

LEGAL GENDER RECOGNITION IN INDIA: A LEGAL, POLICY AND PRACTICE REVIEW

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Contents

Acknowledgments.....	3
I. Introduction.....	4
A.Principle versus Practice.....	4
B. Methodology and Scope	5
C Overview of the Indian Legal System.....	6
II. Legal Protection	8
A. The NALSA Case.....	8
B. Subsequent Decisions.....	11
C. Policies	14
D. Other Executive Action.....	15
D. Draft Legislation	16
E. International Obligations	19
III. Gender Recognition.....	20
A.Diluting the self-identification principle.....	20
B. Procedural requirements for obtaining identity documents.....	22
C. Impact and Implementation.....	27
D. Links between Medical Diagnosis, Availability of Gender Affirming Surgery and Legal Gender Recognition	29
IV. Criminalization	33
A. Explicit Criminalization of Gender Expression.....	33
B. Criminalization of Sexual Acts associated with Transgender Persons.....	34
C. Criminalizing livelihood options that support the transgender community	35
V. Conclusion.....	37
Appendix A.....	39

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⁴ The other countries are: Bangladesh, Pakistan, Nepal, China, the Philippines, Indonesia, and Thailand.

I. INTRODUCTION

A. Principle versus Practice

Early in 2016, a 24 year old transwoman approached the Gazette of India. It had been two years since the Supreme Court passed the *NALSA v. Union of India* judgment that guaranteed transgender persons the right to their chosen gender identity as a constitutional right. In this case, the transwoman wanted her given name officially changed to her preferred name, Jackie Lynn, along with a change in her gender markers to female. She approached the Gazette with an affidavit and newspaper advertisement relaying her change, only to have the official refuse to make the requisite notification as mandated. The reason that was given: she had not supported her documents with a doctor's certificate attesting to her having had gender affirming surgery. Her lawyer who had accompanied her challenged this through mentioning the Supreme Court's guidelines in *NALSA*. When the officer's stance remained unchanged, they asked him to simply change the name without notifying a change of gender – which the officer again refused to do, insisting that Jackie was a woman's name.

If the *NALSA* judgment were to be followed in principle, Jackie should not have encountered any of these problems. Even beyond the frame of *NALSA*, the Yogyakarta Principles on Sexual Orientation and Gender Identity tell us that the right to self-determination and recognition before the law are fundamental human rights belonging to everyone without distinction including transgender people. If self-identification was truly a guaranteed principle, there would be no question of the official asking for medical proof. If the law was truly focused on delinking gender assigned at birth from the individual's chosen gender, the question of refusing a name change on the grounds that the requested name was not reflective of the gender assigned at birth would not arise.

What does it mean to truly provide a right to legal gender recognition? How systemic is the disconnect between the guarantees under the law, and its administered practice when it comes to providing identity documents to transgender persons? What is the broader legal sphere that governs transgender identity both in terms of providing civil rights to transgender persons or criminalizing them? This report attempts to answer some of these questions. This first section will provide a brief overview of the Indian legal system and the methodology of this report. The next section will look at the legal framework that pertains to providing protection or benefits to the transgender community followed by a section explicitly focusing on the question of legal gender recognition for transgender persons. This chapter will will examine in detail how

different identity documents regulate transgender identity, assessing the different ways in which these requirements - whether in principle or practice - track with the right to self-identification. Finally, we will take a brief detour into the legal framework that operates to criminalize transgender persons directly or indirectly before arriving at our conclusion.

B. Scope and Methodology

This study has been put together through a number of different methods. A consultation was initially held in January 2016 to introduce the project to a range of stakeholders, including members of the transgender community as well as State actors responsible for creating relevant laws and policies. This was followed by an assessment and analysis of laws, policies, regulations and court decisions, including how they have been implemented in practice. Following this, a second dialogue was held in September 2016 where the findings of the report were presented, and comments and suggestions solicited.

The chapters relating to protections and benefits as well as criminalization rely on research based on laws, regulations, court decisions and policies. The chapter dealing with legal gender recognition has involved looking at information presented through department websites, filing Right to Information requests with the concerned departments⁵, and interviewing officials at specific sites. In addition to this, we have undertaken interviews with key informants which include lawyers, activists and members of the transgender community to supplement the primary information. In all cases, interviews have been anonymized.

For the purposes of this study, the review has been conducted at multiple levels: in the sections where we look at the broad legal frame concerning transgender persons, we have looked at both national laws and state laws. Given the limited time period, we narrowed our focus to look at State-specific policies in the sections specifically looking at identity documents, in particular in the states of Karnataka and Delhi. The reasons for choosing these two states are varied: Karnataka features a space of particularly robust transgender activism and engagement with the state. Delhi was chosen by virtue of its position as the capital and its proximity to the various central authorities ultimately responsible for the regime relating to gender recognition.

⁵ The RTI allows individuals to file an application with the relevant government department to receive specified details within a 30 day time period. Since the inception of the RTI Act in 2005, the process has become a crucial tool to enhance accountability from the State.

C. Overview of the Indian Legal System

The Indian Constitutional framework is very important when it comes to protecting the rights of transgender persons. In a constitutional democracy, with a strong commitment to fundamental rights the judiciary can protect minorities who suffer from deeply rooted discrimination even in the face of majoritarian prejudices. Thus for the transgender community the fact that the Constitution exists provides a significant lever for both protecting and advancing their rights regardless of the stance taken by parliament and the executive of the day.

India follows a common law system. Though the word “federation” is not mentioned in the Constitution, it is quasi federal in nature. The traditional characteristics of a federal system mark the system - Constitutional supremacy, an independent judiciary and division of power between the Union and the State. Unlike a more purely federal system like the United States, the judiciary operates as an integrated whole - there are no federal courts to decide federal questions exclusively. The doctrine of separation of powers operates with separate spheres demarcated for the executive, legislature and judiciary. However, case law from the Supreme Court indicates that the parliament has a very limited power to amend several fundamental parts of the constitution, including those Articles related to the right to equality before the law and equal protection under the law, the right to life and personal liberty, and the right to freedom of expression. Primacy in interpreting the Constitution in this case lies with the Supreme Court.

The court system has proved significant for the transgender community as when there is legislative and executive indifference the judiciary becomes a tool to goad the executive and parliament into action, the NALSA decision being the strongest example. One of the fundamental rights, Article 32, provides for the right to approach the Supreme Court of India for the enforcement of rights guaranteed under Part III. The Court stands as a final court of appeal from any judgment of a subordinate court whether in civil, criminal or other matters. The Court also exercises advisory jurisdiction which it may exercise on the prerogative of the President to render its opinion on questions of public importance.

Subordinate to the Supreme Court are the various State High Courts, which may be approached for constitutional remedies under Article 226. The Courts again enjoy a broad jurisdiction including for civil and criminal matters, besides having supervisory powers over subordinate courts under them. The subordinate courts, at the level of district and below that, have largely similar structures across the country, dealing with civil and criminal cases in accordance with their respective jurisdictions. In addition to

these Courts there are a number of special courts and tribunals established across the country to govern specific areas of law. Ranging from tax, environment, motor accidents and intellectual property claims to name a few, the purpose of these courts is to lower case burdens on the existing system while providing speedy relief to the parties.

Coming to the legislative process, laws are passed by the Central as well as State legislatures. The legislative competence with respect to areas of law is set out in the Constitution, with some areas of law falling under the concurrent list under which both states and the center have the power to legislate.⁶ Central laws are usually applicable throughout the country except to the State of Jammu and Kashmir. State laws are applicable within the territory of the respective state. Where a state legislature makes an amendment to a central law, the state law must receive presidential assent if it is repugnant to the latter.⁷

Beyond laws enacted by the legislature, the executive can enact rules and regulations which also have the force of law - these are often more procedural in nature, serving to provide a mechanism to implement existing statutory provisions.

Customary/ religious laws are applied within the realm of what is called personal law - relating to matters of marriage, divorce, succession, and adoption amongst others. Many of these laws stand codified, though some continue to be governed by uncodified custom. It is important to understand the wide meaning that law has in India as the impact on the transgender community can be through a range of laws including legislations which prohibit begging, executive orders which regulate gender recognition as well as customary practices which govern marriage.

⁶Article 245 of the Constitution of India.

⁷ Article 254(2) of the Constitution of India

II. LEGAL PROTECTION

In terms of enabling provisions, the most crucial decision which has significantly transformed the legal regime relating to transgender rights in the Court is the Supreme Court of India's decision in *National Legal Services Authority (NALSA) v. Union of India*.⁸ Passed on the 15th of April, 2014, this case was considered an instant landmark, and became the reference point for just about every kind of intervention relating to transgender rights that followed, whether it was appellate court decisions, state policies or central bills relating to transgender rights. This section will therefore begin with an extensive analysis of the decision, followed by an analysis of subsequent decisions and policies that attempt to implement the orders laid down in the NALSA judgement. .

A. *The NALSA Case*

The case emerged from a writ filed by NALSA asking the Court to recognize and grant a broad slew of rights to transgender individuals. NALSA's original writ only dealt with "third-gender" persons, but by the time the Court heard final arguments, there were other intervenors in the matter whose submissions had broadened the idea of what constituted the transgender community. It was heard before a two-judge bench of the Supreme Court, comprised of Justice K.S. Panicker Radhakrishnan, and Justice Arjan Kumar Sikri.

As mentioned above, the judgment was immediately considered a landmark, both in terms of its expansive reading of constitutional rights to empower transgender individuals, along with its wide ranging directions that promised to provide equal citizenship to a historically marginalized group.

