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Critical Analysis of Access to Health Services to The Transgender Persons under the Transgender Persons (Protection of Rights) Act, 2019

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ABSTRACT

The transgender population in India got legal recognition as the third gender through the NALSA judgment. The judgment has directed the central and state governments to grant legal recognition to their gender identity and to adopt appropriate measures. As a result, The Transgender Persons (Protection of Rights) Act, 2019, and the Transgender Persons (Protection of Rights) Rules, 2020, came into existence. The objective of the Act is to provide for the protection of the rights and welfare of transgender persons. Section 2(k) of the Act defines 'transgender person' as a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Affirmation Surgery or hormone therapy or laser therapy or such other therapy), a person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.". This paper primarily aims to increase the understanding of the health rights of transgender persons in India. Section 15 of the Act provides for healthcare facilities. This section is a mandatory provision, but still, it is not effectively implemented. Most of the government hospitals are not equipped to meet the medical need of the community; on the other hand, private hospitals are imposing a huge amount for the same. Here, this paper analyses the Transgender Policy of the Government of Kerala and looks into the steps taken by the Social Justice Department for the welfare of the community. Section 15(d) of the Act provides for bringing out a Health Manual in accordance with the WPATH guidelines. The paper further study how the Indian health standards are in consonance with international health standards for meeting the health rights of transgender persons.

Keywords: *Transgender persons, Health Rights, WPATH, NALSA, International Health Standards, Transgender Policy of Kerala.*

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I. INTRODUCTION

The healthcare facilities for transgender persons are dealt with S.15 [2] of The Transgender Persons (Protection of Rights) Act, 2019. The section imposes a mandatory duty upon the appropriate government (a) to set up separate human immunodeficiency virus Sero-surveillance Centres under the guidelines issued by the National AIDS Control Organisation; (b) to provide medical care facilities including sex affirmation surgery and hormonal therapy;(c) to provide counseling before and after sex affirmation surgery and hormone therapy;(d) to bring out a health manual in accordance with **WPATH** guidelines; (e) to review medical curriculum and research for doctors to address the specific health issues of the transgender community ;(f)) to facilitate access to transgender persons in hospitals and other healthcare institutions and centers and (g) provision for coverage of medical expenses by a comprehensive insurance scheme for any medical intervention such as sex affirmation surgery, laser therapy or any other health issues of transgender persons.

In India, Female Sex Workers (FSW), Men who have Sex with Men (MSM), Hijras/Transgender (H/TG) people, and Injecting Drug Users (IDU), collectively referred as High-Risk Groups (HRGs) under National AIDS Control Programme (NACP), are more infected with HIV than the rest of the population. HIV prevalence in these groups is 7-28 times that of overall adult HIV prevalence of 0.22%. However, the size estimates of the FSW, MSM and IDU under NACP are almost a decade old and do not reflect the current status and dynamics among high-risk group people. For Hijaras or Transgender people, last mapping and size estimation was done in 2012-13 in 10% of the sampled districts in 17 States.[3] Hijaras and transgender persons continue to be high risk for HIV infection.

A 2013 meta-analysis of HIV infection rates found that "transgender women are highly prone to HIV and are in urgent need of prevention, treatment, and care services. [4] The Joint United Nations Programme on HIV/AIDS (UNAIDS) and the World Health Organization (WHO) have noted that trans women frequently experience HIV prevalence rates in excess of 60 percent .[5] Current HIV monitoring and prevention interventions for transgender people are inadequate. [6] Services that are neither accessible nor acceptable for transgender people undermine their health

[2] Supra 2
[3] National AIDS Control Organization (2020). Programmatic Mapping and Population Size Estimation (p-MPSE) of High-Risk Groups: Operational Manual. New Delhi: NACO, Ministry of Health and Family Welfare, Government of India.
[4] Baral, S., Poteat, T., Strömdahl, T., Wirtz, A., Guadamuz, T. and Beyrer, C. (2013) 'Worldwide burden of HIV in transgender women: a systematic review and meta-analysis' in The Lancet Infectious Diseases 13: p. 214.
[5] UNAIDS / WHO (2011) Technical Guidance for Global Fund HIV Proposals Round 11.
[6] Baral, S. et. al. (2013) p. 220.).

