

# 11. Interrelationship of legal gender identity and the right to health of transgender persons in India

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## INTRODUCTION

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) entitles everyone to enjoy the highest attainable standard of physical and mental health, consisting of the individual's biological and socio-economic determinants of health.<sup>1</sup> Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires States to eliminate discrimination against women in healthcare.<sup>2</sup>

Studies<sup>3</sup> have shown that transgender<sup>4</sup> persons are exposed to more chronic health problems, often resulting in an increased risk of mental illness, substance abuse, and sexual and physical violence coupled with specific

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<sup>1</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, UNTS 993, 3 (1966), art. 12.

<sup>2</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, UNTS 1249, 13 (1979), art. 12.

<sup>3</sup> National Aids Organisation, *On Comprehensive Health-Related Services for Transgender Persons* (White Paper, 2023) <[https://naco.gov.in/sites/default/files/Whitepaper\\_on\\_Transgender\\_Persons\\_Health.pdf](https://naco.gov.in/sites/default/files/Whitepaper_on_Transgender_Persons_Health.pdf)> accessed 7 January 2024.

<sup>4</sup> Transgender is an umbrella term used to describe people with a wide range of gender expressions and identities – including transsexual people, people who cross-dress, and people who identify as the third gender. Transgenders may have any sexual orientation and sex characteristics. The authors use the term transgender as it was used in the Supreme Court of India in *National Legal Services Authority (NALSA) v. Union of India* (AIR 2014 SC 1863). The authors are aware that this term may not be inclusive and does not represent the heterogeneity found among the transgender community in India.

challenges and inequalities in their ability to access healthcare.<sup>5</sup> Transgender people experience various direct and indirect barriers to the enjoyment of their human right to health.<sup>6</sup> The COVID-19 pandemic has further exacerbated the existing inequalities, especially in countries and regions where transgender persons are still fighting for legal identity, protection, and equitable treatment in society.<sup>7</sup>

Transgender people face immense discrimination, including issues ranging from difficulties in accessing healthcare due to their unique health needs and access to proper hormones during the transition to being vulnerable to sexually transmitted diseases.<sup>8</sup> Moreover, transgender people are left in a tricky situation due to them being considered outside the gender binary.<sup>9</sup> Certain legal documents may use language reinforcing gender binary, which may intentionally or unintentionally exclude transgender people.<sup>10</sup>

In India, transgender health rights remain a pressing issue, even after the enactment of the Transgender Persons (Protection of Rights) Act, 2019 (TP Act).<sup>11</sup> The Supreme Court of India, in its landmark judgment in the case of *National Legal Services Authority (NALSA) v. Union of India and Others* (NALSA) recognised transgender individuals, affirming the right of every person to choose their gender and granting them equal rights to prohibit discrimination based on gender identity in line with fundamental rights

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<sup>5</sup> Jaclyn M. White Hughto, Sari L. Reisner and John E. Pachankis, 'Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions' (2015) 147 *Social Science & Medicine* 222.

<sup>6</sup> J.D. Safer and others, 'Barriers to healthcare for transgender individuals' (2016) 23(2) *Current Opinion in Endocrinology, Diabetes and Obesity* 168–71.

<sup>7</sup> Satarupa Dasgupta, Sunny Sinha, and Raina Roy, "'We Are Helpless, Hopeless and Living in Despair': Impact of COVID-19 on the Overall Health and Well-being, and Participation of the Transgender Community in India' (2021) 3(4) *The International Journal of Community and Social Development* 372.

<sup>8</sup> Open Society Foundations, '*Transforming Health: International Rights-Based Advocacy for Trans Health*' (Open Society Foundations, February 2013). <<https://www.opensocietyfoundations.org/publications/transforming-health>> accessed 7 January 2024

<sup>9</sup> Aoife M. O'Connor, Maximillian Seunik, Blas Radi, Liberty Matthyse, Lance Gable, Hanna E. Huffstetler and Benjamin Mason Meier, 'Transcending the Gender Binary under International Law: Advancing Health-Related Human Rights for Trans Populations' (2022) *Journal of Law, Medicine & Ethics* 409.

<sup>10</sup> Neela Ghoshal and Kyle Knight, 'Rights in Transition: Making Legal Recognition for Transgender People a Global Priority' [2016] *World Report* 21.

<sup>11</sup> Transgender Persons (Protection of Rights) Act, Act No. 40, 5 December 2019, <[https://www.indiacode.nic.in/handle/123456789/13091?view\\_type=search&sam\\_handle=123456789/1362](https://www.indiacode.nic.in/handle/123456789/13091?view_type=search&sam_handle=123456789/1362)> accessed on 7 January 2024.

protected by the Indian Constitution.<sup>12</sup> This judgment has been instrumental in combating social stigma, prejudice, and discrimination. It has paved the way for increased visibility, acceptance, and equal opportunities by gender by providing for transgender people's inclusion in state welfare programmes. Furthermore, the judgment has also had a positive impact on the healthcare sector, leading to more inclusive practices and improved access to medical services for transgender individuals.<sup>13</sup> Despite this, transgender persons still face numerous challenges and barriers to accessing their right to health.<sup>14</sup> This includes discrimination, stigma, lack of inclusive healthcare services, limited access to gender-affirming treatments and surgeries, and the absence of insurance coverage for gender-affirming procedures.<sup>15</sup> Additionally, there is a lack of medical expertise and knowledge to effectively address the specific health needs affecting the overall well-being of transgender individuals in India.<sup>16</sup> The lack of recognition and inclusion of transgender groups in the formal economy further exacerbates their vulnerability. It hinders their access to appropriate, safe, and quality medical care, violating their right to health.<sup>17</sup>

The TP Act, despite being anti-discrimination legislation, has been subjected to significant criticism and scrutiny due to its implications for the transgender community as it restricts the right to self-identify to only transgender individuals in contrast with the *NALSA* judgment, which allowed for self-identification as transgender, male, or female.<sup>18</sup> The TP Act requires individuals to undergo affirmative treatment and surgery to obtain recognition as either male or

<sup>12</sup> Supreme Court of India, *National Legal Services Authority (NALSA) v. Union of India and Others* (2014) 5 SCC 438.

