

FROM RECOGNITION TO REALIZATION: A CRITICAL ANALYSIS OF THE RIGHT TO HEALTH OF TRANSGENDER PERSONS IN INDIA

Rimjhim Jain*

Abstract

Indian constitutional and human rights law have evolved significantly with the recognition of transgender persons as rights-bearing individuals. However, the formal recognition of equality, dignity and gender identity does not necessarily ensure meaningful access to healthcare. This paper critically examines the legal framework of the right to health of transgender people in India, with an emphasis on the disconnect between legal recognition and realisation. It analyses constitutional principles, judicial developments, the Transgender Persons (Protection of Rights) Act, 2019, the Rules, 2020, and relevant governmental policies and schemes. The study identifies persistent barriers, including stigma, discrimination, inadequate sensitisation, limited access to gender-affirming healthcare, economic constraints and fragmented implementation. It argues for a coordinated, rights-based framework ensuring accessible, enforceable and equitable healthcare entitlements for transgender persons.

Keywords: Transgender Persons; Right to Health; Gender-Affirming Healthcare; Healthcare Access; Rights-Based Approach.

Introduction

The attainment of human dignity and the enjoyment of the entire spectrum of human rights depend on good health. The right to health includes the availability, accessibility, acceptability, and quality of a health care system as well as the underlying determinants of health, such as access to safe drinking water, sanitation, adequate nutrition, housing, healthy working conditions, and health-related information.¹ Recognizing health as an indispensable component of human development, the World Health Organization (WHO) has observed that an effective health system, founded upon the right to health, constitutes a core social institution essential for

* Assistant Professor, Lloyd Law College.

1 Alicia Ely Yamin, *Power, Suffering and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter* (Univ. of Pa. Press 2016).

ensuring social justice and equality.² There is international human rights law that enters into the recognition of the right to health as a universal human right. The recognition of the highest attainable standard of physical and mental health has a solid normative basis in the Universal Declaration of Human Rights, 1948 (UDHR), Art. 25 and in the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), Art. 12. Through the General Comment No. 14,³ the normative content of this right has been further developed and the AAAQ framework, availability, accessibility, acceptability and quality are expressed.

Although international law guarantees the right to health, its practical realization remains unequal for socially marginalized communities. Among the most vulnerable groups are transgender persons, who continue to experience systemic discrimination in accessing healthcare services. Social exclusion, stigma, inadequate legal recognition, economic marginalization, and the lack of sensitization among healthcare professionals significantly restrict their ability to obtain timely and appropriate medical care. The barriers extend beyond general healthcare and include denial of gender-affirming healthcare, mental health support, reproductive healthcare, HIV prevention and treatment services, and access to health insurance.⁴ Consequently, barriers to healthcare faced by transgender persons raise concerns not merely of public health but also of equality, dignity, privacy and non-discrimination.⁵ The Indian Constitution does not list the right to health as a fundamental right. Despite this, the judicial interpretation has progressively broadened the definition of art. 21 to incorporate the right to health as a fundamental component of the right to life and individual freedom.⁶ In *Parmanand Katara v. Union of India*,⁷ *Consumer Education & Research Centre v. Union of India*,⁸ *Paschim Banga Khet Mazdoor Samity v. State*

2 World Health Organization, Human Rights and Health, Fact Sheet No. 323 (2023), <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> (last visited Aug. 11, 2026).

3 Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4 (2000).

4 World Health Organization, Transgender People and HIV (2015); United Nations Development Programme, Discussion Paper: Transgender Health and Human Rights (2013).

5 Nat'l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438 (India); Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

6 *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161 (India); *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 4 SCC 37 (India).

7 *Parmanand Katara v. Union of India*, (1989) 4 SCC 286 (India).

8 *Consumer Education & Research Centre v. Union of India*, (1995) 3 SCC 42 (India).

of West Bengal,⁹ and subsequent decisions, the Supreme Court affirmed that the State bears a constitutional obligation to provide timely and adequate healthcare. In addition to Art. 21, the Directive Principles of State Policy (DPSP) further reinforce the constitutional commitment to public health, particularly through Arts. 38, 39(e), 41 and 47.¹⁰

