

# HEALTH RIGHTS OF TRANSGENDER COMMUNITY AND SUSTAINABLE DEVELOPMENT IN INDIA



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## Abstract

*The health rights of the transgender community in India are impacted by poor physical and mental health status. Recent legal reforms, such as the decriminalisation of Section 377 and amendments to the 'Transgender Persons (Protection of Rights) Bill', aim to improve the health of transgender individuals in India. However, the 'Transgender Persons (Protection of Rights) Act' of India still lacks the guidelines needed to access rights substantively, leading to gaps between legal recognition and practical realities on the ground for the transgender community. In the context of this research, the purpose of the study is to gain an understanding of the susceptibility of transgender individuals to a variety of health risks, including HIV, as well as the obstacles that they face when attempting to access healthcare services. Besides, the researcher aims to evaluate the efficacy of the provisions contained within the 'Transgender Persons (Protection of Rights) Act, 2019', which pertains to the health rights of the transgender community.*

**Key Words:** *Transgender-Health-Healthcare services- Constitution*

## 1. Introduction

The idea of sustainable development fulfills current demands without jeopardizing the capacity of subsequent generations to satisfy their own need. Right to health and gender equality have vital place in the United Nations Sustainable Development Goals to be achieved by 2030<sup>1</sup>. Despite the fact that the transgender issues are not explicitly discussed in the agenda, it could be widely understood to circumscribe the issues confronted by the members of transgender community. According to the World Health Organization, “every

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<sup>1</sup>The United Nations, Report of the World Commission on Environment and Development: Our Common Future, 1987 available at <http://www.sustainabledevelopment.un.org/content/documents/5987our-coomon-future.pdf> (last visited on August 15, 2023).



human being, regardless of their ethnicity, religion, political philosophies, socioeconomic status, sex, gender or any other distinguishing factor, has the inherent right to the greatest attainable standard of health.”<sup>2</sup>

The legislatures in India have enacted the ‘Transgender Persons (Protection of Rights) Act, 2019’ which recognizes their various health rights in section 15 that mandates the appropriate Government to establish HIV Sero-Surveillance Centres, to provide medical facilities that includes arrangement for conducting SRS (Sex Reassignment Surgery), anterior and posterior SRS and hormonal therapy counselling, review of medical curriculum to address issues specific to transgender community, to introduce a comprehensive insurance plan for covering the different health related expenses of trans-people etc. Nevertheless, the major health related issues are neither recognized nor addressed in the legislation. Establishment of separate wards for non-binary people, follow up treatments and hormone therapy of transgender prisoners are some of the instances.

Health is a condition of total well-being of body and mind rather than a state of absence of any infirmity.<sup>3</sup> Right to health is one of the most important human rights of every individual. This precious right is guaranteed to the mankind in many national constitutions<sup>4</sup> as well as under various international human rights documents.<sup>5</sup> It is widely believed that the concept right to health has originated after the Second World War, particularly with the emergence of the World Health Organization.<sup>6</sup> Apart from this various other core international human rights documents also recognizes right to health as a basic rights which the human beings are entitled to irrespective of gender *inter alia* other factors.

The international documents on human rights generally recognize three facets

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<sup>2</sup>The World Health Organization, Constitution of the World Health Organization, 1948 available at <https://www.apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1> (last visited on October 4, 2023).

<sup>3</sup>Ibid.

<sup>4</sup>The Philippine Constitution, 1987, art. II, section 15&16; The French Constitution, 1958; The Constitution of India, 1949, art. 21; Japanese Constitution, 1948, art. 25.

