

Queering the LAW

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produced by the LGBT+ rights movement on the issue of LGBT+ inclusion in India’s laws. This project seeks to be a resource which adds to the already existing expansive work on the issue of legal inclusion of LGBT+ persons. This is a work in progress and we look forward to inputs and critique from various groups and community members. We hope to facilitate conversations around this draft and improve it on the basis of these inputs and conversations.

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Errors, if any, in the Report, are the authors’ alone.

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Note

The Vidhi Centre for Legal Policy ('Vidhi') organised a consultation with some members of the LGBT+ community and persons working on gender and sexuality rights issues on the first two chapters of "Queering the law: Making Indian Laws LGBT+ inclusive" i.e. "Identity" and "Violence". The consultation took place on the 13th of April, 2019 and was attended by: Amrita Sarkar, Danish Sheikh, Anindya Hajra, Maitreyi Gupta, Prabha Nagaraja, Sowmya T, Rudrani Chettri, Deepak Kumar Kulshresth, Rihana, Vikramaditya Sahai, Sunil, Minakshi Sanyal, Simran Shaikh, Bittu Kondaiah, Sarim Naved, Ajita Banerjee, Elina, Renu Arya, Saumya Maheshwari, Ramkali, Dhruvo Jyoti, Aditi Mukherji, Aishwarya Ayushmaan, and Priya. It was moderated by Gowthaman Ranganathan.

A draft version of this chapter was shared with the attendees and an open-ended discussion was carried out on the basis of the same. The discussions and issues raised at the consultation are reflected in the sections on "Issues for Consideration" and the "Summary of Consultation" of this chapter. They have also been incorporated into the main text where possible.

We would like to thank everyone who attended the consultation for taking out the time to read the draft reports, sharing their valuable insights and raising critical issues that require consideration for LGBT+ inclusion in our laws.

We would also like to emphasise the importance of reading this report in light of the issues discussed at the same.

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Queering the La



Law: Making Indian Laws LGBT+ Inclusive

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A. The Freezing of Gender Identity by Law

In most countries around the world, an individual's identity is recorded at birth.¹ In India, The Registration of Births and Deaths Act, 1969 ('1969 Act') and rules thereunder regulate the legal registration of personal existence. The registration of birth is an essential prerequisite to be deemed a citizen in the eyes of the law, and for accessing rights and protections under the law.² While the 1969 Act sets up various authorities and provides certain guidelines for registration of births and death, it is operationalised primarily through State rules. The State rules and the forms thereunder are based on the Model Birth and Registration Rules and forms issued by the Office of Registrar General and Census Commissioner of India. All forms, including the Birth Report and the Birth Certificate which provide for the attributes that need to be recorded at the time of birth recognise only two sexes i.e. male and female. Further, the recording of this attribute is

mandatory, thereby resulting in the freezing of one's sex, and consequently gender identity at birth. While one can correct or cancel the entries in the Birth Register (where sex is recorded), such correction is permitted only in case the entry is "erroneous", "fraudulent" or "improper".³ At present, there is no protocol/procedure in place to change one's sex on a birth certificate.

The presence of only options for sex "male" and sex "female" on the birth report and birth certificate not only leads to the assignment of sex, and consequently gender, within the binary at birth, but also goes to show that intersex bodies are completely invisibilised in the law. The law thus requires that persons with intersex variations fit into either one of the two sexes i.e. male or female. As mentioned, this is often achieved through non-consensual surgery on infants with intersex variations which the intersex community

¹ Jill Marshall, 'Human Rights Law and Personal Identity', Routledge (2014).

² Government of NCT Delhi, 'Registration of Births and Deaths in Delhi', available at http://www.delhi.gov.in/wps/wcm/connect/DOIT_DES/des/home/facts+about+births+and+deaths+registration/citizen+charter (Last accessed on November 9, 2018).