The constitutional recognition of transgender rights received a significant impetus through the judgment in *National Legal Services Authority v. Union of India*, wherein the Supreme Court recognized transgender persons as a constitutionally protected third gender and affirmed that gender identity is an integral part of individual dignity, equality and autonomy.¹¹ The Court directed the Union and State Governments to take affirmative measures to ensure that transgender persons have equal access to education, employment and healthcare. Despite these legislative and judicial advances, transgender persons continue to experience significant health inequalities, including limited access to healthcare facilities, insensitive treatment by healthcare providers, and stigma surrounding HIV and mental health issues. These vulnerabilities are often associated with structural discrimination, poverty, family rejection and homelessness.¹² While the healthcare needs of transgender people are included in the statute and legislation, access to gender-affirming healthcare remains one of the largest gaps between statutory recognition and healthcare delivery, as healthcare providers often lack the skills, knowledge, and/or experience necessary to provide gender-affirming care. Although there is statutory recognition and legislation for transgender healthcare needs, access to gender-affirming healthcare remains one of the largest gaps between statutory recognition and healthcare delivery, with the lack of skills, knowledge, and/or experience within the healthcare provider to offer gender-affirming care.¹³ However, healthcare inclusion reforms have been stunted by several implementation issues, including institutional capacity, lack of sensitization of healthcare providers and

9 *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 4 SCC 37 (India).

10 INDIA CONST. arts. 38, 39(e), 41, 47.

11 *Nat'l Legal Servs. Auth. v. Union of India*, (2014) 5 SCC 438 (India).

12 National AIDS Control Organisation, India HIV Estimates 2023: Technical Report (Ministry of Health & Family Welfare, Gov't of India 2024).

13 Dipika Jain, Right to Health and Gender-Affirmative Procedure in the Transgender Persons Act 2019 in India, 55 *Indian J. Plastic Surgery* 205 (2022); World Professional Association for Transgender Health, Standards of Care for the Health of Transgender and Gender Diverse People (Version 8 2022).

lack of uniformity in policy implementation.¹⁴ (Ministry of Social Justice & Empowerment, Gov't of India, The Transgender Persons (Protection of Rights) Rules, 2020; Ministry of Social Justice & Empowerment, Gov't of India, Support for Marginalized Individuals for Livelihood and Enterprise (SMILE) Scheme; Ministry of Social Justice & Empowerment, Gov't of India, National Portal for Transgender Persons).

Existing scholarship has largely focused either on the recognition of transgender identity or on the broader right to health in India. Limited attention has been devoted to examining transgender healthcare rights through an integrated constitutional, statutory and human rights perspective. This study seeks to address this gap by critically analyzing whether the existing legal and policy framework adequately secures the right to health of transgender persons and identifying the reforms necessary for its meaningful realization. There has been little focus on a detailed study of transgender health care rights from a whole of constitution, statute and human rights lens. The aim of this study is to address this gap, critically analysing whether the current legal and policy landscape provides a basis for ensuring the right to health for transgender people and what changes in the law and policy are needed to make this a reality. In this context, this study critically examines the legal framework governing the right to health of transgender persons in India. It examines legal provisions and protections, judicial decisions and international human rights frameworks to determine if the current law sufficiently protects the health rights of transgender people. It further identifies the legal, institutional and policy constraints that impede the effective realization of these rights and proposes reforms aimed at developing a more inclusive, rights-based and gender-sensitive healthcare framework for transgender persons in India.

Challenges in the Realization of the Right to Health of Transgender Persons in India

The NALSA judgment, the Transgender Persons (Protection of Rights) Act, 2019, and healthcare-related welfare measures have contributed to an important legal framework. But the existence of rights and schemes is not sufficient for their effective enjoyment. Even though transgender people are officially recognised, a significant gap remains between formal recognition and effective access to healthcare services. In addition,

14 Ministry of Social Justice & Empowerment, Gov't of India, The Transgender Persons (Protection of Rights) Rules, 2020; Ministry of Social Justice & Empowerment, Gov't of India, Support for Marginalized Individuals for Livelihood and Enterprise (SMILE) Scheme; Ministry of Social Justice & Empowerment, Gov't of India, National Portal for Transgender Persons.

although there have been some positive legal changes, NHRC has also recognized that transgender individuals are still discriminated against and denied access to healthcare services.

• *Discrimination and Stigma within Healthcare Institutions*

Stigma and discrimination experienced by transgender persons within healthcare institutions remain among the most significant barriers to healthcare access. This can lead to insensitive behaviour, the denial of services, inappropriate questioning, or a lack of respect for their gender identity on the part of transgender individuals, which may discourage individuals from seeking healthcare, delay treatment or result in avoidance of healthcare altogether.¹⁵ These experiences may make transgender people less likely to approach health care institutions or may cause them to delay their treatment or even avoid the health care altogether because of the lack of sensitivity or respect for their gender identity. Discrimination in healthcare is especially paramount because it impacts not just on access to gender affirming care, but on regular healthcare services as well.

