

A GENDER THAT IS STILL NOT THAT EQUAL: THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

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INTRODUCTION

According to Sub-section (2) of Section 1 of the Transgender Persons (Protection of Rights) Act, 2019 (hereinafter referred to as the TPA), it extends to the whole of India and as per Clause (k) of Section 2 of the TPA, “*transgender person*” means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone sex reassignment surgery or hormone therapy or laser therapy or such other therapy), persons with intersex variations, genderqueer and person having such socio-cultural identities as: *kinner*, *hijra*, *aravani* and *jogta*. Importantly, Clause (i) of Section 2 of the TPA defines a person with intersex variations as a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body.

According to Section 4 of the TPA, a person has the right to be recognized as transgender person in terms of Section 2 (k) of the TPA and further, a person recognized as a transgender has a right to self-perceived gender identity. As per Section 5 of the TPA, a transgender person has the discretion to make an application to the District Magistrate for issuing a certificate of identity as a transgender person. Interestingly, if a transgender person undergoes surgery to change gender either as a male or female, then such change in gender effected by virtue of the surgery undergone by the transgender person will not disentitle such person from the rights and entitlements under the TPA¹.

MANDATE OF SECTION 12 OF THE TPA:

According to Section 12 of the TPA:

- (a) No child is allowed to be separated from parents or immediate family on the ground of being a transgender,

PREFERRED CITATION

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¹ Section 7

except on an order of a competent court, in the best interest of the child;

(b) Every transgender person has the right:

- i. To reside in the household where parent or immediate family members reside;
- ii. To be not excluded from such household or any part thereof; and,
- iii. To enjoy and use the facilities of such household in a non-discriminatory manner.

(c) Where any parent or a member of the immediate family of the transgender person is unable to take care of such person, then the competent court has the authority to order/ direct that such person be placed in Rehabilitation Centre.

It is important to note that the term “*rehabilitation centre*” has not being defined in the TPA. That the TPA only defines the term “*institution*”. According to Sub-clause (ii) of Clause (b) of Section 2, the term institution falls within the purview of the term “*establishment*”. Clause (e) of Section 2 of the TPA defines the term institution to mean an institution, whether public or private, for the reception, care, protection, education,

training or any other service of transgender persons.

“INCLUSIVE EDUCATION” AND EXCLUSION OF RESERVATION - THE MISSING LINK IN SECTION 13 OF THE TPA

The Section heading of Section 13 of the TPA is worded as: “*Obligation of educational institutions to provide inclusive education to transgender persons*”. That the entire pivot of Section 13 of the TPA surrounds around the words “*inclusive education*”. Clause (d) of Section 2 of the TPA defines inclusive education as a system of education wherein transgender students learn together with other students without fear of discrimination, neglect, harassment or intimidation and the system of teaching and learning is suitably adapted to meet the learning needs of such students.

A bare perusal of Section 13 of the TPA would show that it is legislated in a rather routine and cliché manner, stating that:

- i. Every education institution:
 - (a) Funded, or
 - (b) Recognized,
 by the appropriate Government has to provide:
 - (a) Inclusive education,

- (b) Opportunities for sports,
 - (c) Recreation and leisure activities,
- to transgender persons without discrimination on equal basis with others.
- ii. Thus, a private education institution even if not funded by the appropriate Government but is recognized by the appropriate Government, has to follow the mandate given in terms of Section 13 of the TPA.
 - iii. That is to say, even an unaided, recognized, non-minority, private education institution on private land, has to see that it complies with the mandate contained in Section 13 of the TPA.

That Section 13 of the TPA doesn't speak at all about issues pertaining to:

- i. Gender sensitization of teachers and members of staff of such educational institutions.
- ii. Possibility of having certain minimum number of transgender persons having the requisite academic and other qualifications as teachers in the educational institutions.

- iii. Teaching "*Gender Justice*" as a compulsory and non-elective subject from the primary/elementary level.
- iv. Having certain minimum number of seats reserved for transgender students in educational institutions aided and/ or recognized by the appropriate Government.

CLAUSE (d) OF SECTION 18 AND INEQUALITY WRIT LARGE

- i. According to Clause (d) of Section 18 of the TPA, whoever, 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* is to be punished with imprisonment for a term which shall not be less than *six months* but which may extend to *two years* and with fine.
- ii. That Clause (d) of Section 18 of the TPA on the face of it seems to be in teeth of Article 14 of the Constitution of India, 1950 because it offers to treat even an offence as grave as "*sexual abuse*"

as a summons case and not as a warrant case. That as per Section 2 (x) of the Criminal Procedure Code, 1973, a warrant case means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding *two years*.

