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# LEGAL RECOGNITION OF GENDER IDENTITY OF TRANSGENDER PEOPLE IN INDIA: CURRENT SITUATION AND POTENTIAL OPTIONS

**Policy Brief**

**2013**



# **LEGAL RECOGNITION OF GENDER IDENTITY OF TRANSGENDER PEOPLE IN INDIA: CURRENT SITUATION AND POTENTIAL OPTIONS**

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## EXECUTIVE SUMMARY

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### A. Background

Hijras and other transgender (TG) people in India face a variety of issues. So far, Hijra/TG communities have been excluded from effectively participating in social and cultural life; economy; and politics and decision-making processes. A primary reason (and consequence) of the exclusion is the lack of (or ambiguity in) legal recognition of the gender status of hijras and other transgender people. It is a key barrier that often prevents them in exercising their civil rights in their desired gender. So far, there is no single comprehensive source on the basis of which an evidence-based advocacy action plan can be prepared by transgender activists or possible legal solutions can be arrived at by policymakers. This background document, hopefully will lead to further consultations with trans communities and other stakeholders, could be an essential first step towards achieving the legal rights of hijras/transgender people in India.

The **overall purpose** of the assignment was to build an evidence-base for improving universal access to HIV prevention services, rights and social protection services for hijras/transgender people.

The **specific objective** is to prepare a background paper that will provide:

- **information on the current situation of the legal recognition of gender status of hijras and other transgender people in India; and**
- **potential models for India-relevant laws for legal recognition of the gender status of hijras and other transgender people**

### B. Methods

A comprehensive literature review was conducted to document the current legal recognition of gender identity of 'hijras' and other transgender people in India and in other countries (especially that have progressive laws in relation to trans people). Qualitative field research was conducted in 5 cities - Delhi, Kolkata, Chennai, Bangalore, and Mumbai – to obtain hijra/TG and stakeholder perspectives through focus groups and key informant interviews. We conducted a total of 10 focus group discussions with hijras/TG people; and in-depth interviews with key informants who were hijra/TG community leaders, health care providers and lawyers. Desk review and qualitative data were synthesised to prepare this background paper.

### C. Options for providing identity documents (including change of gender) for trans people

Based on the current practices followed internationally, India can consider three options for facilitating change of gender in the identity documents or getting identity documents in the desired gender:

1. a 'gender recognition certificate/document' by a government authority that usually deploys a committee to certify gender identity.
2. a medical certificate from a doctor that states the current sex/gender of the transgender person (this procedure is already being followed in some states of India). This would be specifically for change of gender from man to woman or woman to man.
3. a self-affidavit or self-endorsement of gender identity submitted to a government authority (e.g., similar to the process in Argentina). This could be for trans persons who want to identify as 'transgender' (male-to-female or female-to-male)

#### **D. Options for legal recognition of gender identity of trans people**

While the identity documents for a specific purpose (such as passport and social entitlement identity card) can provide a range of options such as man, woman, transgender, male-to-female (MtF) transgender, female-to-male (FtM) transgender, and third sex/gender, there are complexities when it comes to the arena of civil rights. In particular, in a country like India where there are strong affirmative action policies for women, there are serious questions as to under what conditions a male-to-female transgender person is entitled to be recognized as a woman as per the law.

The dilemma for the law is whether to recognise transgender persons as a third category through the entire gamut of civil and criminal laws by radically amending all laws or whether to include them within the existing binary gender framework? Is there a *Via Media* where people are given the choice to either become the gender of their choice when a certain medical threshold is reached (e.g., medical certificate based on sex reassignment surgery or hormone therapy) or to be recognized as a third gender on self certification? Can the law accommodate the diversities of trans identities as recommended in the *Via Media* option?

Overall, three options seem to be available for legal recognition of trans people in India:

Option 1 - Legal recognition of gender identity of trans people as women or men

Option 2 - Legal recognition of gender identity of trans people as a separate gender ('third gender' or 'transgender')<sup>1</sup>

Option 3 - Legal recognition of gender identity of trans people based on their choice – women/men or a separate gender ('third gender'/'transgender')

Parameters that can be considered for each of these three options are listed in the table (on the next page). This being a background document, the purpose of providing these options is to consider the pros and cons of each of these options, and as such this brief was not intended to specifically recommend one particular course of action. Additional consultations with various stakeholders are definitely needed before arriving at solutions that best accommodate the diverse identities within trans communities.

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<sup>1</sup> Recognition of hijras/trans people as a possible "third category", "third sex" or "third gender" (these terms are loosely used in the media reports) seems to be focus of the recent public interest litigation filed by National Legal Services Authority (NALSA). <http://www.thehindu.com/news/national/court-notice-to-centre-states-on-transgender-issue/article3956185.ece>  
[http://articles.timesofindia.indiatimes.com/2012-10-02/india/34217135\\_1\\_transgender-community-nalsa-national-legal-services-authority](http://articles.timesofindia.indiatimes.com/2012-10-02/india/34217135_1_transgender-community-nalsa-national-legal-services-authority)

<b>Options for legal recognition of gender identity of transgender people in India: Parameters/Criteria that can be considered</b>			
<b>Parameters/Criteria</b>	<b>Option 1-</b> Legal recognition of gender identity of transgender people as women or men	<b>Option 2-</b> Legal recognition of gender identity of transgender people as third gender	<b>Option 3 -</b> Legal recognition of gender identity of trans-gender people based on their choice – women/men or third sex/gender
<b>Citizenship</b>	Citizen of India	Citizen of India	Citizen of India
<b>Age limit</b>	Above 18 years	Above 18 years	Above 18 years
<b>Diagnosis of gender dysphoria / Self identification</b>	Medical certificate that the person deeply identifies with the gender of his or her choice and hence to be legally recognised as that self-identified gender.	Affidavit that such a person is a 'third gender' or 'transgender' (if seen as a separate gender category) given by trans community members/leaders who know the person as a transgender or third-gender person	Affidavit by the trans person, along with affidavits by friends or community members, that the applicant is third gender/transgender. For recognition as man or woman, a medical certification process would be required
<b>Requirement for SRS and/or hormonal therapy</b>	<i>If the person desires, hormonal therapy can be provided, unless there are medical contraindications.</i>  SRS: Either undergone SRS or emasculation  Valid medical certificate by one or more members of a team of SRS providers to this effect to be produced.	Not a pre-requisite	Not a pre-requisite for trans persons who do not want to be recognised as man/woman.
<b>Parents' or Legal guardian's consent</b>	Not necessary for people aged above 18 years.	Not necessary for people aged above 18 years.	Not necessary for people aged above 18 years.

## **Acknowledgments**

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## 1. INTRODUCTION

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Hijras<sup>2</sup> and other transgender (TG) people in India face a variety of issues.<sup>3 4</sup> So far, Hijra/TG communities have been excluded from effectively participating in social and cultural life; economy; and politics and decision-making processes.

*A primary reason (and consequence) of the exclusion is the lack of (or ambiguity in) legal recognition of the gender status of hijras and other transgender people.* It is a key barrier that often prevent them in exercising their rights related to marriage with a person of their desired gender, child adoption, inheritance, wills and trusts, employment, and access to public and private health services, and access to and use of social welfare and health insurance schemes.

Legal recognition of the gender status of TG people is also critical for the right to contest and right to vote in the elections. The Election Commission has introduced the option of 'other' in the voter's identity card and indicated that 'hijras' can vote or contest as 'other'<sup>5 6</sup>. However, the legal validity of this executive order on the right to contest is not clear. Hijras had contested elections in the past. It has been documented that the victory of a transgender woman who contested in an election was overturned since that person contested in a seat reserved for women and according to the judgment of the Madhya Pradesh High Court<sup>7</sup> the person was not a woman but a "hijra".<sup>8</sup> However, there have been other documented cases of transgender persons contesting elections as women. Since none of these candidates had won, there has been no cause for any other court to pronounce on the question of whether hijras are 'women' for the purposes of contesting from women-only constituencies.

The Tamil Nadu state government's 'Aravani (male-to-female transgender people) Welfare Board'<sup>9</sup> has given identity card for Aravanis – in which both their male and female names are given. This identity card may, however, have limited value and may not be useful for accessing a broader series of rights. For example, these cards (voter identity card or Aravani welfare board card) might not be enable hijras want to access other civil rights such as marriage, as legally marriage is seen as only between a man and a woman and there is no recognition of a third gender category in the marriage laws.

Another key legal issue is the ambiguous legal status of the sex reassignment surgery (SRS) itself and the legal validity of the post-operation certificate provided by the health care providers about the current sex of the transgender person<sup>10</sup> as there are no explicit policy or legal guidelines on the same from the government. Both the above two key legal issues (legal recognition of gender identity/status of Hijra/TG and the legal validity of the sex change (gender status) certificate after SRS) are closely related (Figure 1). Thus, there is a need to gather more comprehensive information about the legality of these two issues. So

<sup>2</sup> Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women, or "not-men", or "in-between man and woman", or "neither man nor woman". Hijras can be considered as the western equivalent of transgender/transsexual (male-to-female) persons but Hijras have a long tradition/culture and have strong social ties formalized through a ritual called "reet" (becoming a member of Hijra community). There are regional variations in the use of terms referred to Hijras. For example, Kinnars (Delhi) and Aravanis/Thirunangai (Tamil Nadu).

<sup>3</sup> People's Union for Civil Liberties, Karnataka. (2003). *Human rights violations against the transgender community: A study of kothi and hijra sex workers in Bangalore, India.* <http://www.altlawforum.org/PUBLICATIONS/PUCL%20REPORT%202003>

<sup>4</sup> Chakrapani, V, Babu, P, Ebenezer, T. (2004). Hijras in sex work face discrimination in the Indian health-care system. *Research for Sex Work.* p12-14.

<sup>5</sup> <http://timesofindia.indiatimes.com/india/Undertrials-must-get-right-to-vote-Election-Commission/articleshow/5259200.cms>

<sup>6</sup> <http://www.queerty.com/india-asks-voters-male-female-or-transgender-20091113/>

<sup>7</sup> *Kamla Jaan v. Sadik Ali*, Civil Revision Petition No 1294 of 2002 on file with the Alternative Law Forum

<sup>8</sup> Most trans people consider the term 'eunuch' to be derogatory and plain wrong to be applied to trans people.

<sup>9</sup> <http://infochangeindia.org/200804147036/Human-Rights/News/TN-constitutes-welfare-board-fortransgenders.html>

<sup>10</sup> Venkatesan Chakrapani. (Forthcoming). Sex Change Operation and Feminizing Procedures for Transgender women in India: Current Scenario and Way Forward. In Arvind Narrain and Vinay Chandran (Eds.). *Medicalisation of Sexual Orientation and Gender Identity: A Human Rights Resource Book.* New Delhi: Yoda Press.



far, there is no single comprehensive source on the basis of which an evidence-based advocacy action plan can be prepared by the transgender activists or possible legal solutions can be arrived at by policymakers. This background document, hopefully will lead to further consultations with trans communities and other stakeholders, could be an essential first step towards initiating a discussion on the legal rights of hijras/transgender people in India.

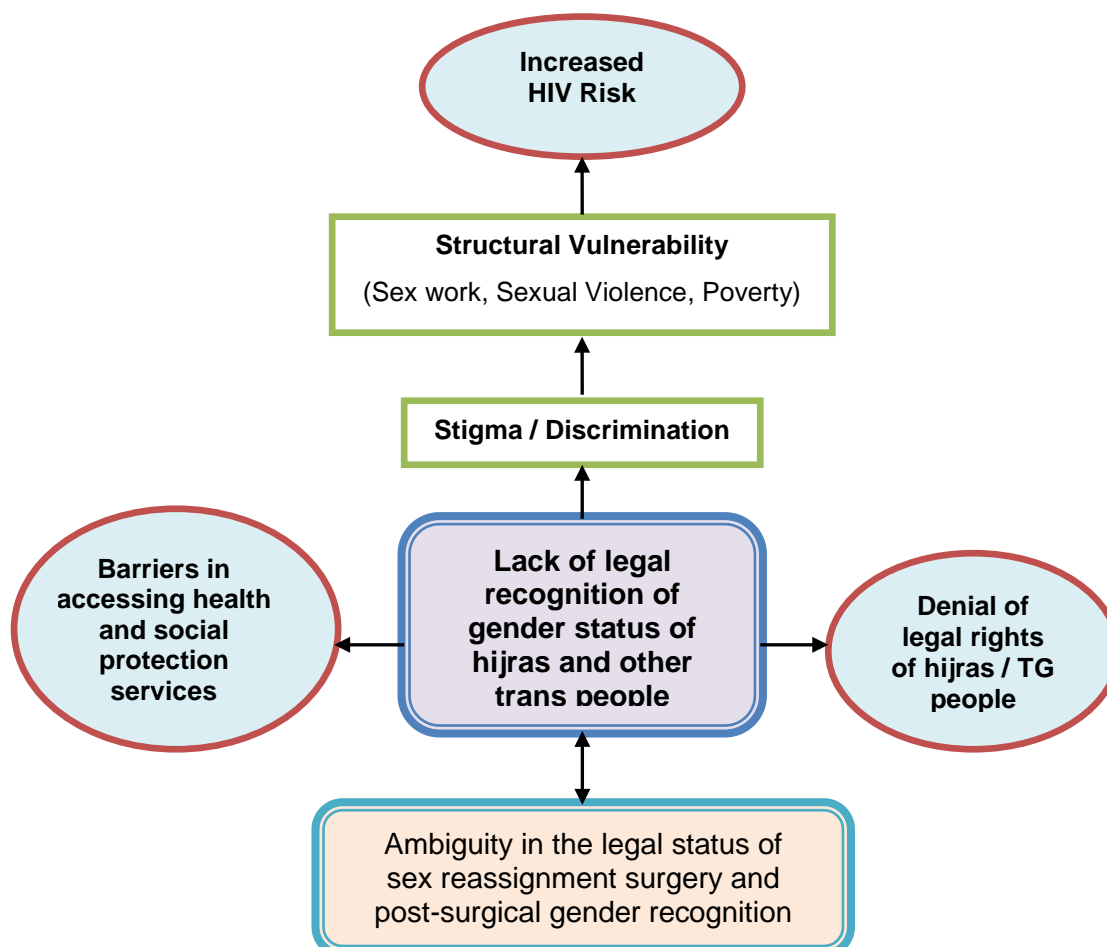
The **overall purpose** of the assignment was to build an evidence-base for improving universal access to HIV prevention services, rights and social protection services for hijras/transgender people.