<sup>13</sup> Dipika Jain, 'Right to Health and Gender-Affirmative Procedure in the Transgender Persons Act 2019' (2022) *Indian Journal of Plastic Surgery* 205.

<sup>14</sup> Vivek Dixit, Bhavuk Garg, Nishank Mehta, Harleen Kaur and Rajesh Malhotra, 'The Third Gender in a Third World Country: Major Concerns and the "AIIMS Initiative"' (2023) 29 *Journal of Human Rights and Social Work* 1-6; Supreme Court of India, *National Legal Services Authority (NALSA) v. Union of India and Others* (2014) 5 SCC 438.

<sup>15</sup> Pratishi Hazarika, 'Examining the Nuances of Trauma Through a Survivor's Testimony: A Study of a Gift of Goddess Lakshmi: A Candid Biography of India's First Transgender Principal by Manobi Bandyopadhyay with Jhimli Mukherjee Pandey' (2021) *Rupkatha Journal on Interdisciplinary Studies in Humanities* 1.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.* 13.

<sup>18</sup> Richie Gupta, 'Gender Affirmation in India-The Current State of Knowledge, Management, Legal and Legislative Situation' (2022) 55(2) *Indian Journal of Plastic Surgery* 139.

female,<sup>19</sup> which raises concerns about bodily and decisional autonomy and the medicalisation of gender identity.<sup>20</sup>

This chapter is the authors' first attempt to understand the interconnection of legal gender identity and the right to health of transgender persons in India and the issues that go against their lived experiences. In doing so, the chapter critically analyses the TP Act on its claims to protect the right to health of transgender persons, emphasising how the implementation of the TP Act impacts the prohibition of non-discrimination and the right to health for transgender persons in India. While international human rights standards do not adhere to any definition of gender identity, various human rights bodies have increasingly used the definition provided by the Yogyakarta Principles, which state 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", affirming transgender people's right to their own gender identity.<sup>21</sup> Considering this definition, we argue that the Indian legal framework fails to protect the basic rights of transgender people due to restricted self-identification, mandatory affirmative treatment, and the limited recognition of gender identities.

Furthermore, the authors argue that the TP Act also violates the provisions of self-determination, equality, non-discrimination, privacy and autonomy along with the right to life provided under the Constitution of India and various other international human rights treaties.<sup>22</sup> It reduces the protection of transgender rights under the legislation to a mere facade. Hence, a right-based approach to address barriers to accessing healthcare services for transgender persons should be prioritised, and the enforcement mechanisms should reaffirm the community's faith in accessing healthcare in an inclusive and culturally competent manner.

The chapter discusses the right to health of transgender persons in international law and in India post-NALSA judgment. Furthermore, it critically analyses the interconnection of transgender people's right to health with their legal gender identity in India under the TP Act. It argues that mere recognition of this legal right in isolation would have a limited effect unless it follows comprehensive guidelines ensuring access to these substantive rights and non-discrimination laws across institutional spaces, including healthcare.

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<sup>19</sup> The Transgender Persons (Protection of Rights) Act, 2019, Section 7.

<sup>20</sup> Jain (n. 13) 206.

<sup>21</sup> The Yogyakarta Principles, Principles on the application of international human rights law in relation to sexual orientation and gender identity (2006).

<sup>22</sup> The Constitution of India, 1950, Article 21 <[https:// legislative .gov .in/ constitution-of-india/](https://legislative.gov.in/constitution-of-india/)>, accessed on 7 January 2024.

The chapter concludes with suggestions to address the medicalised model of gender identity to achieve self-determination and transformative equality.

## THE RIGHT TO HEALTH OF TRANSGENDER PERSONS IN INTERNATIONAL LAW

The right to health has been recognised and protected through various international human rights instruments such as the Universal Declaration of Human Rights<sup>23</sup> (UDHR), the ICESCR<sup>24</sup> and the Convention on the Rights of Persons with Disabilities (CRPD), among others.<sup>25</sup>

The rights to legal recognition, self-determination, bodily autonomy, and privacy are provided under various binding international human rights treaties that India has ratified.<sup>26</sup> The Yogyakarta Principles also uphold the right to legal recognition, stating that each person's self-defined gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity, and freedom.<sup>27</sup> The Yogyakarta +10 Principles calls for States to ensure that no eligibility criteria, such as medical or psychological interventions, economic status, health, marital or parental status, shall be a prerequisite to change one's name, legal sex or gender.<sup>28</sup> The right to health is an inalienable right. The full realisation of this right may depend on several social, economic, and cultural factors.<sup>29</sup> Transgender individuals face unique challenges when it comes to accessing healthcare, such as violence, stigma, discrimination, social rejection, and inadequate specialised healthcare

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<sup>23</sup> General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, A/RES/3/217 A.

