TRANSITIONING CHALLENGES FACED BY TRANSGENDER IN INDIA

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"Our genetic and endocrine equipment constitutes either an unresponsive fertile soil on which the wrong conditioning and a psychological trauma can grow and develop into such a basic conflict that subsequently a deviation like transsexualism can result." 

Transsexualism is something that cannot be ignored or suppressed and people who are transsexual feel that they have the gender identity which is different from the gender assigned during their birth, and because of this, they suffer discomfort which is called “Gender Identity Disorder (GID) or Gender Dysphoria.”

Person with GID feels trapped in the wrong body and therefore they take recourse to transition which usually involves hormonal therapy followed by surgery.

Introducing the status of transgender in India, they are quite diverse in terms of their self-identities, social structure, and cultural norms. However, there is one thing that runs common in them, i.e. they have high vulnerability to HIV. Since the beginning of the third phase of National AIDS Control Programme, transgender community have been recognized as a ‘key population’ which is at risk for HIV.

Although little progress has been made in respect of HIV in this trans population, yet a fundamental concern for them is the continued lack of gender identity-related services such as Sex Reassignment Surgery and hormone therapy. Huge gap has remained in this area. In the draft of 12th Five-Year Plan, the Government of India has explicitly mentioned that –

1 LL.M, Symbiosis Law School, Pune, Ph.D Research Scholar, Assam University, Silchar
6 SRS – it indicates all the varied types of surgeries which is done on trans patients in order to bring their identity in Consonance with their appearance and functioning.
“It proposes empowerment of the transgender community by advocating that Ministries support their education, housing, access to healthcare” and in its approach, it also mentions that “the health policy must focus on the special requirements of ... lesbian, gay, bisexual, and transgendered (LGBT) community”.7

Now looking at the healthcare service in relation to gender transitioning, hormonal therapy and SRS are the two essential health services that are available for trans patients so as to assist them in altering their appearance to meet with the inner feeling of their gender identity.8 Although multifarious kind of treatments relating to gender transitioning are available, but when it comes to right to have access to such medical treatments, the road to it is rife with roadblocks. It is to be noted that mere availability of medicines or surgical options cannot automatically make way for transgender to have access of them.

LEGAL BARRIER IN ACCESS TO MEDICAL SERVICE FOR TRANSGENDER

Potential adverse legal consequence stands as an obstruction for the healthcare providers for conducting SRS or for prescribing hormonal therapy. Doctors are concerned that they may be held legally liable for having changed the sex of a person. There are no specific laws for or against SRS and therefore the absence of law on it has led to ambiguity. Doctors get worried that they could be sued by the parents for changing their child’s sex, even if the ‘child’ is a legally major, or even by the patients themselves if something goes wrong.9 Under Section 320 of the Indian Penal Code10 ‘Emasculation’, i.e. unsexing the man and which legally means depriving a person of masculine vigor and also includes ‘castration’, is explicitly mentioned as a Grievous Hurt. Causing injury which would render a man impotent as under Section 320, IPC11 is therefore made a punishable offence under Section 325, IPC and the punishment for it may extend to seven years imprisonment and can also be made liable to pay fine.

Using of the words “voluntarily causing grievous hurt” in both the above mentioned Sections encompasses within its meaning that irrespective of the consent of the person who has been castrated, the

7 Transforming Identity, Access to Gender Transition Services for Male-to-Female Transgender People in India.
8 Coleman, et.al. 2011
9 Current Situation: Gender Identity Services in India
10 Bare Act, THE INDIAN PENAL CODE, 1860 ACT NO. 45 OF 1860
11 ibid
doctor who performed it can still be made liable. Considering that transgender suffer from GID\textsuperscript{12} for which psychiatric treatment is also given, therefore in matters of legal action, this disorder can be litigated to prove that person with GID fall under the umbrella term of “person with unsound mind”. Since consent given by a minor or a person of unsound mind is considered to be no consent, hence the doctors fear that the parents of such trans patients can sue them or even the patient himself can bring legal action against the doctor if anything goes wrong. Therefore, the exception provided under Section 88 of the IPC in the name of “consent” stands diluted. This apparent contradiction in law has created ambiguity and therefore the doctors show reluctance in conducting SRS related to emasculation. Similarly, doctors are unclear about the legal implications of prescribing hormonal therapy to self-declared transgender.