The **specific objective** is:

Through desk review and discussions with stakeholders, to prepare a background paper that will provide:

- **information on the current situation of the legal recognition of gender status** of hijras and other transgender people in India; and
- **potential models for India-relevant laws for legal recognition of the gender status** of hijras and other transgender people

**Figure 1. Lack of legal recognition of gender status of trans people is central to increased HIV risk and poses barriers to accessing services and exercising civil rights**



## 2. METHODS

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### **a. Preparation of a background paper through desk review and qualitative research to gather stakeholder perspectives**

#### ***Desk review of legal / policy literature***

A *comprehensive literature review* on the current status of the legal status (gender identity) and legal rights of hijras/transgender people in India was conducted by collecting and analysing key legal and other documents such as relevant judgements and publications. Information about the legal rights of transgender people in general, and transgender people in particular in other countries (especially that have progressive laws in relation to TG people) was collected and analysed. Similarly, academic and UN databases on legal issues and human rights of transgender people and other sexual minorities were searched and relevant documents were reviewed to propose potential legal models for the recognition of gender status of hijras and other transgender people in India.

#### ***Qualitative open-ended interviews and focus group discussions***

*Primary data collection* was conducted to understand the perspectives of hijras at the grass-root level as well as the hijra/TG community leaders. Qualitative data were collected by interviewing Hijra/TG community leaders and through focus group discussions with the Hijra/TG people at the grass-root level. Key informant interviews (n=15 to 20) were also conducted with other key stakeholders such as lawyers, policymakers, and doctors. Integrated Network for Sexual Minorities (INFOSEM) helped in identifying suitable 'information-rich' community key informants who have different perspectives on this issue of legal recognition and through their partner agencies helped in organising 10 focus groups (in each focus group - about 6 participants) in five cities. Desk review and qualitative data were synthesised to form the background paper.

### **b. National consultation to get inputs from diverse stakeholders on moving forward**

The findings from this policy research will be presented to key stakeholders such as representatives of community agencies working on the issues of sexual minorities, community activists, and policymakers. The inputs from the stakeholders will help in developing next steps.

### 3. FINDINGS

#### A. THE CURRENT SITUATION: LEGAL RECOGNITION OF THE GENDER STATUS AND LEGAL RIGHTS OF HIJRAS AND OTHER TG PEOPLE

##### Procedures for name and sex/gender change in official identity documents

So far none of the state governments except Tamil Nadu has made provision for changing transgender people's birth name and sex in official gazette and official identity documents either after realising their gender identity or undergoing sex transition surgeries. Notably, Tamil Nadu state government through its Transgender Welfare Board (TGWB) constituted a district level screening committee<sup>11</sup> in each district to certify 'aravanis' (MtF transgender persons) after screening and provide an identity card. The content of the card include: birth (male) name, transgender (feminine gender) name, permanent address, and membership number<sup>12</sup>. Card does not mention the gender identity (as transgender/aravani) of the bearer. This identity card is usually required if transgender people apply for TG-specific welfare schemes (e.g., loans for self-help groups) of TGWB, or if they go to government hospitals to obtain SRS services<sup>13</sup>. While some members complained that TGWB ID card is not accepted as a valid card for identity and address proof (e.g., for opening bank accounts), some have opened bank accounts and obtained passports using this card.

In recent past, Tamil Nadu state government has introduced provision for changing MtF TG people's name (from male to female name) and sex/gender (female/'transgender') in official gazette. Besides, the government publishes sex- and name-change notice of post-operative transgender individuals whose sex change is certified by a medical doctor that included obstetrician/gynaecologist<sup>14</sup>. However, it was not clear whether usual practise of public notification would specifically result in any adverse consequences for those individuals due to implicit/explicit disclosure of their past sex status. And, the possible benefits that transgender people might get after making changes in official gazette is yet to be tested/clarified.

In some states, post-SRS medical certificate issued by qualified SRS service providers was helpful for some transgender individuals in getting ID documents in new/self-assigned gender followed by SRS. Presently, passports are given as 'female' based on post SRS medical certificate or self-reported transgender and 'emasculatation' status although there are no written guidelines from the Union government for the process of providing passport for transgender people. Thus, male to female sex change in official documents appears to be possible only for post-operative transsexuals, leaving out pre-operative TG people (waiting to undergo SRS), TG people who are medically unfit for surgeries, and self-identified TG people unwilling to undergo SRS – all of whom might want to change their gender in the official identity documents. Furthermore, lack of uniformity in the way gender/sex ('transgender' 'woman') is mentioned in the post-operative (SRS) medical certificates and lack of uniform procedures in the name and gender change in identity documents means many trans people could not able to have identity documents that have their desired name or gender. Finally, transgender people before or after sex transition wanting to make changes

<sup>11</sup> District screening committee functions under the Chairmanship of District Collector and members included Deputy Director of Medical and Rural Health Services, District Social Welfare Officer, a clinical psychologist, a psychiatrist, and a transgender community representative. The committee assesses psychological (Transgenderism) status and emasculatation status (that is, whether or not the person has undergone emasculatation or sex change operation). In particular, role of the community representative is to assess whether the person belongs to the transgender community (irrespective of self-identify of the person).

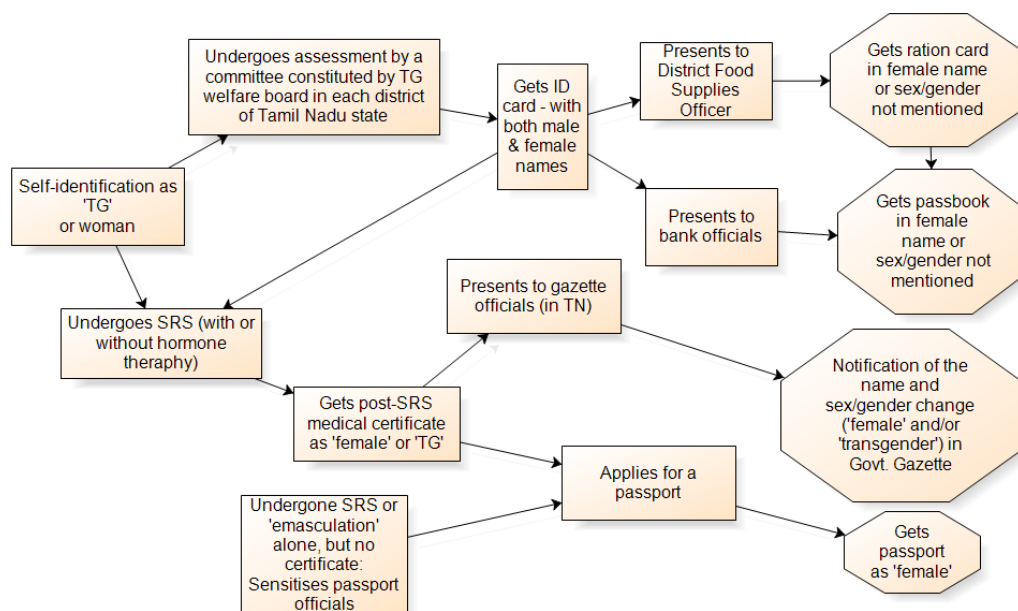
<sup>12</sup> <http://prashanth.photoshelter.com/image/I0000Db4Y34rPmrM>

<sup>13</sup> A detailed psychiatric assessment is, however, followed before offering SRS.

<sup>14</sup> <http://www.tn.gov.in/stationeryprinting/gazette/2012/29-VI-4.pdf> ( link not available )

only in their name without altering their sex, the procedures seem easier and like any other usual name change cases. However, some gazette officials found to be reluctant to process the application requesting male-name to female-name change.<sup>15</sup>

**Figure 2. Obtaining or changing identity documents for male-to-female trans people: Usual process in the state of Tamil Nadu**



**Box 1. Gender or Sex categories mentioned in official identity documents**

Documents issued by federal government (gender identity)	Documents issued by state governments (gender identity)
Passport ('Gender' column provides only two options – male and female <sup>16</sup> ) Voters ID (Others <sup>17</sup> , Male, Female) Unique Identification Card - Aadhaar <sup>18</sup> (Male, Female, Transgender) <sup>19</sup> Permanent Account Number card or PAN <sup>20</sup> card (Gender is not mentioned <sup>21</sup> )	Birth certificate (Male, Female) Ration card (Male, Female or 'Aravani' in Tamil Nadu) Driving license (Male and Female <sup>22</sup> ) Bank passbook (gender not mentioned)

<sup>15</sup> Informal interactions with a male-to-female transgender person who shared her name change experience

<sup>16</sup> <http://passportindia.gov.in/AppOnlineProject/online/downloadEFormStatic>. In 2010, the 'Gender' column in the passport form included the categories male, female and others. <http://passport.gov.in/cpv/ppapp1.pdf> accessed on 29 April 2010. In 2005, the form mentioned male, female and eunuch. <http://infochangeindia.org/human-rights/news/third-sex-finds-a-place-on-indian-passport-forms.html>

<http://passport.gov.in/cpv/ppapp1.pdf> accessed on 29 April 2010.

<sup>17</sup> [http://www.dnaindia.com/india/report\\_poll-panel-recognises-the-other-gender\\_1310919](http://www.dnaindia.com/india/report_poll-panel-recognises-the-other-gender_1310919)

<sup>18</sup> Issued by Unique identification authority of India (UIDAI)

<sup>19</sup> [http://uidai.gov.in/images/FrontPageUpdates/uid\\_download/enrolmentform.pdf](http://uidai.gov.in/images/FrontPageUpdates/uid_download/enrolmentform.pdf)

<sup>20</sup> For income tax purposes.

<sup>21</sup> However, some persons have changed their previous names into self-assigned gender-appropriate names.

<sup>22</sup> <http://qazalhopos.blogspot.in/search/label/Election%20Commission%20of%20India>

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### Medical certificate provided after SRS: Content, use and its legality

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The template of the post-SRS medical certificate given in a Chennai government hospital for male-to-female SRS clients is given below. Not all SRS providers issue a post-SRS medical certificate unless specifically asked by the clients.

#### Box 2. Example of a post-SRS medical certificate issues by a SRS provider

This is certify that Mr. XXX [male name], now called as YYY[female name], a transgender; physically a male and psychologically a female has had Sex Reassignment Surgery on (DD/MM/YYYY), after undergoing all investigations and psycho-legal counselling.

Date of Birth in record: DD/MM/YY

As reported by some TG people who participated in focus groups, the post-SRS medical certificate seems to be useful in changing legal sex/gender and name in many official documents such as ration card, voters ID, driving license, passport, and bank passbook. The situation varied across the states.

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### Consent for undergoing SRS

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Usually, the consent of both TG clients (legal majors) and their parents are sought by SRS providers after clearly stating the irreversible nature of SRS and associated risks. One of the templates used to get written consent from TG clients for undergoing SRS is given below

#### Box 3. Example of an informed consent and waiver of liability form used by a SRS provider

##### Informed consent and waiver of liability

I, -----, having been fully informed in writing of the potential risks and complications of hormonal or surgical sex reassignment, do hereby choose of my own free will and consent to undertake this treatment because I want to alter my physical appearance to more closely reflect my gender identity.

I hereby release Dr. ----- of any and all liability for my decision to undertake a change of my sexual appearance and, long-term use of hormones or for sex reassignment surgery to affect on a permanent, irreversible basis my current sexual functioning.

I promise not to sue Dr. ----- for any of the consequences of my hormonal or surgical sex reassignment unless those consequences are the result of negligence in the conduct of my hormone therapy or in the carrying out of my surgery.

Dated, signed and witnessed.

Although SRS surgeons seem to be well aware that TG persons above 18 years have the right to choose SRS, they are often reluctant to provide SRS in case of any active opposition

from parents. For example, in a recent test case,<sup>23</sup> although the court clearly stated that it is the choice of individuals to undergo SRS provided if they are above 18 years and meet the requirements of doctors, trans people have reported that doctors do not agree to perform SRS citing certain reasons such as the need for parental consent to avoid future litigations.

In relation to legal minors, there are some reported cases of police having arrested trans community persons (and/or quack doctor who performed emasculation) based on complaints filed by parents that trans people forced their son to undergo SRS or emasculation.

Although waiver of liability and parental consent forms are available, there is still lack of legal clarity. In view of this situation, as suggested by a medico-legal adviser, it is better to convert these consent forms into affidavits by paying the appropriate court or notary fee and getting these signed by a magistrate or notary. This means that 'the state' is now a witness to this agreement<sup>24</sup>.

## B. PROGRESSIVE DEVELOPMENTS FOR TRANSGENDER RIGHTS IN INDIA

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### Indian Constitutional Framework and the *Naz* Decision<sup>25</sup>

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India has a well-established framework of fundamental rights embedded in the Constitution. With the recent *Naz* decision (see below) there is a new precedent to discern transgender rights being recognised by the Constitution. The four important provisions from the point of LGBT rights are:

*Article 14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*

*Article 15. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them*

*Article 19 All citizens shall have the right:*

- (a) to freedom of speech and expression;*
- (b) to assemble peaceably and without arms;*
- (c) to form associations or unions;*
- (d) to move freely throughout the territory of India;*
- (e) to reside and settle in any part of the territory of India; and*
- (g) to practise any profession, or to carry on any occupation, trade or business.*

*Article 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.*

In terms of criminal law, until the decision of the Delhi High Court in *Naz Foundation vs. NCT Delhi* in 2009<sup>26</sup>, all non-penovaginal sexual relationships among consensual adults were a criminal offence under Section 377 of the Indian Penal Code meriting a maximum punishment of life imprisonment. The said provision violated Article 17 and Article 2(1) of the ICCPR<sup>27</sup>. The *Naz* decision has now brought Indian jurisprudence into conformity with

<sup>23</sup>[http://articles.timesofindia.indiatimes.com/2012-04-01/chennai/31269633\\_1\\_transgender-parents-change-operation](http://articles.timesofindia.indiatimes.com/2012-04-01/chennai/31269633_1_transgender-parents-change-operation)

<sup>24</sup> Gupta, R., & Murarka, A. (2009). Treating transsexuals in India: History, prerequisites for surgery and legal issues. *Indian J Plast Surg*, 42(2), 226-233. doi: 10.4103/0970-0358.59287

<sup>25</sup> Taken from Arvind and Siddharth Narrain's (2010) "CJ Reference: Human Rights, Sexual Orientation and Gender Identity Background paper for the 15th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions"

<sup>26</sup> *Naz Foundation vs. NCT Delhi* (2009) 160 DLT 277.