<sup>24</sup> *International Covenant on Economic, Social and Cultural Rights* (n. 1).

<sup>25</sup> General Assembly, *Convention on the Rights of Persons with Disabilities*, UNTS 2515, 23 (2007).

<sup>26</sup> *Ibid.* 23, art. 16; UN Treaty Body Database 'View the Ratification Status by Country or by Treaty' <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79)> accessed 7 January 2024; Jain (n. 13) 205.

<sup>27</sup> The Yogyakarta Principles, *Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2006), principle 3.

<sup>28</sup> The Yogyakarta Principles plus 10 (YP+10) <<http://www.ypinaction.org/yogyakarta-principles-10/>> accessed 7 January 2024.

<sup>29</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment XIV: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, E/C.12/2000/4 (2000), para. 4.

facilities.<sup>30</sup> It is essential to recognise and address these challenges to ensure that transgender individuals can fully exercise their right to health.

In international law, there is a growing recognition of the right to health for transgender individuals.<sup>31</sup> The right to health encompasses the crucial aspect of sexual and reproductive health for transgender individuals, constituting a fundamental component of Article 12 of the ICESCR.<sup>32</sup> This right seeks to attain the highest possible standard of physical and mental health, obligating States to provide medical services and attention to all.<sup>33</sup> Unfortunately, discrimination against transgender individuals remains prevalent in the health sector, manifesting in issues such as limited accessibility and affordability.

The right to health is distinct from the right to be healthy, encompassing both freedoms and entitlements.<sup>34</sup> Freedoms include the right to control one's health and body, sexual and reproductive freedoms, freedom from interference, torture, and non-consensual medical treatment.<sup>35</sup> Entitlements involve the right to a health protection system providing equal opportunities for the highest attainable health, considering biological and socio-economic determinants.<sup>36</sup>

The right to health components includes availability, accessibility, acceptability, and quality.<sup>37</sup> Availability entails abundant healthcare facilities, goods, and services. Accessibility necessitates universal access without discrimination, which is crucial for transgender individuals facing obstacles in obtaining proper healthcare.<sup>38</sup> Dimensions of accessibility cover non-discrimination, physical and economic accessibility, and information availability.<sup>39</sup> Additionally, healthcare environments should be culturally respectful, inclusive of gender identity, and uphold confidentiality.<sup>40</sup> Moreover, medical services must meet

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<sup>30</sup> Waleed M. Sweileh, 'Bibliometric analysis of peer-reviewed literature in transgender health (1900 – 2017)' [2018] *BMC International Health and Human Rights* 18, 16.

<sup>31</sup> Sari L. Reisner and others, 'Global Health Burden and Needs of Transgender Populations: A Review' (2016) 388 *The Lancet* 412.

<sup>32</sup> CESCR, *General Comment XXII: The Right to sexual and reproductive health (Art. 12)*, E/C.12/GC/22 (2016), para. 2.

<sup>33</sup> CESCR, *General Comment XIV: The Right to the Highest Attainable Standard of Health (Art. 12)*, para. 12.

<sup>34</sup> CESCR, *General Comment XIV: The Right to the Highest Attainable Standard of Health (Art. 12)*, para. 8.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, para. 12.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

scientific and medical standards for appropriateness and quality.<sup>41</sup> Article 12 of the ICESCR emphasises integrating a gender perspective and addressing gender-specific needs in health policies and programmes.<sup>42</sup>

Article 2(2) of the ICESCR delineates two forms of discrimination: direct and indirect.<sup>43</sup> Direct discrimination involves treating an individual less favourably and encompasses acts or omissions based on prohibited grounds.<sup>44</sup> On the other hand, indirect discrimination pertains to seemingly neutral laws and policies that, while appearing impartial, can disproportionately benefit certain members of society, thereby impacting the exercise of rights outlined in the ICESCR.<sup>45</sup>

The Yogyakarta Principles, which focus on the application of international human rights law to sexual orientation and gender identity, hold great importance due to their potential to address and rectify the injustices faced by LGBTQ+<sup>46</sup> individuals in accessing healthcare and experiencing discrimination.<sup>47</sup> These principles outline the rights of LGBTQ+ individuals to enjoy the highest attainable standard of physical and mental health, free from discrimination and stigma.<sup>48</sup> Additionally, they emphasise the right of LGBTQ+ individuals to access comprehensive and affordable healthcare services without facing barriers or discrimination based on their sexual orientation or gender identity.<sup>49</sup> By incorporating the Yogyakarta Principles into national legislation and policies, governments can ensure that LGBTQ+ individuals have equitable access to healthcare services tailored to their specific needs and promote their

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<sup>41</sup> Ibid.

<sup>42</sup> CESCR, *General Comment XIV: The Right to the Highest Attainable Standard of Health (Art. 12)*, para. 20.

<sup>43</sup> CESCR, *General Comment XX: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/20 (2009), para. 10.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Authors use the term LGBTQ+ to describe “lesbian, gay, bisexual, transgender, queer/questioning where the + signifies the expansion and new understanding of different parts of the very diverse gender and sexual identities”.

<sup>47</sup> The Yogyakarta Principles (n. 27), principle 2; Maria Elisa Castro-Peraza, Jesús Manuel García-Acosta, Naira Delgado, Ana María Perdomo-Hernández, María Inmaculada Sosa-Alvarez, Rosa Llabrés-Solé, Nieves Doria Lorenzo-Rocha ‘Biological, Psychological, Social, and Legal Aspects of Trans Parenthood Based on a Real Case-A Literature Review’ (2019) 16(6) *International Journal of Environmental Research and Public Health* 925.