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rights.

The Government of India, through The Ministry of Social Justice and Empowerment, has formulated a comprehensive scheme named **"SMILE"** [7] for transgender persons. The department with the aid and support of the state governments provides Transgender certificates and ID cards, scholarships, skill development, medical facilities, and shelter homes for transgender persons. But for availing the above-said welfare schemes, the transgender person should hold a Transgender Certificate & Identity Card issued by the National Portal. As per statistics shown by the social justice department, only 13,403 applications came before them for obtaining Transgender certificates and ID cards out of which only 10,572 persons got a transgender certificate and only 10,563 persons got ID cards respectively. Nearly 3000 applications are pending before the department.[8] Recent studies show that the majority of the transgender population is still outside the scope of various welfare measures of the government.

Healthcare professionals can use the WPATH standard of care (SOC) to help patients to consider the full range of health services open to them, in accordance with their clinical needs and goals for gender expression. While the SOC are intended for worldwide use, WPATH acknowledges that much of the recorded clinical experience and knowledge in this area of health care is derived from North American and Western European sources. From place to place, both across and within nations, there are differences in all of the following: social attitudes towards transsexual, transgender, and gender nonconforming people; constructions of gender roles and identities; language used to describe different gender identities; epidemiology of gender dysphoria; access to and cost of treatment; therapies offered; number and type of professionals who provide care; and legal and policy issues related to this area of health care.[9]

In applying these standards to other cultural contexts, health professionals must be sensitive to these differences and adapt the SOC according to local realities. In many cultures, social stigma toward gender nonconformity is widespread and gender roles are highly prescriptive.[10]Gender-non-conforming people in these settings are forced to be hidden, and therefore may lack opportunities for adequate health care.[11]The first edition of Indian Standards of Care for Persons with Gender Incongruences and People with Differences in Sexual Development / Orientation was published in 2021, but still it is not implemented.

[7] **Support for Marginalized Individuals for Livelihood and Enterprise.**
[8] "Support for Marginalised Individuals for Livelihood & Enterprise": National Portal For Transgender Persons, Department Of Social Justice And Empowerment., https://transgender.dosje.gov.in/ .
[9] Winter, 2009.
[10] Winter et al., 2009.
[11] Supra 11

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(A) Literature review

Cal Horton (2022)[12], in his article examines trans children's experiences of Gender Minority Stress (GMS) in primary and early secondary education (ages 3–13years old) in UK schools. Trans children's rights in England, Scotland and Wales are protected under the Equality Act 2010, with "gender reassignment" one of nine protected characteristics.[13] In the absence of national governmental guidance, UK schools are looking to a wide-range of informal guidance material, with diverse approaches to trans inclusion and varied levels of commitment to trans children's equality and safety at school.[14]

The article highlighted that ;

(1) Trans children are known to face a wide range of challenges in education, with extensive documentation of experiences of harassment, discrimination or abuse.[15]

(2) Qualitative research predominantly considering the experiences of trans pupils in secondary schools has highlighted experiences of harassment and exclusion.[16]

(3) Some UK research has gained insight into younger trans children's experiences through parental interview. [17]

(4) Research from outside of the UK has shown how cis normative primary schools can react with fear to having a trans pupil.[18]

(5) Research from Ireland has highlighted the effort parents of trans children make to challenge cis normative cultures and practices in education[19], in schools that are ill-equipped for including trans pupils.

