

## **SYNOPSIS**

The Petitioners, are members of the transgender community, and well-known transgender rights activists who have been working for the promotion of the rights and entitlements of transgender, intersex and gender non-conforming persons in India for the last several years. They are filing the present Writ Petition praying for issuance of writ/ writs, order/ direction declaring that Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the Transgender Persons (Protection of Rights) Act, 2019 as ultra vires Part III of the Constitution of India, 1950, particularly, being violative of their fundamental rights under Articles 14, 15, 19 and 21 of the Constitution of India.

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 5<sup>th</sup> 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 this Hon'ble Court in National Legal Services Authority v. Union of India, (2014) 5 SCC 438, K.S. Puttuswamy and another v. Union of India and Others (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.

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.**

It is submitted that in *NALSA vs. Union of India*, (2014) 5 SCC 438.

this Hon'ble 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.

This Hon'ble 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.

Further 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.**

Section 7 requires transgender persons to undergo medical surgery in order to identify with a gender of their choice. This violates the decision of this Hon'ble 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 behavior 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 Court in NALSA vs Union of India, K.S. Puttuswamy and Another vs Union of India and Navtej Singh Johar and others v. Union of India.

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 this Hon'ble 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.

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.**

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.

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 labor 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 labor 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.

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.

Finally, this Hon'ble 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. This Hon'ble 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 this Hon'ble court.

The clear constitutional protections set out by this Hon'ble 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. Hence it is prayed that this Hon'ble Court decide on the constitutionality of these provisions. Hence, the present Writ Petition.

### **LIST OF DATES**

9.11.2006 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 9.11.2019. The Yogyakarta Principles that are relevant to illustrate the rights of transgender and intersex



persons under international human rights law to self-identify one's gender are as follows.

**Principle 3 of the Yogyakarta Principles on the right to recognition before the law** states that each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.

**Principle 18 of the Yogyakarta Principles on the 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.

**Principle 6 of the Yogyakarta Principles** states that 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.

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 women, men 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.

15.05.2014

This Hon'ble Court passed the judgement on transgender rights in *National Legal Services Authority (NALSA) vs Union Of India & Ors*, (2014) 5 SCC 438 under which recognized "third gender"/transgender persons for the first time and discussed the concept of "gender identity" at length.

This Hon'ble 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.

This Hon'ble 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.

This Hon'ble 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."*

This Hon'ble Court directed the Central and State Governments to take several steps for the advancement of the transgender community, including inter alia:

1. To make provisions for the legal recognition of "third gender" in all documents.

2. To recognize the third gender persons as a “socially and educationally backward class of citizens”, entitled to reservations in educational institutions and public employment.
3. Taking steps to frame social welfare schemes for the community.

12.12.2014

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 12<sup>th</sup> December 2014. It was unanimously passed in the Rajya Sabha on 24<sup>th</sup> 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 this Hon’ble 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 reservation 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.

02.08.2016

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 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 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 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 a 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 Bill.

Under Section 13 of the Bill, all transgender persons are provided with the right to reside in the household where parent or immediate family members reside. As per Section 13(3) of the Bill, compels a transgender person to either continue living with their birth family or be placed in a rehabilitation centre upon the orders by a competent court.

Further, under Section 19, the Bill criminalizes the act of compelling or enticing a transgender person to indulge in act of begging or bonded labor and provides a punishment of imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

08.09.2016 The Transgender Persons (Protection of Rights) Bill, 2016 was referred to the Standing Committee on Social Justice and Empowerment for examination and Report on the 2016 Bill.

21.07.2017 The Standing Committee on Social Justice and Empowerment presented its 43<sup>rd</sup> 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."

None of these recommendations made by the Standing Committee have been incorporated in the 2019 Act.

24.08.2017

In Justice K.S. Puttaswamy vs. Union of India (2017) 10 SCC 1, this Hon'ble Court declared privacy as "a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution."

This Hon'ble Court held "that privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life." In addition, it noted that personal intimacies (marriage, procreation and family), including sexual orientation, are at the core of an individual's dignity.