³ Section 15, 1969 Act; Rule 15, Model Birth and Registration Rules.

declares to be a form of genital mutilation.⁴ The failure to recognise sex outside of the binary also raises the central query - on what basis/parameters is sex assigned at birth? At present, there is no legal definition for “sex” in the law, and there is no legally sanctioned medical test for the determination of sex at birth. Further, interviews with doctors reveal that there is no uniform medical protocol on the basis of which sex is assigned at birth. In a few hospitals across the country, upon the birth of an infant with intersex variations, the general protocol is to carry out a chromosomal analysis to determine whether the infant is genetically male or female. As the infant grows, they are usually subject to a psychometric analysis to determine whether they are displaying masculine or feminine traits. Surgical intervention is delayed until the child nears puberty. Thereafter, on the basis of medical input, and conversations with the parent and the child, sex is assigned to such child. However, this practice is not the norm in hospitals across the country, and in most cases, surgery is performed on infants with intersex variations immediately after birth, often to the detriment of such infant.⁵ In some cases, the choice of sex is based on which surgical intervention would be easiest depending on the

shape of the genitalia of the infant, i.e. would it be easier to surgically fit such infant into sex “male” or sex “female”. Such calls are not based on any objective or medically agreed upon criteria and are often at the discretion of the concerned doctor.⁶ This goes to demonstrate that as far as the category of “sex” is concerned, medical jurisprudence plays a dominant role in freezing it within the binary of “male” and “female”. The High Court of Madras, in its judgment in *Arunkumar & Ors. vs. The Inspector General of Registration & Ors.*⁷ (*Arunkumar*), has recognised that non-consensual surgery on infants with intersex variations constitutes a violation of *NALSA* and has accordingly directed the Government of Tamil Nadu to issue a government order prohibiting sex re-assignment surgeries on infants with intersex variations.⁸ Similarly, it was recommended at the consultation that the Government of India issue a circular to medical establishments prohibiting surgeries on infants with intersex variations.⁹

However, despite judgments such as *Arunkumar*, *NALSA vs. Union of India*¹⁰ (*NALSA*), *Navtej Johar vs. Union of India*¹¹ (*Navtej Johar*), and demands from the LGBT+ community, the

⁴ Erin Lloyd, ‘Intersex Education, Advocacy & the Law: The Struggle for Recognition and Protection’, *Cardozo Women’s Law Journal*, Vol. 11 (2005).

⁵ Interview with Dr. Richie Gupta, MBBS, DA, MS (General Surgery), M.Ch (Plastic Surgery), Fortis Hospital.

⁶ Interview with Dr. Ranjita Biswas, consultant psychiatrist.

⁷ WP (MD) No. 4125 of 2019.

⁸ *Arunkumar*, Para 20.

⁹ Consultation dated 13th April, 2019, *see* Summary of Consultation.

¹⁰ *NALSA vs. Union of India*, Writ Petition (Civil) No.400 of 2012.

¹¹ *Navtej Johar vs. Union of India*, WP (Crl.) No.76/2016.

medical community at large continues to be ignorant of discourse on sexual orientation and gender identity, and till date, medical texts treat non-normative genders and sexual orientations as “deviant”.¹² Given that the medical establishment is a major site of violence for LGBT+ persons, there is a pressing need to create awareness and sensitise the medical community. The need for the medical community to move towards a more progressive outlook on LGBT+ persons has also been recognised in *Navtej Johar*.¹³

Further, certain jurisdictions such as Malta are now recognising the harms caused by practices such as the fixing of gender identity at birth, and performing surgeries on infants with intersex variations to force fit them into the binary of male and female. Malta’s Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (‘GIGESC’) permits parents to postpone the assignment of a gender marker to a child until they turn 18¹⁴ and prohibits surgery on infants with intersex variations unless the minor has granted informed consent.¹⁵ An individual is thus

legally granted autonomy to select one’s gender identity upon attaining legal majority and to choose whether they want to subject their bodies to medical procedures. However, while parents have the right to choose their child’s gender identity before such child turns 16, the child can challenge such assignment of gender before Court via a relatively simple procedure.¹⁶ However, as of now Malta just recognises gender identities within the binary of male-female but dialogue on third gender being recognised in the law is also underway.¹⁷ Further, Malta has also taken the decision to permit individuals to not declare their gender identity on their identity documents, giving them the option to leave the same “unspecified”. The rationale behind this decision comes from recognising that for many, gender may be a deeply personal category.¹⁸ Malta thus demonstrates that legislation can open doors to a more progressive idea concerning sex and gender identities.

