



Right to Health and Gender-Affirmative Procedure in the Transgender Persons Act 2019 in India

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Indian J Plast Surg 2022;55:205–210.

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Abstract

Keywords

- ▶ transgender persons
- ▶ right to health
- ▶ legal recognition of gender
- ▶ gender affirmative procedure
- ▶ self-determination

The Transgender Persons Act, 2019 mandates that the government ensures medical facilities provide care to transgender persons (including for gender-affirmative procedures) and review medical curricula to address the health needs of transgender persons. However, despite the enactment of the law, many transgender and gender-variant persons in India struggle to access essential health care services. Legal provisions on health care strip them of their right to self-determination by setting up complex bureaucratic processes for the legal recognition of gender identity. In this article, I critically examine the health care provisions in the Act and the lack of efficient legal criteria for gender-affirming procedures, as well as the basic flaws in the medicalized model of legal recognition of trans persons' gender identity, which not only characterize the Act but also have serious implications for its implementation across the country.

Introduction

On April 15, 2014, a two-judge bench of the Supreme Court of India delivered a landmark judgment, which declared that self-determination of gender identity was a fundamental right protected by the Constitution of India. The *National Legal Services Authority v. Union of India*¹ (NALSA) decision was a watershed moment in Indian jurisprudence, and the judgment has had positive effects on transgender and gender-variant persons' by laying down a precedent for the protection of their constitutional rights.^{2–4}

From 2015 onwards, the Ministry of Social Justice and Empowerment began working on a Transgender Persons (Protection of Rights) Bill as a follow-up to the NALSA decision, after Tiruchi Siva (a Member of the Rajya Sabha from Tamil Nadu) presented a private member's Bill on the

rights of transgender persons.^{2,5} Despite reservations by transgender and gender-variant individuals and activists, as well as widespread protests against the legislation, the Transgender Persons (Protection of Rights) Bill was finally passed by Parliament in November 2019 with little debate and has been in force since January 2020 as the Transgender Persons (Protection of Rights) Act 2019 (Transgender Persons Act).⁶ The Transgender Persons Act prohibits discrimination in health care services, mandating that the government ensures medical facilities provide care to transgender persons (including for gender-affirmative procedures) and review medical curricula to address the health needs of transgender people. These provisions are in line with the observations in NALSA, wherein the Supreme Court pointed out that discrimination against transgender persons is especially pronounced in fields such as health care.

published online
July 14, 2022

Issue Theme Gender
Incongruence

DOI <https://doi.org/10.1055/s-0042-1749137>.
ISSN 0970-0358.

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Thieme Medical and Scientific Publishers Pvt. Ltd., A-12, 2nd Floor, Sector 2, Noida-201301 UP, India

However, despite the directives of the Supreme Court and the enactment of the Transgender Persons Act, many transgender and gender-variant people in India struggle to access essential health care services. This is mostly due to systemic issues such as discrimination based on their gender identity, inaccessibility of public health facilities in many parts of the country, lack of accountability and transparency in the delivery of services, or prohibitive costs of treatment in the private sector.⁷ Although there is strong jurisprudence protecting the right to health—read into the fundamental right to life and liberty in Article 21 of the Constitution—it is a serious concern that transgender and gender-variant persons are prevented from exercising this right due to structural and legal barriers.

In this article, I first provide an overview of the legal recognition of transgender persons in India, particularly through the NALSA decision and subsequent legislative developments. I argue that the judicial decision, as well as the Transgender Persons Act and Rules, emphasizes the importance of access to health care and obligates the State to ensure that transgender persons are not discriminated against by the health care system. Furthermore, I lay out the challenges and critiques of the Transgender Persons Act, highlighting the provisions on health care and how they strip people of their right to self-determination by, for instance, setting up complex bureaucratic processes that transgender persons must navigate to obtain the legal recognition of their gender identity. I also examine the lack of legal criteria for gender-affirming procedures, as well as the basic flaws in the medicalized model of legal recognition of trans persons' gender identity, which not only characterize the Act but which also have serious implications for its implementation across the country. All references to "health rights" within the Transgender Persons Act lay bare the medicalization of transgender and gender-variant bodies that forms the basis for entitlement and access to health care services.

