

SYNOPSIS

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This writ petition under article 32 of the Constitution questions the constitutional validity of the Transgender (Protection of Rights) Act, 2019. The Act, instead of furthering or protecting the fundamental rights of transpersons, violates and facilitates the violation of the right (s) to life, privacy and equality of transpersons.

The judgment of this Hon'ble Court in *National Legal Services Authority v. Union of India* (2014) 5 SCC 438 [hereinafter referred to as '**NALSA**'] recognized the marginalization of and discrimination against trans-persons in India and directed the Union and State Governments to take necessary remedial steps to ensure that fundamental rights of transpersons are not violated. This recognition of the struggles of transpersons was a signal to Parliament and the state legislatures to enact progressive legislations giving full effect to the fundamental rights of transpersons.

The Petitioner, (a transperson and a transgender rights activist), submits that the impugned Act, however, sets the clock back and negates even the protections secured to transpersons by this Hon'ble Court in its judgment in *NALSA*.

First, the right to self-identification of gender identity is a fundamental right that forms part of right to life under Article 21 of the Constitution (*NALSA*). The impugned Act provides for a method of state-identification of transpersons by a process of

certification by the District Magistrate. The Petitioner^C submits that this method is a disproportionate invasion into the right to privacy of transpersons and is manifestly arbitrary. Sections 4 to 7 of the impugned Act violate Article 14 and 21 of the Constitution.

Second, the provisions intended to grant a right against non-discrimination are completely toothless and no remedy has been provided for the violation of these provisions. The Petitioners submit that these provisions are contrary to Articles 14, 15 and 16 of the Constitution of India.

Third, Section 18 permits the imposition of as little as six months imprisonment for acts such as "endangering the life of a transperson" or sexual abuse of a transperson. It is submitted that the provision is completely arbitrary and irrational. The provision violates the right to life of transpersons by prescribing grossly inadequate punishment for heinous acts.

Fourth, this Hon'ble Court in NALSA expressly directed the Union and State Governments to take steps to treat Transpersons as Socially and Educationally Backward Classes of citizens for the purposes of reservation in educational institutions and in public employment. The Act contains no such measure. In fact the Act contains no specific measure to be adopted by the appropriate Government for furthering the right to equality of transpersons.

The Petitioner submits that the impugned Act is a regressive piece of legislation which is more likely to harm the interests of

the transgender community in India. The impugned^D legislation has several provisions which suffer from the vice of arbitrariness and vagueness. The Petitioners invites the attention of the Court to the grounds in the petition where the specific challenges to these provisions have been set out.

The Petitioner submits that provisions of the Act are built around the unconstitutional concept of state-identification of transpersons. The Act treats transpersons with suspicion and several provisions of the Act evince and reinforce the very prejudice that the legislation ought to have aimed at eliminating. The Petitioner submits that the Transgender (Protection of Rights) Act, 2019 is wholly and irreparably in violation of the right to life with dignity of transpersons.

INDIAN LEGAL NEWS

LIST OF DATES

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1950 The Constitution of India which was adopted by the Constituent Assembly on 26th November, 1949 came into force on 26th January 1950. The Preamble declares that the Constitution secures Liberty, Equality and Fraternity to the citizens of India. The guarantee of fraternity, in turn, assures the protection of the dignity of each individual citizen. Part III of the Constitution makes these guarantees effective by recognizing fundamental rights including the right to life, the right to equality and the prohibition of discrimination.

27/01/2014 An expert committee constituted by the Ministry of Social Justice and Empowerment submitted a report on Issues relating to Transgender Persons. The Report recognized the rights of transgenders to a limited extent.

15/04/2014 In 2014, this Hon'ble Court in *National Legal Services Authority v. Union of India* (2014) 5 SCC 438 declared that the continued discrimination against the transgender community in India is contrary to the Constitution. This Hon'ble Court recognized that gender identity is one of the most

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fundamental aspects of life and that every individual has a right to self-identification of one's gender identity. This Hon'ble Court expressly noted that depriving persons who are transgender of rights, benefits and privileges available to other persons in India is contrary to Article 14 of the Constitution. Further, this Hon'ble Court noted that the term 'sex' in Articles 15 and 16 of the Constitution includes gender as a distinct component. Thus, any discrimination against transgenders, the Court held, violates Article 15 and 16 which prohibit discrimination on the basis of sex. Most importantly, the Court noted that self-determination of gender is an integral part of personal autonomy protected under Article 21 of the Constitution. Further, the expression of one's self-identified gender is protected under Article 19 (1) (a). In furtherance of these declarations, this Hon'ble Court directed *inter-alia* the Central and State Governments to grant legal recognition to transgender persons and to take steps to treat them as Socially and Educationally Backward Classes of citizens for the purposes of reservation in educational institutions and in public employment.

24/04/2015 A private member's Bill titled 'The Rights of Transgender Persons Bill 2014'⁶⁷ was introduced in the Rajya Sabha on 12/12/2014. The Bill was passed by the Rajya Sabha on 24/04/2015.

2016 Despite the Bill being passed unanimously in the Rajya Sabha, Respondent No.1 took upon itself to pilot a fresh draft of the Bill incorporating the features of the private member Bill.

02/08/2016 Respondent No.1 introduced the Transgender Persons Bill 2016 in the Lok Sabha. The Petitioners submit that this Bill was fundamentally flawed and had a set of provisions which were more likely to harm the interests of transgender persons.

27/09/2016 The Bill was referred to the Parliamentary Standing Committee on Social Justice and Empowerment.

21/07/2017 The Parliamentary Standing Committee laid a report before both the houses of Parliament pointing out several flaws in the draft Bill. It was pointed out that the Bill fails to guarantee the right to self-determination of gender. It was also pointed out by the Committee that the Bill lacks

teeth in so much as there is no ^H grievance redressal mechanism. The non-discrimination provisions, the provisions for health benefits, and the provisions for social empowerment and inclusion were all found to be inadequate.

12/2018 The 2016 Bill was passed by the Lok Sabha with 27 amendments accepting some of the suggestions of the Standing Committee. However, the fundamental flaws at the heart of the Bill remained and were left untouched by the Union of India.

2019 The 2016 Bill lapsed on the dissolution of the Sixteenth Lok Sabha on completion of its term in 2019. The aforesaid Bill was introduced once again in Seventeenth Lok Sabha. The Bill was passed by the Lok Sabha on 05.08.2019. The Rajya Sabha passed the Bill on 26.09.2019