At present while the law does not prohibit surgeries on infants with intersex variations in India, it was recommended at the consultation

¹² Rema Nagarajan, ‘Now, MBBS students to do course on medical ethics too’, Times of India, available at <https://timesofindia.indiatimes.com/india/now-mbbs-students-to-do-course-on-ethics-too/articleshow/66612950.cms> (Last accessed on November 15, 2018).

¹³ *Navtej Johar*, pg. 110.

¹⁴ Section 7(4), GIGESC.

¹⁵ Section 14, GIGESC.

¹⁶ Interview with Gabriella Calleja, Head of the LGBTIQ Unit, Human Rights and Integration Directorate, Malta.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

that Section 322¹⁹ of the Indian Penal Code, 1860 ('IPC') which criminalises voluntarily causing grievous hurt, could be relied upon to penalise non-consensual surgeries carried out on persons with intersex variations.²⁰

¹⁹ Section 320 of the IPC which defines grievous hurt includes emasculation. It was recommended that as emasculation fell within the scope of grievous hurt, section 320 and 322 could be used in cases of non-consensual surgeries on persons with intersex variations.

²⁰ Consultation dated 13th April, 2019, *see* Summary of Consultation.

B. Accounting for Change in Gender Identity in Law

In addition to invisibilising persons with intersex variations, and freezing gender identity at birth, existing laws continue to presume that gender identity remains stable, and thus fail to account for a change in the status of rights and liabilities of an individual once they change their gender identity. In light of *NALSA*, an individual has a fundamental right to choose their gender identity, and this gender identity can be different from the one assigned to them at birth. However, the law, including The Transgender Persons (Protection of Rights) Bill 2018, is completely silent on the status of rights and liabilities of a person upon change of their gender identity. For instance, does a marriage automatically dissolve when one of the partners changes one's gender identity since India

does not recognise same-gender marriages? Does a person become eligible for reservations meant for women if they start identifying as a woman? All these questions remain unanswered in the existing legal regime. Countries such as Ireland²¹, United Kingdom²², Malta²³, Argentina²⁴, and Norway²⁵, have, in their gender identity laws, clarified the impact of change in gender on the rights of persons who change their gender identity vis-a-vis other laws. For India, addressing this issue, ideally in a bill on transgender rights is critical. Simultaneously, making our laws LGBT+ inclusive also becomes intrinsic to avoid the possible confusion that can result from a change in gender identity, particularly in a legal regime

²¹ Part III, Ireland's Gender Recognition Act, 2015.

²² Chapter on Consequences of issue of gender recognition certificate etc., The UK Gender Recognition Act, 2004.

²³ Section 3(2), GIGESC.

²⁴ Article 7, Argentina's Gender Identity Law, 2012

²⁵ Section 6, Norway's Legal Gender Amendment Act.

which continues to disregard the rights of LGBT+ persons.

C. Gendered

Drafting of Laws

The language of the law is another means through which hierarchisation and invisibilisation of gender are reinforced. Language in itself can be a tool of oppression, and this is true especially of gendered legal language. In India, gendered legal drafting finds its roots in the General Clauses Act, 1897 ('1897 Act'). The objective of the 1897 Act is to shorten language and provide uniformity of expression across legislations. It does so by defining words commonly used in the law, and by laying down guidelines for the same. Section 13(1) of the 1897 Act reads as follows:

*"In all '[Central Acts] and Regulations, unless there is anything repugnant in the subject or context -
(1) words importing the masculine gender shall be taken to include females;"*

Section 13(1) not only entrenches the presumption of "male as the universal norm" but also reinforces the binary by presuming that there exist only two genders i.e. male and female. Several jurisdictions have recognised the regressive nature of this legal presumption and have gone on to repeal and modify the same.²⁶ However, legal drafting in India continues to be dictated by this

archaic principle, and it is time we move to gender-neutral drafting of laws (unless the law itself is gendered).