<sup>27</sup> See *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). Para 8.6 and para 8.7 for the interpretation of the ICCPR that anti-sodomy laws violated both the right to privacy clause and the non discrimination clause. <http://hrlibrary.ngo.ru/undocs/html/vws488.htm> accessed on 26 April 2010.

international law by decriminalising all consensual same sex activity between adults. As the Court noted:

*“In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual”.*<sup>28</sup>

The importance of the Naz decision was that it gave a new interpretation to the existing framework of Constitutional Rights. These four provisions included above are the heart of the Fundamental Rights Chapter. Prior to the Naz decision, it was never seen fit to apply these provisions to LGBT persons. What the Naz decision did was to apply the understanding of Constitutional rights to a minority which had never been deemed worthy of rights protection or judicial consideration. As the Delhi High Court observed, invoking Jawaharlal Nehru:

*‘If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as “deviants” or “different” are not on that score excluded or ostracised’.*<sup>29</sup>

The Naz decision interpreted Article 21 to include protection for both zonal and decisional privacy of individuals as well as the dignity of LGBT individuals. As the Court noted,

*‘In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.’*<sup>30</sup>

With respect to Article 14, the Naz decision held that,

*The criminalisation of private sexual relations between consenting adults absent any evidence of serious harm deems the provision’s objective both arbitrary and unreasonable. The state interest “must be legitimate and relevant” for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily the classification will have to be held as unreasonable. The nature of the provision of Section 377 IPC and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else.*<sup>31</sup>

In an extension of equality doctrine, the Naz decision also found Section 377 to be violating the non-discrimination provision in Article 15, stating:

*We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.*<sup>32</sup>

<sup>28</sup> Naz Foundation v. NCT Delhi, op. cit., Para 131.

<sup>29</sup> Naz Foundation v. NCT Delhi, op. cit., See Para 130.

<sup>30</sup> Naz Foundation v. NCT Delhi, op. cit., See para 41.

<sup>31</sup> Ibid. See para 92.

<sup>32</sup> Ibid. See para 104.



Legal commentators have pointed to the far reaching significance of this aspect of the ruling as it implies that non-discrimination provision will have to be read to include sexual orientation and thereby provide protection to LGBT persons<sup>33</sup>.

The judges were also cognizant of emerging international law on sexual orientation and gender identity and in particular refer to the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity. They stated that,

*“the principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity”.*

In particular they noted that the Principles recognise:

*Human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights;*

*All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity;*

*Every citizen has a right to take part in the conduct of public affairs including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, without discrimination on the basis of sexual orientation and gender identity<sup>34</sup>.*

#### *Transgender Rights in the Naz Decision*

The judgment specifically narrates instances of how Section 377 applies to the transgender community:

*“Then there is a reference to 'Bangalore incident, 2004' bringing out instances of custodial torture of LGBT persons. The victim of the torture was a hijra (eunuch) from Bangalore, who was at a public place dressed in female clothing. The person was subjected to gang rape, forced to have oral and anal sex by a group of hooligans...”.*<sup>35</sup>

The judges were also cognizant of the deep historical roots of the oppression faced by the transgender community:

*“During Colonial period in India, eunuchs (hijras) were criminalised by virtue of their identity. The Criminal Tribes Act, 1871 was enacted by the British in an effort to police those tribes and communities who 'were addicted to the systematic commission of non-bailable offences.' These communities and tribes were deemed criminal by their identity, and mere belonging to one of those communities rendered the individual criminal. In 1897, this Act was amended to include eunuchs..... While this Act has been repealed, the attachment of criminality to the hijra community still continues.”*<sup>36</sup>

Hence, the decision is not limited to only homosexual persons as is the case in the landmark decisions in both the US and South Africa which only refer to gay men. The decision in the Naz Foundation by contrast encompasses an understanding of sexuality which is broader and includes what the court calls LGBT persons. This again is historic as the inclusive term LGBT has not been used by any other court in any other part of the world. So, while the final order in the Naz judgement talks of decriminalising sexual orientation, the decision then

<sup>33</sup> Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for all Minorities*, 2 NUJS L. Rev. (2009) 419.

<sup>34</sup> Ibid. Para 44.

<sup>35</sup> Naz Foundation v. NCT Delhi, op.cit. para 22.

<sup>36</sup> Ibid. para 50

clearly means that hijra persons are also entitled to the right to equality, non-discrimination, privacy and dignity as every other LGBT citizen in India.<sup>37</sup>

The *Naz* judgment removed the criminal law from the backs of LGBT persons and provided a legal basis to continue to combat discrimination against LGBT persons. The continuing forms of struggle for the transgender community encompass the struggle for a civil identity. These identification documents like a birth certificate, passport or ration card, are a predicate for the ability to enter into a variety of relationships in civil and official society – for obtaining driver's licenses, for accessing legal service, employment opportunities, university admissions and essential benefits including health care. Identification has traditionally been on the basis of sex within the binaries of male and female. The Indian state's policy has traditionally been towards recognizing only two sexes and refusing to recognize hijras as women, or as a third sex.

*Taking the Naz decision forward: National Legal Services Authority v. Union of India*

The National Legal Services Authority has been proactive in addressing the concerns of the transgender community by initiating judicial sensitization programmes about the issues facing the transgender community in various states. In Karnataka, the State Legal Services Authority, then headed by Justice Manjula Chellur had organised workshops on the issues of transgender people and the law in Belgaum, Gulbarga, Shimoga and Bangalore. This initiative was part of a larger national programme spearheaded by the National Legal Services Authority (NALSA) to bring this issue in the judicial mainstream. Justice Altamas Kabir, who then headed NALSA has publicly stated that he has proposed an amendment to a bill that is being discussed around extending adoption rights to various religious groups on the lines of the Special Marriage Act, to also include provisions that will enable transgender persons to legally adopt.<sup>38</sup>

NALSA has taken this concern forward by now filing a public interest litigation (PIL) specifically related to entitlements for transgender people. The NALSA petition states that Article 21 of the Constitution provided fundamental right to life and personal liberty that could not be denied to transgender people. It further stated:

- *“Right to life includes right to live with human dignity and transgenders are entitled to bare necessities in life such as food, nutrition, clothes, shelter, medical facilities, right to education and to adopt children, and marry.*
- *Every citizen has the right to decide their sex orientation and to espouse and determine their identity including transsexuals, transgenders, transvestites and they are entitled to be considered as third and equal sex. The Citizenship Act of India uses the expression person without reference to sex. Transgenders, being citizens of India, ought to be entitled to vote and to contest elections as they are natural persons.*
- *Many hospitals and other institutions do not admit them in women's ward because women do not feel comfortable or free in their presence and in men's ward they face sexual abuse. Provision of separate wards in all hospitals and other institutions is necessary.*
- *Various manifestations of deprivation are the consequence of the practice of recognising only two sexes-or-genders for various facilities, amenities and privileges; that is, male and female. There is an urgent need for recognising the third gender that is transgender.*
- *Treating a transgender as a legal non-entity was a violation of Articles 14, 15 and 16 of the Constitution and it was arbitrary and discriminatory, NALSA noted and*

<sup>37</sup> See also Siddharth Narrain, *Crystallizing Queer Politics: The Naz Foundation Case and its Implications for India's Transgender Communities*, 2 NUJS L. Rev. (2009) 455.

<sup>38</sup> Speech by Justice Altamas Kabir, “Transgenders and the Law Seminar”, organised by Karnataka State Legal Services Authority and Karnataka High Court Legal Services Committee, Bangalore, October 2011

*sought a direction to the Centre and States to recognise them as a third category for the purpose of conferring various benefits.”*

In relation to NALSA’s petition, the Supreme Court in its order dated October 1, 2012, has observed:

*“This petition has been filed by National Legal Services Authority to recognise and grant Transgenders a legal status as a third gender and to recognise their rights under Articles 14, 15,16 and 21 of the Constitution of India. Petitioner also seeks direction to the Union of India and State Governments to grant equal protection and rights to Transgenders as available to males and females of this country. The question involved is of considerable public importance which calls for an authoritative pronouncement which will have far reaching consequence to Transgender community.”*

Potentially, the case before the Supreme Court can radically alter the field of transgender rights and might very well turn out to be the most significant recent development on transgender rights.

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### **Legal gains for the transgender community throughout India**

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While the struggle at the level of the Courts continues, some important advances have been made in transgender rights without much fanfare in some ways amounting to a silent revolution. In India, one’s gender and sex is fixed at birth and is used in all subsequent legal transactions. Thus, binary classification of gender into male and female that does not recognise a third gender category, as the Peoples’ Union for Civil Liberties (PUCL) Report on ‘Human Rights Violations against the Transgender Community’<sup>39</sup> argues, turns the transgender status of hijras into that of a legal non-entity.

Only two sexes – male and female – are recognised in Indian civil law<sup>40</sup>. Furthermore, India does not recognise sex changes on identity cards, which makes it impossible for an intersex person or hijra to choose a legal female identity in most states. Lack of legal recognition has important consequences in getting government ration (food-price subsidy) shop card, passport, and bank account.

The PUCL report recommends that “Civil rights under law such as the right to get a passport, ration card, make a will, inherit property and adopt children must be available to all regardless of change in gender/sex identities.”<sup>41</sup> Furthermore, The UNDP Report (2010) ‘Hijras/Transgender in India: HIV, Human Rights and Social Exclusion’<sup>42</sup> recommends: “Develop action steps toward taking a position on legal recognition of gender identity of Hijras/TG need to be taken in consultation with Hijras/TG and other key stakeholders. Getting legal recognition and avoiding ambiguities in the current procedures that issue identity documents to Hijras/TG are required as they are connected to basic civil rights such as access to health and public service, right to vote, right to contest elections, right to education, inheritance rights, and marriage and child adoption”.

There have been major inroads into the otherwise rigid gender classification system in India amounting to a silent revolution in sexuality rights.

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<sup>39</sup> People’s Union for Civil Liberties (Karnataka), Human Rights Violations against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore, India”, Bangalore 2003, available at [www.sangama.org/files/sexual-minorities.pdf](http://www.sangama.org/files/sexual-minorities.pdf)

<sup>40</sup> Sood, N. (2010). Transgender People’s Access to Sexual Health and Rights: A Study of Law and Policy in 12 Asian Countries. Asian-Pacific Resource and Research Centre for Women (ARROW).

<sup>41</sup> People’s Union for Civil Liberties (Karnataka), Human Rights Violations against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore, India”, Bangalore 2003, available at [www.sangama.org/files/sexual-minorities.pdf](http://www.sangama.org/files/sexual-minorities.pdf)

<sup>42</sup> [http://indiagovernance.gov.in/files/hijras\\_transgender\\_in\\_india\\_hiv\\_human\\_rights\\_and\\_social\\_exclusion.pdf](http://indiagovernance.gov.in/files/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf)

**Elections:** For the purposes of securing an Election ID card, persons can use the category called ‘Other’<sup>43</sup>. Also, when it comes to contesting elections as women, it must be noted that openly transgender persons have contested elections as women in India. The Madhya Pradesh High Court in a ruling in Kamala Jaan's case ruled that *hijras* are not women and are not entitled to contest elections within the category of seats reserved for women.<sup>44</sup> However in 2009, Veena S contested elections for the Bangalore Municipality.<sup>45</sup> Veena herself was not the first transgender person to contest local elections with at least eleven transgender persons before Veena taking the electoral plunge and winning the elections.<sup>46</sup>

**ID Documents:** The recognition of transgender people is seen in new identity documents such as the Unique Identification Number with the gender category including male, female and transgender<sup>47</sup> (though, access to this still has been limited).<sup>48</sup> It is estimated that over 19,000 transgender people across the country have been issued Aadhaar cards that recognise them as a third gender.<sup>49</sup>

**Property:** In the opinion of the MP High Court, a hijra woman was allowed to receive property from her Guru because the court accepted that the community cannot transfer property to anyone outside of the community. In this ruling the court explicitly acknowledges the existence of a distinct ‘eunuch’ class with its own customs and rituals that must be respected.<sup>50</sup>

**Harassment:** In *Jayalakshmi v. The State of Tamil Nadu & Ors* the Madras High Court was confronted with a case where a male-to-female transgender person was harassed by the police to the extent that that person self-immolated and died. The court held that the State had to pay compensation for the harassment by its police force and also directed the institution of disciplinary proceedings against the officers.

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## Legal gains for transgender community at the State level

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The States of Karnataka and Tamil Nadu over the past few years have implemented the most progressive policies for transgender and gender-variant people in India. These states serve as promising examples of what can be realised in the rest of India.

### **Karnataka**<sup>51</sup>

Legal classification as ‘backward’ community: The government is now grappling with the question of what systems to set in place to help identify communities marginalised on the basis of their gender identity. The impetus for these benefits in the state were a direct result of a number of developments in the state, the most important of these being the C.S.

<sup>43</sup> During months of hearings, the election commission heard written and oral testimony (or “representations”) from “various individuals and interest groups”, according to TOI. Election commissioner S Y Qureishi explained, “When the representation came, we readily agreed. Why should a section of the population be left out? The decision will help in mainstreaming a section of the population. I am sure even government would like to do the same” [http://lgbtqnews.com/gaynews/eunuchs-transsexuals-given-third-gender-option-india-election-forms\\_BYN.aspx](http://lgbtqnews.com/gaynews/eunuchs-transsexuals-given-third-gender-option-india-election-forms_BYN.aspx) accessed on 28 April 2010.

<sup>44</sup> <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.pdf> at p. 53.

<sup>45</sup> <http://bangalore.citizenmatters.in/articles/view/1851-praja-rajakiya-vedike-bbmp-elections-candidates> accessed on 28 April 2010.