It is not just a matter of deliberate discrimination. Healthcare systems have traditionally been structured around a binary understanding of gender, which may create challenges in registration, admission, allocation of wards, and provision of gender-responsive services in healthcare. The absence of inclusive institutional practices can therefore make healthcare inaccessible even where treatment is not expressly denied. National and international health guidance increasingly recognizes that stigma, discrimination and inappropriate treatment within healthcare settings can adversely affect the willingness of transgender and gender-diverse persons to seek medical care.¹⁶

• *Lack of Sensitization and Specialized Healthcare Services*

A further challenge is the inadequate availability of healthcare professionals trained to address the specific needs of transgender persons. Gender-affirming healthcare may require access to appropriately trained professionals, including endocrinologists, surgeons, mental-

15 National Human Rights Commission, Study on Human Rights of Transgender as a Third Gender (2018).

16 World Health Organization, Improving LGBTIQ+ Health and Well-Being with Consideration for Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics; National AIDS Control Organisation, Operational Guidelines for Comprehensive HIV and STI Services for Hijras and Transgender People.

health professionals and other specialists. However, such services are not uniformly available across the country, particularly outside major urban centres.¹⁷

The lack of professional sensitization also affects the quality of general healthcare. Medical practitioners may have limited understanding of gender identity or of the healthcare requirements of transgender persons. This can result in inappropriate assumptions, unnecessary medicalization or a failure to provide care in a manner consistent with the patient's identity and dignity. The need for healthcare-worker education and training has also been recognized internationally as an important component of gender-inclusive healthcare.¹⁸ An important recent development is the issuance of Standard Operating Procedures for the medical treatment of transgender persons by the Directorate General of Health Services in 2024. Such procedures are steps towards the standardization of healthcare. The presence of guidelines, however, does not guarantee uniformity in their implementation, especially in the availability of trained health care personnel and health care facilities.¹⁹

• *Limited Access to Gender-Affirming Healthcare*

Another major obstacle to gender affirming care is access. Depending upon an individual's needs and choices, such healthcare may include counselling, hormone therapy, surgical procedures and post-operative care. But there is access to such services remains uneven in terms of geographical availability and affordability.

It is necessary for the appropriate Government to take measures to provide healthcare facilities including facilities in relation to sexual reassignment surgery and hormonal therapy as required by the Act, 2019. But avilment of such services remains contingent on the availability of trained professionals and proper healthcare facilities in various parts of the country.²⁰ Although healthcare coverage under schemes such as Ayushman Bharat TG Plus represents an important development, insurance coverage alone does not guarantee effective access where empanelled facilities

17 World Professional Association for Transgender Health, Standards of Care for the Health of Transgender and Gender Diverse People (Version 8 2022).

18 World Health Organization, Update on the Guideline Development Group on the Health of Trans and Gender Diverse People (2024).

19 Directorate General of Health Services, Ministry of Health & Family Welfare, Gov't of India, Standard Operating Procedures for Medical Treatment of Transgender Persons (2024).

20 Transgender Persons (Protection of Rights) Act, 2019, Sec- 15 (India); Jain, *supra* note 15.

or trained healthcare providers are unavailable. Financial support and physical availability of services must therefore operate together for the right to healthcare to be meaningfully realized.²¹

• *Economic and Social Barriers to Healthcare*

Healthcare exclusion can't be discussed without taking into account the social and economic marginalisation that transgendered individuals face. Access to education, employment, housing and family support may be compromised, which can make obtaining health care be a significant barrier.²²

The right to health also encompasses all the factors needed for a healthy life. Lack of stable housing, income and social support then can have indirect, negative impacts on physical and mental health. This illustrates the shortcoming of a one-sided view of hospitals or medical care. The right to health must be realized in a way that links health care to social welfare policies in general.²³

• *Implementation Gaps and Institutional Limitations*

One of the principal challenges is the gap between legal recognition and effective implementation. The Act, 2019 spells out the prohibition on discrimination and mandates the provision of healthcare facilities to the government and the Rules and various welfare schemes provide mechanisms for implementation. These measures, however, are largely dependent upon action at the State and local level. The effectiveness of transgender healthcare rights is thus critically reliant on the capacity and commitment of State Governments and individual health care institutions, as well as central laws and policy measures. Therefore, national legislation and schemes can achieve only a modest impact if there is lack of infrastructure, lack of awareness and weak monitoring mechanisms. The implementation of transgender rights issues continued to be a concern for the Government with issuance of advisories and institutional measures related to the same.²⁴

21 National Human Rights Commission, Study on Human Rights of Transgender as a Third Gender (2018).

22 National Human Rights Commission, Study on Human Rights of Transgender as a Third Gender (2018).

23 General Comment No. 14, *supra* note 3.

24 Ministry of Home Affairs, Gov't of India, Advisory for Ensuring the Welfare of Transgender Persons (June 23, 2026); Ministry of Social Justice & Empowerment, Gov't of India, Welfare of Transgenders (Aug. 7, 2024).