<sup>48</sup> The Yogyakarta Principles (n. 27), principle 17.

<sup>49</sup> Ibid.

overall well-being.<sup>50</sup> Furthermore, the Yogyakarta Principles emphasise the importance of removing barriers to healthcare access for LGBTQ+ individuals and ensuring that their specific healthcare needs are met.<sup>51</sup>

## THE RIGHT TO HEALTH IN INDIA

India has recognised the importance of the right to health and has taken steps to ensure the fulfilment of this right. Under Article 21 of the Indian Constitution, the right to health is protected as it is inherent to a life with dignity and casts an obligation on the State to preserve life.<sup>52</sup> The Government of India has a legal obligation to guarantee its citizens' right to health.<sup>53</sup> The Supreme Court, in a landmark case, held that the right to dignity and health falls within the ambit of life and liberty under Article 21.<sup>54</sup> This Constitutional obligation aligns with the international standards and principles outlined in various international human rights instruments, including the UDHR and the ICESCR. India's legal obligations include recognising and implementing the right to health and the right to healthcare for all citizens in accordance with international human rights standards. In conclusion, India has a legal obligation to protect and promote the right to health for its citizens.<sup>55</sup>

The government has taken significant steps towards achieving universal access to healthcare, implementing policies and initiatives to improve the accessibility and quality of healthcare services. The Ministry of Health and Family Welfare in India has various national health programmes, including a national health mission and a National Mental Health Policy. The policy aims to promote mental health, prevent mental illnesses, and ensure access to mental healthcare services for all individuals. It emphasizes the integration of mental health services into primary healthcare and the involvement of communities in mental health promotion and prevention activities. Further, the government enacted the rules under the TP Act, emphasising the need for specific schemes

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<sup>50</sup> Aniths Chettiar, 'Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference to Their Health and Harassment by the Police' (2015) 5(9) *International Journal of Social Science and Humanity* 752-9.

<sup>51</sup> The Yogyakarta Principles (n. 27), principle 17.

<sup>52</sup> The Constitution of India, 1950, Article 21; Supreme Court of India, Pt. Parmanand Katara v. Union of India & Others 1989 SCR (3) 997.

<sup>53</sup> *Ibid.*

<sup>54</sup> Supreme Court of India, *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 812.

<sup>55</sup> *Ibid.*



for healthcare, education, and social security of transgender people.<sup>56</sup> Despite the challenges faced in implementing these policies and addressing the social determinants of health, India remains committed to ensuring that every person has the right to achieve the best possible level of health.<sup>57</sup>

## THE RIGHT TO HEALTH OF TRANSGENDER PERSONS IN INDIA: DEVELOPMENT FROM *NALSA* AND BEYOND

The development of transgender rights is crucial for studying the interconnection of the right to health of transgender persons with their legal gender identity in contemporary India. The Supreme Court of India, in its judgment in *NALSA v. Union of India and Others* in 2014, declared the right of self-determination of gender identity, a fundamental right protected by the right to equality<sup>58</sup> and right to life<sup>59</sup> under the Constitution of India, further recognising the civil rights of transgender persons free from any discrimination on the grounds of gender.<sup>60</sup> Soon after the judgment was delivered, the Ministry of Social Justice and Empowerment began drafting the bill – the TP Act – for the protection of transgender people as a follow-up to the *NALSA* judgment.<sup>61</sup> Civil society and the transgender community and activists in particular were not widely consulted while drafting the Bill.<sup>62</sup> Despite widespread reservations and protests about the bill, the Parliament passed it into law in November 2019 and it came into force in January 2020.<sup>63</sup>

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<sup>56</sup> Department of Health and Family Welfare, Ministry of Health and Family Welfare, Government of India (Annual Report 2019–20) <<https://main.mohfw.gov.in/sites/default/files/Annual%20Report%202019-2020%20English.pdf>> accessed on 7 January 2024.

<sup>57</sup> *Supreme Court of India, Pt. Parmanand Katara v. Union of India & Others* (n. 52).

<sup>58</sup> The Constitution of India, 1950, Article 14.

<sup>59</sup> The Constitution of India, 1950, Article 21.

<sup>60</sup> *Supreme Court of India, National Legal Services Authority (NALSA) v. Union of India and Others* (2014) 5 SCC 438.

<sup>61</sup> Dipika Jain and Kimberly Rhoten, 'A Comparison of the Legal Rights of Gender Non-Conforming Persons in South Asia' (2013) 48(52) *Economic and Political Weekly* 10.

<sup>62</sup> Deeksha Pandey and Muthusamy Sivakami, 'How Inclusive Is the Transgender Persons Act? Evidence from the Ground' (2021) 4 *Journal of Psychosexual Health* 49; a 'Bill' refers to a proposal for a new law or a change to an existing law that is debated and amended before Parliament.

<sup>63</sup> Transgender Persons (Protection of Rights) Act, 2019.

This recognition of transgender rights has been both celebrated and critiqued due to its failure to alleviate the adverse conditions faced by transgender persons, primarily due to the contradictory and complex framework provided under the Act.<sup>64</sup> The TP Act provided for the recognition of transgender persons by way of filing applications before the District Magistrate for the certificate of identity. However, specific provisions of the Act are highly problematic and do not embody the idea of self-determination upheld in the NALSA judgment. The following section will focus on the challenges and critiques of the TP Act and how it takes away the right of self-determination from certain transgender persons by providing rights to some individuals while leaving out others, impacting their access to healthcare facilities, among other things.