- iii. That the term “*sexual abuse*” has not being defined under the TPA. However, if we see the scheme of the IPC, Chapter XVI of the IPC deals with “*Of Offences Affecting the Human Body*” and in this chapter “*sexual offences*” are being dealt with from Sections 375 to 376-E of the IPC. All “*sexual offences*” in the IPC are to be tried as warrant cases, being cognizable, non-bailable and having imprisonment of minimum of 10 years. Thus, Section 18 (d) of the TPA on this count seems unconstitutional.
- iv. Even otherwise, the offence under Section 354 of the IPC dealing with “*Assault or use of criminal force to a woman with intent to outrage her modesty*” despite being on the *lighter side* in comparison with the offences stipulated under the heading “*sexual offences*”

in the IPC, has being made punishable with minimum of *one year* and maximum of *five years* of imprisonment. Thus, the legislative move, making the offence under Section 18 (d) of the TPA punishable with minimum of *six months* and maximum of *two years*, in itself is writ large questionable.

- v. That as the definition of the term “*sexual abuse*” in the TPA seems lost in oblivion, same is the case as regards definition of the terms, namely, *verbal*, *emotional* and *economic abuse*.
- vi. That “*sexual offences*” under the IPC (Sections 375 to 376-E) are to be tried by the Court of Session, but as per Section 29 of the Criminal Procedure Code, 1973, an offence committed under Section 18 of the TPA, having a maximum punishment of *two years* is to be tried by the Magistrate of First Class. Thus, discrimination on this count also is quite obvious and apparent.

SECTION 20 OF THE TPA, NOT OF MUCH HELP

That Section 20 of the TPA states that the provisions of the TPA shall be in addition to,

and not in derogation of, any other law for time being in force. That the idea behind this provision of law seems to be, to save the application of the provisions of the IPC, so that transgender persons can sue their abusers, assaulters, assailants and aggressors under the provisions of the IPC as well. But this does not seem to be the case, because the TPA does not cause or effect any amendment to the provisions of IPC, and for that matter to the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and the Protection of Children from Sexual Offences Act, 2012, so as to make them gender-neutral. However, the provisions of the IPC *not* being gender-neutral, cannot be applied to transgender persons especially in cases of “*sexual offences*”, that is to say that, no protection as such is extended by the provisions of the IPC to transgender persons, to protect them from their abusers, assaulters, assailants and aggressors, and this can be seen from the following:

- i. Section 8 of the IPC defines the term “*gender*” as follows:

“The pronoun “he” and its derivatives are used for any person, whether male or female.”

Further, Section 10 of the IPC defines the terms “*Man*” and “*Woman*” as follows:

“The word “man” denotes a male human being of any age; the word “woman” denotes a female human being of any age.”

Lastly, Section 11 of the IPC defines the term “*Person*” to mean a company, association or body of persons, whether incorporated or not.

Thus, the IPC:

- (a) Firstly, does not define who a “*transgender person*” is;
- (b) Secondly, does not recognize “*transgender*” as a third-form of gender; and,
- (c) Thirdly, it does make any offence transgender-specific, like the offence of “*rape*” in the IPC is women/ female specific.

- ii. That in the matter of: ***National Legal Services Authority V/s Union of India & Ors***, AIR 2014 SC 1863, it was observed that non-recognition of gender identity of transgender persons is violative of Articles 14 and 21 of the Constitution of India, 1950. But still, since then, the

provisions of the IPC have remained unaltered and unamended.

LOST OPPORTUNITY- “*RIGHT TO PROCREATE*”:

- i. In 2006, in response to the well documented patterns of abuse of transgender persons, a distinguished group of international human rights experts met in Yogyakarta (Indonesia) to outline a set of international principles relating to “*sexual orientation*” and “*gender identity*”. The result was the *Yogyakarta Principles*, which formed, a universal guide to human rights which affirm the binding international legal standards with which all States needed to comply.
- ii. In the matter of *National Legal Services Authority* (Supra), it was held that “*Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity*” not being inconsistent with the fundamental rights enshrined in Part III of the Constitution of India, 1950, must be recognized and followed in India as part and parcel of its national law.
- iii. That the TPA states nothing about the “*reproductive rights*” of transgender persons. It is important to note that *Principle 24* of the *Yogyakarta Principles* deals with the right to found a family; and it expressly states that, all States should take necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity.

CHALLENGE TO THE PROVISIONS OF THE TPA

That, lately, the first transgender Judge of Assam, Swati Bidhan Baruah, has challenged the constitutional validity of certain provisions of the TPA before the Hon’ble Supreme Court of India, and the matter is still *sub judice* and pending for consideration (and adjudication) before the Hon’ble Court.