There is also a need for appropriate grievance-redressal mechanisms that can be used to address cases of discrimination and/or denial of access to health services. However, a legal ban on discrimination without the ability to report violations or secure a remedy is of little use for transgender people. Enforcement and accountability mechanisms are also necessary to actualize healthcare rights: substantive rights provisions are not enough.

• Need for a More Comprehensive Healthcare Approach

The current legal and policy landscape is an illustration of a welcome shift from the perception of transgender healthcare as a “charity” or “welfare” concern to one that is a “right” concern. However, the current one is not exactly cohesive. Constitutional rights, statutory provisions, health policies and welfare schemes exist at various institutional and governmental levels. This can lead to challenges in achieving an integrated and coherent approach to transgender health care delivery.

A better structure needs to incorporate non-discrimination, appropriate and accessible health services and effective implementation. Transgender people must have the right to receive general and specialized healthcare services, without stigma or discrimination. This demands the inclusive infrastructure of healthcare and sufficient funding and skilled personnel. The difficulties outlined above highlight that a right to health does not necessarily equate substantive equality. Although India has laid a crucial constitutional and statutory groundwork for the protection of transgender people, many obstacles are still prevailing in the way of them accessing accessible, affordable and appropriate healthcare. The real task will be to turn formal legal recognition into real access to healthcare services. The next chapter critically reviews the weaknesses in the current legal and policy framework and explores the ability of the current system to guarantee the substantive enjoyment of the right to health of transgender people.

Legal Framework Governing the Right to Health of Transgender Persons in India

International Framework

The international human rights framework provides an important normative foundation for examining the healthcare rights of transgender persons. The right to the highest attainable standard of physical and mental health, guaranteed by Art. 25 of the UDHR and Art. 12 of the ICESCR, needs to be seen in the context of equality and non-discrimination. The normative content of the right to health is elaborated on in General Comment No. 14, under the principles of availability, accessibility,

acceptability and quality. These principles, however, are particularly relevant in the context of transgender health service, as they have to do with access to health services, not only in the sense of services being in place, but whether they are available without discrimination and in a way that is respectful of an individual's dignity, gender identity, and personal autonomy. Healthcare services may formally exist, yet remain inaccessible where transgender persons experience stigma, discriminatory treatment, breaches of confidentiality or a lack of appropriately trained healthcare professionals.²⁵

The right to health of transgender persons is therefore closely connected with other human rights, particularly equality, non-discrimination, privacy, dignity and bodily autonomy. The realization of this right requires States not only to ensure the availability of healthcare services but also to ensure that medical decision-making respects informed consent, confidentiality and bodily integrity.²⁶ Although the International Covenant on Civil and Political Rights, 1966 (ICCPR) does not expressly recognize an independent right to health, its guarantees relating to life, freedom from cruel, inhuman or degrading treatment and privacy provide an important normative basis for protecting bodily integrity and personal autonomy in healthcare decision-making.²⁷ The Yogyakarta Principles, 2007 offer a helpful interpretative tool for existing human rights principles as they pertain to sexual orientation and gender identity. They state that the right to health should be exercised non-discriminatorily and respecting the dignity, the autonomy and informed consent of the person. The Yogyakarta Principles plus 10 further developed these principles in relation to gender identity, gender expression and bodily autonomy.²⁸ Thus, international human rights standards provide a normative framework based on equality, non-discrimination, accessibility, privacy, dignity and bodily autonomy for examining transgender healthcare rights in India.

25 General Comment No. 14, *supra* note 3; World Health Organization, Transgender People and HIV (2015).

26 General Comment No. 14, *supra* note 3; World Health Organization, Transgender People and HIV (2015).

27 International Covenant on Civil and Political Rights arts. 6, 7, 17 (1966).

28 International Commission of Jurists, The Yogyakarta Principles (2007); International Commission of Jurists, The Yogyakarta Principles Plus 10 (2017).

Constitutional and Judicial Framework in India

The right to health is not a specific fundamental right in the Indian Constitution, but it can be said that the right to health has been recognized through judicial interpretation under Article 21. The constitutional commitment to public health and assistance in time of sickness is also reflected in Articles 41 and 47 of the Directive Principles of State Policy.²⁹

Healthcare has always been acknowledged as an integral part of the right to life by the Supreme Court. In *Parmanand Katara v. Union of India*,³⁰ *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*³¹ and *Consumer Education & Research Centre v. Union of India*,³² the Court affirmed the importance of timely medical assistance and recognized health and medical care as integral to a life with dignity.