### **Right of Self-determination Under the TP Act**

The right to self-determination is a tool through which transgender people can legally identify as their self-perceived identity without undergoing invasive procedures such as hormonal therapy and sex reassignment surgery. Regrettably, this avenue is still not accepted in India. The TP Act makes it compulsory for a transgender person to be subjected to surgery to be identified as male or female.<sup>65</sup> This chapter takes the position that the individual's gender identity is a private affair and the State should not have the authority to decide it. The interference of the State in this aspect can result in numerous human rights violations, such as the right to dignity, bodily autonomy, and the right to privacy.<sup>66</sup> Self-determination should ideally be used as a tool, and it is essential that the State respects, protects, and fulfils it without excessive bureaucratic and medical intervention.<sup>67</sup>

The legislation further intervenes with gender identity as it mandates the authorisation of gender identity certificates from a district authority. This implies that a person must substantially prove their gender identity before a district authority to qualify or be legally certified as transgender.<sup>68</sup> The District Magistrate will issue such a certificate based on the recommendations of a District Screening Committee, which comprises the Chief Medical

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<sup>64</sup> Jennifer Ung Loh, 'Transgender Identity, Sexual versus Gender "Rights" and the Tools of the Indian State' (2018) 119(1) *Feminist Review* 39.

<sup>65</sup> The Transgender Persons (Protection of Rights) Act, 2019, Section 7.

<sup>66</sup> Jayna Kothari, 'Trans Equality in India: Affirmation of the Right to Self-Determination of Gender' (2020) 13 *NUJS Law Review* 3.

<sup>67</sup> The Transgender Persons (Protection of Rights) Act, 2019, Section 6.

<sup>68</sup> *Ibid.*

Officer, a District Social Welfare Officer, a psychologist or psychiatrist, a representative of the transgender community, and an officer of the government. Transgender activists argue that this practice goes against the right to dignity, bodily and decisional autonomy, placing an additional burden on transgender people, which lengthy or corrupt bureaucratic processes may further exacerbate.<sup>69</sup>

This interference with the person's privacy and bodily autonomy violates self-determination.<sup>70</sup> The TP Act provides various measures to be performed by the State, including setting up separate human immunodeficiency virus and sero-surveillance centres to estimate antibody levels against infectious diseases for transgender persons.<sup>71</sup> It also mandates the State to provide gender-affirmative surgery, hormonal therapy, and counselling and to bring out a health manual. However, these provisions are ineffective due to highly bureaucratised identity recognition, which serves to institutionalise the oppression faced by transgender persons.<sup>72</sup> Despite the legal enactment, transgender persons continue to struggle to access healthcare facilities because of the complex legal processes and bureaucratic hurdles involved in the legal recognition of their gender identity. It becomes imperative that the gender identity of transgender people is recognised by society, medical professionals, and the State.<sup>73</sup>

Medical professionals often lack awareness of trans-specific health needs, and the absence of proper training may hinder transgender people from living in their experienced gender.<sup>74</sup> The lack of medical facilities and medical insurance and the prohibitory costs of private healthcare treatments pose significant challenges. Therefore, the State should equip transgender people with full legal capacity. Transgender people find it challenging to get their gender altered on

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<sup>69</sup> Shamayeta Bhattacharya, Debarchana Ghosh, Bandana Purkayastha, 'Transgender Persons (Protection of Rights) Act of India: An Analysis of Substantive Access to Rights of a transgender Community' (2022) 14(2) *Journal of Human Rights Practice* 676.

<sup>70</sup> *Ibid.*

<sup>71</sup> The Transgender Persons (Protection of Rights) Act, 2019, Section 6.

<sup>72</sup> *Ibid.*; Nikhil Kumar Gupta, 'Ruptures and resurgences: Marking the spatiality of transgender identity in India since the enactment of transgender persons act 2019' (2022) *Frontiers in Political Science* 4.

<sup>73</sup> Maciej Szydłowski, 'Gender recognition and the rights to health and health care: Applying the principle of self-determination to transgender people' (2016) 17(3–4) *International Journal of Transgenderism* 199.

<sup>74</sup> Sally Hines, 'Recognising Diversity? The Gender Recognition Act and Transgender Citizenship' in Sally Hines and Tam Sanger (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 92.

their identification cards, which very often reflect the gender assigned at birth and not their experienced gender.<sup>75</sup> Although there seems to be no consensus among scientists, health professionals, and human rights experts regarding the gender recognition of transgender people, still the essential legal tool of self-determination should be allowed to be used by individuals or groups to determine their political status in India.<sup>76</sup>

It is important to note that various provisions of the TP Act are challenged in the Indian Supreme Court as unconstitutional being violative of the fundamental rights under the Constitution of India. It is argued by several transgender activists, including Centre of Policy Research on behalf of Grace Banu, that the TP Act creates an arbitrary hierarchy among transgender persons vis a vis transgender men and women by providing different procedures taking the decisional autonomy away from transgender persons, and this goes against the spirit of the *NALSA* judgment.<sup>77</sup>

It is important to note that recognition of identity is essential to obtaining the benefit of any welfare schemes, health benefits and penalties prescribed under the TP Act, the denial of which may result in the denial of all associated benefits provided under the TP Act. Hence, the medicalised model of legal recognition of gender identity with all the flaws mentioned above may seriously affect the access of transgender people to the health benefits provided by the Act. The following section focuses on specific issues about gender identity and the right to health faced by transgender persons in India.