²⁶ Constanza Toro, 'Gender neutral drafting: Gender equality or an unnecessary burden?', IALS Law Review, Vol. 5 (2018).

D. Identity Documents, Sex and Gender Identity

Identity documents are the foundation of an individual's legal identity, and are essential for accessing legal and social resources including rights and protections. For transgender persons, in addition to accessing rights, identity documents that correctly reflect their name and gender are symbolically important since they legitimise their self-chosen identity. At present, the process of changing name and gender is highly bureaucratised and involves multiple cumbersome steps.²⁷ It is only after a transgender person has legally changed their name and gender can they go

about changing the same in their identity documents. The 2018 Bill sought to simplify the process for legally changing gender but had come under fire for introducing a screening mechanism, and requiring gender-affirming surgery for transgender persons who want to identify within the binary. It is hoped that in the future legislation on transgender rights takes into account the perspectives coming from the transgender community²⁸ and provides a fair and simple legal procedure for recognition of gender identity which

²⁷ You can read about the process of legally changing gender identity and name at Vidhi Centre for Legal Policy, 'The Law Isn't Straight: A Queer Person's Guide to Accessing Rights', available at <https://vidhilegalpolicy.in/reports/2018/2/12/the-law-isnt-straight-a-queer-persons-guide-to-accessing-rights>.

²⁸ 'Amended Transgender Persons (Protection of Rights) Bill, 2016, contrary to Supreme Court NALSA verdict, violates right to self-identity and constitutional rights, encodes discrimination, offers no reservations while criminalizing transgender community traditional livelihood of begging' available at <http://orinam.net/content/wp-content/uploads/2018/12/Press-Release-Transgender-Persons-Protection-of-Rights-Bill-2019-Kolkata-Press-Meet.pdf> (Last accessed on February 20, 2019).

respects the right to self-identified gender identity as recognised in *NALSA*.²⁹

It is in the backdrop of legal recognition of the right to self-identified gender identity that the law needs to become cognisant of the distinction between sex and gender. At present most laws (and forms seeking personal information) appear to conflate categories of “sex” and “gender” and use them interchangeably. Such arbitrary and interchangeable use of the terms sex and gender cannot be continued, especially since the distinction between the two has been legally recognised by the *NALSA* judgment.³⁰ The distinction between sex and gender is also being reflected in newer judgments including in a verdict of the Rajasthan High Court (‘High Court’) in *Ganga Kumari vs. State of Rajasthan and Ors*³¹ (*Ganga Kumari*). In *Ganga Kumari*, the High Court while drawing a distinction between sex and gender declared that an employer or appointing authority seeking information about the sex of an individual (and requirement to be subject to medical examination for determination of sex), unless the nature of the job necessitates

such information, is an intrusion of one’s right to privacy.³² It goes on to clarify, however, that information about gender may be sought.³³ This judgment is particularly remarkable because, in addition to recognising that seeking information about sex in certain circumstances may amount to a privacy intrusion, it directs the State to reconsider the basis on which it negotiates its relationship with an individual i.e. gender instead of sex.

Similarly, Graham Mayeda in his article “*Re-imagining Feminist Theory: Transgender Identity, Feminism, and the Law*”, also raises a point about the basis (sex or gender) of engagement between the State and the individual. He highlights that often the relationship between the State and individual for the purpose of welfare initiatives is based on gender, while for traditional social institutions such as marriage, it continues to be the biological sex.³⁴ In India, a reading of the 2018 Bill confirms this observation. While it provides for anti-discrimination and welfare provisions for transgender persons, it continues to be silent on their rights to access core societal institutions such as marriage, adoption, etc. thus preserving the status quo of these institutions being based on

²⁹ You can read Vidhi’s submissions on the 2016 Bill at: Vidhi Centre for Legal Policy, ‘Submissions to the Standing Committee on The Transgender Persons (Protection of Rights) Bill, 2016’, available at <https://vidhilegalpolicy.in/reports/2016/11/7/submissions-to-the-standing-committee-on-the-transgender-protection-of-rights-bill-2016>.