Health Rights within the Transgender Persons Act 2019

The Transgender Persons Act 2019 was enacted to provide for the protection of rights of transgender persons and their welfare and connected incidental matters. The Act not only prohibits discrimination against transgender persons on various grounds but also provides for a method for "recognition" of transgender identity through filing applications before jurisdictional District Magistrates for "certificates of identity." The Act, additionally, casts obligations on governments and employers to undertake welfare measures for transgender persons, and to not discriminate against them in employment. The right to residence of transgender persons is also upheld by the Act, which prohibits the separation of transgender children from their parents, and explicitly outlines the rights of transgender persons to reside in the household where their parents/immediate family resides, to not be excluded from households and to use and enjoy household facilities free from discrimination. However, it needs to be noted that the right to residence should be

expanded to affirm the freedom to live with other transgender and gender-variant persons, in hijra gharanas, and other choice-based residences outside the legal structures of adoption, marriage, and birth-based kinship.

However, as many activists and scholars have noted, certain sections of the Transgender Persons Act are extremely problematic and dilute the spirit of the NALSA judgment, which is rooted in the idea of self-determination. While Section 4 of the Act upholds "self-perception of gender identity," Sections 5 and 6 directly contradict this by requiring transgender persons to apply to a District Magistrate for a certificate recognizing their gender identity.² Trans activists have argued that this requirement is transphobic and strips them of decisional autonomy—effectively outsourcing the determination of one's gender identity to the State.^{8–10} Furthermore, Section 7 of the Act states that transgender persons who wish to be legally recognized either as male or female must provide the proof of having undergone gender-affirmative surgery. Such a requirement has been said to continue "to violate both the Constitutional spirit of the NALSA judgment as well as the principle of self-identification and determination laid out in the Transgender Persons Act itself."² The Act is currently facing constitutional challenges from transgender activists in the Supreme Court on this ground and on the basis of the arbitrary hierarchy it creates between the different procedures for recognizing transgender persons vis-a-vis transgender women and men.^{11,12}

Despite the widespread backlash against the Act, the Central Government proceeded to introduce the draft Transgender Persons (Protection of Rights), Rules in April 2020, while the country was in lockdown due to the coronavirus disease 2019 (COVID-19) pandemic.² Many trans-led groups opposed this move and critiqued it as ill-timed, highlighting the lack of stakeholder consultation and deliberation preceding the introduction of the draft Rules. However, transgender activists and trans-led civil society organizations led efforts to hold virtual consultations and submitted two rounds of recommendations to the government. Due to these efforts, the final version of the Rules contains provisions that mitigate some of the violations resulting from the provisions of the Act. For example, transgender persons need not submit proof of surgery under Section 7 of the Act but only of "medical intervention," which may be interpreted broadly.² However, even in the attempt to circumvent the restriction to surgical interventions for the purpose of obtaining an identity certificate, the Rules continue to only recognize medical interventions as valid for the purpose of granting identity documents that align with self-determined gender. This, therefore, invalidates and excludes non-medical gender-affirmative and transitional processes.

A United Nations Development Program report from 2013 notes that transgender people face systemic discrimination in accessing health care services, including the refusal of care and being treated with contempt by health care service providers.¹³ Moreover, many trans persons are unable to afford necessary medical procedures. During the pandemic, several people expressed concerns over COVID-19 treatment

for trans persons; one person stated that “if someone from our community gets infected, we will be quarantined at male or female wards against our choice of gender identity. This will further traumatize an already infected transgender person.”¹⁴ The Supreme Court in the NALSA judgment had taken note of the lack of access to health facilities for transgender persons.¹⁵ The petitioner in the NALSA case made averments regarding the lack of special sero-surveillance centers for transgender persons, who are usually put in the category of men who have sex with men, to which the Court responded by directing the Central and State Governments to set up and operate such centers, especially for transgender persons. Additionally, to address issues pertaining to the lack of access to health care by transgender persons, the Court directed Central and State Governments to provide medical care to transgender people in hospitals.

The Transgender Persons Act, in aiming to uphold the directions of the Supreme Court in NALSA, framed Section 15 to provide health care facilities to transgender and gender-variant individuals. The Act calls for various measures to be performed by the “Appropriate Government,” including the setting up of separate human immunodeficiency virus sero-surveillance centers to conduct sero-surveillance for trans persons in accordance with the guidelines issued by the National AIDS Control Organization. The Act goes on to obligate the governments to run medical care facilities, including for the provision of gender-affirmative surgery and hormonal therapy, and counseling before and after gender-affirmative surgery and hormone therapy, and to bring out a health manual related to gender-affirmative surgery in accordance with the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People by the World Professional Association for Transgender Health guidelines (WPATH).