### **Gender Identity and the Right to Health of Transgender Persons in India**

Despite the recognition of transgender people as a third gender by the Supreme Court of India in the *NALSA* judgment and the subsequent legislation (TP Act), there are still significant barriers to their full inclusion and protection of their fundamental rights.<sup>78</sup> The struggles faced by transgender individuals in India are multi-faceted and include discrimination in education, employment,

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<sup>75</sup> United Nations Development Programme (UNDP) and Asia Pacific Transgender Network (APTAN), 'Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia' (2017), 18. United Nations, *Legal gender recognition* (2017) <[https://weareaptn.org/wp-content/uploads/2019/05/UPDATED-ACKNOWLEDGMENTS-2019\\_rbp-hhd-2017-legal-gender-recognition-1.pdf](https://weareaptn.org/wp-content/uploads/2019/05/UPDATED-ACKNOWLEDGMENTS-2019_rbp-hhd-2017-legal-gender-recognition-1.pdf)> accessed 1 August 2024.

<sup>76</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>77</sup> Supreme Court of India, *Grace Banu Ganeshan & Others v. Union of India & another* W.P. (Civil) No. 406/2020.

<sup>78</sup> Jain (n. 13) 207.

healthcare, and housing.<sup>79</sup> For instance, a study on transgender sex workers in India reported instances of discrimination in health facilities, leading to self-medication as an alternative.<sup>80</sup> Furthermore, the healthcare sector in India is plagued with discrimination against transgender individuals, which hinders their access to quality healthcare services.<sup>81</sup> This is supported by evidence indicating that transgender people face mistreatment in healthcare settings, impacting their ability to access transition-related services due to healthcare refusal or subsequent avoidance of healthcare due to anticipated discrimination.<sup>82</sup>

Transgender persons' right to access comprehensive healthcare services is crucial in addressing their unique health needs and challenges. However, the reality is that transgender-friendly healthcare services are virtually non-existent in India.<sup>83</sup> The COVID-19 pandemic also had highly adverse effects on the health of transgender persons in India, showing the gendered impact of the pandemic. Studies suggest that transgender persons face many health disparities, such as a higher prevalence of clinical depression, anxiety, higher incidence of HIV/AIDS, less focus on mental health, including the absence of experienced transgender healthcare providers, and prohibitory cost of treatment of private healthcare service providers. Transgender treatment is not taught in medical curricula, and very few physicians have the requisite expertise and comfort level to deal with the health issues of transgender persons.<sup>84</sup> These factors promoted a severe course of COVID-19 infection, and therefore, transgender persons were more at risk.

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<sup>79</sup> Ibid.

<sup>80</sup> Deepika Ganju and Niranjana Saggurti, 'Stigma, Violence and HIV Vulnerability among Transgender Persons in Sex Work in Maharashtra, India' (2017) 19 *Culture, Health & Sexuality* 903.

<sup>81</sup> Rangan R, 'Need for Comprehensive Language with Respect to Sexual Orientation, Gender Identity and Expression in Indian Healthcare' (2023) 8 *Indian Journal of Medical Ethics* 39.

<sup>82</sup> Gilbert Gonzales and Carrie Henning-Smith, 'Barriers to Care among Transgender and Gender Nonconforming Adults' (2017) 95 *The Milbank Quarterly* 726.

<sup>83</sup> Apurvakuma Pandya, Alex Redcay, 'Impact of COVID-19 on Transgender Women and Hijra: Insights from Gujarat' (2022) 7(2) *Indian Journal of Human Rights and Social Work* 148.

<sup>84</sup> Daniela Luz Moyano, María Lara Martínez, and Laura Lara Martínez, 'Gender and social protection and health policies promoted during the COVID-19 pandemic: Global scoping review and future challenges' (2022) *Journal of Global Health* 14.

However, despite this recognition in the *NALSA* judgment, the prevailing societal stigma and lack of expertise in the medical community continue to pose significant barriers to transgender individuals seeking healthcare.<sup>85</sup> The government and healthcare institutions have not, so far, prioritised transgender health. There are no medical programmes specifically designed to meet the unique needs of gender-diverse individuals. This includes providing comprehensive mental health services that cater to the specific challenges faced by transgender individuals.<sup>86</sup>

Furthermore, there is a pressing need for medical education that includes transgender health concepts and principles. This will equip medical students with the necessary knowledge and skills to provide appropriate and inclusive healthcare services to transgender individuals.<sup>87</sup> This will help identify gaps in education and training and develop strategies to address them. Studies assessing medical students' attitudes and beliefs towards transgender persons are rare in developing countries like India. Still, they are essential to bridge the knowledge gap and ensure that healthcare professionals are well-prepared to provide quality care.<sup>88</sup>

Additionally, it is essential to address the social factors that impact the mental health outcomes of older transgender individuals in India. Ageism can have detrimental effects on the mental health of older transgender individuals, even in a culture where family and friends traditionally provide social support.<sup>89</sup>

There is ample evidence to prove the harassment and stigmatisation the transgender community faces at the hands of healthcare workers.<sup>90</sup> For instance, most doctors lack a general awareness of gender identity and sexual orientation, perpetuating stereotypes and negative portrayals of transgender individuals, leading to discriminatory practices and harassment within health-

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<sup>85</sup> Laura H Thompson, Sumit Dutta, Parinita Bhattacharjee, Stella Leung, Anindita Bhowmik, Ravi Prakash, Shajy Isac, Robert R Lorway, 'Violence and Mental Health Among Gender-Diverse Individuals Enrolled in a Human Immunodeficiency Virus Program in Karnataka, South India' (2019) *Transgender Health* 316.