<sup>5</sup>The Universal Declaration of Human Rights, 1948, art. 25; The Convention on the Rights of Child, 1989, art. 24(1); International Covenant on Economic, Social and Cultural Rights, 1966, art. 12(1); Convention on the Elimination of Discrimination Against Women, 1979, art. 12; The African Charter on Human and Peoples’ Right, 1981, art. 16

<sup>6</sup>Adam Gaffney, To Heal Humankind The Right to Health in History 1 (Routledge New York & London I Edn., 2018)



of the right to health. They are, firstly, the recognition of the very same right; secondly, the fixation of standards for addressing the various health needs of different vulnerable groups; and finally, suggesting the methods of its implementation.<sup>7</sup> In the same manner, the principle of non-discrimination under various international human rights documents indirectly ensures the right to health by stating that the basic rights including the right to health are available to everyone irrespective of race, sex, gender etc.<sup>8</sup>

The objective of the study with respect to this research is to understand the vulnerability of transgender people to various health hazards, including HIV, and barriers to accessing healthcare services. The researcher also intends to evaluate the effectiveness of the provisions in the Transgender Persons (Protection of Rights) Act, 2019, concerning the health rights of the transgender community.

## 2. The concept of Transgender

The term transgender is a complex concept. The term “sex” refers to the biological classification of an individual at birth as male, female, or occasionally intersex, while gender pertains to the cultural roles associated with being male or female, or a combination of both. The intricacy of the concept of transgender is evident in instances where both the legislature and judiciary have struggled to frame and interpret it. Transgender is a person who stands outside the boundary of socially accepted gender binary, such as male and female. In other words, transgender is someone whose gender does not conform to his or her sex assigned at the time of birth. In 1999, Kamala Jaan, a hijra, was elected as the mayor of Katni district in Madhya Pradesh. The defeated candidate contested Kamala’s candidature, asserting that the Katni district was designated for female candidates and that Kamala did not meet the criteria as a female. The absence of conceptual clarity prompted the court to consult ancient holy literature, including the Mahabhara and the Kamasutra. Additionally, the judge cited historical materials from the courts of Akbar and Alauddin Khilji to assert the existence of groups of individuals who were neither male nor female. Additionally, the court referenced the standard dictionary definition of “female,” defined as one capable of delivering a child, and concluded that

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<sup>7</sup>Virginia A. Leary, “The Right to Health in International Human Rights Law”, 1 Health and Human Rights 26 (1994).

<sup>8</sup>The Charter of United Nations, 1945, art. 25; the Universal Declaration of Human Rights, 1948, art. 2; the International Covenant on Economic Social and Cultural Rights, 1966, art. 2; the International Covenant on Civil and Political Rights, 1966, art. 2.



a transgender is a castrated man. It is also noteworthy that the same view has been upheld by the High Court of Madhya Pradesh on appeal.<sup>9</sup> According to the 'Transgender Persons (Protection of Rights) Act, 2019', a person can be considered transgender even if they have not undergone hormone therapy, sex reassignment surgery, or laser therapy.<sup>10</sup>

### 3. Right to Health in the Gender Perspective

It must be recognized at the very outset that a major reason behind the initiation of litigation to recognize the existence of the transgender community by the Naz Foundation was the concern about their failure of the efforts to prevent HIV/AIDS among the members of the transgender people in India.<sup>11</sup> The scholars argue that a discussion about the development of transgender rights would be incomplete without addressing the roles played by certain civil society organizations in HIV/AIDS prevention.<sup>12</sup> As per studies, the transgender population is 13 times more vulnerable to HIV/AIDS than their cisgender counterparts. Ironically, they are hesitant to seek medical care because of the discrimination and humiliation that they face from society in general.<sup>13</sup> Section 377 that penalized the unnatural sexual intercourse in the Indian Penal Code, 1860, has identified itself as a major barrier for reaching out to members of the sexual minority, including the transgender community in India. Therefore, the civil society organizations working in the field of prevention of HIV/AIDS have started acting for the abolition of Section 377, which in turn led to the filing of a Writ Petition by a prominent non-governmental organization called the NAZ Foundation. However, another NGO, AIDS Bhedbhav Virodhi Andolan, initiated the first recognized legal battle in this connection, aiming to prevent sexually transmitted diseases. The case was initiated due to the unusual spread of HIV/AIDS in Tihar Prison, which was caused by inmates engaging in sodomy. Therefore, the NGO filed a Writ Petition before the High Court of Delhi to direct the prison authorities to distribute condoms to the prison inmates. The Writ Petition specifically prayed for the abolition of Section 377 of the Indian Penal Code and the implementation of the government's national AIDS program, inter alia. However, the petitioner organization's dissolution after seven years of conducting the case led to the dismissal of the Writ Petition.