³⁰ *NALSA*, Para 59.

³¹ *Ganga Kumari*, S.B. Civil Writ Petition No. 14006/2016.

³² *Ganga Kumari*, Para 24, 25.

³³ *Ganga Kumari*, Para 25.

³⁴ Graham Mayeda, ‘Reimagining Feminist Legal Theory: Transgender Identity, Feminism and the Law’, *Canadian Journal of Women and Law*, Vol. 17 (2005).

biological sex and between persons of opposite genders.³⁵ Lawmakers and policymakers in India must be cognisant of the distinction between gender and sex while shaping sex and gender-based legislation and policies in the age of *NALSA*.

In light of the above, *Annexure A* presents provisions in some laws and schemes which continue to operate on the binary of male and female, or violate *NALSA* by imposing unconstitutional conditions for recognition of one's chosen gender identity. The table identifies the law and the forms (if any) that need to be amended to account for transgender persons and suggests tentative amendments. This table is however not a comprehensive database of all laws or policies which continue to operate in the binary or are violative of *NALSA* but seeks to provide a snapshot of identity-related provisions in India's laws. It was suggested at the consultation that a comprehensive exercise identifying all laws, policies and schemes that operate on the binary be carried out, and the same be amended to include transgender persons.

³⁵ While there are cases where marriages have been registered in cases of transgender persons, the same has been achieved through an interpretation of marriage laws in light of *NALSA* as opposed to policy or legislative changes.

ANNEXURE ‘A’

A snapshot of laws relating to identity

S.No .	Name of Law/Scheme	Relevant Provision	Analysis	Recommended Action	Forms that have to be changed	Relevant Ministry
1.	The General Clauses Act, 1897	Section 13(1) - words importing the masculine gender shall be taken to include females.	<ol style="list-style-type: none">1. The presumption of section 13(1) operates on the belief that the norm of humanity is male.2. It does not account for genders outside of the binary.	Section 13(1) must be deleted, and gender-neutral language must be adopted for drafting of laws (unless otherwise necessary).		Ministry of Law and Justice
2.	The Passport Rules	Schedule III, Table 3, column 38 and 39.	<i>NALSA</i> grants an individual the right to self-identified gender identity	This provision needs to be deleted.	<ol style="list-style-type: none">1. Passport Application Form2. Personal	Ministry of External Affairs

		<p>Proof of sex change to be demonstrated through a certificate of sex change operation from the hospital where such operation was carried out.</p>	<p>independent of gender affirming surgery/procedure. However, under the Passport Rules, proof of sex change needs to be demonstrated through a medical certificate of sex change operation. This violates <i>NALSA</i>.</p>		<p>Particulars Form</p> <ol style="list-style-type: none"> 3. External Application Form for Indian Passport at Indian Mission/Post 4. Application Form for Miscellaneous Services on Indian Passport 5. Application Form for Miscellaneous Services on Indian Passport (A) Renewal, ... 6. Application for the Issue of Diplomatic/Official Passport 7. Application for Issue of an Emergency Certificate 8. Application for the Issue of Certificate of Identity 	
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3.	National Food Security Act, 2013 & Form for Issue of Ration Card	Section 13- the Oldest woman to be treated as head of household for the issue of ration cards. Where a household does not have a woman or woman above 18 years, eldest male to be treated as head of household till woman attains the age of 18.	<ol style="list-style-type: none"> 1. While the intention behind section 13 is to empower women by designating them as head of household, the section continues to presume that gender exists in the binary by only recognising women and men as members of eligible households. 2. In Allahabad High Court's judgement <i>Ashwin Kumar Misra v Bharat Sarkar (2015)</i>, the Court applied the <i>NALSA</i> judgment and recognised that transgender persons can also be the heads of households. It 		Application Form for National Food Security Ration Card	Ministry of Consumer Affairs, Food and Public Distribution [Department of Food and Public Distribution] & Food Departments of respective State Governments
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			<p>directed State Governments to make sure that ration card forms have the category of “third gender/transgender.”</p> <p>3. However, both section 13, as well as ration card forms, continue to be restricted to the binary. They need to be amended to include transgender persons.</p>			
4.	The Census Act, 1948 & The Household Schedule Form	Column 3 - Sex includes male, female and other.	<p>The Household Schedule Form provides the categories of data to be collected for the census and includes the category “sex” which is divided into male, female and other.</p> <p>The <i>NALSA</i> judgment</p>	A policy call needs to be taken to determine whether the census will reflect data on sex, gender or both. It must be kept in mind that legally sex continues to exist in the binary (unless a call is taken	The Household Schedule Form	Ministry of Home Affairs