<sup>46</sup> Table of successful candidates on file with the Alternative Law Forum.

<sup>47</sup> See Demographic Data Standards and Verification procedure (DDSV) Committee Report, Unique Identification Authority of India, December 2009.

<sup>48</sup> <http://www.deccanherald.com/content/250353/getting-aadhaar-card-big-challenge.html>

<sup>49</sup> <http://www.deccanherald.com/content/249637/over-19000-transgenders-issued-aadhaar.html>

<sup>50</sup> *Ilyas and Others v. Badshah, alias Kamla*. AIR 1990MP 334.

<sup>51</sup> Much of the material for this section was drawn from the article of Siddharth Narrain, Alternative Law Forum, with permission: Siddharth Narrain (2012). Gender Identity, Citizenship and State Recognition Vol 8(2), Socio-legal Review. <http://sociolegalreview.com/OJS2/ojs-2.3.8/index.php/SLR/article/download/55/48>

Dwarakanath Backward Classes Commission Report of 2010, which emerged through a series of testimonials before the Commission in the same year.<sup>52</sup> The Commission recommended that the transgender community be included in the category of more backward communities (2-B) that would then entitle them to government benefits. The Commission held that based on evidences, witnesses and spot inspection and detailed analysis, that they are more backward, and hence under the Section 19(1) of the Karnataka State Backward Classes Commission Rules 1995, the Commission recommended to the Government of Karnataka to include the sexual minorities called Hijras, Kothis, Jogappa, Female to Male [transgender people], Mangalamukhis, and Transgenders in the Category II (B) of the Backward Classes List. The basis for this decision was their finding that none of the persons from these communities who they had spoken to got government jobs either in Government Departments or in the non-government agencies. Many of them were school dropouts and a few had studied only up to tenth standard. The areas where they resided were even worse than slums. The rooms measuring 6X10 feet had 5 to 10 occupants. The Commission noted, "From the fact that they used to share the food they got from begging, we realized that they were backward not only economically but also socially and educationally."<sup>53</sup>

*Economic Justice:* Intensive efforts of local queer rights groups have resulted in a Government Order that secures benefits for 'gender minorities' – a term that encompasses a range of gender identities including kothi, hijra, female to male transsexuals, mangalamukhis, and jogappas.<sup>54</sup> The Karnataka Government has recently enacted orders that provide for socio-economic benefits for these people.<sup>55</sup> The Karnataka High Court recently appointed C. Anu, a transgender person, to an administrative job in the Group D category.<sup>56</sup> If this is anything to go by, the time is ripe for crucial claims to legal rights and social entitlements that transgender persons are seeking.

*Identification:* Government officials have acknowledged the lack of identity documents as one of the main reasons for the limited efficacy of existing schemes for transgender people. In its 2012-2013 Budget, the Karnataka Government has instituted an initiative entitled *Lingathwara Alpasankhyathara Yojana* (Gender Minorities Programme) proposing to implement trainings, loans and subsidies through NGOs working in the area (because transgender people may not have permanent addresses and may have issues with identification).<sup>57</sup> An important debate in the move towards more state recognition of gender minorities has been the methods that are used to identify 'gender minorities'. Sexuality rights activists Sumathy Murthy and Sunil Mohan, who work with Lesbit, a group that works on the rights of lesbians and female born transsexuals have argued that the best practice in this area will be to evolve a system of self-identification.<sup>58</sup> Currently the state government is in consultation with sexuality rights groups and psychiatrists in NIMHANS to evolve methods of identifying persons who will be eligible for state benefits.

*Civil Society:* Bangalore University has announced reservation for transgender persons in its

<sup>52</sup> "Panel Recommends BC Tag for Transgenders", *The Hindu*, 9 July 2010, available at <http://www.hindu.com/2010/07/09/stories/2010070951150400.htm> accessed on 30 April 2012

<sup>53</sup> C.S. Dwarakanath Backward Classes Commission Report, 2010

<sup>54</sup> For footage from *Chandana Channel* of former Chief Minister announcing this order see: <http://archive.org/details/KarnatakaCmB.s.YadiyurappaAnnouncingTransgendreGovtOrderCopyOnChandana> accessed on 1 October 2012.

<sup>55</sup> See Government of Karnataka, Department of Women and Child Development, G.O. No. 507/2010 dated 20 October 2010 available with the author. See also DD1 footage of ex-Chief Minister 's announcement related to the government order available at <http://archive.org/details/KarnatakaCmB.s.YadiyurappaAnnouncingTransgendreGovtOrderCopyOnChandana> accessed on 1 October 2012

<sup>56</sup> Krishnaprasad, "High Court Strikes a Blow for Transgenders", *The Hindu*, 5 February 2012, available at <http://www.thehindu.com/news/states/karnataka/article2860948.ece> accessed on 9 May 2012

<sup>57</sup> Government of Karnataka Budget 2012-2013, 21 March 2012, p. 32 available at [www.finance.kar.nic.in/bud2012/budsp-gen2012-e.pdf](http://www.finance.kar.nic.in/bud2012/budsp-gen2012-e.pdf) accessed on 1 October 2012.

<sup>58</sup> Sunil Mohan and Sumathi Murthy, *Towards Gender inclusivity: A study on contemporary concerns around gender*. Bangalore: Alternative Law Forum and LESBIT.

postgraduate courses.<sup>59</sup> In addition, the National Institute of Neurosciences and Mental Health (NIMHANS), in collaboration with NGOs, is establishing mechanisms to identify transgender people who will be eligible for medical entitlements under the Karnataka government order.

### **Tamil Nadu**

In Sood (2009)'s report "Transgender people's access to sexual health and rights: a study of law and policy in 12 Asian countries" the contemporary situation of transgender justice in Tamil Nadu is discussed and the author uses this as a case study to inform future advocacy in the region.

A relatively recent report from UNDP provides a case study of Tamil Nadu Welfare Board. Below is the excerpt from the executive summary of that report that summarises the formation and governance of the board, as well as its schemes and achievements. The report provides models for establishing state level TG welfare boards in other states as well as a possible national nodal agency for transgender welfare.

#### Excerpt from:

Chakrapani, V. (2011). *The case of Tamil Nadu Transgender Welfare Board: insights for developing practical models of social protection programmes for transgender people in India*. New Delhi: UNDP India.

[http://www.undp.org/content/dam/india/docs/HIV\\_and\\_development/the-case-of-tamil-nadu-transgender-welfare-board--insights-for-d.pdf](http://www.undp.org/content/dam/india/docs/HIV_and_development/the-case-of-tamil-nadu-transgender-welfare-board--insights-for-d.pdf)

### **TAMIL NADU TRANSGENDER WELFARE BOARD**

#### **Formation**

A confluence of several factors contributed to the formation for Tamil Nadu Transgender Welfare Board (TGWB). These factors ranged from gain in the political support as a legitimate minority, increase in the acceptance of the general public and mass media, and advocacy efforts of transgender community leaders and activists and civil society.

#### **Governance and Structure**

Tamil Nadu TGWB functions under the leadership of – Minister of Social Welfare; Special Commissioner and Secretary of Social Welfare and Nutritious Meal Programme Department; and Director of Social Welfare - who are President, Vice-President and Member Secretary, respectively, of TGWB. The board has official and non-official members. The official members are the representatives from the various government bodies that include: Department of Finance, Department of Law, State Women Commission, Police Department, Human Rights and Social Justice Commission, Women Development Corporation, Department of Higher Education, Department of Medical Education, and Department of Employment and Training. Out of the eight non-official members, 7 are TG community leaders, and one person is a NGO leader.

The strength of this structure is that it allows interaction among various government departments that facilitate inter-departmental coordination allowing access of transgender people into the existing government schemes. This arrangement, in which members from various government bodies and TG communities are present, thus enables board to have different perspectives of the issues and formulate effective schemes – reflecting a true participative democracy in action.

#### **Schemes**

TGWB addresses the social protection needs of TG people - income assistance, housing, education, employment and health care.

TGWB addresses these needs as:

- an agency that **designs and implements schemes exclusively for TG people** focusing on income/employment, housing, education and health care needs of TG people.

<sup>59</sup> See Rashmi Belur, "Transgender Quota in Postgraduate Courses has not Found Takers", *DNA*, Bangalore, 1 September 2010 available at [http://www.dnaindia.com/bangalore/report\\_transgender-quota-in-post-graduate-courses-has-not-found-takers\\_1431913](http://www.dnaindia.com/bangalore/report_transgender-quota-in-post-graduate-courses-has-not-found-takers_1431913) accessed on 1 October 2012



- a platform to bring **various government departments together to discuss what can be done to address these basic needs by allowing access to government's pre-existing services, schemes, or institutions** for TG people – thus trying to end the social exclusion and marginalization of TG populations.

#### ***TG-specific welfare schemes funded and implemented by TGWB***

These include small grants for self-employment and providing material support (such as sewing machines) for needy TG people. Some eligible TG people have also received support for their higher education. Furthermore, short-stay home was started in Chennai to serve as a temporary shelter for TG people in crisis and as a safe place to for TG people to stay when they visit Chennai for medical care and sex reassignment surgery.

#### ***Access to existing government schemes***

The existing state government schemes that are accessed by TGWB members include TG self-help groups (SHGs) supported by accredited agencies. To address housing needs of TG people, the state government offers free land *pattas*. Besides, the central government's scheme – Indira Awaas Yojana (IAY) – is also used to provide free housing for TG people. TGWB facilitates access to existing government institution-delivered programmes such as insurance, education, and employment. TGWB facilitates access to employment opportunities for TG people by enabling them to register in the state government 'employment exchange'. TGWB also facilitates provision of free sex reassignment surgery through select government hospitals in Chennai. Moreover, ration/food cards that are usually provided to a family are now provided to TG people even if they live alone.

## **C. PERSPECTIVES OF TRANSGENDER COMMUNITIES AND OTHER STAKEHOLDERS**

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In the focus groups conducted with trans people in different cities, trans participants were divided in their opinion on whether they want the law to recognise them as a woman or as a separate "third" gender. Key articulated reasons for wanting to be legally recognised as a separate gender included: high possibility of getting separate social protection schemes, and reservations in jobs and election contests; and not wanting to be subsumed under the 'woman' category as they are not "biologically" female. Key articulated reasons for wanting to be legally recognised as a woman included: self-identification as a woman, even though they are not born as a female; satisfaction with having equal rights as that of a woman/female; and social protection benefits alone should not be a reason for the need to be recognised as a separate gender. Some significant proportion of participants seemed to have misunderstood that getting social protection benefits as getting legal recognition, while others thought that getting social protection benefits and getting a legal recognition as a woman are mutually exclusive. The different positions of the participants are summarized in Table 1, and illustrative quotes are summarized in Table 2.

As male-to-female transgender people in India are quite heterogeneous, the differences in perspectives are understandable in terms of self identity, socioeconomic status, and ideology. Further consultations and informed debates with and among communities of male-to-female and female-to-male transgender people and other stakeholders are needed to obtain a pragmatic solution/consensus on how the Indian law need to recognise the gender status of trans people.



**Table 1. Trans community perspectives: Articulated merits and demerits in legal recognition as a separate gender and as a woman/man**

Legal recognition type	Perceived Merits	Perceived De-merits
As a separate gender (Third gender or Transgender)	<ul style="list-style-type: none"> <li>- Specific focus in the national policies</li> <li>- Easy access to social benefits</li> <li>- As MtF and FtM trans people come under the broader umbrella of 'trans' people, it will be beneficial for the solidarity of the trans communities.</li> </ul>	<ul style="list-style-type: none"> <li>- Could be a type of social self-exclusion: Isolating from the mainstream women communities might further increase societal stigma (for MtF trans people)</li> <li>- Relatively more complex amendments need to be made in the Indian legal system to recognise the legal rights of TG people</li> <li>- MtF and FtM trans people might differ in whether they can be clubbed together as 'third gender' (as it is possible that some proportion of FtM trans people might want to be recognised separately from the MtF trans people)</li> </ul>
Women (in the case of MtF trans people) or men (in the case of FtM trans people)	<ul style="list-style-type: none"> <li>- Less complicated as it falls within the binary gender model</li> <li>- Relatively easy for the Indian legal system to amend laws that recognise the rights of trans people</li> </ul>	<ul style="list-style-type: none"> <li>- Community advocates believe that specific needs of TG women might be subsumed while combining them with mainstream women communities</li> <li>- Delay in getting social benefits</li> <li>- Mainstream women/men may not accept trans women as peers. So, trans women/men might face challenges in being recognized as women/men, but it was felt by focus group participants and community leaders that eventual acceptance by biological females/males is more likely.</li> </ul>

<b>Table 2. Male-to-Female Trans community perspectives: Illustrative quotes for asking for legal recognition as woman or as ‘third gender’/‘transgender’</b>	
<b>Legal recognition as a separate gender (Third gender or ‘Transgender’)</b>	
<b>“Not biological females”</b>	<i>“Female is one such [sex/gender] which is gifted by god and people like us just like that one can’t become female by undergoing surgery. We can’t become “complete female”. ... Female is one who is capable of giving birth to a child and this is not possible by people like us. So we cannot be recognized as female.” (A hijra community leader)</i>
<b>High possibility of getting separate social protection schemes</b>	<i>“If we get recognition as women, we will get only the reservation meant for women. Only if we get recognition as ‘TG’, we can easily get [trans-specific] schemes and benefits from the government.” (A MtF transperson)</i>
<b>Perceived lack of acceptance by biological females</b>	<i>“Let us say if my ID card states I am a female. In case I have to travel in a plane or something then after seeing the ID and then [airport security] looking at me - there may be some problem like “This person looks like a Hijra how come this person’s ID says ‘female.’” (A hijra community leader)</i>  <i>“If we get recognition as women, whether it would be possible for us to mingle with other women and work [at work place]. Would women accept this? They might look at us differently. Some might be afraid of us.” (A non-operative MtF trans person)</i>
<b>Legal recognition as woman</b>	
<b>Self-identification as a woman</b>	<i>“Legally, I would like to be recognized as a woman. We were born males, but as we grew up our behaviour, desires and dreams began to change. We have thus changed our sex to live like a woman. Therefore, I would like to be considered as a woman.” (A post-operative MtF TG person)</i>
<b>Sufficient to obtain equal rights as that of a biological female</b>	<i>“We need to be identified as a woman. All the rights given to a woman, then need to be given to us too. That should be okay for me.” (A MtF trans person)</i>

## D. GOOD PRACTICES FOR TRANS\* RIGHTS: REVIEW OF INTERNATIONAL LEGAL DEVELOPMENTS

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In this section, we analyse international precedents on transgender rights to envision what the best strategy would be in India for legally recognition of their gender identity and for obtaining sexual reassignment surgery to those who need it. We will begin by reviewing the two prominent models that emerge at the international level: the gender dysphoria/diagnosis model as delineated by the World Professional Association of Transgender Health (WPATH) Standards of Care 7 (formerly the Harry Benjamin Standards of Care) and the self-identification model of gender identity as outlined by the Yogyakarta Principles and the International Bill of Gender Rights. We will also draw from important laws, cases, and international documents to supplement and inform these approaches.