BARRIER IN HEALTHCARE SYSTEM

The SRS and hormonal therapy are not offered for free, rather they are heavily priced. Transgender people find it unaffordable because they don’t have adequate personal resources and they therefore take recourse to Dai Nirvan\textsuperscript{13} or quacks for their emasculation. Although in Tamil Nadu, free SRS was made to be provided in a few government hospitals but in reality, it is relatively inaccessible. In Chennai, only in one government hospital, SRS was made free but the output is insignificant. This is because of the added reason that knowledge and expertise among healthcare providers about gender transition services is very limited. A plastic surgeon in Delhi said –

“There is nothing in our medical curriculum that talks about gender reassignment surgery. We don’t have any Indian SRS guideline or any regulatory body.” \textsuperscript{14}

As a result of all these barriers, and additionally also because transgender generally are under/uneducated and unemployed, they are left with the option to obtain hormones from non-proficient sources, including peer members, street sellers, the Internet, and pharmacists without having the efficient physician’s prescription of all the barriers discussed above, cost factor seems to be the biggest obstacle in accessibility. Since gender transitioning requires the dosage to be taken for a long-term, it also means that during the time of administration, the trans patient will have to be under regular supervision of the

\textsuperscript{12} Gender Identity Disorder
\textsuperscript{13} The operation — referred to by hijras as a nirvan (“rebirth”) and carried out by a dai (traditional midwife) Involves removing the penis and scrotum with a knife without anesthesia.
\textsuperscript{14} Current Situation: Gender Identity Services in India
specialist. The hormone administration is not a single time exhaustive process. Therefore, to be a regular consultant of a super specialist doctor and to incur the diagnostic and medicine costs for a long term, it becomes an expensive matter. Also in regard to SRS, it is a multi-disciplinary surgery process wherein super specialist surgeons jointly need to conduct the surgery. So the expense of surgery inevitably gets hiked up.

Although in the Indian context, there is no authentic data available where SRS is declared as falling under the umbrella of “cosmetic surgery”, but the way it is treated and is offered in cosmetic surgery clinics and is excluded from the health insurance coverage makes it apparent on the face that they are considered as cosmetic surgeries. Health insurance coverage does not get extended to these transition related services. Because of this reason, they are yet again discriminated at the healthcare services.

HEALTH INSURANCE DISCRIMINATION FOR TRANSGENDER PEOPLE

Transgender are denied health insurance coverage because of the way the health insurance contracts are written. Scrutiny of the reputed insurance websites of Bajaj Allainz and Aviva are done. The insurance coverage of Bajaj Allianz Health Insurance explicitly excludes to cover treatments related to gender dysphoria. The plan says –

“Congenital external are excluded permanently.

Congenital internal have waiting period of 4 years (if disclosed at the time of proposal and policy acceptance).

Cosmetic, aesthetic or related treatments will not be covered.”