For transgender persons, the constitutional protection of health must be read alongside Arts. 14, 15 and 21, which protect equality, non-discrimination, dignity and personal liberty. The Supreme Court in *NALSA* judgment has declared transgender persons as a third gender and has acknowledged that gender identity is an integral part of dignity, autonomy and identity.³³ Significantly, *NALSA* judgment also addressed the healthcare needs of transgender persons and directed the Central and State Governments to take appropriate measures to provide medical care and healthcare facilities. The decision therefore moved beyond formal recognition of transgender identity and acknowledged the State's responsibility to address the practical conditions affecting their ability to live with dignity.³⁴

The principles of autonomy and personal identity were subsequently strengthened in *Justice K.S. Puttaswamy (Retd.) v. Union of India*,³⁵ where the Supreme Court recognized privacy as a fundamental right and emphasized decisional autonomy in matters central to individual identity. Similarly, *Navtej Singh Johar v. Union of India*³⁶ reinforced constitutional

29 INDIA CONST. arts. 21, 41, 47.

30 *Parmanand Katara*, (1989) 4 SCC 286 (India).

31 *Paschim Banga Khet Mazdoor Samity*, (1996) 4 SCC 37 (India).

32 *Consumer Education & Research Centre*, (1995) 3 SCC 42 (India).

33 INDIA CONST., *supra* note 10.

34 *Id.*

35 *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 (India).

36 *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

values of dignity, equality and individual autonomy while emphasizing that constitutional rights cannot be denied on the basis of social morality or majoritarian attitudes.

The constitutional and judicial developments outlined here offer a crucial building block for the rights of transgender people in healthcare. However, statutory protection, policies and institutional mechanisms are necessary to enable their effective implementation.

• *Statutory and Policy Framework for Transgender Healthcare*

The Transgender Persons (Protection of Rights) Act, 2019 constitutes the principal statutory framework governing the rights of transgender persons in India. Section 3 prohibits discrimination against transgender people in various respects, such as health services, public facilities and services.³⁷ Section 8 further requires the appropriate Government to take measures for the welfare and protection of transgender persons.

Section 15 is particularly significant from the perspective of healthcare. It requires the appropriate Government to take measures for providing healthcare facilities to transgender persons, including counselling, hormonal therapy, sex reassignment surgery and other health services. The provision also suggests the review of the medical curriculum and research to consider the health care needs of transgender females, and the Government's obligation to create comprehensive insurance schemes for medical expenses.³⁸ The Transgender Persons (Protection of Rights) Rules, 2020 further provide an institutional framework for implementing the rights and welfare measures recognized under the Act.³⁹ The National Health Policy, 2017 emphasizes equity, universal access and the reduction of healthcare inequalities. Although it does not provide a separate framework specifically for transgender persons, its commitment to universal health coverage provides a broader policy basis for addressing the healthcare needs of marginalized communities.⁴⁰ More targeted support is provided through the SMILE scheme, which includes measures for the welfare and rehabilitation of transgender persons and addresses healthcare alongside counselling, education, livelihood and other welfare measures.⁴¹ Transgender-specific healthcare benefits have also been introduced under

37 Transgender Persons (Protection of Rights) Act, 2019, Sec- 3 (India).

38 *Id.* Sec- 8, 15.

39 Transgender Persons (Protection of Rights) Rules, 2020 (India).

40 Ministry of Health & Family Welfare, Gov't of India, National Health Policy, 2017.

41 Ministry of Social Justice & Empowerment, Gov't of India, Support for Marginalised Individuals for Livelihood and Enterprise (SMILE) Scheme Guidelines.

the Ayushman Bharat framework. Pursuant to the 2022 Memorandum of Understanding between the Ministry of Social Justice and Empowerment and the National Health Authority, eligible beneficiaries may access Ayushman Bharat TG Plus benefits, including insurance coverage and specified transition-related healthcare services.⁴²

The National Portal for Transgender Persons further facilitates the issuance of transgender certificates and identity cards and assists in connecting eligible persons with welfare measures and healthcare-related benefits.⁴³ These statutory and policy measures collectively establish the principal framework for the protection and promotion of transgender healthcare rights in India. Their effectiveness, however, depends on the implementation of the appropriate institutional mechanisms.