Furthermore, the Act prescribes more long-term measures, which include the reviewing of medical curricula and research to enable doctors to address specific health concerns of transgender persons. It casts an affirmative obligation on governments to facilitate access to transgender persons in hospitals and other health care institutions and centers and to provide for the coverage of medical expenses by a comprehensive insurance scheme for the gender-affirmative procedure including hormonal therapy, laser therapy, or any other health issues of transgender persons. The welfare measures under the Rules also require the establishment of separate wards in hospitals and washrooms for transgender persons. Finally, the Act stipulates that whoever harms or injures or endangers the life, safety, health, or well-being, whether mental or physical, of a transgender person shall be liable to be punished with imprisonment for a term which shall not be less than 6 months, which may extend to 2 years and with a fine.

In 2016, as a response to the Transgender Persons (Protection of Rights) Bill introduced by the Ministry of Social Justice and Empowerment, Sampoorana Working Group (a trans and intersex-led network) submitted a letter with their recommendations. In the letter, they noted that “Health is a

huge concern for trans and intersex people. We recommend that a separate chapter on health be brought into the bill that fully addresses trans and intersex health care as well as general health care for these communities.”¹⁶ They further suggested that all public health facilities should follow the guidelines set out by the WPATH. A consolidated response by other trans-led groups such as Nirangal and Telangana Hijra Intersex Transgender Samiti also submitted that “Trans healthcare is absolutely critical for trans people to go on living their lives. Key services like counselling, hormone therapy, various gender affirming procedures have to be made mandatory services that are accessible to all underprivileged sections of the trans communities.”¹⁷

There is sufficient evidence to suggest that a lack of access to such care can lead to immense psychological distress and that “social, psychological, and medical gender affirmation were significant predictors of lower depression and higher self-esteem while the absence of domains of affirmation were significantly associated with suicidal ideation.”¹⁸ It thus becomes crucial to ensure that transgender and gender-variant people persons are able to fully exercise their right to health.

Despite the Transgender Persons Act containing several provisions pertaining to the health care of transgender persons, as outlined in the previous section, other provisions of the Act serve to institutionalize violations and oppressions experienced by transgender and gender-variant persons in their daily lives. For instance, the Transgender Persons Act provides for welfare schemes and penalties associated with the fundamental right to health of transgender persons, but the provisions relating to the “recognition of the identity of transgender persons” predicate the receipt of benefits under these schemes, as well as protection from discrimination on the receipt of a “certificate of identity” as a transgender person. The certificate is mentioned in the Act as a document, once issued, which “shall confer rights and be a proof of recognition” of a person’s “identity as a transgender person.” It essentially follows that without this process of “recognition” through application to a District Magistrate, transgender persons would not be recognized as beneficiaries of the specific grounds under the anti-discrimination provisions, protections, and welfare measures aimed for transgender and gender-variant persons.

The receipt of a “certificate of recognition” is therefore a legally mandated requirement for transgender persons to be able to access health care services that are already elusive to these gender-variant persons. Additionally, the Act’s narrow definition of family as those related to transgender persons by blood, kinship, adoption, or marriage severely limits who can consent on behalf of them, especially in situations involving a medical emergency. The legal criteria (or, in many cases, lack thereof) that, in turn, characterize the provision of gender-affirming surgeries and cause significant ambiguity in the medical processes required to make changes in legal identification documents of transgender persons are covered in the following section.

Legal Criteria for Gender Affirmation Surgery

In 2014, Justice Radhakrishnan noted in the NALSA judgment the need to “clarify the ambiguous legal status of gender affirmative surgery and provide gender transition and gender affirmative services (with proper pre- and post-operation/transition counselling) for free in public hospitals in various parts in India.” Before the NALSA judgment, Swati Bidhan Baruah had moved the Bombay High Court to safeguard her right to avail gender-affirmative surgery, against the threat posed by her parents to restrict her decision. The Court declared that there was no law in the country barring adults from undergoing “sex-change operations.”¹⁹ Although Section 15 of the Act obligates the government to provide comprehensive insurance coverage of medical expenses, most of the country is yet to offer free or even subsidized medical care for transgender persons.²⁰ Only some states such as Tamil Nadu provide free gender-affirmative procedures,²¹ while states such as Kerala have formulated a policy on the subject but have no government-run hospitals that actually provide gender affirmation surgeries.²²