It noted that the right to privacy was at the intersection of Articles 15 and 21 of the constitution, by referring to its decision in *NALSA vs. Union of India*, which grants the right

to self-recognition of gender. It stated that the right to privacy was an expression of individual autonomy, dignity, and identity.

10.11.2017 The Yogyakarta Principles Plus 10 (YP+10) were adopted. 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:

**Principle 31 of the Yogyakarta Principles on 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.

**Principle 32 of the Yogyakarta Principles on 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.

17.12.2018 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.

05.08.2019 The Transgender Persons (Protection of Rights) Bill, 2019 was unanimously passed by the Lok Sabha on 05.08.2019.

26.11.2019 The Transgender Persons (Protection of Rights) Bill, 2019 was passed in Rajya Sabha in its existing form.

05.12.2019 The Transgender Persons (Protection of Rights), Act 2019 received the President's assent and was notified as law in the official gazette.

2.2020 Hence, this Writ Petition.



1. Union of India  
Ministry of Law and Justice  
4<sup>th</sup> Floor, A-Wing, Shastri Bhawan  
New Delhi – 110001  
Represented by its Secretary ...Respondent No.1
  
2. Union of India  
Ministry of Social Justice  
Central Secretariat  
New Delhi - 110001  
Represented by its Secretary ...Respondent No.2

**A WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA FOR ENFORCEMENT OF THE FUNDAMENTAL RIGHTS OF THE PETITIONERS BY WAY OF ISSUANCE OF AN APPROPRIATE WRIT, ORDER OR DIRECTION IN THE NATURE OF MANDAMUS AND/ OR CERTIORARI, OR ANY OTHER WRIT, ORDER OR DIRECTION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA INTER-ALIA DECLARING SECTIONS 4, 5, 6, 7, 12(3), 18(A) AND 18(D) OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 TO BE ULTRA VIRES PART – III OF THE CONSTITUTION, AND PARTICULARLY THE GUARANTEE UNDER ARTICLES 14, 19 AND 21 OF THE CONSTITUTION OF INDIA.**

TO

THE HON'BLE CHIEF JUSTICE OF INDIA AND  
HIS COMPANION JUSTICES OF THE HON'BLE  
SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE  
PETITIONERS ABOVE NAMED

**MOST RESPECTFULLY SHOWETH:**

1. The Petitioners, who are members of the transgender community, are filing the present Writ Petition s are filing the present Writ Petition praying for issuance of writ/ writs, order/ direction declaring that Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of The Transgender Persons

(Protection of Rights) Act, as ultra vires Part III of the Constitution of India, 1950, particularly, being violative of their fundamental rights under Articles 14, 15, 19 and 21 of the Constitution of India.

2. That the Petitioners are members of the transgender community, and are filing the present petition as their fundamental rights guaranteed under Part III of the Constitution of India particularly fundamental rights guaranteed under Article 14, 15, 16, 19 and 21 of the Constitution of India are being violated by the provisions of the Transgender Persons (Protection of Rights) Act 2019. That since the Petitioners are challenging the constitutional validity of the Act, they have not made any representation to the respondent Authorities there being no necessity for the same. That the Respondent No. 1 is the Union of India through the Ministry of Law and Justice and the Respondent No. 2 is the Union of India through the Ministry of Social Justice. The Respondents fall within the ambit of "State" under Article 12 of the Constitution and are hence, amenable to the writ jurisdiction of this Hon'ble Court under Article 32 of the Constitution of India.
3. The brief facts and background giving rise to the filing of this petition are narrated below:

#### **PARTICULARS OF THE PETITIONERS**

- (i) The Petitioners are members of the transgender community and well-known transgender rights activists who have been working for the rights and welfare of the transgender persons in India.
- (ii) The Petitioner No. 1 Grace Banu is a transgender rights activist and has been active in the movement to secure the rights of transgender persons in India and more particularly in the State of Tamil Nadu since the year 2010. She is the first transgender person to be admitted to and have graduated from an engineering college in Tamil Nadu and to have secured an engineering degree. She has established the Trans Rights Now Collective, which is a national collective of transgender persons established with the objective of building capacity and leadership among the transgender community across India. Through the Trans Right Now Collective, the Petitioner No. 1 has advocated for securing the rights of SC and ST transgender persons in India. She has also been an active voice in the movement for the implementation of the directions of the Hon'ble Supreme Court in NALSA, urging the State to provide reservations for transgender persons in educational institutions and public employment. Petitioner No. 1 has been an active voice in opposing the Transgender Persons (Protection of Rights) Bill, 2018 (hereinafter referred to as 'the 2018 Bill') as it is in violation of the constitutional rights of transgender persons and seeks to harm them instead of protecting them. She has also been involved in organizing the transgender community in voicing our concerns against the 2018 Bill. The Petitioner No. 1 has also assisted many transgender



persons in securing employment opportunities in the State of Tamil Nadu through advocacy and assistance with litigation. She has also written in the media actively on transgender rights and concerns.

(A copy of a profile of the Petitioner published by the website Wikipedia is annexed hereto and marked as **Annexure – P/1**)

(A copy of the newspaper article “Transgender protest at bill definition” published in The Telegraph is annexed and marked as **Annexure – P/2**)

(A copy of the judgement in *Swapna & Ors. v. The Chief Secretary, W.P. No. 31091 of 2013* is annexed herein and is marked as **Annexure – P/3**)

(A copy of the newspaper article “Where are the archives of our Dalit Trans foremothers and forefathers” published in ThePrint is annexed and marked as **Annexure – P/4**)

- (iii) The Petitioner No. 2 Vyjayanti Vasanta Mogli is a transgender rights activist and was one of the founding members of the Telangana Hijra, Intersex and Transgender Samiti, which is an unregistered organization working for the welfare and the rights of transgender persons in Telangana. She has also been a public policy student at the Tata Institute of Social Sciences and has been a fellow of the International Visitors Leadership Program of the State Department of the United States of America. The Petitioner No. 3 has actively worked for the improvement of the conditions of the transgender community. She is also a recipient of the Vocational Excellence award from the Rotary Club of Hyderabad Midtown and Barclays

Bank for her contributions to the advancement of the welfare of women and transgender people. She has helped the community in many instances of violence to file First Information Reports against atrocities, which are focused on the transgender community. The Petitioner No. 2 has fought for the rights of the entire Transgender community, and works towards creating awareness on the government policies as well as corporate policies of companies, which exclude transgender persons. As a founding member of the Telangana Hijra Intersex and Transgender Samiti, she has actively worked with the collective in promoting and protecting the rights of the Transgender community. The Telangana Hijra Intersex and Transgender Samiti is an unfunded collective of transgender, hijra, non-hijra intersex, trans-women, trans-men and gender non-conforming people. It has participated in and organized several protests against the inaction of the police and the government in securing the rights of transgender persons. The Samiti has been vocal in addressing the lacuna in the legal system, and has made recommendations on the Rights of Transgender Persons Bill, 2014 and on the Transgender Persons (Protection of Rights) Bill, 2016. It deposited with the inter-parliamentary Standing Committee of Social Justice & Empowerment on the Transgender Persons (Protection of Rights) Bill, 2016. It has initiated and taken part in awareness campaigns and protests condemning the murder of trans-women and the violence faced by the community as a whole.

A True Copy of the news article titled “US should borrow our NALSA verdict” dated 10.11.2016, in New Indian Express, is annexed herein and is marked as **Annexure – P/5**

A True Copy of the news article titled “Being LGBT in India: Some home truths” dated 27.08.2016, in Live Mint, is annexed herein and is marked as **Annexure P/6**

A True Copy of the news article titled “We need sensitivity, not sensationalism” in the January-March 2017 release of the Press Institute India, annexed herein and marked as **Annexure P/7**

A True Copy of the news article titled “Transgender people seek separate welfare board” dated 11.10.2014, in The Hindu, is annexed herein and marked as **Annexure P/8**

A True Copy of the letter titled “Recommendations on Rights of Transgender Persons Bill, 2015 released by the Ministry of Social Justice & Empowerment” from the Telangana Hijra Intersex Transgender Samiti along with other groups is annexed herein and marked as **Annexure P/9**