In its decision, the Court affirmed that the transgender community was deprived of a range of fundamental rights. It held that not recognizing gender identity is violative of the right to equality (Article 14)⁹ and the State has to act to ensure that the promise of equal protections of the laws applies to transgender persons. The court also concluded that discrimination on the ground of sex¹⁰ includes 'gender identity'. It explained that "sex" was included in these articles to prevent different treatment of people simply because they do not behave in the way that is expected of their gender.

⁸National Legal Services Authority versus Union of India, 3 (2014) 5 S.C.C. 438, available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41411> (hereinafter NALSA).

⁹ Para 54, NALSA

¹⁰ Para 56, NALSA

The Court also concluded that the right to freedom of speech and expression (under Article 19(1)a) includes the right to expression of one's self identified gender.¹¹ Since self-identified gender can be expressed through dress, words, action or behaviour or any other form. A transgender person's personality, could be expressed by the individual's behaviour and presentation. The State thus cannot prohibit, restrict or interfere with a transgender person's expression of such personality, subject to "reasonable restrictions" as mentioned under Article 19(2), such as public order, decency and morality.

Furthermore, the Court stated that gender is a very important part of a person's identity and that recognition of self-defined gender identity is part of the fundamental right to dignity.¹² The Court had in the past noted that dignity included the right to express one's self in different ways. Given that gender constituted the core of one's sense of being as well as an integral part of the person's identity, the recognition of an individual's gender identity would lie at the heart of the right of dignity.

Coming to its order, the Court directed Centre and State Governments to legally recognize gender identity, whether it is third gender, or if it is of persons changing their gender from male to female or from female to male.¹³ With respect to the former, the Court recognized that fundamental rights are available to the third gender in the same way as they are available to males and females. Further, not recognizing third gender in both criminal and civil laws like marriage, adoption and divorce laws would be a form of discrimination against the third gender. For recognizing gender change from male to female or female to male, the Court said a "psychological test", should be followed instead of a "biological test". They also note that insisting on "Sex Reassignment Surgery (SRS)"¹⁴ as a condition for changing one's gender was illegal.

The Court didn't provide a specific procedure for recognizing gender identity. Three months before the judgment, an Expert Committee Report on Issues Relating to Transgender Individuals was released by the Ministry of Social Justice and Empowerment.¹⁵ Amongst other points, the Expert Committee Report itself allows

¹¹ Para 62, NALSA.

¹² Para 67, NALSA.

¹³ Para 129, NALSA.

¹⁴ The quotation marks reflect the fact that this is the Court's chosen terminology. Where other authorities have chosen to use similar terminology, the term has been placed in quotations as well. The authors have otherwise used the more human rights friendly term of "Gender-affirming surgery" in this document.

¹⁵ Para 130, NALSA.

people to choose any gender without requiring surgery or hormone treatment.¹⁶ The Court held that its declarations would be implemented keeping in mind the recommendations of the Report. However, it should be noted that the Ministry of Social Justice and Empowerment did not officially submit the Report to the Supreme Court during the course of the hearings. As a result, the judgment does not take substantive cognizance of the report's findings, even as its declarations complement the more detailed recommendations of the report.

Other declarations in the judgment related to socio-economic rights more broadly, and specific measures relating to public health and public awareness.¹⁷ With respect to socio-economic rights, Centre and State Governments were asked to formulate various social welfare schemes for the community and to treat the community as socially and economically backward classes within the meaning of Article 16(4) of the Constitution.¹⁸ They were also asked to give reservation in educational institutions and for public appointments. As far as Public Health and Sanitation was concerned, Centre and State Governments were directed to take proper measures to provide medical care to Transgender persons in the hospitals and also provide them separate public toilets and other facilities. They were directed to operate separate HIV sero-surveillance for transgender persons. Finally, with respect to stigma and public awareness, Centre and State Governments were asked to take steps to create public awareness so that Transgender persons will feel that they are also part and parcel of the social life and not be treated as untouchables; take measures to regain their respect and place in society; and seriously address the problems such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies and social stigma.

As mentioned earlier, the Court's declarations are to be read in conjunction with an Expert Committee Report on Transgender Persons constituted by the Ministry of Social Justice and Empowerment. Since the report is quite broad, these already broad declarations can be seen side by side to push the government to do things that are not specifically mentioned in the judgment but are mentioned in the report. For example, recommendations in the Report like setting up of crisis centres, and gender

¹⁶ Report of the Expert Committee on the Issues Relating to Transgender Persons, Ministry of Social Justice and Empowerment, available at <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf>.

¹⁷ Para 129, NALSA.

¹⁸ Article 16(4) allows the state to make reservations in employment in favour of underrepresented backward classes of citizens. Backward class here is a collective term used to refer to economically and socially disadvantaged groups. The Constitution further mandates the Government under 340 to provide for the welfare of citizens belonging to backward classes.

sensitization in institutional settings¹⁹ can easily be seen as part of the NALSA judgment's broad declarations.

B. Subsequent Decisions

In increasing numbers following NALSA, transgender persons across the country are actively using the courts to access remedies for recognition of name or gender marker change to accessing benefits under socio economic legislations and ensuring equality in other areas of their life. Some of the court decisions explained below demonstrate that although a Court might have the intention to apply the NALSA judgement, they are mistaken in their interpretation. Other decisions are illustrative examples of how courts can further apply human rights protections for trans people. The success that some of these cases have achieved also indicates the need for more systematic courtroom-based advocacy for developing a transgender human rights jurisprudence.

The following cases demonstrate the way the lower courts have used NALSA with both positive and negative consequences, sometimes within the course of the same decision.

For example on 17 April 2014, two days after the NALSA judgment, the Madras High Court set aside an order of termination by the Superintendent of Police in Karur district whereby a female-identified individual, with an intersex variation, was dismissed from service after her medical reports stated she was transgender.²⁰ While the outcome of this decision was positive for the intersex person involved, it was based on erroneous assumptions about the person's gender identity, as she identified as female, not as a trans man. The decision privileged medical evidence over self-defined identity and highlights the confusion amongst the judiciary about the difference between people with intersex variations and trans people.

In terms of legal doctrine, the Madras High Court expanded the Constitutional dimensions of NALSA. It noted that the right to life under Article 21 of the Constitution included the right to privacy and the right to lead a dignified life. It held: "By compelling an individual, who has been recognised all through as a female, like the petitioner, to undergo medical examination so as to declare her as a transsexual will be a gross violation of the right to privacy which falls within the ambit of Article 21 of the

¹⁹ Chapter 13, Report of the Expert Committee on the Issues Relating to Transgender Persons, Ministry of Social Justice and Empowerment.

²⁰ Jackuline Mary v. The Superintendent of Police & Ors., Madras High Court, April 2014 (available at <http://indiankanoon.org/doc/144523857/>)

Constitution of India.” The Court further held that in the absence of a legislation, compelling an individual to expose themselves to medical examination to medically declare their sex identity was violative of Article 21.

As an other example, In July of 2014, the Karnataka High Court took cognizance of the NALSA judgment²¹ in a case where a transgender petitioner requested the Court to issue a direction to the State to provide reservation of posts to the transgender class of persons. The Court pointed out that this particular question had already been answered in the NALSA petition. As a result, the Court used the existence of NALSA as a crutch to refrain from awarding specific remedies. On the one hand, this decision failed to take the opportunity to practically implement the NALSA decision. On the other hand, it clearly recognised the broad mandate of the NALSA decision. For transgender persons the question remains as to whether there is a will to fully implement the decision.

A Delhi District Court in December 2014 decision is an other example, how the court misconstrued the rationale of NALSA and used NALSA to attack some of the traditional ways in which the transgender community makes a living. In North India one of the traditional ways in which the hijra community makes a living is Badhai which is a ‘a practice of asking for money and materials (by hijras) by going to occasions and functions such as marriage, birth functions (especially birth of male babies), and opening of new shops). This practise was considered illegal by the Court which noted that the Supreme Court in NALSA had mandated bringing this marginalized group within mainstream society. This is a reading of NALSA which is dangerously off the mark as NALSA’s ratio is to do with making a space for provision of future entitlements to the community rather than declaring existing livelihood practices illegal.²²

In the same month, the Punjab and Haryana High Court²³ in a positive development cited NALSA as further impetus to implement international laws and mechanisms regarding sexual-health violations.

The Supreme Court itself has taken forward the ratio of NALSA positively in *Ram Singh vs. Union of India*, where NALSA was cited favourably to expand the category of those entitled to access affirmative action.²⁴ The Court held that the ‘third gender

²¹ Aslam Pasha Urf. Chandini v. The State of Karnataka & Anr., Karnataka High Court, July 2014 (available at <http://indiankanoon.org/doc/100300089/>)

²² State v. Bobby Kinnar and Ors., December 2014 (available at <http://indiankanoon.org/doc/177596720/>)

²³ Hans Raj Chauhan v. The State of Haryana & Ors., Punjab-Haryana HC, December 2014 (available at <http://indiankanoon.org/doc/112098487/>)

²⁴ Ram Singh v. Union of India, Supreme Court, March 2015 (available <http://indiankanoon.org/doc/33182715/>)

category can come within the meaning of the constitutional category of socially and educationally backward class of citizens and hence entitled to the range of benefits which those historically disenfranchised are entitled to under Indian law.