The policy, therefore, excludes congenital defects/disorders and went on to exclude not just cosmetic but also related treatments. The health insurance policy of Aviva Insurance has listed out 12 critical illness

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15 Bajaj Allianz, Health Guard Individual Policy
16 Heart Attack, Stroke, Cancer, End stage kidney failure, Major organ transplant, Coronary artery bypass surgery, Benign brain tumour, Heart Valve Surgery, Motor Neurone Disease, Multiple Sclerosis, Coma and Paraplegia
that will be covered by their health insurance plan. It does not extend to cover gender transition-related health services.\textsuperscript{17}

At this juncture, attention should be drawn at a landmark judgment given by the U.S. Tax Court on the question of whether SRS should be considered as “cosmetic surgery” or a “medical necessity”. The fact of this said case - \textbf{O’Donnabhain v. Commissioner}\textsuperscript{18} was that the petitioner Rihannon O'Donnabhain was a transgender women who, after diagnosed with GID, started taking hormonal treatment as per the standard treatment regime. Thereafter, she underwent SRS which had cost her US $25,000. She was fully reimbursed by the IRS\textsuperscript{19} but later after an audit was conducted, the IRS characterized her surgery as “cosmetic surgery” and not “medically necessary”. Hence, they denied the deduction under 26 U.S.C. § 213(d) (9) and demanded her the refund back. O'Donnabhain then sued the IRS in Tax Court and the issue that was raised was -

“\textit{Whether a taxpayer who has been diagnosed with gender identity disorder can deduct sex reassignment surgery costs as necessary medical expenses under 26 U.S.C. § 213.}”

Medical Expense Deductions under Section 213 was discussed in the judgment, wherein the definition of medical care as per Section 213 (d) was also seen. The Court laid down in its judgment that –

“\textit{Since the inception of the medical expense deduction, the definition of deductible ‘medical care’ has two prongs. The first prong covers amounts paid for the ‘diagnosis, cure, mitigation, treatment, or prevention of disease and the second prong covers amounts paid “for the purpose of affecting any structure or function of the body.”}”\textsuperscript{20}

The definition of “cosmetic surgery” under Section 213 (d) (9) was also highlighted in the judgment which says that –

“\textit{(9) Cosmetic Surgery – (A) – In general – The term ‘medical care’ does not include cosmetic surgery or other similar procedures, unless the surgery or procedure is necessary to ameliorate a deformity}

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\textsuperscript{17} Aviva Health Secure, Individual Plan
\textsuperscript{18} 134 T.C. No. 4, United States Tax Court, decided on Feb. 2, 2010.
\textsuperscript{19} The IRS, i.e. Internal Revenue Service, is the U.S. government agency responsible for tax collection and tax law enforcement, website - www.irs.gov
\textsuperscript{20} O’Donnabhain v. Commissioner, 134 T.C. No. 4, United States Tax Court, pp. 25
\end{flushleft}
arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease.

(B) Cosmetic Surgery defined – For purposes of this paragraph, the term cosmetic surgery means’ any procedure which is directed at improving the patient’s appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.”

The Court, therefore, ruled in favour of the petitioner and held that treatment for gender identity disorder qualifies as medical care under the Internal Revenue Code, and is therefore deductible. The ruled that O'Donnabhain should be allowed to deduct the costs of her treatment for gender-identity disorder, including sex-reassignment surgery and hormone treatments.

India lacks such kind of similar legislation nor there is any judgment pertaining to it. Indeed, the definition of “cosmetic surgery” which is found under Drugs and Cosmetics Act, 1940 is ambiguous. This definition which is given under Section 3 (aaa) says –

“cosmetic’ means any article intended to be rubbed, poured, sprinkled or sprayed on, or introduced into, or otherwise applied to, the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and includes any article intended for use as a component of cosmetic.”

Mention of the words “altering the appearance” can mean to include the surgical changes related to transitioning. The repercussion of it is felt at assessing gender transition related services because, as has been stated above, the health insurance policies implement this point in their ‘exclusion clause’ and thereby it straightaway denies Trans patient to avail of health insurance coverage for their SRS.

Moreover, mental health counselling, a very fundamental medical treatment for trans health, without which it can lead to stress, depression and suicide attempts is also denied health insurance coverage.