### Gender Dysphoria/Diagnosis Model

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This model is the most prevalent across the world in countries that acknowledge gender identity and transgender issues as legitimate concerns. In this model patients must receive approval from medical professionals to undergo surgery or have changes to their ID documentation. While the degree of and requirements for this approval vary from country to country, this usually involves a diagnosis of gender identity disorder (GID) or gender dysphoria. In some countries individuals are not only required to be diagnosed with gender dysphoria, they must also be required to undergo medical intervention including surgery, hormone treatment, or other procedures. It is only after this process that they can get identity documents in the gender of their choice.

### WPATH Standards of Care

The WPATH Standards of Care Version 7 released in 2011<sup>60</sup> is the most widely accepted document that outlines the best practices for this model. The guidelines/criteria mentioned in this section are from that document.

As the document notes: “[T]he criteria put forth in the SOC for hormone therapy and surgical treatments for gender dysphoria are clinical guidelines; individual health professionals and programs may modify them. Clinical departures from the SOC may come about because of a patient’s unique anatomic, social, or psychological situation; an experienced health professional’s evolving method of handling a common situation; a research protocol; lack of resources in various parts of the world; or the need for specific harm-reduction strategies. These departures should be recognized as such, explained to the patient, and documented through informed consent for quality patient care and legal protection.”

WPATH’s Guidelines for Feminizing/Masculinizing Hormone Therapy (one referral or chart documentation of psychosocial assessment)

1. Persistent, well-documented gender dysphoria
2. Capacity to make a fully informed decision and to consent for treatment
3. Age of majority in a given country (if younger, follow the SOC for children and adolescents)
4. If significant medical or mental concerns are present, they must be reasonably well controlled

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<sup>60</sup> Coleman, E., Bockting, W., Botzer, M., Cohen-Kettenis, P., DeCuypere, G., Feldman, J., . . . Zucker, K. (2012). Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7. *International Journal of Transgenderism*, 13(4), 165-232. doi: 10.1080/15532739.2011.700873

WPATH's Guidelines For Breast/Chest Surgery (one referral)

*Mastectomy and creation of a male chest in FtM patients:*

1. Persistent, well-documented gender dysphoria
  2. Capacity to make a fully informed decision and to consent for treatment
  3. Age of majority in a given country (if younger, follow the SOC for children and adolescents)
  4. If significant medical or mental health concerns are present, they must be reasonably well controlled
- Hormone therapy is not a pre-requisite.

*Breast augmentation (implants/lipofilling) in MtF patients:*

1. Persistent, well-documented gender dysphoria
2. Capacity to make a fully informed decision and to consent for treatment
3. Age of majority in a given country (if younger, follow the SOC for children and adolescents)
4. If significant medical or mental health concerns are present, they must be reasonably well controlled

Although not an explicit criterion, it is recommended that MtF patients undergo feminizing hormone therapy (minimum 12 months) prior to breast augmentation surgery. The purpose is to maximize breast growth in order to obtain better surgical (aesthetic) results.

WPATH's Guidelines for Genital Surgery (two referrals)

*Hysterectomy and ovariectomy in FtM patients and orchiectomy in MtF patients:*

1. Persistent, well documented gender dysphoria
2. Capacity to make a fully informed decision and to consent for treatment
3. Age of majority in a given country
4. If significant medical or mental health concerns are present, they must be well controlled
5. 12 continuous months of hormone therapy as appropriate to the patient's gender goals (unless the patient has a medical contraindication or is otherwise unable or unwilling to take hormones).

The aim of hormone therapy prior to gonadectomy is primarily to introduce a period of reversible estrogen or testosterone suppression, before a patient undergoes irreversible surgical intervention. These criteria do not apply to patients who are having these surgical procedures for medical indications other than gender dysphoria.

*Metoidioplasty or phalloplasty in FtM patients and vaginoplasty in MtF patients:*

1. Persistent, well documented gender dysphoria
2. Capacity to make a fully informed decision and to consent for treatment
3. Age of majority in a given country
4. If significant medical or mental health concerns are present, they must be well controlled
5. Twelve continuous months of hormone therapy as appropriate to the patient's gender goals (unless the patient has a medical contraindication or is otherwise unable or unwilling to take hormones)
6. Twelve continuous months of living in a gender role that is congruent with their gender identity

Although not an explicit criterion, it is recommended that these patients also have regular visits with a mental health or other medical professional.

The criterion noted above for some types of genital surgeries – i.e., that patients engage in 12 continuous months of living in a gender role that is congruent with their gender identity – is based on expert clinical consensus that this experience provides ample opportunity for patients to experience and socially adjust in their desired gender role, before undergoing irreversible surgery.

### **Strengths of this (medical model) approach**

- These standards clearly outline best practices for medical professionals concerning hormone therapy and sexual reassignment surgery – many of whom are unaware of transgender issues and lack trans\* sensitivity in medical practice
- These standards set up guidelines to ensure that people are able to make fully-informed consent to undergo transition – a process which might have significant side-effects
- These standards acknowledge gender transition as a process, rather than a single event (sexual reassignment surgery)
- These standards are approved by leading medical experts from across the world

### **Limits of this approach**

- The WPATH SOC has been widely critiqued for relying on a model of gender dysphoria / gender identity disorder. Critics argue that this pathologises trans\* experience and that this depicts trans\* people as having a ‘problem’ that needs to be ‘fixed.’<sup>61</sup>
- These standards do not take into account that medical professionals themselves may be prejudiced/biased and unwilling to grant approval for gender transition
- These standards often only fit the experiences of transsexual individuals who want to formally transition into an ‘opposite’ gender. These standards may not account for other genderqueer, gender-non conforming, or third gender people who negotiate their transitions differently.
- These processes are often very bureaucratic and take a significant amount of time to achieve. Consequently, trans\* people who may ‘pass’ as another gender than the one listed on their ID documents are increasingly susceptible for violence/discrimination in the interim waiting for approval.
- These standards do not respect the emotional and mental health of individuals who are transitioning. For many individuals transition is a confidential and very emotional process – requiring individuals to jump through so many logistical hoops to realise themselves makes this emotional journey even more difficult.
- These principles frame gender transition as something that only a transgender minority might be interested in without envisioning how gender self-determination is a right for all people, regardless of whether they identify as trans\* or not.
- Requirements that individuals must live as the ‘opposite gender’ for a certain amount of time do not address the need of trans\* or gender variant constituents who have ‘lived’ as their gender of choice for years (for example hijras and aravanis in India).
- In practice even if individuals have explicit diagnosis or approval from medical practitioners, state institutions refuse to accept this documentation (as is the case in South Africa).

### **Examples**

The countries reviewed in Appendix 1 that utilise some permutation and combination of this method of gender diagnosis are the United Kingdom, South Africa, Germany, Australia, and Japan (among others) as well as the state of Jersey.

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<sup>61</sup>See Bockting, W. (2009). Are gender identity disorders mental disorders? Recommendations for revision of world professional association for transgender health's *Standards of Care*. *International Journal of Transgenderism*: 11(21), 53-62.  
 Lev, A. (2009). The ten tasks of the mental health provider: recommendations for revision of the world professional association for transgender health's *Standards of Care*. *International Journal of Transgenderism*: 11(2), 74-99.

United Kingdom: The Gender Recognition Act (2004) in the UK recognises gender identity for trans\* communities who have gender dysphoria, lived in 'acquired dysphoria for more than two years. Trans\* people can change their legal sex by sending an application along with requisite documents (that include medical certificate for gender dysphoria) to the gender recognition panel. After scrutinizing the documents/applications the panel will provide full or interim gender recognition certificate.

South Africa: Act 49 requires trans\* people to have a note from a medical professional to change their ID documents. Any person whose sexual characteristics have been altered by surgical *or* medical treatment resulting in gender reassignment may apply for alteration of sex. While trans\* people do not have to undergo surgery, they still need a report/letter from a medical practitioner stating the nature and results of any procedures carried out and any treatment applied.

Germany: The application for a legal name change for transsexual persons has to be done at court and requires two independent evaluations by medical health practitioners appointed by the court. These reports must confirm a diagnosis of transsexuality and testify to the presence of a strong probably irreversible desire to live as the opposite gender for at least the last three years. The process for change of sex is even more complicated and requires proof of the permanent infertility of the applicant, hormone treatment and gender reassignment surgery.

Australia: Changing gender on Australian documents is possible with a certifying letter from a doctor. While sexual reassignment surgery is not required to issue a passport in the preferred gender, a letter from a medical practitioner confirming intersex status or appropriate clinical treatment for gender transition is required.

Japan: The law enables transsexual people to change their legal sex after undergoing surgery and being diagnosed with gender dysphoria by two doctors.

Jersey: Trans\* people can change their legal sex and name by applying to the Royal court for a gender recognition certificate. After getting full gender recognition certificate, relevant changes will be made in birth certificate and other official records.

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### **Self-Identification Model**

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A self-identification model of gender recognition sees right to self-determination of one's own gender is a fundamental right for all people. Individuals are not required to be diagnosed with gender dysphoria or gender identity disorder and, instead, have the right to declare their own gender and have this reflected on all of their ID documents and have the right to access both hormonal treatment and surgery.. Individuals over the age of eighteen years merely have to submit to the concerned government department a request to alter their birth certificate to reflect the self-determined gender. This, for example, is deemed sufficient when it comes to the new Gender Identity Law in Argentina.

It is important to note that this model *does not* dismiss the importance of medical intervention and treatment and this model *does not* disagree with all of the standards for healthcare outlined by WPATH. Where it makes its departure is moving away from a diagnosis/pathology model to one of self-determination and allowing trans\* people to change their ID documents and bodies without diagnoses.

The Yogyakarta Principles best express this value. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender

Identity is a set of principles relating to sexual orientation and gender identity, intended to apply international human rights law standards to address the abuse of the human rights of lesbian, gay, bisexual, and transgender (LGBT) people, and issues of intersexuality.<sup>62</sup> The preamble to the Yogyakarta Principles usefully notes that gender identity is used: “to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.<sup>63</sup>

The Yogyakarta Principles highlight legal recognition before the law based on one’s self-defined identity as a fundamental right.

*Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.*<sup>64</sup>

The Yogyakarta Principles further establish that – States shall:

- Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;
- Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity;
- Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex—including birth certificates, passports, electoral records and other documents—reflect the person’s profound self-defined gender identity;
- Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
- Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;
- Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

Furthermore, these principles also outline appropriate standards for identity documents. They hold that states must “[t]ake all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person’s profound self-defined gender identity.”<sup>65</sup>

Refusal of states to reflect chosen gender identity on documents may also violate the right to freedom of opinion and expression. As the Yogyakarta Principles note: “the right to freedom of opinion and expression...includes the expression of identity or personhood

<sup>62</sup> The Principles were developed at a meeting of the International Commission of Jurists, the International Service for Human Rights and human rights experts from around the world at Gadjra Mada University on Java from 6 to 9 November in 2006. The concluding document contains 29 principles adopted unanimously by the experts, along with recommendations to governments, regional intergovernmental institutions, civil society, and the UN itself.

<sup>63</sup> *Yogyakarta Principles*, princ. 3.

<sup>64</sup> *Yogyakarta Principles*, princ. 3.

<sup>65</sup> *Yogyakarta Principles*, princ. 3.



through speech, deportment, dress, bodily characteristics, choice of name, and other means.”<sup>66</sup>

The International Bill of Gender Rights<sup>67</sup> also establishes the right to self-determination of one’s gender identity and to medical care that allows individual to realise this.

- **The Right To Free Expression Of Gender Identity:** Given the right to define one’s own gender identity, all human beings have the corresponding right to free expression of their self-defined gender identity. Therefore, all human beings have the right to free expression of their self-defined gender identity; and further, no individual shall be denied Human or Civil Rights by virtue of the expression of a self-defined gender identity.
- **The Right To Control And Change One's Own Body:** All human beings have the right to control their bodies, which includes the right to change their bodies cosmetically, chemically, or surgically, so as to express a self-defined gender identity. Therefore, individuals shall not be denied the right to change their bodies as a means of expressing a self-defined gender identity; and further, individuals shall not be denied Human or Civil Rights on the basis that they have changed their bodies cosmetically, chemically, or surgically, or desire to do so as a means of expressing a self-defined gender identity.
- **The Right To Competent Medical And Professional Care:** Given the individual's right to define one's own gender identity, and the right to change one's own body as a means of expressing a self-defined gender identity, no individual should be denied access to competent medical or other professional care on the basis of the individual's chromosomal sex, genitalia, assigned birth sex, or initial gender role. Therefore, individuals shall not be denied the right to competent medical or other professional care when changing their bodies cosmetically, chemically, or surgically, on the basis of chromosomal sex, genitalia, assigned birth sex, or initial gender role.

### Case Study: Argentina

Argentina’s Gender Identity Law passed in 2012 is the most progressive piece of gender identity legislation in the world and the one that mostly aligns with the values of self-determination expressed in the Yogyakarta Principles.

The key provisions of the law are:

Article 1 – Right to gender identity.

All persons have the right,

- a) To the recognition of their gender identity;
- b) To the free development of their person according to their gender identity;
- c) To be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of the first name/s, image and sex recorded there.

Article 2 – Definition. Gender identity is understood as the internal and individual way in which gender is perceived by persons, that can correspond or not to the gender assigned at birth, including the personal experience of the body. This can involve modifying bodily appearance or functions through pharmacological, surgical or other means, provided it is freely chosen. It also includes other expressions of gender such as dress, ways of speaking and gestures.

