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## Avinash Kumar



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-I, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

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# **Transgender Persons (Protection Of Rights) Act, 2019 And Its Impact On Article 14,19 And 21**

Authored By - Arya Singh

## **INTRODUCTION AND BACKGROUND**

According to the Down-to-earth Survey, there are around 4.8 million people who identify as transgender persons in India. However, due to their conduct and life choices deviating from the "normal" paradigm, transgender people deal with the stigma and preconceived views about them from society. A transgender child is rarely accepted in an Indian family, even till now.

We have seen the persistence of transgender people through the medieval and modern times as well. In the recent times, the awareness regarding the rights of transgender persons has been ever increasing. We have witnessed lots of movements for the assurance of the rights of the LGBT+ community, especially the transgender people. These movements gained momentum around 2006 and after no proper response by the Government, a case was filed against the Indian Government. The verdict of the case, i.e., *National Legal Services Authority vs Union of India*<sup>1</sup> came in favour of transgender persons and declared them as the "third" gender. This judgement was a game-changer as it gave various directions to the government regarding the protection of the rights of the transgender people.

## **THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019**

This Act came as the legislative product of the NALSA Judgement. The Act contains 23 sections which are roughly divided into 9 chapters. The transgender community is not happy with the act as it does not fulfil their demands properly, and tries to control their actions and decisions. The Sections 4, 5, 6, 7, 16(g), 18(a) and 18(d) are the sections which are problematic as they infringe upon the fundamental rights of the transgender people primarily guaranteed under Article 14, 19 and 21.

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<sup>1</sup> AIR 2014 SC 1863

## Section-Wise Analysis of The Transgender Persons Act:

The various sections mentioned above talk about granting the rights to the transgender people and fulfilling their needs, but still does not eliminate the element of government control. The act has, in fact, indirectly allocated very arbitrary powers to the government, especially in the hands of its officials.<sup>2</sup>

### 1) Affects Self-Identification (Gender Identity): (Article 19 and 21)

**Section 4** talks about recognition of the identity of the transgender people.<sup>3</sup> The problem with this section is that it does not differentiate between the transgender persons, intersex, transsexuals, and genderqueer.

**Section 5** states the need for applying for the certificate of identity with the District Magistrate.<sup>4</sup> This is tricky as it compels the transgender community to engage with this biased bureaucracy.

**Section 6** talks about the issuing of a certificate of identity by a District Magistrate<sup>5</sup> after following due procedure which “indicates” the gender of the person.

**Section 7** focuses on determination of gender of the person after surgery only upon the issuing of a certificate by the Chief Medical Officer or a Medical Superintendent<sup>6</sup> of a medical establishment.

**Section 7(3)** also allows then to change only their first name<sup>7</sup>, meaning that they cannot give up their surnames. This is troublesome for people who would like to take up the name of their Gurus as surnames.

These provisions gravely limit their right to self-identity which is enshrined under Article 19(1)(a), and can also lead to bureaucratic manipulation.

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<sup>2</sup> Manini Syali and Vinayak Jhamb, 'Mishandling the Issue of Gender Dysphoria in India - An Analysis Of The Transgender Persons (Protection Of Rights) Act, 2019' (*Inderscience Online*, 2021) <<https://www.inderscienceonline.com/doi/pdf/10.1504/IJHRCS.2022.119450>> accessed 2 September 2022.

<sup>3</sup> The Transgender Persons (Protection of Rights) Act, 2019, §4.

<sup>4</sup> The Transgender Persons (Protection of Rights) Act, 2019, §5.

<sup>5</sup> The Transgender Persons (Protection of Rights) Act, 2019, §6.

<sup>6</sup> The Transgender Persons (Protection of Rights) Act, 2019, §7.

<sup>7</sup> The Transgender Persons (Protection of Rights) Act, 2019, §7(3).

This also violates Article 21 as a right to choose one's gender identity is integral to live a life with dignity and is hence protected under the right to life.