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21 Supra Note, 107, pp. 29
22 LGBT Legal Advocates, GLAD, Equal Justice Under Law
23 DRUGS AND COSMETICS ACT, 1940 (23 OF 1940)
24 Human Rights Campaign, Working for Lesbian, Gay, Bisexual and Transgender Equal Rights
GROWING SUPPORT FOR HEALTH INSURANCE COVERAGE

The American Medical Association had joined the movement to end discrimination in health insurance for transgender people by passing the following resolution at their annual meeting:

"RESOLVED, That our American Medical Association support public and private health insurance coverage for treatment of gender identity disorder as recommended by a physician.” 25

According to a 1999 study by the San Francisco Department of Public Health, more than 50 percent of transgender people did not have any form of health insurance.26 According to a 2003 survey conducted by the National Center for Lesbian Rights and the Transgender Law Center, more than 30 percent of transgender San Franciscans indicated that they had been discriminated against while trying to access healthcare. 27

All these different kinds of hindrances to accessibility can be curbed only when the government takes any initiative for making transgender health care facilities feasible and accessible. In regard to India, except including few drugs related to hormonal treatment as “essential medicines”28 under the Essential Medicines List, Government of NCT of Delhi 2103, the government has not done much in context of removing the various discussed barriers which stands on the way of accessing their healthcare service, particularly for the transitioning. Taking a look at the government intervention at the matter of healthcare of transgender in the United States of America, it is seen that The Patient Protection and Affordable Care Act (PPACA),29 commonly called the Affordable Care Act (ACA) or "Obamacare"30, has been passed which prohibits gender identity discrimination. The Act gives guaranteed coverage of pre-existing

25 “Removing Barriers to Care for Transgender Patients,” American Medical Association, GLBT Advisory Committee, 2008
26 Kristin Clements, “Transgender Community Health Project Descriptive Results,” San Francisco Department of Public Health.
27 Minter, Shannon and Christopher Daly, Trans Realities: A Legal Needs Assessment of San Francisco’s Transgender Communities, (San Francisco: National Center for Lesbian Rights; San Francisco: Transgender Law Center), 2003.
28 Essential Medicines are those that satisfy the priority healthcare needs of the population. They are selected with due regard to public health relevance, evidence on efficacy, and safety and comparative cost effectiveness. These medicines are intended to be available at all times in adequate amounts, in appropriate dosage forms with assured quality and adequate information and at a price the individual and community can afford – as is laid down in National List of Essential Medicines, 2013
30 Wallace, Gregory (June 25, 2012). "'Obamacare': The word that defined the health care debate". CNN.
conditions and the elimination of gender discrimination. The U.S. Department of Health and Human Services (HHS) clarified that it is a law that bans sex discrimination in federally-funded health services and such discrimination includes discrimination on the basis of gender identity and gender stereotyping. Section 1557 of the Affordable Care Act says that people who face discrimination or are being denied access to any federally funded health service or program on the basis of gender identity may file a complaint with the Office of Civil Rights at HHS and the Office for Civil Rights will investigate such complaints and treat them as forms of discrimination based on sex. The protection applies to all healthcare facilities and programs that receive any funds from the federal government. This includes any hospitals, clinics, and mental health facilities that receive Medicare and Medicaid funding.

This anti-discrimination law, enacted as part of the Affordable Care Act, creates an important new tool to combat anti-LGBT and especially anti-transgender discrimination in healthcare. In India, instead of taking similar equitable stance for transgender healthcare service, the discriminating clause against gender-transition related services provided in the LIC is still not taken down. It is to be noted that-

- LIC is India’s largest insurance company and is government owned and carries the sovereign guarantee for all insurance policies issued by it.
- “Insurance” falls under the Union list in the Seventh Schedule of the Constitution of India, meaning it can be legislated by the Central Government.

But the unconcern and reluctance for transgender’s healthcare can be seen from the still existing exclusion clause mentioned in the LIC –

“1. Common Exclusions in respect of HCB & MSB Benefits:

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33 Life Insurance Corporation of India
(a) Pre-existing condition—any medical condition or any related condition (e.g. illnesses, symptoms, treatments, pains and surgery\(^34\)) that have arisen at some point prior to the commencement of this coverage, irrespective of whether any medical treatment or advice was sought.