The Allahabad High Court In April 2015 is a landmark decision recognized an affirmative obligation of the State to provide access to food security to transgenders by recognising _transgender persons as a head of household who are entitled to have ration cards issued under the Food Security Act.²⁵ In this particular instance, the form which was prescribed by the Uttar Pradesh State Government for submitting applications under the Food Security Act required a disclosure of the name of the woman who was the head of the household. This, the Court held, could not be held to exclude transgender individuals. Given that the understanding of women as the default head was to bring about a sense of empowerment, the same would have to include transgender people as well.

The Court made this decision in the context of NALSA's recognition of the fundamental right of the transgender population as citizens of the country to possess an equal right to realize their full potential as human beings. With the Allahabad Court's decision, they extended the NALSA reasoning to find that the fundamental right to live with dignity (under Article 21 of the Constitution) included the right of access to all facilities for development of the personality including education, social accumulation, access to public places and employment opportunities, Accordingly, the objective and transparent administration of ration cards is a critical element in enhancing access to food security, since they are important documents enabling holders and their families to gain access to subsidized food grains

In September of 2015, the Delhi High Court²⁶, cited NALSA in an order recognizing the right of a female to male trans person who was being kept against his will by his parents, to not be harmed throughout the course of his time in India and to return safely to the United States. Remarkable in this judgment is the degree of compassion the Court displays towards the petitioner: the opening sentence of the judgment reads "Shivani is a braveheart"

The record of judicial decisions post NALSA is mixed with some decisions showing a clear recognition of human rights of trans people. A few others cite NALSA wrongly to whittle down rights of trans people and in others NALSA is ignored but trans rights are

²⁵ Ashish Kumar Misra v. Bharat Sarkar through Sachiv Khadhya and Prasanskarn Mantralaya. Allahabad High Court, April 2015(Available at <https://indiankanoon.org/doc/12537865/>)

²⁶ Shivani Bhat v. the State of NCT of Delhi , Delhi High Court, September 2015(Available at <https://indiankanoon.org/doc/10525112/>)

protected. As an example of the last category, in August 2014 the Madras High Court passed an order where it castigated authorities who were refusing to make changes in documents that the transgender petitioner wanted to make reflecting her changed gender following her sex reassignment surgery.²⁷ In noting that "the authorities in a case of this nature must extend their helping hand to a transgender [person] rather than denying the relief on technical reasons" the Court was reaffirming the principles behind NALSA even without actually citing the judgment.

C. State Level Policies

Following the NALSA judgment, a number of States moved towards implementing its broad declarations. The manner in which this was done varied – in some cases, states worked on comprehensive policies that covered a range of issues, in others, a transgender welfare board was set up with a more limited focus.

When it comes to comprehensive policies, the notable example is that of the state of Kerala. In September 2015, the State's Department of Social Justice issued a Policy for Transgender people²⁸ with the aim of implementing the NALSA judgment and the MSJE Report. Besides the establishment of a Transgender Justice Board at the district level which would serve as a monitoring and implementing agency, the policy created a wide range of responsibilities and enabling provisions, such as ensuring non-discriminatory treatment towards transgender individuals by all government departments and public authorities, government schemes and sensitization across the education, healthcare and employment sector, and access to legal aid. The policy also stated that sexual assault laws would be made transgender inclusive and the Juvenile Justice Act be amended to include the concerns of gender non-conforming children. However, several months in, reports indicate that the Policy remains largely unimplemented: for instance, the creation of job opportunities seems to have been a non-starter as has been the offering of health services for transgender persons.²⁹ While the 2016-17 Budget Speech by the Kerala Chief Minister takes note of the fact that the State has a policy and schemes for transgender persons³⁰, the Budget itself does not seem to have made provisions to implement the policy. Action on the policy remains

²⁷ S. Swapna v. The State of Tamil Nadu, Madras HC, August 2014 (available at <http://indiankanoon.org/doc/125208179/>)

²⁸ <http://www.swd.kerala.gov.in/images/VIKASBHAVAN/12704tgpolicy15.pdf>

²⁹ <http://www.thenewsminute.com/article/seven-months-keralas-transgender-policy-still-thicker-paper-reality-44773>

³⁰ http://www.finance.kerala.gov.in/index.php?option=com_content&view=article&id=537:kerala-budget-2016-17&catid=18:state-budget

further stalled with a change of Government in Kerala following the State Elections in 2016.

The other state which actively engaged in a public process around creation of a Transgender Policy was Karnataka. The government released a draft policy in 2014³¹ which covers a range of issues that would also find their place in the Kerala policy later. However, the policy has yet to be formally issued. It was last mentioned in the Budget Speech for 2015-16 by the Chief Minister, who noted that the Policy would be implemented in that year. However, even then, the idea of implementing the policy has largely been restricted to a claim of providing 1000 beneficiaries a financial incentive of INR 20, 000 each.³² At the start of 2016, the government announced a housing scheme to provide shelter to 600 transgender persons in a space in the outskirts of the city, even as this scheme does not flow from the policy itself³³.

Beyond these instances, state implementation efforts have been more piecemeal. Maharashtra³⁴ and West Bengal³⁵ have both set up transgender welfare/development boards on the lines of the pre-existing Tamil Nadu welfare board, but both initiatives have had difficulty in taking off, with an unclear mandate and irregular meetings. Outside the structure of policies or administrative mechanisms, states like Odisha have announced social welfare schemes for transgender persons relating to pension, housing and provision of food grains.³⁶

D. Other Executive Action

In terms of implementing authorities, the mandate to implement the NALSA judgment was clearly split across a range of Ministries. A briefing note by the International Commission of Jurists puts together some of the actions taken by different Ministries and Government agencies:³⁷ The Ministry of Social Justice and Empowerment took the lead by constituting an Inter-Ministry Coordination Committee

³¹ <https://www.karnataka.gov.in/spb/Reports/draft%20State%20Policy%20forTransgenders.pdf>

³² <http://finance.kar.nic.in/bud2015/bs2015eng.pdf>

³³ <http://www.masterplansindia.com/housing/karnataka-govt-announces-housing-scheme-for-transgenders-of-bengaluru>

³⁴ <http://www.thehindu.com/news/national/national-policy-on-transgenders-still-awaited/article6360734.ece>

³⁵ <http://indianexpress.com/article/cities/kolkata/bengal-govt-announces-transgender-development-board/>

³⁶ <http://economictimes.indiatimes.com/news/politics-and-nation/odisha-becomes-first-state-to-give-social-welfare-benefits-to-transgender-community/articleshow/52553342.cms>

³⁷ ICJ Briefing Paper: Implementation of the NALSA decision, available at <http://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf>

comprised of senior officials from across different ministries with the Committee. The Committee is responsible for coordinating actions on the recommendation of the aforementioned Expert Committee on transgender people. As per the MSJE, four Inter-Ministerial meetings have been conducted to date.³⁸

As the briefing note further relates³⁹, the Ministry has also set up a media committee for initiating sensitization drives. The Ministry of Labour and Employment has directed states to provide vocational training to transgender individuals. Beyond the Ministries, other statutory authorities have also taken steps towards implementation. In July 2014, the University Grants Commission directed educational institutions to put in place a number of transgender friendly measures, ranging from scholarship schemes to infrastructural changes.⁴⁰ The National Commission for Backward Classes recommended the inclusion of transgender persons within the “other backward classes” category in May 2014.⁴¹ Even as this move flows directly from the NALSA mandate and has the potential to allow for access to a range of affirmative action policies, it must be noted that no move has been made since then to concretize this recommendation.

The Ministry also set up a media committee for the purpose of initiating sensitization drives which was complemented by advice tendered by the Ministry of Information and Broadcasting to its media units to publicize transgender issues while disseminating their support programmes. The Ministry of Labour and Employment directed all states in the country to provide vocational training to transgender individuals under a Skill Development Initiative Scheme. Other statutory authorities have

E. Draft Legislation

One of the tangible ways for the principles of NALSA to be implemented would be through the legislative process. Two sets of draft laws that attempt to do this are

³⁸ As the Ministry website notes: The Expert Committee has recommended that “Ministry of Social Justice & Empowerment may set up a Standing Coordination Mechanism in the form of an Inter-Ministerial Committee for coordinating the welfare activities being undertaken by the various Ministries and State/UT Governments for transgender community comprising representatives of concerned Central Govt. Ministries and representatives of State Governments.” Accordingly, an Inter-Ministerial Committee has been constituted to discuss these issues. see <http://socialjustice.nic.in/Home/Index>.

³⁹ Supra note 35.

⁴⁰ See http://www.ugc.ac.in/pdfnews/2465555_Annual-Report-2014-15.pdf.

⁴¹ <http://indianexpress.com/article/india/india-others/backward-commission-recommends-transgenders-for-reservation/>.

currently at different stages in the legislative process. The first was drafted by a private member of parliament, the subsequent one by the government

On April 24, 2015 the Rajya Sabha (the Upper House of Parliament), passed a private member's bill, which provides a comprehensive rights framework for transgender persons⁴². Introduced by MP Tiruchi Siva, this is a victory of staggering magnitude — not only was it voted in unanimously, it is also the first time in 46 years that a private member's bill has been passed.⁴³ The bill articulates a range of substantive rights for the community. It provides a highly expansive definition of the term transgender is one that relies on the NALSA judgment's invocations for inclusiveness and encompasses anyone whose self-defined gender differs from that assigned to them at birth⁴⁴. The bill also looks at rights and entitlements across eight clauses⁴⁵, including the rights to equality, life, free speech, community, integrity, family, along with rights against torture and abuse. One clause specifically provides for transgender children. Education, employment and social security and health are then covered in successive chapters. The chapter on education mandates the Government to provide for inclusive education for transgender students. It also places an obligation on the Government towards ensuring participation of transgender in adult education programmes.