			draws a distinction between sex and gender and recognises the right of an individual to self-identified gender as male, female or transgender. However, it recognises sex only in the binary of male and female.	otherwise) while gender includes three categories of male, female and transgender.		
5.	The Right of Children to Free and Compulsory Education Act, 2009	Section 2(c) - "Child" means a male or female child of age six to fourteen years.	<ol style="list-style-type: none"> 1. Section 2(c) continues to presume gender exists in the binary of male and female. 2. The Government of NCT Delhi has identified transgender children as Disadvantaged Children under the RTE Act thus recognising that children exist out of the binary. 	<p>Section 2(c) must thus be amended and made gender neutral as follows:</p> <p><i>"Child" means a person of age six to fourteen years gender-based"</i></p>		Ministry of Human Resource and Development

6.	CBSE Examination Bye-Rules	Rule 2(xxiii) - Words importing the masculine gender also include the feminine gender.	<ol style="list-style-type: none"> 1. Rule 2(xxiii) presumes that the norm of humanity is male. 2. It does not account for genders outside of the binary. 	Rule 2(xxiii) must be deleted.		Central Board of Secondary Education (Ministry of Human Resource and Development)
		Rule 69 - Changes and Corrections in Name and Date of Birth.	<ol style="list-style-type: none"> 1. Rule 69 only permits change of name and date of birth and not gender. This may create problems while applying for jobs or higher education when there is a mismatch between gender on school certificates and gender on other identity documents. 2. The issue of change of gender in school 	Rule 69 needs to be amended to permit change in gender identity.		

			<p>certificates came up in <i>Chanchal Bhattacharya vs. State of West Bengal</i>³⁶, wherein the High Court of Calcutta relying on <i>NALSA</i> directed the West Bengal Board of Secondary Education to make an endorsement in the school certificates of petitioner's son such that his self-identified gender reflected in such certificate. Further, transgender persons are now moving Courts³⁷ around the</p>			
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³⁶ W. P. 30295 (W) of 2015.

³⁷ *Riya Sharma vs. Union of India & Ors.* (W.P. (C) 6595/2017).

			country to effect change of gender in school certificates demonstrating the need for an amendment to laws governing school certificates.			
7.	Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003	Rule 12(e) - One may make an application for modification of one's particulars in the National Register of Indian Citizens including "change of sex".	<p>Rule 3(3) provides that the "sex" of a citizen will be recorded in the National Register of Citizens. Subsequently, Rule 12 permits an individual to make an application for change of particulars in the Register including "change of sex" (Rule 12(e)).</p> <p>The <i>NALSA</i> judgment draws a distinction between sex and gender and recognises the right of an individual to self-identified gender. Thus legally one can change</p>	Amend Rule 12(e) and replace the word "sex" with "gender".		Ministry of Home Affairs