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<sup>66</sup> *Yogyakarta Principles*, princ. 19.

<sup>67</sup> Although not legally binding, these principles provide a useful framework for thinking about issues of sexual orientation and gender identity. <http://inquirer.gn.apc.org/GDRights.html>

Article 3 – Exercise. All persons can request that the recorded sex be amended, along with the changes in first name and image, whenever they do not agree with the self-perceived gender identity.

Article 4 – Requirements. All persons requesting that their recorded sex be amended and their first name and images changed invoking the current law, must comply with the following requirements:

- Prove that they have reached the minimum age of eighteen (18) years, with the exception established in Article 5 of the current law.
- To submit to the National Bureau of Vital Statistics or their corresponding district offices, a request stating that they fall under the protection of the current law and requesting the amendment of their birth certificate in the records and a new national identity card, with the same number as the original one.
- To provide the new first name with which they want to be registered. In no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place.

The law legally recognises *self-perceived* gender identity of both male-to-female and female-to-male trans\* communities (Article 2). It acknowledges the rights of trans\* communities (under Article 11) to *free* personal development – sex transition by surgical interventions and or hormonal treatment. Individuals do not require surgery, hormones, or medical diagnosis or approval to change their gender on ID documents.

#### **Limits to this (self-identification model) approach**

- This self-identification model has largely only been exercised to reflect the experiences of transsexual people who aspire to transition to the ‘opposite’ gender. The Argentina law makes no accommodations for individuals who self-identify outside of the gender-dichotomy as a third or other gender.
- In Argentina there are still legal requirements such as an accompanied informed consent and authorization by competent judicial authorities to change one’s gender on ID documents. To fully reflect values of self-determination, individuals should be able to change their ID documents without the need for validation/approval from any other sources both medical and judicial.
- This model has not been used to question the legitimacy of even recording gender on ID documents. A truly progressive initiative would envision ways to make the marker of gender unnecessary in certain contexts.
- Self-determination is a value only articulated when it comes to ‘gender.’ The mandate of self-determination – especially when it comes to bodies and identity –go far beyond gender. Thus far, gender rights have been the only political campaigns to adopt this rhetoric, but the potential for radical coalition building around this value is manifold.

#### **Strengths of this approach**

- Individuals are not required to jump over as many hurdles to obtain their desired gender presentation and representation. Their own self-identification with a particular gender is seen as sufficient.
- This move depathologises gender ‘diversity and makes the process of gender transition more easy, accessible, and speedy.

## 4. POTENTIAL MODELS FOR LEGAL RECOGNITION OF GENDER IDENTITY OF TRANS PEOPLE IN INDIA

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### Options for providing identity documents (including change of gender) for trans people

Based on the current practices followed internationally, as well as some national developments, India can consider three options for facilitating change of gender in the identity documents or getting identity documents in the desired gender:

1. a 'gender recognition certificate/document' by a government authority (e.g., similar to the panel constituted by Gender Recognition Act of UK or the Tamil Nadu Aravani Welfare Board) that usually deploys a committee to endorse gender identity.
2. a medical certificate from a doctor that states the current sex/gender of the transgender person (this procedure is already being followed in some states of India). This would be specifically for change of gender from man to woman or woman to man.
3. a self-affidavit or self-endorsement of gender identity submitted via a proper channel (e.g., similar to the process in Argentina or the UID or Aadhaar in India – in which the person can self-declare as 'transgender'<sup>68</sup>). This could be for persons who want to identify as 'transgender' or other.

### Options for legal recognition of gender identity of trans people

While the identity documents for a specific purpose (such as passport and social entitlement identity card) can provide a range of options such as man, woman, transgender, male-to-female (MtF) transgender, female-to-male (FtM) transgender, and third sex/gender, there are complexities when it comes to the arena of civil rights. In particular, in a country like India where there are strong affirmative action policies for women, there are serious questions as to under what conditions a male-to-female transgender person is entitled to be recognized as a woman as per the law.

The dilemma for the law is whether to recognise transgender persons as a third category through the entire gamut of civil and criminal laws by radically amending all laws or whether to include them within the existing binary gender framework? Is there a *Via Media* where people are given the choice to either become the gender of their choice when a certain medical threshold is reached (e.g., medical certificate based on sex reassignment surgery or hormone therapy) or to be recognized as a third gender on self-certification? Can the law accommodate the diversities of trans identities as recommended in the *Via Media* option?

Overall, three options seem to be available for legal recognition of trans people in India:

Option 1 - Legal recognition of gender identity of trans people as women or men

Option 2 - Legal recognition of gender identity of trans people as a separate gender ('third gender' or 'transgender')<sup>69</sup>

Option 3 - Legal recognition of gender identity of trans people based on their choice – women/men or a separate gender ('third gender'/'transgender')

<sup>68</sup> As *Aadhaar* application has three columns for 'Gender' – Male, Female, Transgender.  
[http://uidai.gov.in/images/FrontPageUpdates/uid\\_download/enrolmentform.pdf](http://uidai.gov.in/images/FrontPageUpdates/uid_download/enrolmentform.pdf)

<sup>69</sup> Recognition of hijras/trans people as a possible "third category", "third sex" or "third gender" (these terms are loosely used in the media reports) seems to be focus of the recent public interest litigation filed by National Legal Services Authority (NALSA).  
<http://www.thehindu.com/news/national/court-notice-to-centre-states-on-transgender-issue/article3956185.ece>  
[http://articles.timesofindia.indiatimes.com/2012-10-02/india/34217135\\_1\\_transgender-community-nalsa-national-legal-services-authority](http://articles.timesofindia.indiatimes.com/2012-10-02/india/34217135_1_transgender-community-nalsa-national-legal-services-authority)

Parameters that can be considered for each of these three options are listed in Table 3. This being a background document, the purpose of providing these options is to consider the pros and cons of each of these options, and as such this brief was not intended to specifically recommend one particular course of action. Additional consultations with various stakeholders are definitely needed before arriving at solutions which best accommodate the diverse identities within trans communities.

<b>Table 3. Options for legal recognition of gender identity of transgender people in India: Parameters/Criteria that can be considered</b>			
<b>Parameters/Criteria</b>	<b>Option 1- Legal recognition of gender identity of transgender people as women or men</b>	<b>Option 2- Legal recognition of gender identity of transgender people as third gender</b>	<b>Option 3 - Legal recognition of gender identity of trans-gender people based on their choice – women/men or third sex/gender</b>
<b>Citizenship</b>	Citizen of India	Citizen of India	Citizen of India
<b>Age limit</b>	Above 18 years	Above 18 years	Above 18 years
<b>Diagnosis of gender dysphoria / Self identification</b>	Medical certificate that the person deeply identifies with the gender of his or her choice and hence to be legally recognised as that self-identified gender	Affidavit that such a person is a 'third gender' or 'transgender' (if seen as a separate gender category) given by trans community members/leaders who know the person as a transgender or third-gender person	Affidavit by the trans person, along with affidavits by friends or community members, that the applicant is man or woman or third gender/transgender. For recognition as man or woman, a medical certification process would be required.
<b>Requirement for SRS and/or hormonal therapy</b>	<i>If the person desires, hormonal therapy can be provided, unless there are medical contraindications.</i>  SRS: Either undergone SRS or emasculation  Valid medical certificate by one or more members of a team of SRS providers to this effect to be produced.	Not a pre-requisite	Not a pre-requisite for trans persons who do not want to be recognised as man/woman.
<b>Parents' or Legal guardian's consent</b>	Not necessary for people aged above 18 years.	Not necessary for people aged above 18 years.	Not necessary for people aged above 18 years.

## 5. RECOMMENDED STANDARDS FOR LEGAL RECOGNITION OF GENDER IDENTITY OF TRANS PEOPLE IN INDIA

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Even though we have provided three options for legal recognition, aiming for the following standards will place India as a progressive nation that ensures equal legal rights for all of its citizens.

- Self-determination model: Following Argentina's lead, India can choose to adopt the Yogyakarta Principles – that is, adopt a model of gender recognition that does not rely on a diagnosis of gender dysphoria by medical professionals. Rather, India's law can be aimed to allow individuals to self-identify as their own gender.
- No requirements for surgery: India can follow the lead taken by **Argentina** and depart from current standards in countries like **South Korea** and **Japan** by not requiring gender reassignment surgery, divorce, or sterilisation in order to change one's information on ID documents.
- Third gender options: Following **Pakistan** and **Nepal's** lead in recognising a third gender in all interactions between individuals and the states, India can consider allowing individuals to opt for gender categories outside of the gender dichotomy of male and female. Qualitative research can be conducted with the trans\* community to identify the best terminology/phrasing for this category. Current efforts in India that list 'Other' and 'Eunuch' could potentially be isolating for individuals who feel as if they are being stigmatised with these names.
- Transparency and flexibility: India can follow the precedent established by **Portugal**, which currently is believed to have the most expeditious and transparent procedures for changing gender identity on official documents. In Portugal a decision for a change in name and gender has to be granted within a maximum of eight days following the submission of a complete application, and individuals are allowed to change their gender and name on their ID documents at the same time (unlike **South Africa** where individuals must submit two separate applications for these changes). Additionally, individuals can be allowed to change their gender on their documents multiple times without penalty.
- Confidentiality: Following the standards adopted by the **United Kingdom**, **Jersey**, and **Argentina**, India can consider not having public records of changing gender/name on documents. For example, in **Argentina** trans\* people are specifically exempted from the requirement of announcing a name change in the newspaper. Many transsexual people who are transitioning to the 'opposite' gender do not want their previous name and gender to be discovered.
- Safeguards: This law should anticipate delays in implementation and provide safeguards for this. Following examples in **Germany** and the state of **Tamil Nadu**, perhaps individuals who request gender/name changes can be provided with temporary documentation that lists their 'old' and 'new' names to facilitate this process.
- No unanticipated legal outcomes: In the **United Kingdom**, change in legal sex does not have an effect on marriage and security benefits/pensions and do not adversely affect parenthood or succession rights. India can aim for this standard as well.

- Sexual Reassignment Surgery as a Public Health Right: Following precedents established by **Argentina, Brazil, and Iran**, sexual reassignment surgery and hormone therapy should be defined as a public health right that is made freely available at hospitals across India. As part of this mandate, resources must be provided to equip medical service providers with adequate technology and skills to undergo these highly complex surgeries.
- Consent: Individuals must be of the minimum age of consent in India to be eligible for sexual reassignment surgery. While, according to current medical guidelines, individuals need to be diagnosed with gender dysphoria to undergo SRS, individuals must be informed by trained professionals about the risks, complications, and other pertinent information associated with undergoing such surgery.
- Indian Standards of Care for Transgender People: The medical community in India must review the WPATH Standards of Care and identify what standards will be used. A procedure must be put in place to make sure that all individuals who choose to undergo such surgery are making fully informed decisions. In 2011, UNAIDS India convened a national working group to develop interim national guidelines for SRS for male-to-female transgender people in India. There is a need for a comprehensive set of guidelines for gender transition for transgender people in India, which needs to be developed or finalised with the consent of Ministry of Health.
- Non-discrimination Law: India might need a special law like the 2010 Equality Act in the United Kingdom, which tackles the issue of discrimination on the basis of gender identity as well as sex/gender reassignment.

### Other Important Considerations

Movement Building: Any litigation strategy for SRS and gender recognition must envision these rights within a larger trans\* movement – one which places similar emphasis on sensitisation of medical service providers, the criminal justice system, and other stakeholders. It is important that there be a wider campaign around trans\* rights to ensure that any legal change percolates down to the grassroots.

Coalition Building: Thus far, discussions of self-determination have been relegated to the domain of (trans)gender rights. However, legally, a public right to gender self-determination has many implications. What does such a ruling mean for people with disabilities who want to receive State funds for medical intervention to modify their bodies? A commitment to establishing diverse coalitions and re-imagining the potential of the State to accommodate bodies that require medical intervention might be helpful.

Analysis of Poverty and Development: As the WPATH standards of care express: there are differences in practices across the world because of scarcity of resources. A class-lens is particularly important with these legal campaigns. How do we make sure that these laws are accessible by all groups of people? What sort of movement infrastructure is established to push for the implementation of these laws? What does it mean to prioritise access to sexual reassignment surgery when many people still lack basic access to health care? How can we create a campaign that does not construct transgender rights as ‘special’ rights?

For example, in **Brazil** where sexual reassignment surgery is technically a public health right, many poor trans\* people are unable to access this because doctors are able to determine for themselves which medical cases to prioritise. Thus, only those of higher socio-economic classes are able to access this through private health care. Additionally, in **South**

**Africa** there are only a couple of public hospitals which have trained personnel to perform sex reassignment surgery. Also, there are not enough trained physicians in the country to meet the demand for surgery.

Cultivating partnerships with key stakeholders: Unlike gay rights, transgender rights often involve direct interventions and contributions by medical service providers, lawyers, judicial officials, the criminal justice system, and others who are involved with the process of transition and gender recognition. Therefore, it is important to build meaningful partnerships with individuals in a vast array of capacities in order to successfully realise these rights.



## 6. GLOSSARY

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### **Hijras**<sup>70</sup>

Individuals who voluntarily seek initiation into the Hijra community, whose traditional profession is badhai but due to the prevailing socioeconomic and cultural conditions, a significant proportion of them are into begging and sex work for survival. These individuals live in accordance to the community norms, customs and rituals which may vary from region to region.

### **Transgender people**<sup>71</sup>

Transgender persons usually live or prefer to live in the gender role different to the one in which they are assigned at birth. The preferred gender role may or may not be related to their sexual preferences. It is an umbrella term that includes transsexuals, cross-dressers, intersex persons, and gender-variant persons. Transgender people may or may not have undergone gender transition-related surgery or may or may not be on hormonal therapy related to their gender identity. Transgender people can be 'male-to-female' (**MtF**) or 'female-to-male' (**FtM**), and sometimes referred to as '**transgender woman / trans woman**' and '**transgender man / trans man**', respectively.