(6) Other research has examined teacher attitudes and institutional barriers to trans inclusion in primary education, highlighting systemic forces impeding trans inclusion.[20]

Trans children and adolescents are known to be at risk of poor mental health, with studies noting high levels of depression, anxiety or suicidal ideation.[21] A growing body of research has shown that poor mental health is not intrinsic to being trans, with evidence of positive mental health

[12] Cal Horton, Gender minority stress in education: Protecting trans children's mental health in UK schools , International Journal of Transgender Health,(2022). https://doi.org/10.1080/26895269.2022.2081645.
[13] Wadham et al., 2016).
[14] Horton, 2020.
[15] Bradlow et al., 2017; Human Rights Campaign, 2018; Kosciw et al., 2018.
[16] Bower-Brown et al., 2021; Leonard, 2019; Paechter et al., 2021.
[17] Davy & Cordoba, 2020.
[18] Payne & Smith, 2014.
[19] Neary, 2021.
[20] Bartholomaeus et al., 2017; Martino & Cumming-Potvin, 2016.
[21] Srivastava et al., 2021; Strauss et al., 2020; Veale et al., 2017.

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correlating with family support[22], social affirmation[23], and trans-inclusive primary and secondary education[24] .Those wishing to reduce mental health disparities between trans and cis youth are increasingly looking at the external drivers of such mental health disparities.[25] The concept of GMS draws on an understanding that trans individuals are "subjected to unique stressors navigating the world as members of a minority group, which, in turn, increases vulnerability to negative physical and psychosocial health outcomes".[26] The original GMS framework focused on four areas of externally driven or distal stress (discrimination, rejection, victimization, non-affirmation); three areas of internally driven or proximal stress (internalized transphobia, low expectations for the future, non-disclosure) and inversely, two areas of resilience (community connectedness, pride).The author tries to link Gender Minority Stress (GMS) and mental health differentials in transgender populations but fails to find out the link. The article aims to fill knowledge gap by providing evidence to inform efforts to reduce GMS and enhance trans children's mental health and well-being for that the author has collected data and it was analysed through reflexive thematic analysis [27] to understand child and parental accounts of the challenges trans pupils experienced at school.This article demonstrate a critical need for systemic change across the educational system , but the author fails to address how it can be made possible.The author also fails to establish the duty of care by school authorities to ensure trans students enjoy school environment which is free from all sort of harassment and bullying.

Ramaswami Mahalingam (2003) [28] in his paper examines the gender beliefs of the Aravanis, a transgender community in Tamil Nadu, and examined the role of social location and marginality in essentialist beliefs about gender. The author substantiates why he choose Arvanis for his study because, Aravanis are living examples of gender transgression, and gender-bending is central to their identity. Gender transgression and gender transformation tasks were used to examine the essentialist notions of the Aravanis' beliefs about gender. For collecting data the author participated in a total of 100 Aravanis in his study. In the gender transgression task, the Aravanis endorsed both male and female gender transgressions. The study highlighted that in the gender transformation task, the Aravanis believed in the male-to-female transformation but

[22] Katz-Wise et al., 2018; Klein & Golub, 2016; Pullen Sansfaçon et al., 2020; Simons et al., 2013; Travers et al., 2012.
[23] Durwood et al., 2017; Olson et al., 2016; Whyatt-Sames, 2017.
[24] Horton, 2020; McGuire et al., 2010; Ullman, 2017.
[25] Coyne et al., 2020; Delozier et al., 2020.
[26] Delozier et al., 2020, p. 2.
[27] Reflexive thematic analysis is an approach suited to exploratory studies in novel or under-researched areas (Braun & Clarke, 2006; Rendle et al., 2019).
[28] Ramaswami Mahalingam, Essentialism, Culture, and Beliefs About Gender Among the Aravanis of Tamil Nadu, India, Vol. 49, Sex Roles, (2003).

not in the female-to-male transformation. In the paper, the author argued that the asymmetry in the Aravanis' responses suggests that their beliefs about gender are consistent with Hindu patriarchal beliefs that feminine gender is essential and primordial, whereas masculine gender transformations are viewed as part of the male prerogative but the author failed to find out how the community is having such a belief. The author relied on social and cognitive approaches to essentialism and emphasized different aspects of beliefs about gender, but the author failed to justify why he employed this approach instead of others. The author employed the essentialist principle and pointed out that Aravanis are an interesting group for studying essentialist beliefs about gender for a number of reasons and he emphasized two reasons; first, as gender transgressors, their everyday life experiences challenge many essentialized notions about gender. Second, the marginalized status of the Aravanis provides an opportunity to examine the interactions among essentialism, power, and social location. The author in this paper gave much emphasis on culture and he completely ignored scientific reality.