<sup>9</sup>Sadiq Ali & Ors v Kamala Jaan, Election Petitions No.12/2000, 13/2000, 18/2000 & 21/2000 (First Additional District Court, Katni) (Unreported)

<sup>10</sup>The Transgender Persons (Protection of Rights) Act, 2019, S.2(k)

<sup>11</sup>Naz Foundation v NCT of Delhi, 160 DLT 277

<sup>12</sup> Suparna Bhaskaran, *Made in India: Decolonizations, Queer Sexualities, Trans/National Projects 7* (Palgrave Macmillan, New York, 2004).



#### 4. Right to health of transgender community in India

Discrimination, prejudice, and aggression, coupled with other social, political, and economic conditions, severely affect the physical, psychological, and behavioural health of transgender individuals. Even in so-called progressive societies, the harassment and discrimination against transgender people is a shocking reality. Even in so-called progressive societies, the harassment and discrimination against transgender people is a shocking reality. For instance, a 2019 survey by the 'Behavioural Risk Factor Surveillance System (BRFSS)' in the United States reveals that twice as many transgender people as cis-gender people are likely to suffer from depressive disorder and poor mental health. The survey also showed that one in four transgender people have attempted suicide at least once in their lives, and that the suicide rate in the transgender community is four times higher than that of their cis-gender counterparts.<sup>14</sup> As pointed at the outset, the right to health constitutes a basic constitutional protection in several jurisdictions. In India also it is a fundamental right guaranteed under Part III of the constitution.<sup>15</sup> Although the same is not directly given, the Supreme Court of India has repeatedly recognized the same right as one of the most significant fundamental rights.<sup>16</sup> Differential treatment in access to healthcare affects the quality of transgender individuals in the global level in contrast to their cis-gender counterparts. This phenomenon exists even in those jurisdictions where their rights are officially acknowledged. In India, where religions and culture play a vital role in shaping the status of sexual minority including transgender people, their condition is very pathetic. The general discrimination against the transgender community reflects in all walks of their life and thereby adversely affects the ability in accessing healthcare facilities as well. It is also noteworthy that 'the health rights of

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<sup>13</sup>Press release, UNAIDS and the LGBT Foundation launch groundbreaking study on happiness, sex and quality of life for LGBTI people, available at: [https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2019/may/20190514\\_survey](https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2019/may/20190514_survey) (last visited on Oct. 27, 2019).

<sup>14</sup>Report on Protecting and advancing Health Care for Transgender Adult Communities, available at <http://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities/> (last visited on January 28, 2023).

<sup>15</sup>The constitution of India, 1950, art. 21

<sup>16</sup>*Paschim Banga Khet Mazoor Samiti v State of West Bengal* (1996) 4 SCC 37; *Consumer Education and Research Centre v Union of India* AIR 1995 SC 922; *Burrabazar Fire Works Dealers Associations and Others v Commissioner of Police, Calcutta*, AIR 1998 Cal. 121; *Parmanand Katara v Union of India* 1989 SCR (3) 997



transgender community in India are protected under the Transgender Persons (Protection of Rights) Act, 2019'. Consequently, it is the responsibility of the appropriate government to implement measures such as:

- a) To set up distinct laboratories for conducting AIDS tests as per the recommendations provided by the National AIDS Control Organization.<sup>17</sup>
- b) To offer medical facilities for sex reassignment surgery and hormonal therapy.<sup>18</sup>
- c) To provide counselling prior to and subsequent the procedure for sex reassignment.<sup>19</sup>
- d) To create a health manual focused on transgender health, specifically addressing pre- and post-sex reassignment surgery stages, in accordance with the recommendations established by the World Professional Association for Transgender Health.<sup>20</sup>
- e) To evaluate the curriculum of physicians specializing in transgender health in accordance with developing concerns.<sup>21</sup>
- f) To guarantee access to hospitals for transgender individuals.<sup>22</sup>
- g) To implement comprehensive insurance plans that includes the costs of both sex change procedures and hormone therapies for transgender individuals.<sup>23</sup>

## 5. The Transgender Health Scheme in India

The Government of India has introduced an insurance scheme exclusively for the members of the transgender community named “Ayushman Bharat TG Plus” under its flagship health scheme, “Ayushman Bharat.” The main object behind the introduction of this scheme is to provide transgender people with financial aid to improve their health situation through proper medical care and also to undergo Sex Reassignment Surgery and related treatments like hormone and laser therapy. The scheme specifically benefits transgender

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<sup>17</sup>Supra note 10, s. 15(a).