As reported by the Hindustan Times in 2018, the Indian Council of Medical Research, which had been tasked with creating detailed national-level guidelines on transgender health, has thus far failed to come up with the document.²³ The medical curriculum in India also neither addresses health care for transgender persons nor sensitizes health care professionals on how to provide gender-affirmative care. The management of the health of transgender and gender-variant persons is, therefore, guided by Version 1 of the Indian Standards of Care (ISOC-1) for Persons with Gender Incongruence and People with differences in Sexual Development/Orientation, which was released in November 2020 by Wisdom Publishers, Delhi. ISOC-1 are based on and draw from the guidelines published by WPATH, and their release was initiated by the Association for Transgender Health in India at an international conference consisting of 200 professionals working in the field of transgender health care, in different specialties and subspecialties.²⁴ The WPATH Standards of Care Version 7 are the globally accepted standards that serve as the model template for gender-affirmative procedures, and these have been subsequently adopted by several countries on a domestic level through the introduction of legislations and guidelines for the provision of care for transgender and gender-variant persons.²⁵

The ISOC-1 seek to draw from the best practices in sync with the WPATH standards and contain detailed guidelines for the surgical care of transgender and “gender incongruent” persons consisting of several procedures, a public health approach to dealing with “gender incongruence” that proposes several institutional and structural changes to improve diversity in care and, finally, a parents support group section to guide parents of “gender incongruent” persons.²⁴ The document aspires to be the base document for addressing all concerns related to the health of transgender and gender-variant persons, keeping in mind the various key stake-

holders that are involved in the provision of holistic and affirmative care to persons irrespective of their self-affirmed gender identity.²

However, it is pertinent to note that even though the document purports to have been developed in consultation with transgender persons to account for regional differences in transgender health care and claims to be oriented to the particular needs of transgender and gender-variant persons residing in India, it is notable that none of the authors or mentioned contributors are transgender or gender-variant individuals. ISOC-1 have been developed by doctors and medical practitioners keeping in mind a limited target audience of the medical fraternity and lack the adequate representation and participation, making it an exclusionary document. This is also reflected in the lack of knowledge and conversation by transgender and gender-variant individuals on the publication of these standards of care. Any policies that dictate or guide health care provision for trans persons, including surgical, infrastructural, or social aspects of the same, require in-depth consultation, review, and deliberation with transgender and gender-variant stakeholders. Further, although the ISOC-1 have been developed to ensure that the medical professionals, as well as family and community members, are sufficiently sensitized to the needs of trans and gender-variant persons, especially in the case of those medical professionals carrying out gender-affirmative surgeries, these standards are yet to be adopted on a national scale so as to mandate adherence to them. These are guidelines that have been put forward by a non-statutory body or public institution, and the legitimacy of the same can, therefore, not be ensured in the absence of their adoption by the Indian Council of Medical Research. Consequently, in the absence of legislative frameworks that ensure that these standards and guidelines are adopted by all agencies and institutions, both public and private, working toward ensuring quality health care for trans and gender-variant persons, significant gaps and lacunae in the transition process will continue to exist.

Now that the Transgender Persons Act and Rules are in force, there is a clear process for changing an individual's gender markers and name—although still subject to a complex bureaucratic web.² There are two separate processes for certification under the Transgender Persons Act. First, there is the process for being identified as a “transgender person” under Section 5 of the Act, which requires the person to apply in the format of Form-2 under the Rules to the District Magistrate of the jurisdiction in which they have been residing for at least the last 12 months. After verifying the correctness of the application—but without any medical examination—the Magistrate, under Rule 5, will issue a “certificate of identity” and “transgender identity card.” Both issued documents can be used to request a change in their other official documents, including their birth certificate, caste/tribe certificate, secondary education certificate, Aadhaar card, passport, ration card, and other illustrative documents listed under Annexure I of the Rules.

Second, under Section 7 of the Act, a person can apply to the District Magistrate for a revised certificate identifying

their binary change in gender (male or female) and name, after undergoing “medical intervention.” The application, under Rule 6, should be made as per Form-1 of the Transgender Persons Rules and be accompanied by a certificate from the Medical Superintendent or Chief Medical Officer of the medical institution where the procedure was completed. After verifying the correctness of such certificate, as per Rule 7, the Magistrate will issue a revised “certificate of identity” and “identity card.” The person may, thereafter, use these revised documents to request a change in their official documents. Although the Transgender Persons Act and Rules replace all prior procedures for amendment of official documents, persons that have officially recorded the change in their gender prior to December 5, 2019 are not required to make an application under the new laws. There is currently also an impending constitutional challenge to Section 7 of the Act.