An analysis carried out on the ***2019- 2020 Annual Report of Department of Social Justice & Empowerment, Government of India*** revealed that transgender community is not even considered as a target group in that report and it is against the objective of Social Justice Department.

However, none of the above papers dealt with legal aspects of health rights of transgender persons. Hence, there is a considerable gap in the available literatures.

(B) Research objectives

1. To understand the health rights of transgender persons in India.
2. To share successful legal practices, tools and guidelines from other regions which provides competent health services to the transgender persons.
3. To understand how the Transgender Persons (Protection of Rights) Act, 2019 and the Transgender Policy of Government of Kerala is benefitting the community.

(C) Research questions

1. How the law has contributed to the evolution of health rights of transgender persons in India?
2. Whether the Indian health standards of transgender persons are in consonance with International health standards of transgender persons?
3. Whether the Transgender Policy of Government of Kerala is benefiting the community?

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(D) Research methodology

The data is collected through the doctrinal method as well as through semi-structured interviews with transgender persons.

II. EVOLUTION OF HEALTH RIGHTS OF TRANSGENDER PERSONS IN INDIA

Everyone has the right to enjoy the highest attainable standard of physical & mental health.[29] Various studies shows that transgender people face systemic discrimination while trying to access general health services.[30] This includes being treated with contempt and refused care. The UN Committee on Elimination of Discrimination against Women has expressed concern about transgender persons, intersex, lesbian & bisexual women as "victims of abuses & mistreatment by health service providers".[31] Violence, stigma, social exclusion & discrimination are the evils that harm transgender persons from aviling health services and these factors also deter transgender persons from seeking HIV prevention, treatment, care & support services.

YOGYAKARTA PRINCIPLES states that states have a duty ;(a) to provide adequate access to medical care ;(b) recognise any particular needs of persons on the basis of their sexual orientation or gender identity;(c) to have access to reproductive health ,HIV/AIDS information, hormone therapy as well as gender affirmation treatments where desired. The Principle also provides for the protection from medical abuse, that is protection against unethical or involuntary medical procedures or research for AIDS/HIV or other diseases.

UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfil the human rights of all persons, regardless of their gender identity.[32]

International Conventions and norms are significant for the purpose of interpretation of gender equality and through the landmark NALSA[33]judgment transgender persons in India got legal recognition as a third gender .The Supreme Court in number of cases upheld the health rights[34] of transgender persons.

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[29] International Covenant on Economic, Social & Cultural Rights. Article 12(1)
[30] Open Society Foundations (2013).
[31] Concluding observation on Costa Rica (CEDAW/C/CRI/CO/5-6),para.40 .
[32] United Nations Committee on Economic, Social and Cultural Rights in its Report of 2009).
[33] Supra 1.
[34] Kabeer C v. State of Kerala, on17 November, 2021, Veera Yadav v. The Chief Secretary,on 17 August 2022,Swati Bidham Bauah v. The State of Assam and Ors,on 11 November,2021.

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III. HEALTH STANDARDS OF TRANSGENDER PERSONS

Health care professionals are often insensitive to the vulnerability of transgender persons and they might be ignorant of the specific health needs of the community or they lack the professional training required to meet the health needs of the community.[35]