**Male-to-Female (MtF):** Adjective to describe individuals assigned male at birth who are changing or who have changed their body and/or gender role from birth-assigned male to a more feminine body or role. (From: <http://www.tghiv.com/for-providers/glossary/>)

### **Aravanis and 'Thirunangi'**

Hijras in Tamil Nadu identify as "Aravani". Tamil Nadu Aravanigal Welfare Board, a state government initiative under the Department of Social Welfare defines aravanis as biological males who self-identify themselves as a woman trapped in a male's body. Some Aravani activists want the public and media to use the term 'Thirunangi' to refer to Aravanis.

### **Jogtas/Jogappas**<sup>72</sup>

Jogtas or Jogappas are those persons who are dedicated to and serve as servants of Goddess Renukha Devi (Yellamma) – whose temples are present in Maharashtra and Karnataka. 'Jogta' refers to male servant of that Goddess and 'Jogti' refers to female servant (who is also sometimes referred to as 'Devadasi'). One can become a 'Jogta' (or Jogti) if it is part of their family tradition or if one finds a 'Guru' (or 'Pujari') who accepts him/her as a 'Chela' or 'Shishya' (disciple). Sometimes, the term 'Jogti hijras' is used to denote those male-to-female transgender persons who are devotees/servants of Goddess Renukha Devi and who are also in the hijra communities. This term is used to differentiate them from 'Jogtas' who are heterosexuals and who may or may not dress in woman's attire when they worship the Goddess. Also, the term 'Jogti hijra' differentiates them from 'Jogtis' who are biological females dedicated to the Goddess. However, 'Jogti hijras' may refer to themselves as 'Jogti' (female pronoun) or Hijras, and even sometimes as 'Jogtas'.

### **Shiv-Shakthis**

Shiv-Shakthis are feminine males who are considered to be possessed by or particularly close to a goddess. Usually, Shiv-Shakthis are inducted into the Shiv-Shakti community by senior gurus, who teach them the norms, customs, and rituals to be observed by them. In a ceremony, Shiv-Shakthis are married to a sword that represents male power or *Shiva* (deity). Shiv-Shaktis thus become the bride of the sword. Occasionally, Shiv-Shakthis cross-dress

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<sup>70</sup> This definition is based on the consensus definition in a national consultation organised by UNDP India on hijras/transgender people (held in New Delhi in 2010).

<sup>71</sup> Same reference as above.

<sup>72</sup> Chakrapani, V., Mhaprolkar, H., Basu, J., Kavi, A.R. (2007). Dynamics of men who have sex with men (MSM) and Hijras in Maharashtra: A qualitative study on sexual networks and vulnerability. The Humsafar Trust, Mumbai, India.

and use accessories and ornaments that are generally meant for women. Most people in this community belong to lower socio-economic status and earn their living as astrologers, soothsayers, and spiritual healers; some also seek alms.

### **Identity**

How one thinks of oneself, as opposed to what others observe or think about one. However, there is a close symbiosis in societies between the formation of a sense of self-identity and the social and cultural application of labels to describe people. Identities are not acquired in isolation and are profoundly social in character.

### **Sexual minorities or Sexual minority community<sup>73</sup>**

Refers to lesbian, gay, bisexual and transgender/transsexual persons as well as persons with other identities (such as kothis and hijras) as a minority group in a predominantly heterosexual population. (Sometimes referred to as '**sexuality minorities**'). These days, the terms '**Sexual minority communities**' or '**Sexual minority populations**' are used to stress that, like the people they comprise, these communities or populations are diverse.

### **Intersex**

Refers to a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that does not seem to fit the typical definitions of female or male. For example, a person might be born appearing to be female on the outside, but having mostly male-typical anatomy on the inside. Or a person may be born with genitals that seem to be in-between the usual male and female types. For example, a girl may be born with a noticeably large clitoris, or lacking a vaginal opening (From <http://www.isna.org/faq>)

### **Sex reassignment surgery (gender affirmation surgery):**

Surgery to change primary and/or secondary sex characteristics to affirm a person's gender identity. Sex reassignment surgery can be an important part of medically necessary treatment to alleviate gender dysphoria.

(Adapted from: Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People - available at: [http://www.wpath.org/publications\\_standards.cfm](http://www.wpath.org/publications_standards.cfm))

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<sup>73</sup> Chakrapani, V; Kavi, A R; Ramakrishnan, R L; Gupta, R; Rappoport, C; & Raghavan, S S (2002). *HIV prevention among men who have sex with men (MSM) in India: Review of current scenario and recommendations*. SAATHII, India. Available at [www.indianLGBThealth.info](http://www.indianLGBThealth.info)

## Appendix 1. A brief description of gender identity-related laws in other countries (in relation to sex change operation, and feminisation procedures; and procedures for changing the sex in legal documents)

Country	A brief description of law
Argentina <sup>74</sup>	<ul style="list-style-type: none"> <li>• The law legally recognize self-perceived gender identity of the both male-to-female and female-to-male trans* communities</li> <li>• The law acknowledge the rights of trans* communities under Article 11 to free ‘personal development’ – sex transition by surgical interventions and or hormonal treatment</li> <li>• The law allows legal minors to change their legal sex &amp; name and undergo sex transition with some additional legal requirements such as accompanied informed consent, authorization by competent judicial authorities etc</li> <li>• The law permits self-identified trans* communities to change their legal sex (from male to female or from female to male) and first name in birth certificate and national identity card even before sex transition by straightaway applying to National Bureau of Vital Statistics.</li> <li>• In other words, surgical intervention and or hormonal treatment is not required for self-identified trans* members to change their legal sex and name in official records. However, it is not clear, if minimum attire of trans* communities are taken into consideration (in practice).</li> <li>• Change in legal sex and name will not have implications in the existing legal entitlements to rights and legal obligations</li> </ul>
UK <sup>75</sup> – Gender Recognition Act 2004	<ul style="list-style-type: none"> <li>• The law legally recognizes gender identity of trans* communities who have gender dysphoria, lived in ‘acquired gender’ for more than 2 years, and intends to live in the ‘acquired gender’ until death (within binary gender model. That is from male to female or, from female to male)</li> <li>• Trans* communities can change their legal sex by sending an application along with requisite documents (that includes medical certificate for gender dysphoria) to gender recognition panel. After scrutinizing the documents/applications, the panel will provide full or interim gender recognition certificate based on marital status of applicants (heterosexual marriage)</li> <li>• After getting full gender recognition certificate, the person acquires for all purpose, the sex to which he or she has changed (marriage, child adaptation). However, there are some restrictions levied to transsexuals relating to gender-affected sports and gender-specific offences for exercising their rights in newly acquired sex</li> <li>• It ensures confidentiality of information (former life/identity of trans* communities)</li> </ul>

<sup>74</sup> <http://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf>

<sup>75</sup> <http://www.gires.org.uk/assets/Legal-Assets/GRA.pdf>

	<ul style="list-style-type: none"> <li>• Change in legal sex does not affect parenthood, succession rights, and peerages</li> <li>• Change in legal sex has effect on marriage and social security benefits/pensions</li> </ul>
<b>Jersey<sup>76</sup> - Gender Recognition (Jersey) Law 2009</b>	<ul style="list-style-type: none"> <li>• The law legally recognize gender identity of the both male-to-female and female-to-male transsexuals</li> <li>• It allows transsexuals of 'full' age to change their legal sex and name by applying to the Royal court for gender recognition certificate. After getting full gender recognition certificate, relevant changes will be made in birth certificate and other official records/registers. From there afterwards, the person acquires for all purpose in Jersey, the sex to which he or she has changed (marriage, child adaptation). However, there are some restrictions levied to transsexuals relating to gender-affected sports and gender-specific offences for exercising their rights in newly acquired sex</li> <li>• Transsexuals heterosexually married will not be given full gender recognition unless they provide evidence of annulment/divorce/death of their spouse</li> <li>• Transsexuals based in Jersey who have done SRS and marriage outside Jersey need to apply for gender recognition certificate to get legal recognition of their sex and marriage respectively</li> <li>• It ensures confidentiality of information</li> <li>• Change in legal sex does not affect parenthood and succession rights</li> </ul>
<b>South Africa<sup>77</sup> – Alteration of Sex Description and Sex Status Act</b>	<ul style="list-style-type: none"> <li>• The law allows a transgender person to apply to the Department of Home Affairs to have the 'sex description' altered on their birth record.</li> <li>• Once the birth record is altered they can be issued with a new birth certificate and identity document, and are considered "for all purposes" to be of the new sex.</li> <li>• The specific definition of gender reassignment in this Act refers to reassigning a person's sex by changing physiological or other sexual characteristics, and includes any part of such a process. Thus the transgender person is not required to have had genital surgery in order to have the sex description altered.</li> </ul>
<b>Japan<sup>78</sup> - Act on Special Cases in Handling Gender for People with Gender Identity Disorder – with effect from 16 July 2004</b>	<ul style="list-style-type: none"> <li>• The law enables transsexual people to change their legal sex.</li> <li>• Despite the fact that sex reassignment surgery and hormone replacement therapy are mandatory for a legal sex change, it is not paid for by national health insurance.</li> </ul>

<sup>76</sup> [http://www.jerseycommunityrelations.org/library/document/185310\\_Gender\\_Recognition\\_\(Jersey\)\\_Law\\_2009.pdf](http://www.jerseycommunityrelations.org/library/document/185310_Gender_Recognition_(Jersey)_Law_2009.pdf)

<sup>77</sup> [http://en.wikipedia.org/wiki/Legal\\_aspects\\_of\\_transsexualism](http://en.wikipedia.org/wiki/Legal_aspects_of_transsexualism)

<sup>78</sup> [http://en.wikipedia.org/wiki/Legal\\_aspects\\_of\\_transsexualism](http://en.wikipedia.org/wiki/Legal_aspects_of_transsexualism)

## Appendix 2. Relevant international precedents in relation to gender identity

### People who want to change their assigned gender/sex do not have a pathology

The World Professional Association of Transgender Health released a statement in May 2010 urging the de-psychopathologization of gender nonconformity worldwide. This statement noted that “the expression of gender characteristics, including identities, that are not stereotypically associated with one’s assigned sex at birth is a common and culturally-diverse human phenomenon [that] should not be judged as inherently pathological or negative.”<sup>79</sup>

### States should allow people to modify the gender on their ID documents

The Yogyakarta Principles compel states to “Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex -- including birth certificates, passports, electoral records and other documents -- reflect the person's profound self-defined gender identity.”<sup>80</sup>

These procedures must be “efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned”<sup>81</sup> and States must ensure that these changes “will be recognized in all contexts where the identification or disaggregation of persons by gender is required by law or policy.”<sup>82</sup>

### Compulsory sterilization or surgery is a violation of rights

Principle 18 Protection from Medical Abuses of the Yogyakarta Principles states that “No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.”<sup>83</sup>

Recommendation #4 of the Human Rights and Gender Identity Best Practice Catalogue compiled by ILGA-Europe (ilga-europe.org) is to “abolish sterilization and other compulsory medical treatment as a necessary legal requirement to recognise a person’s gender identity in laws regulating the process for name and sex change.”

Furthermore, Principle 3: The Right to Recognition Before the Law of the Yogyakarta Principles explicitly states that:

“No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.”<sup>84</sup>

<sup>79</sup> WPATH Board of Directors. (2010). De- psychopathologisation statement released May 26, 2010. Retrieved from [http://wpath.org/announcements\\_detail.cfm?pk\\_announcement=17](http://wpath.org/announcements_detail.cfm?pk_announcement=17)

<sup>80</sup> *Yogyakarta Principles, princ. 3C*. See <http://www.yogyakartaprinciples.org/> for full text.

<sup>81</sup> *Yogyakarta Principles, princ. 3D*.

<sup>82</sup> *Yogyakarta Principles, princ. 3E*.

<sup>83</sup> *Yogyakarta Principles, princ. 18*.

<sup>84</sup> *Yogyakarta Principles, princ. 3*.

## Compulsory divorce is a violation of rights

The domestic constitutional courts of both **Austria** and **Germany** have ruled that a change of sex on birth certificates should not require a mandatory divorce.

In 2006, the **Austrian Constitutional Court** repealed<sup>85</sup> the mandatory divorce requirement put in place by the Ministry of Interior through a decree regulating changes on birth certificates of transsexual people. In this case, the complainant was a trans woman who (prior to her transition) had married another woman and had two children with her. Due to the decree's divorce obligation, following her gender reassignment, the trans woman was presented with two unacceptable choices, i.e. (i) continuing her family life while having her identification documents constantly out her, or (ii) change her documents and certificates at the cost of losing her legal ties to her family. The Court ruled that the decree was unlawful as it could not find any law expressly prohibiting a change of birth certificate on the basis that a person is married. Following this decision, married trans people in Austria no longer need to obtain a divorce prior to getting their documents adapted to their new name and gender. However, marriage certificates have not been adapted, and only trans people residing in Vienna can remain in an existing marriage without disclosing their gender reassignment.

In 2008, the **German Federal Constitutional Court** declared<sup>86</sup> that prerequisites for the statutory recognition of transsexuals according to Article 8.1 nos. 3 and 4 of the *Transsexuellengesetz* were unconstitutional. This time, the complainant was a sixty-two-year-old trans woman who had requested a registered partnership with her female partner. Following her request, she was denied the ability to enter into a partnership on the basis that she had not yet undergone gender reassignment to change her gender marker to female (see 3.2.3) and that hence she and her partner could not have access to the institution of registered partnership as it was exclusively reserved for same-sex partners. The local court allowed her no other choice than to marry, in spite of the fact that the women argued that she could not undergo gender reassignment surgery (due to her age and the likely negative consequences to her health) and that she wanted to enter into a registered partnership to ensure that her trans identity is not made visible.

Following this decision, she took her complaint to the Constitutional Court, which ruled that forcing a trans women to enter into a marriage as a man, and as a result, to assign her a gender role that contradicts her gender identity was incompatible with the provisions in German Constitutional law protecting people's intimate sphere. In addition, the fact that trans people have to undergo gender reassignment surgery to enter into a registered civil partnership with their same-sex partner was incompatible with their right to sexual self-determination and physical integrity. The Constitutional Court therefore overruled the local court's ruling as it violated the complainant's fundamental rights and invalidated the problematic dispositions of the *Transsexuellengesetz* mentioned above.