<sup>18</sup>Ibid. s. 15(b).

<sup>19</sup>Id. s. 15(c).

<sup>20</sup>Id. s. 15(d).

<sup>21</sup>Id. s. 15(e).

<sup>22</sup>Id. s. 15(f).

<sup>23</sup>Id. s. 15(g).



people who possess a Transgender Registration Identity Card or Gender Recognition Certificate<sup>24</sup> under the provisions of the Act of 2019.

However, studies reveal that the protection of the right to health extended under the Act of 2019 is insufficient to the interests of the transgender community.<sup>25</sup> This mostly results from structural challenges, including gender identity discrimination, the inability to access public health facilities in many regions, an absence of accountability and transparency in service delivery, and the exorbitant prices of treatment in the private healthcare sector. Despite robust jurisprudence safeguarding the right to health, which is encompassed within the fundamental right to life and liberty as articulated in Article 21 of the Constitution, it is a significant concern that members of transgender community are restricted from exercising this right due to systemic and legal impediments.

It is in this connection that ‘the Ministry of Health and Family Welfare Directorate General of Health Services, Government of India have issued a notification directing all the State Governments and Union Territories to protect the specific health care needs of the members of transgender community’.<sup>26</sup> The Ministry also recognized that the Transgender community in India faces an increased risk of various health challenges, such as different types of cancers, sexually transmitted infections, cardiovascular disease, and mental health issues that include substance abuse and suicide attempts. Stigmatization and discriminatory attitudes create obstacles to appropriate access to healthcare services.

## **6. Problems faced by transgender community with respect to access to right to health in India.**

The transgender community in prisons and correctional facilities frequently struggles to access their health rights. People widely acknowledge that inmates in India’s prisons and correctional facilities receive sufficient medical attention. However, costly or specialised medical treatment remains inaccessible for transgender inmates. Transgender individuals who undergo Sex Reassignment

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<sup>24</sup>Id. s. 7.

<sup>25</sup>Dipika Jain, “Right to Health and Gender-Affirmative Procedure in the Transgender Persons Act 2019 in India”, 205 Indian J Plast Surg. (2022).

<sup>26</sup>Ministry of Health and Family Welfare, Directorate General of Health Services, Government of India, Notification No. C.18018/05/2024/SAS-III dtd. August 21, 2024 available at <http://www.transgender.dosje.gov.in/docs/AdvisoryfromDGHS.pdf> (last accessed on September 20, 2024).



Surgery require prolonged medical attention. In jails, there is no assurance of receiving individualized care from a qualified physician who alone can professionally monitor their medical needs. Additionally, transgender inmates who undergo Sex Reassignment Surgery required to be given hormone treatment for an extended duration, and any interruption in the administration of these medications may result in life-threatening medical consequences.

One of the major lacunae contained in the Act is that it does not provide any provisions that ensure gender-specific treatment. In other words, individuals who cross-dress or whose gender identity does not correspond with their assigned sex at birth may seek medical care from doctors whose gender aligns with their self-perceived gender. Generally, doctors have an ethical obligation to treat all individuals, regardless of their sex or gender. However, only victims of sexual offenses currently receive gender-specific treatments in India. Consequently, meeting the request of a female transgender person for medical treatment from a female physician may be untenable. In the notification, the Ministry has made certain directions about the measures to be adopted by the competent authorities in both the States and Union Territories. They include:-