The Court in *Navtej Singh Johar v. Union of India*<sup>8</sup> said:

“The emphasis on the unique being of an individual is the salt of his/her life. Denial of self-expression is inviting death.”

## 2) **Right to Voice Their Opinions Duly: (Article 19)**

**Section 16(g)** proposes five transgender people from all over India to be a part of the National Council for Transgender Persons<sup>9</sup>. This is a very tiny number as compared to the present transgender population. This will lead to improper voicing of their concerns and will lead to the infringement of their Right to freedom of speech and expression under Article 19(1)(a).

## 3) **Infringes on Their Right to Equality: (Article 14)**

As per **Section 18(a)** the government penalises bonded labour,<sup>10</sup> but fails to properly draw a border around it.

**Section 18(d)** talks about the punishment in case of physical or sexual abuse, or any abuse of some other kind.<sup>11</sup> The punishment stated is at minimum six months and can extend to two full years, with fine.

The problem here is that the maximum sentence for sexual assault against transgender people is two years in prison, whereas identical offences against women are punishable by three years to life imprisonment<sup>12</sup> under the Indian Penal Code, 1860. This violates Article 14 and compromises their right to equality.

A case was filed in the Supreme Court of India. It is still pending in the apex court, and it aims to challenge the act on the grounds that it is violating Article 14,15,19, and 21 of the Indian Constitution.<sup>13</sup>

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<sup>8</sup> AIR 2018 SC 4321

<sup>9</sup> The Transgender Persons (Protection of Rights) Act, 2019, §16(g).

<sup>10</sup> The Transgender Persons (Protection of Rights) Act, 2019, §18(a).

<sup>11</sup> The Transgender Persons (Protection of Rights) Act, 2019, §18(d).

<sup>12</sup> Indian Penal Code, 1860, §354A.

<sup>13</sup> Grace Banu Ganeshan & Ors. v. Union of India & anr. W.P. (Civil) No. 406/2020 (2020)

The Government in 2020 tried to amend the provisions of the Transgender Persons 2019 and brought in the Transgender Rules 2020 for the same. But they too had some flaws, and violated Article 19(1)(e), 19(1)(d), and 21 of the Constitution, by making one-year residence at the same place compulsory for issuance of a certificate, and stressing on the need for a psychologist report<sup>14</sup>, which indirectly became the basis for self-identification. This was really disappointing for the transgender community.

## CONCLUSION

Therefore, after looking at the act and its provisions, and by reading it alongside the Constitution of India and the SC judgements, we can see that it is violating the fundamental rights of the Constitution in various ways. The government has not complied with the guidelines of the Courts given in the two judgements.

The Act outlines human rights w.r.t. its legal application, but ends up reducing them to mere legislative amendments with limited implementation due to the indolence of the state machinery. This has resulted into growing dissatisfaction amongst the transgender community.

As quoted in the NALSA Judgement, the court said:

“Seldom, our society realizes or cares to realize the trauma, agony, and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex.”<sup>15</sup>

The only viable option left with the government is to amend the act in such a way that it grants the transgender people the basic rights that they have been fighting for, since decades.

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<sup>14</sup> 'Draft Transgender Persons (Protection of Rights) Rules, 2020' (*PRS Legislative Research*, 2020) <<https://prsindia.org/billtrack/draft-transgender-persons-protection-of-rights-rules-2020>> accessed 2 September 2022.

<sup>15</sup> Aastha Khanna and Divesh Sawhney, 'NALSA Judgment: Critique of The Indian Perspective Beyond the Adams-And-Eves Worldview - Global Freedom of Expression' (*Global Freedom of Expression*, 2020) <<https://globalfreedomofexpression.columbia.edu/publications/nalsa-judgment-critique-of-the-indian-perspective-beyond-the-adams-and-eves-worldview/>> accessed 2 September 2022.