<sup>86</sup> *Ibid.*

<sup>87</sup> J.D. Safer and others, 'Barriers to healthcare for transgender individuals' (2016) 23(2) *Current Opinion in Endocrinology, Diabetes and Obesity* 168–71.

<sup>88</sup> Sai Chandan Das, Deep Shikha, Sudip Bhattacharya and Richa Sinha, 'A narrative review on priorities of Mental Health Issues Among Transgenders: "so near, yet so far"' (2023) 35(1) *Indian Journal of Community Health* 9–14.

<sup>89</sup> *Ibid.*

<sup>90</sup> Harikeerthan Raghuram and others, 'Impact of the COVID-19 pandemic on the mental health of transgender persons in India: Findings from an exploratory qualitative study' (2023) *Frontiers in Global Women's Health* 4.

care settings. This lack of education, combined with stigma, contributes further to negative interactions with physicians and other professionals in healthcare settings.<sup>91</sup> During the COVID-19 pandemic, there were many concerns regarding the contempt by healthcare providers towards transgender people when they were forced to quarantine in either male or female wards with disregard for their gender identity and expression.<sup>92</sup> This further led to the possibility of physical, mental, and sexual harassment. Moreover, during the vaccine campaign in India, transgender people were left out due to their gender on legal documents not aligning with their gender expression.<sup>93</sup>

Policymakers often divert resources from trans-related health services, with medical professionals sometimes refusing to treat trans-persons.<sup>94</sup> Besides direct, there are also indirect barriers, such as legal, economic, and social factors, which further marginalise transgender people.<sup>95</sup> Additionally, gender stereotyping, misgendering, and so on, can cause mental health issues, which makes realising the right to health imperative. Unfortunately, transgender people tend to be excluded from national policies and health schemes, resulting in infringement of their right to health. Medical professionals may not understand their unique health needs for hormone therapy and sex change surgeries. In such a scenario, a health insurance scheme becomes imperative for them. They are often denied insurance coverage based on their gender status. Lack of health insurance coupled with the prohibitory cost of private treatment interferes with their right to access the healthcare system. States like Tamil Nadu and Kerala have already introduced policies for the welfare of transgender persons, allowing them to undergo free sex reassignment surgery (SRS) at government hospitals. Odisha has also started giving transgender people social welfare benefits such as pensions, affordable housing, food grains, and so on, and is India's first state to do so. It is pertinent that insurance companies come up with better health insurance plans to meet the needs of transgender people. This exclusion from healthcare services is further compounded by societal biases, as transgender individuals encounter discrimination and stigma, making it difficult for them to access healthcare services.<sup>96</sup> Transgender persons often have a high incidence of HIV/AIDS, which, along with real and

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<sup>91</sup> Jaclyn M White Hughto, Sari L Reisner, and John E Pachankis (n. 5) 222.

<sup>92</sup> *Ibid.* 90.

<sup>93</sup> Malavika Murali, 'No data on vaccinated transgender people: Govt in Lok Sabha' (Hindustan Times, 2021) <<https://www.hindustantimes.com/india-news/no-data-on-vaccinated-transgender-people-govt-in-ls-101628048737988.html>> accessed on 7 January 2024.

<sup>94</sup> Jaclyn M White Hughto, Sari L Reisner, and John E Pachankis (n. 5) 223.

<sup>95</sup> *Ibid.*

<sup>96</sup> Das and others (n. 88) 10.

perceived stigma results in their exclusion from healthcare services. The institutional inequities under the healthcare system, along with the discriminatory attitudes of the healthcare professionals, further affect the transgender person's ability to access the healthcare system.

Various studies show that transgender people are more vulnerable to clinical depression and anxiety, leading to suicide attempts making counselling and access to mental health experts extremely important. There is a significant lack of healthcare providers who provide culturally competent healthcare with experience in transgender health issues. Transgender treatment was not taught in the medical curricula, with few practitioners only having the requisite knowledge of transgender health issues.<sup>97</sup> Additionally, the theoretical understanding of the transgender community's participation in Indian politics highlights the challenges faced by transgender individuals, which may also contribute to their exclusion from national health policies.<sup>98</sup>

The exclusion of transgender individuals from national health policies in India is also influenced by the lack of gender-affirmative procedures within the healthcare system. The invisibility of transgender individuals in healthcare settings, coupled with stigma and discrimination, creates significant barriers to accessing quality healthcare services.<sup>99</sup>

## SUGGESTED FRAMEWORK TO ENSURE THE RIGHT TO HEALTH OF TRANSGENDER PERSONS

The TP Act aims to protect and ensure the rights of transgender individuals in India, including their right to health. According to the Act, discrimination in healthcare services against transgender persons is prohibited.<sup>100</sup> This means that healthcare facilities are now required to provide equal and non-discriminatory care to transgender individuals. Moreover, the TP Act mandates that medical curricula be reviewed to address the specific health needs of transgender people.<sup>101</sup>

Apart from the issue of self-determination discussed in the previous section, non-recognition of gender identity can be a barrier to accessing healthcare for some transgender individuals who may not want or be able to undergo

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<sup>97</sup> Dasgupta (n. 7) 372.