The Bill includes detailed provisions in relation to particular rights. For example in the employment chapter the Government is mandated to formulate schemes for vocational training and self-employment of transgender persons, and prohibited discrimination against transgender persons in any establishment, including by private actors. Another example can be seen in the social security and health chapter, the Government is asked to promulgate a range of schemes for promoting the rights of transgender persons to an adequate standard of living. These include schemes for community centres and access to safe drinking water and sanitation. Health care facilities are to be provided in the form of separate HIV clinics and free “sex reassignment surgery”. Transgender rehabilitation programmes, particularly in the areas of health, education and employment are also provided for.

⁴²<http://www.thehindu.com/news/national/rajya-sabha-passes-private-bill-on-transgenders/article7138056.ece>

⁴³ The usual practice is for the government to respond to a private members bill with their response, based on how it is received when introduced in Parliament. As we will see later, even in this case, the Government did go on to produce their own draft of the law.

⁴⁴ Clause 2 (t), Rights of Transgender Persons Bill (hereinafter Transgender Bill) “**transgender person**”: a person, whose gender does not match with the gender assigned to that person at birth and includes trans-men and trans-women (whether or not they have undergone sex reassignment surgery or hormone therapy or laser therapy etc.), gender-queers and a number of socio-cultural identities such as — kinnars, hijras, aravanis, jogtas etc.

⁴⁵ Chapter II, Transgender Bill

Most of these provisions take off directly from the Supreme Court's directions, building on them at different levels. The debate around the Bill, both within the Rajya Sabha and in the ensuing media reportage, was often anchored around NALSA. In the Upper House, a number of MPs from across party lines took part in the discussion and extended their support to the Bill, citing NALSA with approval.

For all that it covered, there was a glaring omission in the Bill in that it made no provision for enabling the self-identification mechanism that the NALSA judgment had enshrined. This particular lacuna was addressed by the Ministry of Social Justice and Empowerment which released its own draft Bill towards the end of 2015. Adapting largely from the text of the Rajya Sabha Bill, this draft significantly added a mechanism for recognizing and certifying transgender identity. The mechanism was lifted directly from the suggestion made by the MSJE Expert Committee Report, where it asked for a two tier screening Committee at the District and State level which would be comprised of a range of experts and members from the community. Even as the Bill provided a mechanism of this nature, it became evident that this contradicted the self-identification principle to an extent. A complex bureaucratic procedure of this nature would only serve to make it much harder for individuals to access legal gender change. This is in addition to the fact that no standardized criteria were indicated to assess gender identity, which made the process potentially further open to vagaries.

Later in 2016, the Government released a new draft of the law, now titled the Transgender Persons (Protection of Rights) Bill, 2016. Unlike the earlier drafts, which had been met with degrees of cautious optimism, this draft was seen as a rejection of the government's mandate to protect transgender rights. The problems with the Bill began right from its definition of transgender, where it rolled back the expansive articulation reflected in NALSA and the other drafts, to limit itself to an understanding based only on the idea of the third gender. Till this point, the legal regime provided a space that would allow individuals to identify as male, female or transgender regardless of the gender assigned to them at birth; with this new draft, the only option available to individuals was that of identification as transgender. The rollback of rights in this frame was supplemented by the addition of a punitive measure for inducement to begging. As mentioned earlier, beggary laws have been widely misused against transgender individuals. A provision of this nature ignores not just that particular history, but is also uncalled for given the existence of other beggary prevention laws across most states. These issues stand alongside other problems such as a provision for prohibition of discrimination that is not enabled by any enforcement mechanism, alongwith a provision on rehabilitation that strongly undercuts individual autonomy. At

the time of writing this report, the Parliamentary Standing Committee on Social Justice had solicited public comments on the draft.

F. International Obligations

International law can be used to interpret constitutional provisions and the leading authority on the point of how international legal developments on transgender rights can go a long way in developing domestic jurisprudence is actually the NALSA decision. The NALSA decision cites a range of provisions of international law and then goes on to extensively cite from the on Principles on Sexual Orientation and Gender Identity. The Principles are standards that apply contemporary international human rights principles to issues of sexual orientation and gender identity. The Court noted:

We have referred exhaustively to the various judicial pronouncements and legislations on the international arena to highlight the fact that the recognition of “sex identity gender” of persons, and “guarantee to equality and non-discrimination” on the ground of gender identity or expression is increasing and gaining acceptance in international law and, therefore, be applied in India as well.⁴⁶

International human rights standards, including those summarized in the Yogyakarta Principles, become particularly relevant when there is a gap in the national law when it comes to protecting transgender persons. As the Court put it:

Unfortunately we have no legislation in this country dealing with the rights of transgender community. Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence the necessity to follow the International Conventions to which India is a party and to give due respect to other non-binding International Conventions and principles.⁴⁷

The Court reading these principles into domestic law rectifies the gap in national legal framework when it comes to protecting transgender persons.

Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. Principles discussed

⁴⁶ National Legal Services Authority versus Union of India, 3 (2014) 5 S.C.C. 438, available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41411> (hereinafter NALSA).

⁴⁷ Ibid.

hereinbefore on TGs and the International Conventions, including Yogyakarta principles, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country.⁴⁸

Thus international law on gender identity has played a key role in the Indian context as it transitions into domestic law converting formerly international obligations into domestic legal obligations.

⁴⁸ Ibid.

IV. GENDER RECOGNITION

A. Diluting the Self-Identification Principle

The governing law relating to gender recognition is *NALSA v. Union of India*. As we have noted earlier, the Court upheld the right of transgender individuals to identify as either male, female, or third gender⁴⁹, further affirming that “sex reassignment surgery”, hormone therapy and other such processes were not mandatory for legal recognition of gender change. Self-identification was understood as the principle that would govern gender recognition.

At the end of the judgment, the government was given six months to comply with the directions of the Court, which were held to be read in conjunction with the MSJE Expert Committee Report on Transgender Persons. The Expert Committee mandated screening committees for certifying gender, which have yet to make their appearance. The only move towards setting up such an apparatus is in a more administratively complex form as described under the pending transgender bill. Even as transgender persons await a formal mechanism, a fragmented regime for legal gender recognition exist in the country. The *NALSA* judgment is recognized as applicable law, but the institutional apparatus implementing its self-determination principle has been extremely variegated.

This section of the report attempts to understand how legal gender recognition operates through examining the stated requirements for obtaining a range of different identity documents. Most of this information was procured through the relevant institution’s website, in some cases supplemented through the filing of an RTI request. The section then goes on to comment upon how these procedural requirements operate in practice, through a sample of interviews with bureaucrats who regulate the process, lawyers who have assisted individuals in obtaining gender recognition, and transgender persons who have approached the different departments to obtain an identification document.

Before we move to looking at specific identity documents, it will be useful to discuss the process of gazette notification. For one, this is often listed as one of the stated prerequisites for name or gender marker change for many documents. Further, the complexities that can arise with respect to using this process as a transgender

⁴⁹ Para 129, *NALSA v. Union of India*.

person shed important light on the difficulties with respect to other identity documents in general.

Gazette of India notifications are authorized legal documents published by the Department of Publication and printed by the Government of India printing presses regularly. All parts of the Gazette are uploaded in the E-Gazette website, and can be accessed free of cost by the public.⁵⁰

A name change is formalized following a notification by the Controller of Publications in the Gazette of India. As per the Gazette of India guidelines⁵¹, for such publication to happen, the person must follow a number of steps, including a change of name advertised in a daily local leading newspaper and furnishing an undertaking signed by the applicant, showing “his/her old and new name along with full details of father’s/ husband’s name with residential address declaring that the facts stated therein are true.”⁵²

In terms of restrictions on the actual choice of name, the guidelines themselves don’t restrict someone from choosing a gender-specific name that does not match their original gender-specific name or gender marker. When it comes to a change of sex, the Gazette has an additional proforma for publication of such notice.⁵³ The notice in this instance asks the applicant to declare their prior name and residence, and then note that they have “after a successful sex reassignment surgery” changed their gender, followed by their new name. The notice also requires the applicant to state under the supervision of which doctor they carried out such change. The proforma was released by the Government subsequent to the NALSA judgment, which makes it even more surprising considering how it flouts the judgment’s self-identification principle and makes such medical interventions a requirement for amending gender markers.

Accounts of individuals at the gazette office tell us that this gender affirming surgery requirement is taken seriously, even as it stands in contradistinction to the NALSA judgement. The account of Jackie Lynn recounted at the very start of this report is an important account of this kind of insistence. A similar requirement may be found with the Telangana State Government printing press in Hyderabad which demands a gender affirming surgery certificate as requisite to publish a gender/ name change

⁵⁰ [http://www.egazette.nic.in/\(S\(c5bldvpszrwqrcm0hest4gz\)\)/Aboutus.aspx](http://www.egazette.nic.in/(S(c5bldvpszrwqrcm0hest4gz))/Aboutus.aspx)

⁵¹ [http://deftpublish.nic.in/forms/Guidelines%20for%20change%20of%20name%20Adult%20\(Major\)_1.pdf](http://deftpublish.nic.in/forms/Guidelines%20for%20change%20of%20name%20Adult%20(Major)_1.pdf)
f. Full draft Annexed.