- (iv) The Petitioner No. 3 is a transgender Rights activist who is based in Telangana. She has partnered with the National Institute for Rural Development and Panchayati Raj (NIRD & PR) under the Ministry of Rural Development, Government of India to mobilize 500 people from the transgender community in various alternative livelihoods and occupations. She has encouraged many transgender persons to acquire and develop skills to enable them to take up occupations

in order to earn a livelihood. The Petitioner No. 3 has also taken an initiative to partner with the Government in the Open Defecation Free Campaign and Swachh Bharat Abhiyaan. The Petitioner No. 3's work has recently been featured in the press and media. She is the General Secretary of the Telangana Transgender People's Association (TTPA).

A Copy of the news item titled "The way we are" featuring the Petitioner No 4's work published by The Week on 07.01.2018 is annexed herewith and marked as **Annexure – P/10**

(v) The Petitioner No. 4 is a transfeminist, transgender rights and social justice activist based in Calcutta, India whose relationship with activism has spanned about two decades. In 1998 she co-founded Pratyay Gender Trust, one of the early community led collectives in India that became a support space for gender non-conforming and transgender persons facing harassment, stigma and violence for their gender identity/ expression. Pratyay focuses on issues surrounding transgender persons' right to work, economic justice and inclusion. She has been deeply involved with sexualities, gender, anti-homophobic/ transphobic violence and transfeminist movements in India. A significant part of her work is focussed on collectivisation of transgender persons across India, advocating with policy makers and building synergies across other human rights movements. A copy of the news item titled "The transgender identity remains lost in translation" featuring the Petitioner No. 6 and her work published by

The Telegraph on 19.05.2019 is annexed herewith and marked as **Annexure – P/11**)

A copy of the news item titled "India's First Transgender Durga Puja Will Be In A Small Neighbourhood in Kolkata" featuring the Petitioner No. 6 and her work published by The Huffington Post on 14.10.2015 is annexed herewith and marked as **Annexure – P/12**)

(vi) The Petitioner No. 5 is a dalit transman from Adilabad, Telangana. He has a diploma in Radiology and is a certified Multi Purpose Health Worker (MPHW) with a certification in First Aid from the Ministry of Health & Family Welfare. He is co-founded and is a board member of the Society for Transmen Action and Rights (STAR), a support group of Transmen for Transmen in Andhra Pradesh, Telangana and Karnataka. He has been a speaker on LGBT issues at many distinguished forums and institutions like IIIT, Hyderabad, University of Hyderabad, Osmania University inter alia and has been closely engaging with churches on the issue of transgender inclusion.

(vii) All the Petitioners are transgender persons. The term "transgender" would also encompass various other terminologies and groups of persons who are referred to under different names including intersex persons, hijras, kothi, aravani, jogappas, shiv shakti, kinnar and other identities.

#### **4. RECOGNITION OF FUNDAMENTAL RIGHTS OF TRANSGENDER PERSONS**

- I. This Hon'ble Court passed 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.
- II. In NALSA, this Hon'ble Court recognized the violence and discrimination faced by transgender persons.

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."

- III. The Yogyakarta Principles were adopted in 2007 are principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Principles 3, 18, 31 and 32 of the Yogyakarta Principles are specifically relevant with regard to the right of transgender persons to self-identify their gender.
- IV. Principle 3 of the Yogyakarta Principles talks about the Right to Recognition before the Law. It states that each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. It also provides that States shall take all necessary legislative, administrative and other measures to fully respect and legally recognize each person's self-defined gender identity and ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex, including birth certificates, passports, electoral records and other documents reflect the person's self-determined gender identity.
- V. Principle 18 of the Yogyakarta Principles reads as under:

“Principle 18 – Protection from Medical Abuses: 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.

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. 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:

- i. 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;
- ii. 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;
- iii. While sex or gender continues to be registered:
- iv. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person’s self-defined gender identity;
- v. Make available a multiplicity of gender marker options;
- vi. 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;

- vii. 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."