In the view of the Commissioner for Human Rights:

"Both rulings call on the state to accept that protecting all individuals without exception from state-forced divorce has to be considered of higher importance than the very few instances in which this leads to same-sex marriages."<sup>87</sup>

## Sexual Reassignment Surgery (SRS) is essential and medically necessary

While many transsexual, transgender, and gender nonconforming individuals find comfort with their gender identity, role, and expression without surgery, for many others surgery is

<sup>85</sup> *Verfassungsgerichtshof* [Constitutional Court], V 4/06-7, 08.06.2006

<sup>86</sup> *Bundesverfassungsgericht* [Federal Constitutional Court], BVerfG, 1 BvL 10/05, 27.5.2008

<sup>87</sup> Commissioner for Human Rights (2009), *Gender Identity and Human Rights: Issue Paper*, Strasbourg: Council of Europe, p 23



essential and medically necessary.<sup>88</sup>

Follow-up studies have shown an undeniable beneficial effect of sex reassignment surgery on postoperative outcomes such as subjective well-being, cosmesis, and sexual function.<sup>89</sup>

### SRS should be covered by public health services for free

Recommendation #5 of the Human Rights and Gender Identity Best Practice Catalogue compiled by ILGA-Europe (ilga-europe.org) is to “make gender reassignment procedures, such as hormone treatments, surgery and psychological support, accessible for transgender persons, and ensure that they are reimbursed by public health insurance schemes.”

The World Professional Health Association for Transgender Health “urges state healthcare providers and insurers throughout the world to eliminate transgender or trans-sex exclusions and to provide coverage for transgender patients including the medically prescribed sex reassignment services necessary for their treatment and well-being, and to ensure that their ongoing healthcare (both routine and specialised) is readily accessible.”<sup>90</sup>

Furthermore, the Yogyakarta Principles explicitly include Principle 17: The Right to the Highest Attainable Standard of Health: “Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.”<sup>91</sup> In addition, Principle 3 establishes that States must “undertake targeted programs to provide social support for all persons experiencing gender transitioning or reassignment.”<sup>92</sup>

### It is possible to recognise a third gender

Recognising a third gender is a completely legitimate political aim and process and has been realised in Nepal. The implications of doing so are widespread. As Human Rights Watch argues: “[W]henever the law currently allows for men and women to be treated differently, despite the general prohibition on discrimination on the grounds of sex, the law would need to be rewritten to take account of this category, and across societies measures would be required to adjust to this new legal framework.”<sup>93</sup>

In 2007, the Nepali Supreme Court in its judgement recognising the third gender as a legal identity noted:

*The fundamental rights comprised under Part III of the Constitution are enforceable fundamental human rights guaranteed to the citizens against the state. For this reason, the fundamental rights stipulated in Part III are the rights similarly vested in the third gender people as human beings. The homosexuals and third gender*

<sup>88</sup> Hage, J. J., & Karim, R. B. (2000). Ought GIDNOS get nought? Treatment options for nontranssexual gender dysphoria. *Plastic and Reconstructive Surgery*, 105(3), 1222- 1227.

<sup>89</sup> De Cuyper, G., T'Sjoen, G., Beerten, R., Selvaggi, G., De Sutter, P., Hoebeke, P., . . . Rubens, R. (2005). Sexual and physical health after sex reassignment surgery. *Archives of Sexual Behavior*, 34(6), 679-690. doi:10.1007/s10508-005-7926-5

Gijs, L., & Brewaeys, A. (2007). Surgical treatment of gender dysphoria in adults and adolescents: Recent developments, effectiveness, and challenges. *Annual Review of Sex Research*, 18, 178-224.

Klein, C., & Gorzalka, B. B. (2009). Sexual functioning in transsexuals following hormone therapy and genital surgery: A review (CME). *The Journal of Sexual Medicine*, 6(11), 2922-2939. doi:10.1111/j.1743-6109.2009.01370.x

Pfäfflin, F., & Junge, A. (1998). Sex reassignment. Thirty years of international follow-up studies after sex reassignment surgery: A comprehensive review, 1961-1991. *International Journal of Transgenderism*. Retrieved from <http://web.archive.org/web/20070503090247/http://www.symposium.com/ijt/pfaefflin/1000.htm>

<sup>90</sup> WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage for Transgender and Transsexual People Worldwide, online at [www.wpath.org/medical\\_necessity\\_statement.cfm](http://www.wpath.org/medical_necessity_statement.cfm)

<sup>91</sup> Yogyakarta Principles, princ. 17

<sup>92</sup> Yogyakarta Principles, princ. 3F.

<sup>93</sup> Human Rights Watch, Controlling Bodies, Denying Identities: Human Rights Violations Against Trans People In The Netherlands 80 (2011), available at <http://www.hrw.org/sites/default/files/reports/netherlands0911webwcover.pdf>



*people are also human beings as other men and women are, and they are the citizen of this country as well.... Thus, the people other than 'men' and 'women' including the people of 'third gender' cannot be discriminated on the ground of sexual orientation.*<sup>94</sup>

In 2009, the Pakistani Supreme Court passed an order, recognising the eunuch [sic] community:

*It is to be noted that this class (eunuchs) has been neglected merely on account of gender disorder in their bodies, otherwise they are entitled to enjoy all the rights granted to them by the Constitution being its subject including their rights in inherited property because normally to deprive them from their legitimate rights sometimes families disowned them. As far as existing laws are concerned, there are no provisions on the basis of which they can be deprived from their legitimate rights to inherit properties.*<sup>95</sup>

Furthermore international passports indicate that sex may be listed as unspecified.<sup>96</sup> ICAO standards for Machine Readable Passports indicate that the 'sex' field must be filled in as follows:

- Sex of the holder, to be specified by use of the single initial commonly used in the language of the State where the document is issued and, if translation into English, French or Spanish is necessary, followed by a dash and the capital letter F for female, M for male, or X for unspecified.<sup>97</sup>
- In the Machine Readable Zone of the passport, sex must be marked as "F = female; M = male; < = unspecified."<sup>98</sup> X is replaced with a "<" filler symbol, which is used in other places, for example, in place of hyphens in names.<sup>99</sup>

### Good strategies for lobbying for transgender rights in Asia

In their report "Transgender People's Access to Sexual Health and Rights: A Study of Law and Policy in 12 Asian Countries" Sood (2009) establishes some of the best strategies that have been useful in lobbying for trans\* rights in Nepal which might be useful in the Indian context.<sup>100</sup>

- Making arguments of the personhood and naturalness of trans\* subjectivities
- Citing case law and highlight international jurisprudence to answer the basic question: Can there be discrimination based on sexual orientation and gender identity?
- Reference the country's Constitution and international treaties – including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) – to make the case for non-discrimination, equality, protection and promotion of human rights. For example as used in Nepal: When the bench noted that the ICCPR does not list sexual orientation and gender identity as grounds for non-discrimination, it was argued that the Covenant states "any other grounds" for the purpose of covering all grounds, and that every individual should be protected from discrimination of any kind. Hari elaborated: "The bench then noted that in *Toonen v. Australia*, the term 'sex' was interpreted as including sexual orientation, to which we responded that while this could be done, sexual orientation also emerges as a separate ground.

<sup>94</sup> *Sunil Babu Pant and others v. Nepal Government and others*, <http://www.gaylawnet.com/laws/cases/PantvNepal.pdf> accessed on 26 April 2010.

<sup>95</sup> *Mohammad Aslam Khaki vs S.S.P (Operations) Rawalpindi and others*, Constitution Petition No. 43 of 2009.

<sup>96</sup> INT'L CIVIL AVIATION ORG., *supra* note 65, pt. 2, vol. 1, fig.III-1.

<sup>97</sup> *Id.* pt. 1, vol. 1, § IV, para. 8.6.

<sup>98</sup> *Id.* pt. 1, vol. 1, § IV, para. 9.7.

<sup>99</sup> *Id.* pt. 1, vol. 1, § IV, paras. 9.6–7.

<sup>100</sup> Sood, N. (2009). *Transgender People's Access to Sexual Health and Rights: A Study of Law and Policy in 12 Asian Countries*. Asian-Pacific Resource and Research Centre for Women (ARROW).

- Providing example of other Southern constitutions (for example South Africa and Fiji)
- The presence of an affected party in the courtroom
- Pointing out that non-heterosexuality and transgenderism are not new in our society, and that history and religion have recorded their presence abundantly.
- Citing international respected organizations
- Explain how public morality will not be disturbed if LGBT people are granted rights: The problem is not with the behaviour of transgender people, but with lack of understanding of them.
- It is not enough to prevent violations; we need to demand from our governments to respect, protect, promote and fulfil rights.

### **Appendix 3. Amendments that might be required in Indian laws if the option of legal recognition of 'third gender' (as a separate gender category) is considered**

The following Indian laws may require modifications.

#### **a) The Penal Code 1860**

The Indian Penal Code under Section 10 defines man and woman. The term 'man' denotes a male human being of any age; the term 'woman' denotes a female human being of any age. It is not clear where transgender persons will fit in. If sex reassignment is recognised then, the persons will be recognised in the gender into which they transit. However, the category of third sex/gender will need to be specifically incorporated into the definition of person so that all persons can be protected from crimes. While such a recognition would mean that the definitions of 'wife', 'husband', 'adultery', as incorporated in Sections 497, 498 and 498A as well as 'wife' in Section 125 IPC will have to be read to include transgender persons.

#### **b) Personal Laws**

The right to marry is again contingent on the question of gender with only men and women entitled to enter into the relationship of marriage. There is also a heterosexual specificity to the relationship of marriage with only men entitled to marry women. While the relationship of marriage obviously disentitles homosexual relationships, there is no bar on those who are transgender and transit legally to a gender apart from the gender of their birth from entering into this relationship. However, if the person is then recognized as third gender then technically one stands disentitled from entering into the relationship of marriage until and unless there is a simultaneously an amendment of the Hindu Marriage Act, The Christian Marriage Act and Special Marriage Act recognizing the third sex/ third gender as capable of entering into marital relationships.

*Getting to the right of adoption under the Hindu Adoption Act:*

Section 7

Any male Hindu of sound mind and not a minor has the capacity to take a son or a daughter in adoption.

Section 8

Any female Hindu of sound mind and not a minor ... has the capacity to take a son or daughter in adoption.

Again unless there is an amendment to this law, there will be no possibility of this right accruing to those of the third sex/gender.

### *Inheritance*

When it comes to the question of succession again the law is clearly gendered. The Hindu Succession Act under Section 2(f) defines heir to mean any person - male or female who is entitled to succeed to the property of the intestate under this Act. When it comes to defining who is capable of inheriting Section 6 notes:

....the daughter of a coparcenor shall.-

- (a) by birth become a coparcenor in her own right; the same manner as the son here;
- (b) have the same rights in the coparcenary property as she would have had if she had been a son.

What is clear is that the Hindu Succession Act grants the right to succession to sons and daughters. The third sex/gender is not envisaged within the category of this statute.

The Indian Succession Act which governs the devolution of property among Christians is less clear. Under Sections 36-40 provision is made for the devolution of property if a Christian dies intestate. Interestingly the statute only uses the language of surviving children without getting into the notion of gender of the child. However, case law interpretation of the term child has always been about whether the term child includes both male and female with the courts upholding the position that child includes both male and female.<sup>101</sup> The position with respect to third sex/third gender is not decided by the judiciary.

### **c) Labour law**

Employees Compensation Act, 2011

The definition of a dependent who is entitled to compensation on death of the employee is gendered.

Under Section 2(d) the dependent is:

- (1) A widow, a minor son, an unmarried daughter or a widowed mother
- (2) If wholly dependent on the earnings of a workman at the time of death, a son or daughter who has attained the age of eighteen years and who is infirm.

Thus, on the face of it the third sex or third gender is not envisaged when one uses the phrase 'son or daughter'.

### **d) Equal Remuneration Act**

Section 4

No employer shall pay to any worker employed by him in an establishment or employment remuneration, whether payable in cash or in kind at rates less favourable than those at which remuneration is paid by him to the workers of the opposite sex in such establishment or employment for performing the same work or work of a similar nature.

The other areas of labour law where gender is not a relevant category the operative word used is person and potentially broad enough to cover the third gender concept . E.g.:

- Bonded Labour Prohibition Act
- Contract Labour Regulation and Prohibition Act
- Minimum Wages Act
- Unorganised Workers Act

### **e) Insurance Law**

Under the Employees State Insurance Act, 1948:

[(6-A) dependant means any of the following relatives of a deceased insured person, namely:

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<sup>101</sup> Ma Khin v. M Ahma , AIR 1934 Rang 72.

2 [(i) a widow, a legitimate or adopted son who has not attained the age of twenty-five years, an unmarried legitimate or adopted daughter; ]

3 [(ia) a widowed mother ;]

(ii) if wholly dependent on the earnings of the insured person at the time of his death, a legitimate or adopted son or daughter who has attained the age of 4[twenty-five] and who is infirm ;

(iii) if wholly or in part dependent on the earnings of the insured person at the time of his death,

(a) a parent other than a widowed mother,

(b) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married and a minor or if widowed and a minor,

(c) a minor brother or an unmarried sister or a widowed sister if a minor,

(d) a widowed daughter-in-law,

(e) a minor child of a pre-deceased son,

(f) a minor child of a pre-deceased daughter where no parent of the child is alive, or

(g) a paternal grand-parent if no parent of the insured person is alive ;]

[(11) family means all or any of the following relatives of an insured person, namely :

(i) a spouse ;

(ii) a minor legitimate or adopted child dependent upon the insured person ;

(iii) a child who is wholly dependent on the earnings of the insured person & who is

(a) receiving education, till he or she attains the age of twenty-one years,

(b) an unmarried daughter ;

(iv) a child who is infirm by reason of any physical or mental abnormality or injury and is wholly dependent on the earnings of the insured person, so long as the infirmity continues;

(v) dependant parents, whose income from all sources does not exceed such income as may be prescribed by the Central Government ;

(vi) in case the insured person is unmarried and his or her parents are not alive, a minor brother or sister wholly dependant upon the earnings of the insured person ;]

In terms of the understanding of both family as well as dependents, the categories of gender are inescapable. If a person is classified as third sex/third gender the person will not be considered a spouse, a daughter, a son or a widow effectively disentitling the person from any benefits under the said Act.



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