⁵² An earlier procedure required the submission of an affidavit attested by a Magistrate or Notary, while now a self-attested document is sufficient. Printing charges for publication of change of name are INR 850 in the most recent notification, which can go up to INR 1100 in certain specified instances

⁵³ http://deftpublish.nic.in/forms/Specimen%20Proforma%20regarding%20Change%20of%20Sex_1.pdf

notification. As per reports, production of a copy of the NALSA judgment did not help, with officials telling the applicant they were not aware of any rule, and even alleging that the judgment was printed by the individual on her own.⁵⁴

In conversing with lawyers in Delhi and Bangalore who work with transgender clients, the importance of the gazette was considered markedly different. In Delhi, the gazette is a crucial prerequisite for getting identity documents changed, with departments like the Passport Office insisting on the same. In Bangalore, the lawyer interviewed noted that the gazette is not considered necessary, instead often successfully achieving legal gender recognition through approaching different departments with a newspaper notification, a notarized affidavit, and a copy of the NALSA judgment.

B. Procedural requirements for obtaining Identity Documents

We will now go on to look at the processes that are mandated for procuring different identity documents. It will become evident that the processes for obtaining each document vary, and are not always in consonance with the NALSA principle. This analysis will be supplemented by the field interviews that were done with key informants and community members in Delhi and Bangalore. There are three distinct scenarios that might be envisioned here: first, when an individual already holds a particular identity document and wants to obtain a change of gender on that existing document. The second, when an individual is applying for a fresh identity document within the transgender category (as opposed to male or female). The third scenario is when an individual is making a fresh application for an identity document, and asking for a change of gender within the male-female binary. While this section of the report will proceed in a narrative format, the table placed in Appendix A attempts to represent this information in a more systematic manner.

i) VOTER IDENTITY CARD

The Electors Photo Identity Card (EPIC), commonly referred to as the voter id is a document that may be procured by every citizen following the age of 18, to be used during elections for casting votes, besides serving as a proof of identity.⁵⁵ The card

⁵⁴<http://www.thehindu.com/news/cities/Hyderabad/gender-change-on-paper-turns-nightmare-for-transgenders/article8067493.ece>

⁵⁵ Election Commission of India, Guide for Voters: http://eci.nic.in/eci_main/ECI_voters_guideline_2006.pdf

allows individuals to choose from the option of male, female and otherS⁵⁶. No gender specific honorifics such as Mr/Ms are included on the EPIC and, unlike some countries, the number system does not disclose someone's gender markers.

In order to correct entries on electoral rolls, and consequently on their voter id, individuals have to present a prescribed form before the Electoral Registration Officer within the constituency of their residence which may even be filed online.⁵⁷

The Application first asks individuals to list out their relevant details such as name, age, date of birth, and gender. Documentary proof is required of age where the applicant is between the ages of 18 and 21. The documents that may serve as proof include a birth certificate, passport, PAN card⁵⁸, Aadhaar card⁵⁹ or Driving License. In case the applicant does not have such proof, their parents may step in to testify to their age. For applicants above the age of 21 who physically appear to be so for the Officer, declaration of age will be taken as proof without insistence on documentary proof. At the end of the application, individuals are then asked to tick the details that needs to be corrected on the basis of the information that has been supplied: name and gender are both provided for as options, along with one for photograph.

In order to file for a fresh Voter ID, the process is largely the same, with another form that is required to be filled and submitted, where such submission may happen online.⁶⁰ In case of applicants between the ages of 18 and 21 who don't have an age proof, the guidelines also make provisions for culturally specific gender identities, namely people assigned a male sex at birth who identify as hijra, aravani etc. In such cases the person can have their "guru" step in to testify in place of their parents.⁶¹

For grievances with regard to the electoral roll or the ID card, there is an appellate process which is in place. Starting with the zonal officer for a group of polling stations, it goes up to the Chief Electoral Officer at the State Level.⁶²

ii) AADHAR CARD

⁵⁶ National Voters Services Portal, Form 6, <http://www.nvsp.in/forms/form6.html>.

⁵⁷ National Voters Services Portal, Correction of Entries in the Electoral Roll, http://www.nvsp.in/forms/form_instr_pdf/FORM8.pdf

⁵⁸ see sub-section (iii) of this Chapter.

⁵⁹ see sub-section (ii) of this Chapter.

⁶⁰ http://www.nvsp.in/forms/form_instr_pdf/FORM6.pdf

⁶¹ http://www.nvsp.in/forms/form_instr_pdf/FORM6.pdf

⁶² Election Commission of India, Guide for Voters: http://eci.nic.in/eci_main/ECI_voters_guideline_2006.pdf

The Aadhar Card was born out of the Unique Identification project, initially conceived by the Planning Commission of India as an initiative that would provide identification for each resident across the country and be used primarily as the basis for delivery of welfare services – such as food security benefits, education, employment and healthcare services. It was also envisioned as a tool for monitoring the various programs and schemes of the government.⁶³ As it now stands, the Unique Identification Authority of India collects biometric and demographic data of residents, registers them in a centralized database and issues a 12-digit unique identity number called Aadhar to each resident. Even as a range of concerns have been raised around state surveillance and privacy with respect to the document⁶⁴, the card has been in high demand as an identity document.

The card allows individuals to choose the option of male, female or transgender. Where an individual has an existing card and would like to change their gender, relevant instructions are provided in a broader list:⁶⁵ this mentions that residents can update/correct the following pieces of information on their card by sending a postal application – name, address, date of birth, gender and mobile number. The supporting documents that may be used for name correction include a passport, PAN card, Ration card, Voter ID, Driving license and a Gazette Notification, amongst others. Update of gender on the card however does not seem to require any stipulated documents.

When it comes to a fresh application for an Aadhar Card for the Transgender category, the general requirement for obtaining a card is a pre-existing supporting document, identical to the list mentioned above. Again, there are no additional requirements placed when it comes to verifying gender. The data entry clerk at the Aadhar counter in Bangalore verified that no additional documents are required to submit this form.

One person interviewed in Bangalore confirmed obtaining an Aadhar card reflecting ‘transgender’. Online records reflect that applications have been granted under the category ‘transgender’. This is corroborated by newspaper reports that show that several hundred cards have been issued.

iii) PAN CARD

⁶³ <https://uidai.gov.in/about-uidai.html>

⁶⁴ See for instance <http://www.thehindu.com/opinion/lead/lead-article-on-aadhaar-bill-by-chinmayi-arun-privacy-is-a-fundamental-right/article8366413.ece>, <http://www.livemint.com/Opinion/BPa93wigfryRXeOvUvI0rL/Importance-of-respecting-privacy.html>.

⁶⁵ <https://uidai.gov.in/how-to-enroll-en.html>

PAN, or permanent account number, is a unique 10-digit alphanumeric identity allotted to each taxpayer by the Income Tax Department under the supervision of the Central Board of Direct Taxes. It also serves as an identity proof. PAN is mandatory for financial transactions such as receiving taxable salary or professional fees, sale or purchase of assets above specified limits, buying mutual funds and more.⁶⁶ The card does not feature gender-specific details beyond a name.

For the name to be corrected, the application must be accompanied by personal identification proof, age proof and address proof.⁶⁷ The application itself asks the individual to identify as male or female. It is unclear whether a change in gender from 'male' to 'female' or vice versa is possible when such supporting documents do not reflect the same gender.

Even as the card does not include a gender marker, accounts from individuals show that it is a desirable and relatively more accessible document that enables them to obtain an id card with a changed name, precisely because of the absence of the gender marker. Two key informants in Delhi both stated this was the first identification they obtained – administrative hassles were minimal in both instances though one of them did feel they had to pay an inordinately large amount to obtain the card. In Bangalore, two of the persons interviewed verified that they obtained a PAN card with a name reflecting a gender different from that assigned at birth once they submitted other supporting documents (voter's id/ ration card) reflecting this changed gender identity.

iv) RATION CARD

Ration cards are used to purchase subsidized food items like wheat, rice, sugar and kerosene from public distribution shops or "ration shops". They are an important subsistence tool for the poor, provide proof of identity and a link with government data bases that use the ration cards to establish identity, eligibility, and entitlement.

As far as issuance of Ration Cards is concerned, the rules governing the Public Distribution System are currently undergoing reform and all new applications/requests for changes in present ids are presently suspended.

⁶⁶<http://www.businessstoday.in/moneytoday/tax/permanent-account-number-pan-card-application-importance/story/196107.html>

⁶⁷<https://tin.tin.nsd.com/pan/>

In terms of obtaining a new card, the application form provides for the categories of male, female and other, even though the card itself does not identify persons by gender. No supporting documents are required as far as proof of the “other” category is concerned, as verified by a form processing clerk at the Bangalore office. However, there is no given method for obtaining a new card in a gender other than the one that is assigned at birth.

One example provided to the authors was from a person who wanted to tick female and was refused, with the clerk insisting she apply as 'other' which she did not want to do. After arguing with them in detail, and showing her gender dysphoria certificate from a counsellor (not a surgery certificate), the clerk finally agreed.

v) PASSPORT

The passport is a document that is not necessarily a priority for a large number of individuals within the community, who are less concerned with international mobility. However in the interactions that we had, it did play a crucial role for transgender persons who were members of academic/activist groups required to travel to other countries for meetings, conferences or higher education. Domestically the passport may be used as an accepted form of photo identification.