It must be noted that the trans movement strongly disagrees with the impetus of the Act, as it disrespects their autonomy and denies their right to self-determination of gender identity—in favor of determination by the State’s bureaucratic machinery.² Despite claiming to uphold their right to self-identification, the web of bureaucratic procedures violates the NALSA judgment’s call for self-affirmation and identification of gender without the prerequisite of gender-affirming surgery.²

This “medical model” of recognition prescribed by the Act is conflated with the actual gender identity of individuals, who may not identify within the gender binary and whose gender-variant identity is essentially erased through this dangerous equivalence, as codified in law. It is known that transgender persons may undergo several procedures before deciding on undergoing gender affirmation surgery, may undergo only some of the procedures, or may choose not to go through it at all. Such decisions should ideally not affect the “identity” of the person in law, with entitlements to gender-variant persons being enforced independently from surgical status. Furthermore, the mandatory requirement of surgery to allow individuals to formally “change” their gender is not only likely to be exclusionary to gender-variant persons who do not identify within the legally prescribed binary, but it can also be hazardous for transgender persons who are living with a health condition that may be impacted by undergoing such a procedure. The health system, rather than facilitating access to health care services and self-identification, is adopting the position of a “gatekeeper” that helps to medicalize the legal discourse around gender identity.²⁶

In contrast to India, Argentina’s 2012 law on gender identity upholds the right by all persons to the recognition of their gender identity, as well as free development of their person according to their gender identity.²⁷ Transgender and gender-variant people can also request that their recorded gender be amended along with the changes in first name and image. Similarly, in June 2020, the Government of the Netherlands removed all gender markers from national identification documents, deeming them as “unnecessary.”²⁸

In addition to the dismantling of the bureaucratic web, the development and implementation of standard protocols or

guidelines on health care for transgender persons, especially gender-affirmative procedures, is an important conversation to be had with the transgender and gender-variant movements. This continues to be an important step for ensuring that transgender and gender-variant persons have access to the best possible health care based on the best available science. The absence of legally enforceable guidelines has created a lacuna with respect to maintaining transparency, accountability, and safety in the delivery of such procedures, especially in cases of medical negligence such as that involving Ananniyah Kumari Alex.²⁹ WPATH itself notes that most of its research and experience is based on North American and Western European perspectives and, therefore, stresses the importance of adapting its standards to other parts of the world while accounting for cultural relativity.²⁵

Conclusion

The right to health of transgender persons, as well as the barriers to accessing health care facilities by transgender and gender-variant individuals, has been covered and recognized by the Supreme Court as well as the legislature, through portions of the NALSA judgment as well as the Transgender Persons (Protection of Rights) Act 2019. However, on a closer examination of the judgment and the legislation, it is seen that till the recognition of transgender and gender-variant identities is divorced from documentary “evidence” and bureaucratic processes, transgender and gender-variant individuals will still face discrimination, stigma, and obstacles in realizing their rights and entitlements in practice. Furthermore, the sheer absence of standards and guidelines for gender-affirming procedures for transgender and gender-variant persons has significant implications on the quality of health care that is accessible. It is imperative to craft a legal framework in consultation with the transgender and gender-variant movement and stakeholder activists and individuals in India to overcome these structural barriers.

Funding

None.

Conflict of Interest

None.

Acknowledgments

I would like to acknowledge the excellent research and editorial assistance of Siddharth Saxena, Kavya Kartik, and Rhea Malik. My gratitude to Kanmani Ray, Abhaya Tata-varti and Disha Choudhary for their close reading of the article and their helpful review. I am grateful to the peer reviewers for their excellent comments and editors of the journal, especially Dr. Kadam for his support. I am writing this piece from my location as a legal academic and I remain attentive to my privilege as a cis-gender academic. I am indebted to my friends in the trans movement in India from whom I have had the opportunity to learn and unlearn, and Dr. Aqsa for inviting me to contribute to this volume.

Note

The author has used the term 'transgender' in this article mainly because the term 'transgender' was used by the Supreme Court in the NALSA judgment and by the Parliament in the Transgender Persons Act and Draft Rules. She is aware that the term 'transgender' is not inclusive and its meaning varies across regions, cultures, and nations. She recognizes that it does not fully represent the diversity and heterogeneity among transgender persons in India.

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