WPATH is an international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, public policy, and respect in transgender health.WPATH's Standard of Care (SOC) provides clinical guidance to healthcare professionals to assist transgender and gender diverse people in accessing safe and effective pathways to achieving lasting personal comfort with their gendered selves with the aim of optimizing their overall physical health, psychological well-being, and self-fulfilment. This assistance may include but is not limited to hormonal and surgical treatments, voice and communication therapy, primary care, hair removal, reproductive and sexual health, and mental health care. The SOC is based on the best available science and expert professional consensus.[36] By relying on the SOC the health professionals can provide greater comfort to the transgender person.S.15 (d) [37] of the Transgender Persons (Protection of Rights) Act, 2019 provides for bringing out a Health Manual in accordance with WPATH guidelines. As a result, Indian Standards of Care (ISOC) for Persons with Gender Incongruence and People with Differences in Sexual Development/Orientation was published in 2021. The ISOC-1 endorses the progressive view of WHO which has de-pathologized Gender Incongruence and seeks to fill the lacunae in Transgender Healthcare by formulating best practices which are in sync with the globally accepted Standards of Care published by WPATH.

ISOC-1 is a proponent of Affirmative Care, favouring early recognition of gender incongruity, provisioning of a gender-sensitive environment for psychosocial development and early access to Healthcare services stressing the need for adopting a multipronged proactive approach for the management of gender incongruence. The ISOC-1 aspires to be the base document for addressing the stakeholders' felt-need to acquire and share knowledge, facilitate the delivery of multispecialty Healthcare, empower through advocacy and implement legislation. It presses for a holistic public health approach to be adopted by all agencies, both Governmental and Non-Governmental, working to ensure equity in the delivery of Healthcare and mandates that existing policies be reworked to address the cause rather than manage the outcomes.(Air Cmde

[35] OHCHR (2011)para.57;Hammarbeg T. (2009) Gender Identity & Human Rights : Issue Paper, Council of Europe, para 33.
[36] Standards of Care for the Health of Transgender and Gender Diverse People, Version 8).
[37] S.15 Healthcare facilities;(d)) bring out a Health Manual related to sex reassignment surgery in accordance with the World Profession Association for Transgender Health guidelines;

(Dr) Sanjay Sharma (Retd) CEO & Managing Director Association for Transgender Health in India).

The healthcare providers can rely on ISOC to provide treatment for transgender persons and the patients can consider the full range of health services open to them and can choose the service in accordance with their clinical needs.

IV. THE TRANSGENDER POLICY OF GOVERNMENT OF KERALA

This chapter draws the experience of transgender people in Kerala, and suggest practical actions that have to be taken in the areas of health, HIV and other health related aspects. The data is collected from state of Kerala, because Kerala is the first state to bring Transgender Policy. The study shows that a large number of transgender persons has denied services by healthcare professionals because of their identity. In the absence of government hospital equipped to do medical interventions for transgender persons, they are forced to avail services offered by private hospitals which is expensive in nature. The study revealed that a large number of respondents underwent surgery outside Kerala. Special needs in the context of treatment were enquired to the respondents. The respondents expressed several needs such as separate timing for examination, free treatment, separate toilets, separate wards and trained doctors for attending them. The Government of Kerala provides financial assistance of 5 lakhs for trans man and 2.5 lakhs for trans women for sex affirmation surgery. The study shows that these amount were not sufficient to meet the expense of surgery. Health problems faced after undergoing surgery was also enquired and majority respondents faces psychological problem, suicidal tendency etc.

The Transgender Persons (Protection of Rights) Act, 2019 and the Transgender Policy of Government of Kerala is completely silent about the mental health of the transgender persons. The financial assistance given for sex affirmation surgery is not sufficient. Necessary amendments have to be brought to address the needs of the transgender persons.

V. CONCLUSION

The findings drawn through the experiences of transgender persons from Kerala, call for revisiting the Transgender Policy of the state. The central problem faced by the community is discrimination from family, educational institutions, work place, etc. , such a situation is calling for the creation of a transgender friendly environment , which is possible only through sensitisation to the general public. Health issues are major problem faced by the community and the number of hospitals equipped to conduct sex affirmation surgery in Kerala is less in number .The mental health of the community is another neglected area which need immediate attention.

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The Government of India is having several schemes to meet the needs of the community. However, it is high time to review these schemes to address the changing needs of the community. It is also essential to monitor the schemes to understand its performance. By making necessary amendments and through co-ordination of various departmental activities we can make a better impact over the welfare of the community.

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