The Passport allows individuals to choose one of three categories: Male, Female or Transgender.⁶⁸ Where a person already has an existing passport, they are required to make a fresh application for re-issue along with a set of accompanying documents. The documents required vary depending on what change is being requested: relevant amendments in case of gender identity could include change in sex, a minor or major name change, or a change in appearance. For instance, to support a request for change in sex, the passport office requires: the old passport, a sworn affidavit regarding change of sex, and certification from the hospital where the person underwent “sex change operation”. A request for change in name in addition to a request for change in sex would require a document of proof of the individual’s current address in their new name, and of their date of birth in their former name.

If a person does not have a pre-existing passport and wants to apply as within the transgender category or wants the passport to reflect a gender within the male-female binary different from their biologically assigned one in existing documents, leaving aside the old passport, the documents required remain the same as above.

⁶⁸ Instructions available at:
<http://www.passportindia.gov.in/AppOnlineProject/pdf/ApplicationformInstructionBooklet-V3.0.pdf>

To further clarify this process, in a Right To Information (RTI) Application that was filed with the passport office a range of questions were asked regarding the prescribed procedure for recognizing change of gender identity. The response from the office stated that⁶⁹:

“If a person is applying for the issue of passport with change of sex consequent to medical procedures changing the sex of an individual, the applicant should give a sworn affidavit regarding the change of sex and furnish supporting certificate from the hospital where in sex will also normally require a change in name, the applicant in that eventuality will also have to follow the procedure regarding change of name. Passport should be issued to such applicants only after fresh police verification. There would be no specific fee for the issue of passport to the persons of such categories.”

It is quite clear that the requirement of asking for such a certificate, both as evidenced through the RTI reply and the Passport office’s own rules, points to a violation of the principle of self-identification laid down in the NALSA judgment. The operative final declaration of the judgment states in no uncertain terms: “Transgender persons’ right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.” Clearly, the current requirement flouts the principle underscoring the judgment.

C. IMPACT AND IMPLEMENTATION

The overview of the different processes for procuring identity documents shows us how disparate the various procedural requirements can be. Even within the requirements for a specific identity document, there are instances where they flout the self-identification principle (most egregiously in the case of the Passport) or where practice does not match the stated requirement. Information received in the stakeholder meetings conducted over the course of drafting this report, along with individual conversations with transgender persons in Delhi and Bangalore have revealed a number of conflicting narratives.

It is overwhelmingly evident that personnel on the ground working as data entry clerks or managers are not aware of any policy or official position on transgender rights. The data entry clerks at all of the offices visited were almost uniformly unaware about

⁶⁹ No. 310/ CPVRTI/2016, On file with the authors.

the process to be followed when we asked about applications by transgender people (whether they identified as male, female or as a third gender) as a transgender person. In Delhi, the officers at the Birth Certificate Registry said they had never been approached by a transgender person, and questioned the need and possibility of changing one's gender on the certificate.

Some, for example, at the Aadhar card application centre in Bangalore, advised us to simply submit the ordinary documents and added that they would submit the application and wait to see if there was any objection by the processing office. Others directed us to senior officials who expressed interest but were equally unaware of any policy. For example, when speaking to the senior most official at a Road Transport Office in Bangalore⁷⁰, he was clear that the Transport Department of the Government of Karnataka had no policy on transgender persons. He was completely unaware about the *NALSA* ruling, but expressed great interest in it, even requesting us to get a copy printed out for him at his cost. He was also unaware that the present application form for a driver's license has an option to apply as a 'transgender' person, in addition to the categories 'male' and 'female'. At other times, the senior most official was aware of the judgment, as in the case of the Delhi Birth Certificate office, but did not see how it applied to their department.

This confusion has been beneficial to some persons. The lack of rigorous cross checking of documents has meant that some transgender women have been able to procure driving licenses as 'female' despite having certain identity documents with their birth assigned sex. Some identification cards are easier to obtain than others since they serve a purpose that is widely considered as a universal entitlement. This includes voter ids, where even date of birth and residence can be attested to by guardians, parents. In an explicit recognition of the cultural tradition of hijras, such attestation can even be done by 'gurus'⁷¹ of a transgender person. Similarly, ration cards can be obtained without any proof of gender change. Other documents, such as passports have been much tougher to procure since, in the words of one of the interviewees, they function as "core proof"⁷² of identity documents. The passport requires a medical certificate attesting that a person has undergone a gender affirming surgery for that person to procure a passport in a gender that differs from sex assigned at birth. However, even in this case, one person was able to obtain a passport as 'female' despite her birth

⁷⁰ The centre operated by Commissioner for Transport and Road Safety for the issuing of licenses and permits in relation to road transport.

⁷¹ A number of transgender communities in India are organized in systems constituting a household or "gharana", led by a guru.

⁷² Pointing to the idea that it is often used as the basis to apply for other identity documents.

certificate describing her as 'male' after showing documents to prove her work as a transgender activist.

For others this confusion has meant prying questions and demeaning treatment at government offices. For example, a transgender man who sought a gender marker change in his passport was asked impertinent questions by the police officer who visited his house to confirm his identity and received a negative police report as the officer was unable to comprehend the idea of such a change.

It has also emerged that procuring the first identification card is the hardest. On perusing the required supporting documents for each of the ID card application forms, it is clear that these forms refer to each other and it would be very hard for someone with no id to procure their first id card reflecting the gender marker of their choice. For example, the RTO lists a passport as a supporting document to prove date of birth, residence and identity. Similarly, a voter's id application refers to a passport, driving license or other government issued identity card.

D. LINKS BETWEEN MEDICAL DIAGNOSIS, AVAILABILITY OF GENDER AFFIRMING SURGERY AND LEGAL GENDER RECOGNITION

The previous section has examined the question of impact and implementation in the context of the disparate and confusing processes that beset the acquiring of identity documents or changing gender markers. This section will look at the other kind of difficulties that arise when one of the required documents is a proof of gender affirming surgery or related medical interventions.

i) AVAILABILITY OF GENDER TRANSITION-RELATED SERVICES

What are the consequences of requiring certificates attesting to gender affirming surgery in violation of the NALSA principle? Requiring medical intervention is not just a violation of the self-identification principle but also ignores the realities of accessing such intervention in the country. In general, very few government hospitals provide gender-affirming health services for transgender people who medically transition, including gender-affirming surgery⁷³. Even in Tamil Nadu, which has formed the first transgender welfare board in India, free surgery is provided currently in only

⁷³ Singh, Y., Aher, A., Shaikh, S., Mehta, S., Robertson, J., & Chakrapani, V. (2014). Gender Transition Services for Hijras and Other Male-to-Female Transgender People in India: Availability and Barriers to Access and Use. *International Journal of Transgenderism*, 15(1), 1-15. doi:10.1080/15532739.2014.890559

one or two government hospitals in Chennai, on an irregular basis⁷⁴. Almost all the surgeries were provided only for trans women, not trans men. Diagnosis of gender dysphoria or gender identity disorder is a prerequisite for undergoing surgery in these hospitals. This diagnosis is usually made by a psychiatrist who provides a letter to the surgeon or just provides a case summary and diagnosis, which can be used by the person with any authority that offers identity card⁷⁵.

After the NALSA judgement, a few Indian states have been noted to take interest in provision of gender affirming health services. For example, in the state of Chhattisgarh, State AIDS Control Society and Department of Health Services took initiative in organising a two-day workshop to train government health care providers on the issues of trans women and how to diagnose gender dysphoria/gender identity disorder⁷⁶ and provide gender-affirming health services – especially gender affirming surgery.⁷⁷

Beyond gender-affirming surgery, it is crucial to take note of practices around hormone therapy. As the previous section of this report noted, the documentation process for obtaining identity documents or changing gender markers is beset with vagaries, without adequate guidance being provided for government officials. In this information void it is likely that a person's outward gender expression may play a greater role in decisions made by health professionals or government officials. Hormone therapy changes a person's secondary sex characteristics and therefore their outward gender expression. It is likely to increase the chance that a transgender person will be socially recognised based on their gender identity. However, social recognition may not amount to legal recognition.

A fair amount of hormone therapy practiced in the country currently takes place without prescription or supervision of qualified medical practitioners. A study has found that lack of knowledge about hormonal therapy for trans people, legal concerns and unwillingness to 'harm a "normal" body' were some of the reasons reported by health care providers to not prescribe hormonal therapy for trans people⁷⁸. This is despite

⁷⁴ Based on discussions with transgender activists in Tamil Nadu and also discussions with a few government medical officers in Chennai.

⁷⁵ *Legal recognition of gender identity of TG people.*
http://www.undp.org/content/dam/india/docs/HIV_and_development/legal-recognition-of-gender-identity-of-transgender-people-in-in.pdf

⁷⁶ ICD-10, which is followed in government hospitals in India, still uses the term 'gender identity disorder'.

⁷⁷ <http://www.thehindu.com/news/national/other-states/chhattisgarh-to-soon-have-srs-facility-for-transgenders/article7613486.ece>

⁷⁸ Chakrapani, V, Mehta, S, Buggineni, P, Barr, F. (2008) Sexual and Reproductive Health of Males-at-risk in India: Service Needs, Gaps, and Barriers. Report presented to the National AIDS Control Organization, India.

guidance from the World Professional Association for Transgender health (WPATH) that such procedures are medically necessary for many transgender people.