D. Principle 32 of the Yogyakarta Principles reads as under:

"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.

E. States Shall:

- i. Guarantee and protect the rights of everyone, including all children, to bodily and mental integrity, autonomy and self-determination;
- ii. Ensure that legislation protects everyone, including all children, from all forms of forced, coercive or otherwise involuntary modification of their sex characteristics;
- iii. 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;
- iv. 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;
- v. 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...."

True Copy of the Yogyakarta Principles dated nil are annexed herein

and are marked as **ANNEXURE – P/13**

True Copy of the Yogyakarta Principles dated nil are annexed herein and are marked as **ANNEXURE – P/14**

F. 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:

5. **Gender Identity Legislations in other Jurisdictions:**

- (i) 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 – P/15**

- (ii) 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 –P/16**

- (iii) 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 –P/17**

6. **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:

(A) The 2014 Bill:

(i) In 2014, following the judgment in *NALSA*, The Rights of Transgender Persons Bill, 2014 ('2014 Bill'), was tabled as a Private Member's Bill in the Rajya Sabha on 12<sup>th</sup> December 2014. It was unanimously passed in the Rajya Sabha on 24<sup>th</sup> April, 2015 but it was never debated in the Lok Sabha. The Bill was the first effort at framing legislation "*to provide for the formulation and implementation of a comprehensive national policy for ensuring overall development of the transgender persons and for their welfare to be undertaken by the State and for matters connected therewith and incidental thereto.*"

(ii) In line with the decision of this Hon'ble Court in **NALSA**, the 2014 Bill defines transgender persons in psychological terms 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*. Importantly, the 2014 Bill had no provisions dealing with the process for legal identification of transgender persons.

(iii) Based on the directions of this Hon'ble Court in the judgment in the case of **NALSA**, this Bill also provided for reservation 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.

(iv) Sex affirmation surgery – Section 15 (b) of this Bill provided that the appropriate Government shall provide welfare measures which would include medical care facility including sex reassignment surgery and hormonal therapy and counselling.

(v) The 2014 Bill also provided for the creation of Special Transgender Rights Courts to deal with civil suits, which may be filed by or on behalf of transgender persons under the Bill or any other law for the time being in force. The 2014 Bill also specified penalties for the offence of hate speech (imprisonment that may extend to one year and with fine) and for the failure to produce information as required under the Act (fine). A True Copy of the Rights of Transgender Persons Bill, 2014 is annexed herewith and marked as

**ANNEXURE - P/18**

(B) **The 2016 Bill:**

(i) The Transgender Persons (Protection of Rights) Bill, 2016 ('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.”*

- (ii) Under Section 5 of the 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 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 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 a 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 Bill.

(iii) Under Section 13 of the Bill, all transgender persons are provided with the right to reside in the household where parent or immediate family members reside. As per Section 13(3) of the Bill, compels a transgender person to either continue living with their birth family or be placed in a rehabilitation centre upon the orders by a competent court. Under Section 19, the Bill criminalizes the act of compelling or enticing a transgender person to indulge in act of begging or bonded labor and provides a punishment of imprisonment for a term which shall not be less than six months but which may extend to two years and with fine. A True Copy of The Transgender Persons (Protection of Rights) Bill, 2016 is annexed herewith and marked as **Annexure – P/19**.

(iv) The 2016 Bill was referred to the Standing Committee on Social Justice and Empowerment for its examination and Report on 08.09.2016. The Standing Committee presented its 43<sup>rd</sup> 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 feels 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 fetuses and forced surgical assignment of sex of intersex infants should be there in the Bill."

A True Copy of the 43<sup>rd</sup> 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/20**

C. **The 2018 Bill:**

(i) 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.

A True Copy of The Transgender Persons (Protection of Rights), Bill, 2018 is annexed herewith and marked as **Annexure – P/21**

D. **The 2019 Act:**

(i) 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 True Copy of the Transgender Persons (Protection of Rights) Act, 2019 is annexed herewith and marked as **Annexure – P/22**

(ii) 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.