1. Organizing awareness initiatives across all tiers of healthcare and throughout the community to enhance knowledge of the psychosocial dimensions and challenges faced by the transgender population.
2. Prohibition of forced surgical procedures or treatments for the forced conversion of sexual orientation or gender identity.
3. Ensuring of sex Reassignment Surgeries at designated government or aided hospitals.
4. The designated hospitals that perform the sex reassignment surgery must follow a Standard Operating Procedure for conducting the surgery.
5. The integration of health issues related to the transgender community into the curricula of various medical, nursing, and paramedical courses so as to educate and prepare future medical professionals to address the medical requirements of the community.
6. Facilitating the accessibility of medical tele consultation facility for transgender people.
7. Sensitize the staff at various levels so as to give them knowledge about different transgender terminologies and their health care requirements.





In addition to this notification, ‘the Government of India’s Ministry of Home Affairs’ issued another noteworthy notification in this regard.<sup>27</sup> The notification also mandates the prison authorities in the country to provide the transgender inmates with access to required healthcare facilities. The notification also instructs the authorities to refer trans-people to specialised medical professionals if the in-house doctors lack expertise in the relevant field. A perusal of these directions issued by the Ministry in August 2024 is apparently an implied affirmation that the various health needs of the transgender community have not been properly taken care of even after the enactment of the Act of 2019.

## 7. Conclusion and suggestions

Examining all the facts and literature, it is clear that the transgender community experiences harassment and discrimination in all spheres of their social lives, which ultimately has an impact on their physical and psychological health. Despite its unique characteristics, the Act of 2019 appears to lack effectiveness. Therefore, it requires comprehensive revision, incorporating recommendations and changes suggested by various stakeholder groups that include the transgender community, activists, and scholars. They include:

1. **Inclusive education**—Inclusive education involves delivering education in a way that raises awareness about the various issues faced by transgender individuals. The sensitization through inclusive education will result in the reduction of marginalization, discrimination, and harassment, which ultimately leads to improved mental health for members of the transgender community. Therefore, the curriculum at the school level must integrate the concept of transgender and address various issues related to the transgender community.
2. **Sensitizing law enforcement agencies.**—Sensitizing law enforcement agencies is crucial in tackling the issues confronted by the transgender community. The trans-people faces unique issues such as discrimination and harassment in all areas of social life, which ultimately lead to litigation and other legal proceedings. Studies indicate that the state, as the most powerful institution, stigmatizes transgender people through various antagonistic laws, thereby impacting their

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<sup>27</sup>Ministry of Home Affairs, Government of India, Notification No. 17013/26/2021-PR dtd. January 10, 2022 available at: [http://mha.gov.in/sites/default/files/Advisory\\_TransgenderPersonsInPrisons\\_10012022\\_0.PDF](http://mha.gov.in/sites/default/files/Advisory_TransgenderPersonsInPrisons_10012022_0.PDF) (last visited on February 10, 2024).



physical and psychological health.<sup>28</sup> Therefore, it is crucial to sensitize the members of various law enforcement agencies, such as police and court officials, in order to enforce the rights of transgender people.

3. **Separate wards in hospitals**—In simple words, transgender people are gender nonconforming individuals. The transgender people who already undergo sex reassignment surgery may not be comfortable staying with the cisgender people. It is also noteworthy that different types of transgender people exist, including male-to-female and female-to-males. There should be separate wards in the hospitals, at least for the members who belong to this unique group of people.
4. **Designated hospitals for Sex Reassignment Surgery and other treatments focused on transgender health issues**—The World Professional Association for Transgender Health Standards of Care<sup>29</sup> provides certain guidelines for the doctors and hospitals that perform the Sex Reassignment Surgeries and hormone therapies. The guidelines include crucial directives such as requiring treatment participants to have the ability to provide informed consent and to have gained the majority age in their home country. The designated hospitals must also have the facility for post-surgical treatments and therapies.

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<sup>28</sup>Report of PUCL (People's Union for Civil Liberties). Human rights violations against sexuality minorities in India. A PUCL-K fact-finding report about Bangalore 2001, available at: <http://www.pucl.org/Topics/Gender/2003/sexualminorities.pdf> (last visited on August 10, 2018).