3. Additional Exclusions in respect of Major Surgical Benefit:

(f) Circumcision, cosmetic or aesthetic treatments of any description, change of life surgery or treatment, treatment (including surgery)”

The above mentioned exclusions are gender based because GID will always fall under “pre-existing condition” and since SRS is treated as “cosmetic surgery” and also that “change of life surgery or treatment” is also excluded, hence the entire transgender community cannot have access to health insurance policy even under the Government owned LIC, irrespective of whether insurance coverage is sought for gender transition related service or for any other general healthcare service. This discrimination which is made is unreasonable because the distinction is made on the basis of “sex”. “Transgender community” makes a different gender, i.e. a ‘third gender’ apart from ‘male’ or ‘female’ and legal recognition of their separate identity has already been given in many countries. In India, the Supreme Court has given a ruling on it and held that transgender be considered as third gender. Therefore, making discrimination on the basis of sex is unconstitutional because it violates Article 14 of the Constitution of India. The said gender discrimination also violates Article 21 of the Constitution because taking into account the affordability factor which stands as one the biggest barriers to healthcare facilities, therefore their Right to Health which is but under Right to Life is curtailed by denying them of health insurance coverage.

The National Transgender Discrimination Survey\(^35\) found out that one fifth (22%) of the transgender were denied equal treatment by a government agency or official. The survey and anecdotal evidence shows that transgender people are very often refused and postponed for healthcare. The discrimination is rooted at their identification of gender itself, from which all different kinds of discrimination emanates.

\(^34\) Insurance Plans, Health Protection, Exclusions, Life Insurance Corporation of India, 2004
\(^35\) Jaime M. Grant, Lisa A. Mottet, Justin Tanis, A Report of the National Transgender Discrimination Survey, p.5
This core issue was identified and in order to break this binary gender norm in India, a writ petition was filed on October, 2012. The Hon’ble Supreme Court on the case National Legal Services Authority (NALSA) v. Union of India & Ors\(^ {36} \) has given its judgment on April 14, 2014 and held that recognizing transgender as third gender would enable them to enjoy their rights which they have been largely deprived of. The court agreed that transgender are ridiculed and abused in all public places, from railway stations to schools, workplaces and even to hospitals. Through this writ petition, the grievances of transgender community were addressed and they sought for legal recognition of their gender identity then the one assigned at their birth. The prayer raised before the Court was that non-recognition of transgender identity violates Article 14 and 21 of the Constitution of India and therefore they should be given legal status as a third gender with all legal and constitutional protection. The Court ruled in favour of the petitioner, and in respect of accessing healthcare facilities, it showed consensus that transgender are deprived of access to healthcare as well because of no legal recognition of their gender identity. The judgment at last stated that -

“...an Expert Committee has already been constituted to make an in-depth study of the problems faced by the transgender community and suggest measures that can be taken by the Government to ameliorate their problems and to submit its report with recommendations within three months of its constitution.”\(^ {37} \)

**CONCLUSION**

Giving transgender their due legal recognition of their gender, many discriminations arising out of it can be brought under control. Denying transgender access to healthcare services, especially gender-transition related services which are so pivotal to them would violate their Fundamental Right to Equality and also Right to Life as is enshrined respectively in Article 14 and 21 of the Indian Constitution. India does not have a comprehensive legislation on transgender healthcare services. A legislation is needed which addresses many of the most pressing problems impacting the health of transgender people and their access to quality care, including financial barriers to insurance coverage.

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\(^ {36} \) National Legal Services Authority (NALSA) v. Union of India & Ors. [Writ Petition (Civil) No. 400 of 2012]

\(^ {37} \) Supra Note 103, Paragraph number 130 of the judgment