<sup>98</sup> Gayadhar Malik, 'Gender Biasness in Participation in Indian Politics: A Theoretical Understanding of Transgender Community' (2023) 2 *Journal of Advances in Humanities Research* 46.

<sup>99</sup> *Ibid.* 96.

<sup>100</sup> The Transgender Persons (Protection of Rights) Act, 2019, Section 3.

<sup>101</sup> Jain (n. 13) 205.



such procedures.<sup>102</sup> The government may enhance the availability of public health facilities in certain areas, increase transparency and accountability in healthcare delivery, and reduce the high cost of treatment in the private sector by providing insurance.<sup>103</sup> The TP Act and the process of feedback collection on the part of the government could be improved by involving the members of the transgender community in decision-making process under the TP Act.<sup>104</sup>

It is essential to implement structural changes and comprehensive policies to ensure access and inclusion.<sup>105</sup> Transgender healthcare facilities and measures are to be as per the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People by the World Professional Association for Transgender Health guidelines (WPATH).<sup>106</sup> The TP Act prescribes reviewing the existing medical curricula to ensure transgender-specific healthcare, creating positive obligations on government authorities to facilitate proper healthcare for transgender persons, including medical expenses coverage for hormonal therapy, laser therapy, or any other health issues of transgender persons. It also mandates the creation of special wards in hospitals and separate washrooms for transgender persons.<sup>107</sup> However, the Indian Medical Council, tasked with creating healthcare guidelines, is yet to develop specific healthcare measures. Reliance should be placed on local communities to assess risks and provide solutions, including inclusive health services. Additionally, the State should provide adequate housing and care homes for transgender persons facing extreme violence at their family homes to safeguard the life and safety of persons at risk from others, including family members.

One potential solution to address the barriers faced by transgender individuals in accessing healthcare is the use of telemedicine.<sup>108</sup> Telemedicine can provide a safe and private way for transgender individuals to connect with healthcare specialists virtually, reducing the risk of discrimination that is often experienced in traditional healthcare settings. By offering flexible and

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<sup>102</sup> Ibid. 206.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid. 208.

<sup>105</sup> Venkatesan Chakrapani and others, 'Syndemic violence victimization, alcohol and drug use, and HIV transmission risk behavior among HIV-negative transgender women in India: A cross-sectional, population-based study' (2022) 2(10) PLOS Global Public Health 14.

<sup>106</sup> The World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (1979), 2.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

convenient options for healthcare consultations, telemedicine has the potential to bridge the gap between transgender individuals and adequate medical care.<sup>109</sup>

In addition to telemedicine, there is a need for concerted efforts to increase the availability of gender care specialists. Currently, there is a shortage of healthcare professionals who are trained and experienced in providing gender-affirming care.<sup>110</sup> Additionally, comprehensive policies promoting equal access to healthcare for transgender individuals are needed to address the underlying structural inequalities and discrimination that persist in society.<sup>111</sup>

## CONCLUSION

The history of transgender rights in India paints an accurate picture of the struggles they faced and continue to face. There are always disparities in the healthcare services rendered to transgender people compared to others. This violates their right to health and other associated rights, such as the right to life and privacy as enshrined in the Indian Constitution and international human rights treaties. The full realisation of the right to health requires also realising other rights, for example the right to work. Hence, realising the right to health cannot be achieved only by focusing on better health infrastructure and policies. Moreover, discrimination also hinders their enjoyment of this right. It is very much necessary for the government and private actors to treat trans-persons equally. As the provisions of the TP Act also suggest, the government must take appropriate measures to ensure that they have access to healthcare facilities. The Indian Government, healthcare institutions, and society as a whole need to prioritise addressing these issues by implementing inclusive policies, providing training for healthcare professionals on transgender healthcare, and creating transgender-friendly healthcare services. Moreover, the services should also be affordable and of good quality.

Assessing the situation of transgender people in India is made easier through implementing the TP Act. Through this legislation, we can determine if transgender rights in India meet international obligations. As elaborated in the chapter, the legislation was not well received because of its invasive measures of gender identity which undermine the right to self-determination. The lack of affirmative action provisions to address the socio-economic disparities faced by transgender individuals has also been a point of contention. It can be argue that without targeted measures to address issues like education, employment, and healthcare, the TP Act may not effectively improve the overall well-being

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<sup>109</sup> *Ibid.* 31.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

and inclusivity of the transgender community. The requirement of sex reassignment surgery or gender affirmation surgery should, in our opinion, be an individual choice. The legal system should not suggest invasive procedures as this violates the right to self-determination and the autonomy of the affected persons.

The structural inequities affecting transgender persons are manifested in limited opportunities and health facilities provided to them. Therefore, transgender persons must be represented in law and policymaking platforms, especially in healthcare, to empower the community against the deep-seated stigma, biases, prejudices, and discrimination within Indian society. It is imperative to address the mental health and healthcare needs of transgender individuals to mitigate the disparities they face and enhance their overall well-being and quality of life. Creating support groups, self-help groups, and better advocacy at multiple levels, including training and financial inclusion, may help address public health extension activities. There is a need to prioritise evidence-based policies and a human rights-based approach in securing the rights of transgender persons as these are needed for better programming and redressal of barriers to healthcare services.

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