A few branch offices of Family Planning Association of India (FPAI) have started offering hormonal therapy to trans people, especially trans women. Besides that, non-governmental organisations or even community organisations working with trans people, often do not have adequate information to provide on where to access transition services. Health care providers consulted for this review also had concerns in providing hormonal therapy to trans women who have not had surgeries to remove male genitalia. Further, there were concerns about providing hormone therapy to trans adolescents. Once again this is despite guidance in the WPATH Standards of Care recommending hormone therapy to these groups.

ii) Limited understanding of Gender Affirming Services

Some hijra-identified people may want to remove only their external genitalia without creation of vagina – to signify that they are neither man nor woman but a hijra. Apparently, this has caused some confusion among health care providers and policymakers regarding whether or not to provide surgery that only removes external genitalia (called ‘emasculat⁷⁹ion’ or ‘castration’ – although technically *castration* refers to removal of testes only). Doctors have argued that they would not like to remove a “normal male” external genitalia as it is ‘unethical’ – which highlights the limited understanding about trans people among health care providers⁸⁰. Similarly, one government medical official part of Ministry of Health argued that surgical removal of external genitalia alone should not be offered in government hospitals as the government would not like to create more “eunuchs” and also it is illegal to remove testes alone as such an act could be seen as causing ‘grievous injury’ – although some reports⁸¹ have highlighted the misinterpretation of Section 320 of the Indian Penal Code (which mentions removal of testes as grievous injury) in relation to voluntary removal of testes and penis by trans women. In a similar vein, trans masculine people experience strictures from the medical establishment in terms of mandates to undergo what the doctors call “full transition”. Till the process is “completed”, community

⁷⁹ The term ‘emasculat⁷⁹ion’ is also used in the context of Indian Penal Code 320 (grievous injury)

⁸⁰ Singh et al., 2015. (cited before)

⁸¹ Chakrapani, V. (2015). 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: SAGE Yoda Press.

members report instances where doctors withhold the issuance of the certificate required to begin the process of legal gender recognition

Clarification of this issue may be needed for provision of medically necessary operations for those who require them, and of identity documents based on a person's self-defined gender identity, when gender affirming surgery is a legal prerequisite. However, making legal gender recognition dependent on medical interventions, including sterilisation⁸², undermines the right to recognition before the law and amounts to forced or coerced sterilisation.

iii) NATIONAL GENDER TRANSITION GUIDELINES

There are international guidelines on all gender-affirming medical procedures (including assessment, hormone therapy, chest reconstruction and breast augmentation surgeries and genital reconstruction surgeries) developed by the World Professional Association for Transgender Health (WPATH) and UN agencies including World Health Organisation have endorsed a comprehensive Trans Health Blueprint for this region ⁸³. However, lack of access to this information and lack of national guidelines apparently prevent health care providers in India from providing hormonal therapy⁸⁴. In 2015, a task force was established by Indian Council of Medical Research (ICMR) to prepare guidelines on providing health services for trans people and intersex people. Those guidelines are yet to be released.

⁸² Also, currently there are no guidelines on whether and how to store sperms and ova from trans people before they undergo gonadal removal.

⁸³ Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme. 2015. *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities*. Washington, DC: Futures Group, Health Policy Project.

⁸⁴ Chakrapani, V., Velayudham, J. (2008, January). Whether ICD-10/DSM-IV diagnostic guidelines and WPATH treatment guidelines on 'Gender Identity Disorders' (GID) are relevant to India?: Discussion on the need for 'India-specific' guidelines for GID. 8th Annual National Conference of Indian Psychiatrists Society, Kolkata, India.

V. CRIMINALIZATION

As the preceding section has shown us, the promise of NALSA has yet to be realized when it comes to guaranteeing the right to legal gender recognition for transgender persons in India. In many instances, it is the stigma and discrimination that is faced by members of the transgender community that results in this gap between legal principle and reality. One of the ways in which stigma is perpetuated is through the unjust use of criminal laws to target transgender persons. Whether it is on the basis of targeting certain sexual acts associated with the community or the few livelihood options that are available to a number of transgender persons, these laws construct transgender persons as a criminal subject. In this section, we will take a brief look at some of the significant laws in this regard.

A. Explicit Criminalization of Gender Expression

One of the draconian laws enacted in colonial India was the Criminal Tribes Act of 1871, which effectively resulted in the direct criminalization of transgender identity. Reversing the principle of presumption of innocence, the Act mandated local governments to keep registers of name and residences of hijras amongst other groups as reasonable suspects for crimes. Post independence, the Act was repealed. However, in 2011 an amendment to the Karnataka Police Act brought back elements of the law.

The Police Act in this case was amended to include a provision titled “power to regulate eunuchs”. Under this law, the police commissioner had the power to suppress or control “undesirable activities of eunuchs, in the area under his charge”, by making a register of the names and places of eunuchs residing in the area. As per the guiding note under this provision, the “eunuchs” whose names may be included within this register include all those “who are reasonably suspected of kidnapping or emasculating boys as well as those suspected of committing unnatural offences or any other offences”. The named individuals may then be prohibited from doing any activities stated in the order. This provision effectively criminalized transgender individuals on the basis of their identity. By stereotyping the hijra community as one who kidnaps young children, it criminalised the care giving function which many hijras may engage in and thereby violates the right to family life.

In 2016, the Karnataka Government submitted before a High Court bench reviewing the constitutionality of the provision that it would remove the word “eunuch” from the statute. The move is significant as a recognition of the derogatory nature of the term

“eunuch”, even as it provides an incomplete guarantee of protection to transgender persons who may continue to be vulnerable under the law even in its more broadly worded articulation.

B. Criminalization of Sexual Acts associated with Transgender Persons

Section 377 of the Indian Penal Code criminalizes "carnal intercourse against the order of nature". This provision has been used since 1860 to persecute and prosecute LGBT individuals in the country.⁸⁵ As a People's Union for Civil Liberties - Karnataka Report on "Human Rights Violations against the Transgender Community" demonstrated, the violence of the law would often fall disproportionately on transgender individuals⁸⁶.

In 2009, the Delhi High Court read down this section to exclude consensual sexual acts between adults⁸⁷, a position which was reversed in 2013 by the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*⁸⁸. The Supreme Court's decision has been followed by an escalation of persecution and prosecution related to LGBT individuals in the country⁸⁹. Even as the Koushal Court observed that "Section 377 IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence", it was contradicted by the Supreme Court four months later in the NALSA decision, where the Court noted: "Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons".

The following affidavit filed as part of the petition to review the *Suresh Kumar Koushal* by Ajay, a transgender sex worker, describes the manner in which persecution under the law operates:

Post the judgment of the Supreme Court re-criminalizing homosexuality, the problem of police harassment has only increased. On the Saturday following the judgment on 11 December, 2013, myself and a counsellor Prem who works in

⁸⁵ See, Arvind Narrain, *Queer - Despised Sexuality*, Law and Social Change, Books for Change - 2004.

⁸⁶ Human Rights Violations Against the Transgender Community: A PUCL Report, 2003, available at <http://www.pucl.org/Topics/Gender/2004/transgender.htm>

⁸⁷ *Naz Foundation v. Government of NCT Delhi and Ors.*

⁸⁸ (2014) 1 S.C.C. 1, available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>

⁸⁹ Dignity First: One Year of Resistance to Rec-criminalization of LGBT Lives, available at <http://altlawforum.org/campaigns/dignity-first-one-year-of-resistance-to-re-criminalisation-of-lgbt-lives/>.

my organization were in the field. Again two police officers came and checked my bag and threw the contents down including pamphlets, condoms and lubes. They dragged Prem by the collar hurting him. When I and Prem protested this harsh and uncalled for treatment, we were told that anyway people like us were illegal.

I was told that anyway our community was being talked about on all media including the TV and the newspaper. I was told that in spite of such a big publicity of the Supreme Court judgment which made it a criminal offence to be a sexual minority, I and Prem were still indulging in homosexuality. The police said that we should stop being homosexual since the judgment had now come out I answered by saying that we have not come to the railway station to have sex, I and Prem had only come there to hear the community members speak about their pains and sorrow. The police then threatened us and told us that they will file cases against us as anyway now what we were doing was illegal.⁹⁰

A notable instance of the expansive reach of 377 to persecute individuals is through looking at a pertinent state level enactment. In August of 2014, the State of Tamil Nadu amended its preventive detention law, titled the Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Forest-offences, Goondas, Immoral Traffic Offenders, Sand-offenders, Slum Grabbers and Video Pirates (Amendment) Act 2014, adding sexual offenders, including those who commit offences under Section 377, to its purview.⁹¹ The Act provided for a year of imprisonment without bail with respect to the possible commission of offences listed under it. The amendment comes with an extraordinary discretionary power to the executive, given that the State has deleted the requirement that in order to be detained under the law, one should be a habitual offender⁹².

C. Criminalizing livelihood options that support the transgender community

Beyond the laws that directly or indirectly target transgender identity, there are a number of laws whose impact falls disproportionately on transgender individuals, primarily those who identify as a third gender. For many persons whose gender identity does not match the male one assigned to them at birth, a sense of community is found

⁹⁰ Affidavit of Ajay R.M. a transgender HIV/AIDS field worker documenting harassment by police officers in Haveri, Karnataka. (on file with the Alternative Law Forum)

⁹¹ <http://www.livemint.com/Leisure/5XCUSYRBJYDccUROFjs4bM/Ground-Report-Crime-and-punishment.html>

⁹² <http://www.thehindu.com/opinion/editorial/goondas-act-preventive-detention-law-in-tamil-nadu-amendments-a-threat-to-personal-liberty/article6332457.ece>

through escape from the birth home and into the various socio-cultural identity based groupings that exist throughout the country - hijras, jogappas, aravanis/thirunangais, kinnars - to name a few. With massive barriers from accessing the formal work force, sex work and begging are amongst the only options available to many community members. The legal regime surrounding these activities leads to immense persecution.

For instance, the community is targeted through rampant misuse of the Immoral Trafficking Prevention Act.⁹³ While the Act's objective is to criminalize institutional structures that result in trafficking, it ends up primarily targeting the visible figure of the sex worker and enables the police to arrest and intimidate the transgender sex-worker population. The criminalization of beggary through various state legislations also tends to impact transgender individuals. As the MSJE notes, 20 states in the country have enacted their own Anti-Beggary Legislation or adopted the legislation enacted by other states. The provisions of these legislations and their implementation status, particularly measures taken for rehabilitation of beggars, are not uniform, even as the MSJE advocates an approach towards beggary that is rehabilitative rather than punitive. A notable incident occurred in November 2014 in Karnataka when dozens of members of the community were arbitrarily detained by the police at the Beggar's colony in Bangalore, under the Karnataka Prohibition of Beggary Act, 1975.⁹⁴ Accounts note how most of them were merely going about their daily chores when they were arbitrarily arrested, aided in part by the overbroad definition of a beggar under the law as anyone "having no visible means of subsistence" who is caught "in any public place."

Beyond these broad categories, there are a range of offences both within the Indian Penal Code as well as in state level police acts that can be used to target transgender individuals. The crime of grievous hurt under the penal code includes "emasculatation", which, as noted in the last chapter, has the potential to be misinterpreted and applied to gender affirming procedures even as they stand constitutionally protected under the NALSA judgment. The public nuisance provision in the penal code is also subject to abuse with its overbroad definition of the offence.⁹⁵ This vague definition is then replicated to define the same offence under state police acts which are also used to target and harass transgender persons who occupy public spaces.

⁹³ Scott Long, Buggery and beggary, and Ferguson, available at <https://paper-bird.net/2014/11/28/buggery-and-beggary/>.

⁹⁴ <http://orinam.net/human-rights-violations-tg-karnataka-ondede-report/>

⁹⁵ "A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right".

V. CONCLUSION

This report has been written at a time when the face of legal regulation of transgender rights stands at a crucial juncture. As mentioned earlier, the latest draft of the Transgender Rights Bill is still to be debated in the Parliament, even as community consultations across the country are being held to debate the provisions of the bill, with the legal recognition chapter standing as a particularly contested provision.

At the second expert meeting held in September 2016 where a draft version of this report was presented before a gathering largely comprised of transgender community members, two viewpoints relating to identity recognition became clear. The first, which was completely in favour of the self-identification mechanism, stood for an approach with the most minimal of checks or proofs required for transpersons to access legal gender recognition. The second represented a more cautious approach based on the fact that transgender identity was also linked to a range of entitlements either already available or likely to be guaranteed in the future as the NALSA implementation continued. This in turn led to an apprehension that if the ability to access legal recognition as transgender was not properly regulated, non-transpersons would attempt to pass off as transgender to avail such benefits. Any response must attempt to balance these two viewpoints.

We believe that the manner in which both sets of concerns can be dealt with while also respecting the self-identification principle as enshrined by NALSA is through an approach that delinks identity recognition from receiving entitlements or any other kind of affirmative action. To elaborate, as far as identity documents such as the passport or voter identity card are concerned, the self-identification must be respected fully, with minimal administrative implements to access these documents, or change one's gender when an individual already possesses them. When it comes to affirmative action whether it is in the form of reservations in educational institutions and workplaces or entitlements and welfare schemes offered by the government, a more stringent certification mechanism involving a screening committee may be put in place. In no instance however can such a committee comprise medical officers – that would certainly be a direct contravention of the NALSA non-medical mandate.

More immediately, the government must direct different authorities to cease any kind of medical requirement in process identity documents at present. The practices explicitly carried out in the case of the passport office and gazette notification for sex change in particular must be discontinued immediately insofar as they require a medical certificate.

The specific process of recognition, whether it is for accessing identity documents or for affirmative action is one which needs to be arrived at through community consultation. Indeed, the same must be said of the transgender bill as a whole. Lack of adequate consultation is a plague that ails all the different drafts of the bill and the only way to arrive at a draft that is able to address the community's needs appropriately is through involving a wide range of community members in the drafting process.

APPENDIX A

The table below provides a breakdown of the different national identification documents and their current procedural requirements for recognizing transgender identity. The scenarios are divided along three lines: the first set look at obtaining a change of gender in an existing identity document that one holds. The second looks at obtaining recognition as a transgender person in a fresh application for an identity document. The third looks at changing one's gender from male to female or vice versa in the first application for a specific identity document.

A: Amending existing identity document that reflects gender marker assigned at birth.

Document	Is there a provision to amend existing id that reflects sex assigned at birth?	Where is this provision stipulated?	Supporting documents required
Passport	Yes	<p>Schedule III, Passport Rules, 1980.</p> <p>Also specified in the Instruction booklet.</p>	<p>A person is required to make a fresh application for re-issue of the passport with the accompanying documents:</p> <p>To support the request for change in Sex:</p> <ul style="list-style-type: none"> i) Old Passport in original with self-attested photocopy of its first two and last two pages ii) Sworn affidavit regarding change of sex and iii) Certification from

			<p>hospital where the person underwent sex change operation successfully.</p> <p>iv) Cannot apply for tatkal⁹⁶.</p> <p>To support a major name change:</p> <p>i) Proof of present address in the new name</p> <p>ii) Proof of date of birth in the old name</p> <p>iii) Paper clipping of two leading daily newspapers in original (one daily newspaper should be of the area of Applicant's Permanent Address and the other at Current Address or nearby area)</p> <p>iv) Deed poll/sworn affidavit</p> <p>v) Cannot apply for tatkal.</p> <p>To support a change in appearance:</p> <p>i) Old Passport in original with self-attested photocopy of its first two and last two pages</p> <p>ii) Recent photograph</p>
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⁹⁶ A speedier process.

			iii) Cannot apply for tatkal.
Aadhar card	Yes	<p>Instruction contained on the website:</p> <p>Application by Post for Resident Data Update/Correction, (https://uidai.gov.in/images/instruction_for_request_by_post_05112014.pdf)</p>	This Instruction does not stipulate that any documents are required to accompany this request.
Ration card	No.		
Birth certificate	No.		
Voter's id	Yes	<p>Instructions on the website</p> <p>Form 8: http://www.nvsp.in/forms/form8.html</p>	No gender specific documentation required. Only supporting documentation proving 'date of birth' and 'proof of residence' is required.
PAN card	Yes.	<p>Correction form available online on the Income Tax PAN Services Unit website https://tin.tin.nsdl.com/pan/</p>	Any correction must be accompanied by personal identification proof, age proof and address proof. It is unclear whether a change in gender from 'male' to 'female' or vice versa is possible when such supporting documents do not reflect the same gender.

B: Obtaining new identity document as transgender/third gender/other

Document	Is there a provision to apply for this id in original as transgender or a gender apart from 'male' and 'female'?	Where is this provision stipulated?	Supporting documents required
Passport	Yes	<p>The application form includes 'transgender' as a gender identity in addition to 'male' and 'female'.</p> <p>Detailed rules are contained in Schedule III of the Passport Rules, 1980.</p>	<p>A person is required to make a fresh application for issue of the passport with the accompanying documents:</p> <p>To support the Claim of Change in Sex:</p> <ul style="list-style-type: none"> i) Sworn affidavit regarding change of sex and ii) Certification from hospital where the person underwent sex change operation successfully. iii) Cannot apply for tatkal. <p>To support a minor name change:</p> <ul style="list-style-type: none"> i) Deed poll/sworn affidavit <p>To support a major name change:</p> <ul style="list-style-type: none"> i) Paper clipping of two leading daily newspapers in original (one daily newspaper should be of the area of Applicant's Permanent Address and the other at Current Address or nearby area) ii) Deed poll/sworn affidavit iii) Cannot apply for tatkal.
Aadhar card	Yes	Application form includes 'transgender' as a gender identity, apart from 'male' and 'female'.	This Instruction does not stipulate that any documents that are required to accompany this request.
Ration card	Yes	Application form includes 'other' as a gender identity,	No supporting documents are required

		apart from 'male' and 'female'.	
Birth certificate	No.		
Voter's id	Yes	Instructions on the website Form 6: http://www.nvsp.in/forms/form6.html	No supporting documents required. There is also a stipulation that a transgender person between the ages of 18-21 can have their 'guru' step in the place of a parent to testify to their age if no other age proof is available. See question number 11 in the FAQs here: http://eci.nic.in/eci_main/GeneralElector2122013.pdf
PAN card	No.		

C: Obtaining new identity document as 'male' where gender marker assigned as birth was female or 'female' where gender marker assigned at birth was male

Document	Is there a provision to obtain this id as male or female when that gender identity doesn't match the sex assigned at birth?	Where is this provision stipulated?	Supporting documents required
Passport	Yes.		A person is required to make a fresh application with the accompanying documents: i) Sworn affidavit regarding change of sex and

			<p>ii) Certification from hospital where the person underwent sex change operation successfully.</p> <p>iii) Paper clipping of two leading daily newspapers in original (one daily newspaper should be of the area of Applicant's Permanent Address and the other at Current Address or nearby area) for name change</p> <p>iv) Cannot apply for tatkal.</p>
Driving license	No		
Aadhar card	No		
Ration card	No		
Birth certificate	No.		
Voter's id	Yes.		The application form (Form 6) allows an applicant to enter gender as either 'Male', 'Female' or 'Other'.
PAN card	No.		