Critical Analysis of the Existing Legal and Policy Framework

The previous chapters show that India has established a noteworthy constitutional, judicial and legal mechanism to ensure protection of the rights of transgender people, including the right to healthcare. Key developments include the recognition of transgender identity in the NALSA judgment, protection against discrimination under the 2019 Act, and the introduction of healthcare-related schemes. But the value of this framework needs to be measured more than just by the presence of legislative provisions, and rather by the ability to provide, and ultimately access to, healthcare in a substantive and meaningful way. On a critical examination of the recognition and realization of rights, a number of gaps emerge. This chapter's main premise is that despite the gradual progress of the Indian law in recognizing the dignity, equality and healthcare rights of transgender persons, the current structure does not ensure the clarity, accessibility and enforceability of healthcare rights. The principal deficiency lies in the absence of adequately coordinated mechanisms for implementing and enforcing these rights.

• From Formal Recognition to Substantive Equality

The legal framework provides substantial formal recognition to transgender persons. This is built on a foundation of rights, including, constitutional guarantees of equality, dignity, privacy and personal

42 Ministry of Social Justice & Empowerment & National Health Authority, Gov't of India, Memorandum of Understanding on Comprehensive Healthcare for Transgender Persons Under Ayushman Bharat-PM-JAY (2022); Ministry of Social Justice & Empowerment, Gov't of India, Composite Medical Health for Transgender Persons.

43 Ministry of Social Justice & Empowerment, Gov't of India, National Portal for Transgender Persons.

autonomy and the prohibition on discrimination in the 2019 Act. But formal equality doesn't necessarily lead to substantive equality in health care. A framework based solely on non-discrimination may be insufficient where transgender persons face pre-existing disadvantages arising from stigma, social exclusion and economic marginalization. This right to equal access to healthcare should not be limited to the right to be treated equally, but must also mean the right to receive equal care. It must be taken to eradicate the disadvantages faced by transgender individuals through positive measures. The NALSA judgment itself embraced this more expansive outlook, and instructed governments to take affirmative action with regard to the welfare and social inclusion of transgender people.⁴⁴ However, the application of these principles to specific and enforceable entitlements to healthcare is still limited. Although the legal framework establishes a duty on the State to take appropriate measures, it does not explicitly specify the minimum level of medical care that is required for transgender people, or when such care is required, and will become an enforceable entitlement.

Substantive equality, in the context of health care, therefore involves more than merely equal formal access to existing health care institutions, but also positive steps to enable transgender people to have access to health care that is suitable for their needs.

• Fragmentation of the Legal and Policy Framework

A major limitation of the current framework is its fragmented nature. Transgender persons' right to health comes from several sources such as Art. 21, equality provisions in the Constitution, judicial rulings, the Act, 2019, the Rules of 2020, and a variety of health and welfare schemes. These initiatives together offer transgender protection, but are not a single, complete system of transgender healthcare protection. This fragmentation can make it difficult to identify institutional responsibility and ensure accountability. The various ministries of the state including the Ministry of Health and Family Welfare, the Ministry of Social Justice and Empowerment, the National Health Authority and the State Governments can perform different roles in relation to transgender healthcare. Multiple ministries and authorities can lead to coordination and accountability gaps between the process of policy making, funding, implementation and provision of health care, if there are no clearly defined mechanisms for coordination and accountability. This disjointed structure is also evident in the way that statutory duties are interpreted into healthcare services. Section 15 of the Act, 2019 mandates the appropriate Government to

44 Indian Constitution., *supra* note 10.

make provision for medical insurance, sex reassignment surgery and hormonal therapy for transgender persons. The availability, accessibility or geographical distribution of such services, however, is not defined by the provision itself.⁴⁵

• **Limited Enforceability of Healthcare Entitlements**

The above mentioned fragmentation has focused mainly on institutional coordination and on the distribution of responsibility. A separate, but related, question is how transgender individuals can enforce certain healthcare rights if they do not have those services or if they are denied them.

Another major issue is the lack of a clearly defined and comprehensive statutory right to healthcare. While the right to health has been added to Art. 21 of the Indian Constitution by different courts, the enforcement of this right may vary from case to case. Likewise, the National Health Policy, 2017 is an important policy framework which does not establish independent enforceable legal entitlements.

This creates a distinction between recognition of a general right and the ability to claim specific healthcare services. A transgender individual might have constitutional rights to be free from discrimination but may experience problems accessing a specific medical service, due to its unavailability, cost or lack of trained professionals. This lack of clear standards regarding access, affordability and quality can thus hinder the practical implementation of the rights to health.⁴⁶ This is especially pertinent in relation to gender affirming medical treatment. Statutory recognition does not necessarily translate into a clearly defined and immediately enforceable entitlement to receive such services at accessible and appropriately equipped healthcare institutions.⁴⁷

• **Welfare-Based Measures and a Rights-Based Approach**

The existing framework combines rights-based recognition with welfare-oriented measures. Some schemes like SMILE and health insurance under Ayushman Bharat TG Plus offer significant support. Welfare schemes usually, however, are implemented in a way that is dependent on eligibility conditions, administrative procedures and governmental implementation. Availability may thus be dependent on registration, documentation and awareness.

45 Transgender Persons (Protection of Rights) Act, No. 40 of 2019, Sec- 15 (India).

46 General Comment No. 14, *supra* note 3.

47 Transgender Persons (Protection of Rights) Act, No. 40 of 2019, Sec- 15 (India).

A welfare-based approach might lead to the way transgender care is seen as a problem of governmental support instead of something that is part of equality, dignity, autonomy and constitutional rights. This distinction is relevant because a rights-based approach places corresponding obligations upon the State and highlights accountability for the denial of rights.

The difficulty is ensuring that the statutory and policy measures are consistent with this rights-based approach, which is reflected in the constitutional framework, especially through the principles of the NALSA judgment.⁴⁸ Healthcare should, therefore, be considered as not only a welfare benefit but an integral part of the right to live a dignified life.

• *Inadequate Institutional Accountability*

The effectiveness of any healthcare framework depends upon mechanisms capable of addressing violations and ensuring institutional accountability. While the 2019 Act bans discrimination and makes provision for welfare measures, transgender people may still encounter issues in relation to challenging discriminatory practices within healthcare institutions. While the Act, 2019 prohibits any discrimination, it also mandates compliance to the rights conferred by the Act, the effectiveness of grievance-redressal mechanisms rely on accessibility, awareness and institutional responsiveness.⁴⁹ The lack of a specific and easily-accessed grievance procedure for a healthcare context may also make it less likely that trans people will report discriminatory behaviour, especially when they may already feel stigmatised or victimised. Having reliable data on the availability of transgender-inclusive health facilities and the use of welfare schemes and cases of discrimination, alongside consistent monitoring, is also crucial to effective accountability. Without this information it is hard to determine if legal and policy commitments are leading to real outcomes.

• *Need for a Coordinated and Inclusive Framework*

The current system's biggest shortcoming is not the lack of legal protection, however, it is the disconnect between recognition, implementation and accountability. While India has come a long way from the previous legal invisibility, the present framework is reliant on piecemeal schemes and uneven institutionalization. A more cohesive strategy would need the coordination of constitutional rights, statutory responsibilities and healthcare policy and service delivery. Such a framework should acknowledge that transgender healthcare is not

48 Indian Constitution., *supra* note 10.

49 Transgender Persons (Protection of Rights) Act, 2019, Sec- 3, 10 (India); Transgender Persons (Protection of Rights) Rules, 2020 (India).

limited to gender affirming procedures, and that healthcare should be seen as a continuum, that includes preventive care, as well as curative, mental, sexual and reproductive healthcare. Having clear minimum standards for transgender-inclusive healthcare can also help ensure consistency between States and institutions. Standards should include professional sensitization, respect for gender identity, informed consent, confidentiality, availability of specialized services, as well as grievance-redressal mechanisms.⁵⁰ So that is a significant shift in the law, but not fully realised in practice. Effective access to constitutional and statutory rights to transgender persons, however, is not just about the recognition of transsexuals but about making this recognition a reality in the form of accessible, affordable and appropriate healthcare. The measures proposed in the next chapter, therefore, are centred on strengthening the current framework, and enabling the right to health of transgender persons to be a substantive and enforceable right rather than merely formal recognition.

Recommendations and Way Forward

This preceding analysis shows that India has established important constitutional, statutory and policy provisions to safeguard the right to health of transgender persons. But the biggest hurdle is yet to convert the formal legalization into effective and accessible healthcare. Current system needs to be more coordinated, more accountable and being implemented to enable transgender people to receive equal treatment in healthcare services. The following steps could contribute to the realization of transgender persons' right to health in India. The following measures may help strengthen the realization of transgender persons' right to health in India.

• *Developing a Comprehensive Transgender Healthcare Framework*

India requires a more coordinated healthcare framework specifically addressing the needs of transgender persons. At present, relevant protections are dispersed across constitutional principles, the Act, 2019, the Rules of 2020, healthcare policies and welfare schemes. A comprehensive framework should clearly identify the responsibilities of the Central and State Governments and establish minimum standards for transgender-inclusive healthcare.

⁵⁰ General Comment No. 14, supra note 3.

Such a framework should also establish a coordinated mechanism for translating constitutional and statutory protections into identifiable healthcare obligations, institutional responsibilities and accessible services.⁵¹

• *Strengthening Access to Gender-Affirming Healthcare*

The effective realization of gender identity and personal autonomy requires that transgender persons have access to healthcare consistent with their individual needs and choices. Although Section 15 of the Act, 2019 refers to facilities relating to hormonal therapy and sex reassignment surgery, the availability of such services remains dependent upon healthcare infrastructure and trained professionals.⁵²

Public healthcare institutions should therefore progressively develop the capacity to provide appropriate gender-affirming services. Designated government hospitals at the State or regional level should progressively develop trained multidisciplinary teams capable of providing counselling, hormone-related care, surgical services where required and post-treatment support. This would reduce excessive dependence on a limited number of private or urban healthcare institutions.

• *Sensitization and Training of Healthcare Professionals*

Legal protection cannot be effectively realized where healthcare professionals lack awareness regarding gender identity and transgender-specific healthcare needs. Regular sensitization and professional training should therefore form an essential part of medical education and healthcare administration. Medical and nursing curricula should include appropriate content concerning transgender health, gender identity, non-discrimination, informed consent and respectful communication. Continuing sensitization and professional training should also be provided to practicing healthcare professionals. Clear policies on registration, admission, confidentiality and treatment of transsexuals should be established at the hospital. This would include measures that would reduce institutional discrimination and make health care more inclusive for transgender and gender diverse people, according to standards of care for the health of transgender and gender diverse people, developed by World Professional Association for Transgender Health.⁵³

51 Transgender Persons (Protection of Rights) Act, No. 40 of 2019; Transgender Persons (Protection of Rights) Rules, 2020 (India).

52 Transgender Persons (Protection of Rights) Act, No. 40 of 2019, Sec- 15 (India).

53 World Professional Association for Transgender Health, Standards of Care for the Health of Transgender and Gender Diverse People (Version 8 2022).

• ***Improving Financial and Geographical Accessibility***

Healthcare schemes like Ayushman Bharat TG Plus are an important step in decreasing the financial burden of transgender healthcare. Financial coverage, however, needs to be balanced by proper geographical access. This is because insurance benefits are of little use when empanelled hospitals or trained specialists are not available. The Government should, therefore, gradually increase the number of places in which transgender-inclusive health services are available, especially in smaller cities and areas where transgender people are under-served. States should also regularly check the accessibility of empanelled institutions and specialists. Easy access to information about available services and eligibility to access healthcare schemes should be ensured both online and offline through the Composite Medical Health for Transgender Persons. Information about services offered and eligibility for healthcare schemes should be made easily available online and offline through the Composite Medical Health for Transgender Persons.⁵⁴

• ***Establishing Effective Grievance-Redressal and Accountability Mechanisms***

The remedy must be effective for a right to be meaningful. There is a need for transgender persons to have easy and responsive grievance-redressal processes when they have faced discrimination, denial of treatment and/or violation of their privacy. Healthcare institutions should appoint suitable staff or procedures to handle complaints of discrimination against transgender persons. Mechanisms should be available, confidential and have fast response times. There should also be greater accountability for the systematic gathering of anonymous information on access to healthcare services, availability of specialized healthcare facilities and implementation of government schemes. This would allow policy makers to determine regional deficits and assess if current policy is making a difference.

• ***Moving from Welfare to a Rights-Based Approach***

One of the biggest changes that must be effected is the necessity to always treat transgender healthcare as a human rights problem, and not the welfare problem. Welfare schemes are useful but they might require to be eligible for welfare and have to follow documentation and administrative processes. A rights-based approach, on the other hand, sees access to health care as linked to rights to equality, dignity, privacy and personal autonomy. Future policies and institutional interventions should thus be

54 Ministry of Social Justice & Empowerment, Gov't of India, Composite Medical Health for Transgender Persons.

more than just about 'giving' benefits to transgender persons; they should be about ensuring that they have an effective say in decisions that shape the processes of care over their bodies and identities.⁵⁵

Conclusion

There has been a marked shift in the legal landscape towards transgender people's right to health in India. Constitutional jurisprudence, especially that of NALSA judgment, has emphasized on the significance of gender identity, dignity and personal autonomy, while the Act, 2019 has laid down the statutory obligations on non-discrimination and healthcare. Further, several policy initiatives like SMILE and Ayushman Bharat TG Plus have worked towards increasing welfare and healthcare services.

The ultimate challenge is thus to make transgender care a system of enforceable healthcare rights rather than a randomly mixed bag of constitutional principles, statutory requirements, and welfare considerations. In practice, the right to health will lie not only with the legal but with the institutionalization of standards and remedies that can turn constitutional dignity and equality into healthcare.

55 INDIA CONST., supra note 10.