(iii) Section 4 of the 2019 Act states as follows:

SECTION 4:

“4. Recognition of identity of transgender person. — (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.”

(iv) Section 5 states as follows:

SECTION 5

“5. Application for certificate of identity. — 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.”

#### SECTION 6:

“6. Issue of certificate of identity. — (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.”

#### SECTION 7:

“7. Change in gender. — (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.”

#### SECTION 12(3)

“12. Right of residence. — (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.”

#### SECTION 18(a) and (d)

“18. Offences and penalties. — Whoever

(a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government;

....

(d) harms or injures or endangers 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,

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.”

7. That the present writ petition involves the following substantial questions of law:

A. WHETHER Section 4 of the Transgender Persons (Protection of Rights) Act, 2019 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 gender and is therefore in violation of Article 21 of the constitution?

B. WHETHER 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, without stating which documents are required, is 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.

C. WHETHER 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 the 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?

D. WHETHER 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 is sufficient for the same?

E. WHETHER Section \_\_\_\_\_ 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 this Hon'ble Court in NALSA?

F. WHETHER 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 this Hon'ble 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.

G. WHETHER 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 centre and 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?

H. WHETHER 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 this Hon'ble Court in the case of K.S. Puttuswamy and Another vs. Union of India, (2017) 10 SCC 1?

I. WHETHER 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?

J. WHETHER 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 an 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?

K. WHETHER 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?

L. WHETHER 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), voyeurism (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?

M. WHETHER 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?

N. WHETHER 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 this Hon'ble 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 ?

O. WHETHER 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 this Hon'ble 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."

8. That the Petitioners have filed the present Writ Petition seeking protection of their fundamental rights on the following grounds:

**GROUND**

- (A) THAT Section 4 of the Transgender Persons (Protection of Rights) Act, 2019 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 gender and is therefore in violation of Article 21 of the constitution.
- (B) 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.

- (C) 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
- (D) 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.
- (E) THAT Section 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 this Hon'ble Court in NALSA v. Union of India and hence would be unconstitutional.

- (F) 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 this Hon'ble 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.
- (G) 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 centre 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.
- (H) 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 this Hon'ble Court in the case of K.S. Puttuswamy and Another vs. Union of India, (2017) 10 SCC 1.

- (I) 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.
  
- (J) 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.

(K) 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.

(L) 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), voyeurism (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.

- (M) 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.
- (N) 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 this Hon'ble 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.



- (O) 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 this Hon'ble 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.”*
- (P) THAT in NALSA this Hon'ble 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.”
- (Q) 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.”

- (R) 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 this Hon'ble Court 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.”
- (S) 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.

- (T) 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 attach the members of the transgender community, thereby violating Article 14 of the constitution.

- (U) THAT this Hon'ble 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. This Hon'ble 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.
- (V) THAT this Hon'ble 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.
- (W) THAT this Hon'ble 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.

- (X) 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.
- (Y) 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."

(Z) 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

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 programs to counter discriminatory attitudes."

C. **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.

(AA) 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.

9. That the Petitioners have not filed any other petition before this Hon'ble Court or any other court seeking the same relief.

## PRAYER

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

- (a) Issue writ/ writs, order/ direction declaring Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the Transgender Persons (Protection of Rights) Act, 2019 as ultra vires Part III of the Constitution of India, 1950, being particularly violative of Articles 14, 15, 16, 19 and 21 of the Constitution of India; and,
- (b) Issue a writ/ writs, order/ direction, writ being in the nature of Mandamus to Respondents to implement the directions of this Hon'ble Court in National Legal Services Authority v. Union of India, (2014) 5 SCC 438 to provide reservations to transgender persons in public employment and education as socially and educationally backward classes of citizens;
- (c) Grant such other reliefs as this Hon'ble Court may deem fit and proper in light of the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER SHALL, AS IN DUTY BOUND EVER PRAY

SETTLED BY:

(JAYNA KOTHARI)  
SENIOR ADVOCATE

FILED BY:

(ANINDITA PUJARI)  
ADVOCATE FOR THE PETITIONERS

DRAWN ON: .

FILED ON: