** Section 18(d) of the 2019 Act further violates the provisions of Article 14 of the Constitution of India, 1950 for creating an arbitrary distinction in the penalties applicable for sexual offences against cis women and transgender persons. Similar sexual offences (see IPC offences such as assault and criminal force against a woman with intent to outrage her modesty (s. 354 of IPC), sexual harassment (s. 354A of IPC), assault or criminal force to woman with an intent to disrobe (s. 354B of IPC), rape (s. 375, 376 of IPC), sexual intercourse by a person in authority (s. 376C of IPC), voyuerism (s. 354C of IPC), stalking (s. 354D of IPC)) committed against cis women are subject to higher penalties under the Indian Penal Code, 1860 ranging from 3 years imprisonment to life imprisonment and whereas, all the offences against transgender persons made punishable under the 2019 Act are subject to only a maximum penalty of 2 years imprisonment.
7. **THAT** under the 2019 Act the distinction in the punishment for the offence of sexual abuse under Section 18(d) which can also include acts of rape committed against transgender persons which is a maximum penalty of 2 years imprisonment is significantly lower than the penalty of minimum ten years imprisonment, which may extend to life imprisonment for rape against cis-women as per Section 376 of IPC and this distinction in the level of penalty imposed on perpetrators of rape depending on the gender identity of the victim is completely arbitrary and in violation of Article 15 of the Constitution.
8. **THAT** the distinction in the levels of punishment prescribed for sexual offences committed against transgender persons and cis-women under the Section 18(d) of the 2019 Act and IPC respectively, is based solely on the basis of the gender identity of the victim and as held by the Hon’ble Supreme Court in ***Navtej Singh Johar v. Union of India ,*** (2018) 10 SCC 1,a classification, which discriminates against persons based on their ‘intrinsic or core trait’ such as their gender identity *ipso facto* fail the test of equality under Article 14 of the Constitution of India, 1950 and such classification has no rational nexus with the purpose of the law.
9. **THAT** the 2019 Act is unconstitutional and violates the guarantee of equality for all transgender persons as it does not provide for any reservations in public employment and public education as mandated by the Hon’ble Supreme Court in *NALSA* wherein it stated that: “*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.*”
10. **THAT** Principle 6 of the Yogyakarta Principles, which deals with the *‘The Right to Privacy’* states that ***“****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.”*
11. **THAT** the restrictions imposed in Section 12 of the 2019 Act are in violation of Article 19(1)(e) of the Constitution which guarantees to every citizen the right to reside and settle in any part of the territory of India. Constraining the places where a transgender person can live is in clear violation of Article 19(1)(e) of the Constitution of India, 1950. As held by theHon’ble Court Supreme in ***Ahmedabad Municipal Corporation vs. Nawab Khan Gulab Khan and Ors. (1997) 11 SCC 121,*** “*Article 19(1)(e) of the Constitution provides to all citizens fundamental rights to travel, settle down and reside in any part of the Bharat and none have right to prevent their settlement. Any attempt in that behalf would be unconstitutional. “ …...* ***The policy or principle should be such that everyone should have the opportunity to migrate and settle down in any part of Bharat where opportunity for employment or better living conditions are available and, therefore, it would be unconstitutional and impermissible to prevent the persons from migrating and settling at places where they find their livelihood and means of avocation.****”*
12. **THAT** the provision of Section 18(a) of the 2019 Act, which makes it an offence to compel or entice a transgender person to indulge in the act of forced or bonded labor, has the potential to target and attack the alternative family structures developed by the transgender community and to criminalize the activities of begging and sex-work, in which members of the community are customarily and by economic necessity engaged in to earn their livelihood. The provision is vague as it fails to define the phrase ‘forced or bonded labor’. Section 18(a) can be broadly interpreted by the state authorities in any way that they want in order to target the transgender community members themselves and hence this provision is arbitrary and violative of Article 14 of the constitution.
13. **THAT** the provision of Section 18(a) of the 2019 Act, which makes it an offence to compel or entice a transgender person to indulge in the act of forced or bonded labor, is vague in material terms as it does not define what is meant by forced or bonded labor. The 2019 Act fails to define the activity of forced or bonded labor even by reference to The Bonded Labour System (Abolition) Act, 1976. Therefore, it has the potential to be arbitrarily applied against the members of the transgender community who are already discriminated and face stigmatic treatment at the hands of state officials and other members of the society as indicated above. Further, the provision is also vague as it does not state what amounts to enticing a transgender for the purposes of the 2019 Act. Thus, the provision is void for vagueness considering the potential ways in which it can be arbitrarily used to target and attack the members of the transgender community, thereby violating Article 14 of the constitution.
14. **THAT** the Hon’ble Supreme Court in ***Shreya Singhal vs. Union of India,* (2015) 5 SCC 1** struck down Section 66A of the Information Technology Act, 2000 for inter alia the reason that the expressions used therein are completely open-ended and undefined, and the words used therein have nebulous, vague meanings capable of multiple interpretations. The Hon’ble Supreme Court categorically held that where no reasonable standards are laid down to define guilt in a section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable under Article 14 of the Constitution.
15. **THAT** the Hon’ble Supreme Court in the case of ***Navtej Singh Johar and Others vs. Union of India,* (2018) 10 SCC 1,**where a legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia. In the instant case, Section 18 of the 2019 provides a different punishment for the offence of sexual abuse of two years whereas under the IPC a punishment of 10 years is imposed for sexual assault and rape and this differential punishment is only based on one’s gender identity and hence is a violation of Article 14 of the constitution.
16. **THAT** the Hon’ble Supreme Court in ***NALSA***, upheld the right of transgender persons under Articles 15(4) and 16(4) to access reservations in education and public employment. The Court recognized the significance of providing reservations for transgender persons to ensure that there is representation from the transgender community and they are able to participate in mainstream society and accordingly directed the Centre and the State Governments to treat transgender persons as a socially and educationally backward classes of citizens and to provide them with reservations in educational institutions and in public employment.
17. **THAT** reservations are crucial for integrating transgender and intersex persons in mainstream society by enabling them to receive education and gain employment in public office. The purpose of reservations is not merely to correct past wrongs and discriminatory treatment but also ensure that transgender and intersex persons are provided with the means to actively participate in social life in the future and further that there is greater diversity and representation in our educational institutions and public appointments.
18. **THAT** as per Article 141 of the Constitution of India, law declared by the Supreme Court shall be binding on all courts within the territory of India and hence the directions of the Hon’ble Supreme Court in ***NALSA*** to provide reservations for transgender persons in public employment have to be guaranteed. This is to ensure certainty and continuity in the interpretation of the law across the country as required by the legal doctrine of *stare decisis.*  The Hon’ble Supreme Court in the case of ***Priya Gupta and Ors. vs. Addl. Secy. Ministry of Health and Family Welfare and Ors* (2013) 11 SCC 404** held that, “***The orders passed by this Court are the law of the land in terms of Article 141 of the Constitution of India. No Court or Tribunal and for that matter any other authority can ignore the law stated by this Court.”***
19. **THAT** the non - inclusion of any provisions relating to reservation in public employment and public education under the 2019 Act is also in violation of Principle 12 of the Yogyakarta Principles talks about the right to work and it states that
20. *“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;*
21. *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 programs to counter discriminatory attitudes.”*
22. **THAT** there is an urgent need to implement reservations for transgender and intersex persons in education and public employment, who continue to have low levels of education and are often unemployed or engage in traditional employment like begging and sex work, in order to integrate them to mainstream society.
23. **THAT** the Draft Rules are also not complying with the minimum 30 day period of consultation that is mandated under the Pre-Legislative Consultative Policy and even the Draft Rules are in violation of constitutional provisions.

**GROUNDS FOR INTERIM RELIEF:**

1. THAT unless the operation of the Transgender Persons (Protection of Rights) Act, 2019 is stayed, the Respondents No. 1 and 2 will hurriedly pass the Rules and put the 2019 Act into operation. The introduction of the Draft Rules during the period of the nation-wide lockdown and not providing even the minimum 30 day period for public consultation shows that the Union Government is keen to pass the Rules and operationalize the 2019 Act at any cost. This will lead to violation of the constitutional rights and guarantees of transgender persons. They would not be able to get certificates of identity which would be needed for getting their gender identity recognized, without a medical or psychological report, which is completely in violation of the right to life under Article 21 of the constitution as held by the Hon’ble Supreme Court in NALSA. Such violations cannot be undone and will lead to permanent harm and injury to all sought to be covered under this petition.
2. Thus, if the operation of the 2019 Act is not stayed and the interim relief is not granted, then this entire petition would be rendered infructuous and the ill-effects arising from such operation of the 2019 Act are irreversible.

**PRAYER**

In light of the facts and circumstances stated hereinabove, it is most respectfully prayed that this Hon’ble Court may graciously be pleased to: -

1. Declare Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the Transgender Persons (Protection of Rights) Act, 2019, produced herein as **ANNEXURE-Q,** as ultra vires Part III of the Constitution of India, 1950, as violative of Articles 14, 15, 16, 19 and 21 of the Constitution of India; and,
2. Grant such other reliefs as this Hon’ble Court may deem fit and proper in light of the facts and circumstances of the case.

**INTERIM PRAYER**

Pending the disposal of this writ, the Petitioners pray that this Hon’ble Court be pleased to the stay the operation of the Transgender Persons (Protection of Rights) Act, 2019, dated 05/12/2019, which has been produced herein as **ANNEXURE –** **Q**, in the interest of justice and equity.

**Place:** Bangalore **Counsel for the Petitioners**

**Date:** 01/05/2020 ROHAN KOTHARI

**Address for Service:**

Ashira Law

D6, Dona Cynthia Apartments,

35 Primrose Road

Bangalore – 560025

**IN THE HIGH COURT OF KARNATAKA AT BANGALORE**

**(ORIGINAL JURISDICTION)**

**W.P. No. \_\_\_\_\_/ 2020 (PIL)**

**BETWEEN**

Ondede and others ....Petitioners

AND

Union of India and others ....Respondents

**Memorandum of Facts in lieu of Verifying Affidavit**

We, Rohan Pankaj Kothari, Naveen Reddy and Azhar Ali Farooqi, having our office at Ashira Law, D6, Dona Cynthia, Primrose Road, Ashok Nagar, Bangalore 560025, do hereby state that:-

1. We are the counsels for the petitioners in the abovementioned petition and we have been informed of the facts giving rise to this petition by the petitioners. Therefore, we are competent to submit this memorandum of facts in lieu of a verifying affidavit.

2. We state that the paragraphs 1 to 60 are true to the best of our knowledge and belief.

3. We state that the Annexures A to Y annexed hereto are true copies of their originals.

**Place :** Bangalore

**Date :** 01/05/2020 **Counsel for Petitioners**

**IN THE HIGH COURT OF KARNATAKA AT BANGALORE**

**(ORIGINAL JURISDICTION)**

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**BETWEEN**

Ondede and others ....Petitioners

AND

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**Memo of Appearance in lieu of Vakalathnama**

The counsels for the petitioners, Adv. Rohan Pankaj Kothari, Adv. Naveen Reddy and Adv. Azhar Ali Farooqi, in the above petition most humbly submits that due to the existing lockdown imposed by the government to curb the spread of Covid 19 pandemic, the petitioners are not in a position to visit the office of their counsel to sign the necessary vakalathnama. Considering the extreme urgency and impossibility of the petitioners to sign the vakalathnama, the counsel for the petitioner prays that this Hon’ble Court be pleased to take this Memo of Appearance in lieu of Vakalathnama on record, in the interest of justice and equity

**Place :** Bangalore Counsel for Petitioners

**Date :** \_\_/04/2020

Rohan Pankaj Kothari

Enrol. No: KAR/1213/14

**ADDRESS FOR SERVICE**

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**IN THE HIGH COURT OF KARNATAKA AT BANGALORE**

**(ORIGINAL JURISDICTION)**

**W.P. No. \_\_\_\_\_/ 2020 (PIL)**

**BETWEEN**

Ondede and others ....Petitioners

AND

Union of India and others ....Respondents

**MEMO DISCLOSING EXTREME URGENCY**

The Petitioners most humbly submit that this petition is filed challenging the constitutionality of the Transgender Persons (Protection of Rights) Act, 2019 Act. During the lockdown, on 18.04.2020 the Respondent No. 2 has put out the Transgender Persons (Protection of Rights) Rules, 2020, inviting public comments, latest by 30.04.2020 giving only 12 days’ time for public comments, at a time when the entire country is in a lock down and the transgender community is the worst hit by the lockdown. The said draft Rules are being attempted to be passed with undue haste, in an arbitrary manner and without affording the minimum prescribed period of 30 days to respond. The last date for the Rules being 30th April 2020 has already lapsed and the Rules may be passed any day now, and the same will lead to operationalise the impugned 2019 Act. The petition seeks a stay of the operation of the 2019 Act as it deprives transgender persons of their fundamental rights under the constitution to obtain identity certificates and avail of welfare benefits and the entire transgender community will be put to irreparable loss and undue hardships if the Transgender Persons (Protection of Rights) Act, 2019 which is in gross violation of the fundamental rights guaranteed under Part III of the Constitution of India is not stayed till its constitutionality is examined by this Hon’ble Court. Hence it is prayed that this petition may kindly be listed for hearing and consideration of the interim prayer, in the interest of justice and equity.

**PLACE:** Bangalore

**DATE:** 01/05/2020 **Counsel for Petitioners**