			their “gender” and not “sex”.			
8.	Pradhan Mantri Jan-Dhan Yojana	Financial Inclusion Account Opening Form	The Financial Inclusion Account Opening Form presumes that gender exists only in the binary and provides options for just male and female. However, gender information is irrelevant to the scheme and thus such information is unnecessary.	The form must ideally be amended to remove gender markers. However, if such information may be useful for data collection for policy purposes, then the form must be modified to include transgender persons.	Financial Inclusion Account Opening Form	Ministry of Finance, Department of Financial Services
9.	National Rural Employment Guarantee Act, 2005	Job Card Form	The National Rural Employment Guarantee Job Card Form presumes that gender exists only in the binary and provides options for just male and female. However, gender information is irrelevant to the scheme and thus such information is unnecessary.	The form must ideally be amended to remove gender markers. However, if such information may be useful for data collection for policy purposes, then the form must be modified to include transgender persons.	Job Card Form	Ministry of Rural Development

10.	Atal Pension Yojana ('APY')	Forms	Forms under the APY presume gender exists in the binary and require an individual to choose between the gender markers (Shri/Smt/Kumari) and requires a left thumb impression from male persons and right thumb impression from females. This even though the benefits under the scheme do not depend on gender identity.	The form must ideally be amended to remove gender markers. However, if such information may be useful for data collection for policy purposes, then the form must be modified to include transgender persons.	<ol style="list-style-type: none"> 1. APY Subscriber Registration Form 2. APY Subscriber Registration Form - Swavalamban Yojana Subscribers 3. Form to upgrade/downgrade pension amount 4. APY Account Closure Form 	Ministry of Finance
11.	Pradhan Mantri Jeevan Jyoti Bima Yojana ('PMJJBY')	Forms	The forms under the PMJJBY presume gender exists in the binary and provide for gender markers (Shri/Smt.). This even though the benefits under the scheme do not depend on gender identity.	The form must ideally be amended to remove gender markers. However, if such information may be useful for data collection for policy purposes, then the form must be modified to include transgender persons.	<ol style="list-style-type: none"> 1. PMJJBY Application Form 2. PMJJBY Claim Form 	Ministry of Finance

12.	Pradhan Mantri Suraksha Bima Yojana ('PMSBY')	Forms	The forms under the PMSBY presume gender exists in the binary provide for gender markers (Shri/Smt.). This even though the benefits under the scheme do not depend on gender identity.	The form must ideally be amended to remove gender markers. However, if such information may be useful for data collection for policy purposes, then the form must be modified to include transgender persons.	PMSBY Application Form	Ministry of Finance
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Issues for Consideration

- The law, ideally the bill on transgender rights, must clarify the impact of gender change on the existing rights and liabilities of individuals.
- Some laws use the category of “sex” while others use the category of “gender”. In light of *NALSA* which has introduced a legal distinction between the categories of sex and gender, lawmakers need to analyse the rationale behind certain laws recognising the category of sex and others gender. The distinction between the categories of sex and gender needs to be kept in mind while rethinking existing, and designing future, laws and policies.
- Assignment of sex at birth within the binary of male and female also leads to assignment of gender within such binary and the freezing of gender identity at birth. Such assignment and freezing of gender identity at birth needs to be addressed.
- Minors with intersex variations are often subject to medical procedures such that their bodies fit into the binary of male or female. Such non-consensual medical procedures are a violation of the rights of persons with intersex variations. This needs to be addressed.
- Laws and schemes render the transgender identity invisible directly, by only recognising the categories of male and female, and indirectly, by providing for only male and female prefixes (Smt./Shri. etc.). Where gender is relevant for the law/scheme, it must be amended to account for transgender persons, and where gender is irrelevant, the law/scheme should be ideally amended to remove gender markers, unless the collection of such data is necessary for policy purposes.
- Both the public and private sector must actively un-gender forms where seeking information about gender does not serve a lawful and legitimate purpose. This aligns with the international best practice of un-gendering forms where gender is irrelevant.³⁸
- Laws such as the Passport Rules and the CBSE Bye-Examination Rules fall short of *NALSA* by requiring medical proof for change of gender and failing to permit legal change of gender, respectively. They need to be amended to ensure that they align with *NALSA*.

³⁸Javier Epinoza, ‘Government to consider ‘gender neutral’ official documents’, available at <https://www.telegraph.co.uk/education/2016/07/07/government-to-consider-gender-neutral-official-documents/> (Last accessed on November 9, 2018).

Summary of Consultation

The issues discussed at the consultation are arranged thematically.

- **Implementation of *NALSA***
 - The judgment of the Supreme Court in the matter of *NALSA* needs to be implemented. Despite the judgment, transgender persons continue to face discrimination and rights violations including in spaces such as the Passport Office and hospitals, and find it difficult to access educational and employment opportunities as well as to change their gender identity on documents.
 - There is a pressing need to sensitise all stakeholders including government officials of the *NALSA* judgment. As far as drafting of laws is concerned, those who are in the legislative drafting department need to be sensitised.
- Software used by government offices which provide for recording of gender identity needs to be designed/modified to account for transgender persons.
- Upcoming policies and existing policies must be drafted and implemented in light of the directions of *NALSA*.
- However, *NALSA* continues to be a confusing judgment and uses the terms transgender and third gender interchangeably thus creating confusion about the terminology. The use of the term “third gender” is problematic and must be avoided in forms, laws, etc.
- While *NALSA* pushes sex towards gender, *Navtej Johar* pushes sex towards sexuality. There is a need for clarity on how the transgender identity will be reconciled with the positions in *Navtej Johar*.

- **The Transgender Persons (Protection of Rights) Bill**

- The Transgender Persons (Protection of Rights) Bill, 2018 has major shortcomings including its failure to adopt a rights-based approach [it adopts a welfare-based approach instead]. The Rights of Transgender Persons Bill, 2014 is a better alternative since it was drafted in consultation with the transgender community, adopts a rights-based approach and has a provision on reservations in public education and employment.
- It is unclear who drafted the various Bills on rights of persons with transgender persons, as well as the data they are based on. It is important that a Bill is based on sound research, data and extensive consultation with transgender persons. A representative Committee for drafting the Bill may be set up.
- Reservations:
 - There needs to be clarity about how reservations will be extended to transgender persons. Confusion arises from

the direction in the *NALSA* judgment which directs transgender persons to be treated as a Socially and Economically Backward Community.

Transgender persons may occupy different caste identities and this needs to be accounted for in the provision on reservation.

- Horizontal reservation may be extended to transgender persons. Both gender and caste must be accounted for when envisaging the policy on reservations.

- **The Categories of Sex and Gender**

- Sex is the only constitutional category, while gender is a legal category. The categories of “male” and “female” are still sex, thus making the category of “transgender” the first gender, and not the third gender as is presumed.
- There is a need to understand how Courts have understood sex-based discrimination before we

move onto developing strategies for gender-based discrimination.

- When looking at provisions on sexual offences, individuals should not be required to, as a pre-condition for accessing justice, prove their gender before the Court. If gender is treated as a purely personal category, it may not give rise to such a requirement.
 - Transgender persons may want to continue to identify within the binary, and not as transgender because it allows for ease of access to certain government benefits.
 - There is a need for the law to understand the distinction between sex, sexuality and gender. There is a need to thoroughly think through which category is to be the basis of laws and policies.
 - It is important to ensure that the diversity of identities is not controlled. Diversity of identities allows for flexibility in strategies when seeking access to justice.
- **Persons with intersex variations**
 - Surgery on minors with intersex variations, without their informed consent, is a violation of the rights of such person. Such surgeries are generally not medically necessary and need to be prohibited.
 - Malta's Gender Identity, Gender Expression and Sex Characteristics Act, 2015 ('GIGESC') which prohibits surgery on infants with intersex variations [unless medically necessary] and allows for postponement of assignment of gender marker to an infant till they turn 18 may be explored as a way ahead for India.
 - In the meanwhile, exploring the use of section 320 of the IPC which recognises emasculation as a form of grievous hurt and section 322 which penalises the same may be used in cases where non-consensual surgeries are performed on minors with intersex variations. Further, the government may issue a circular to all medical establishments directing them to prohibit medically unnecessary surgeries on minors with intersex variations.

- **Issues that require community consultation**

- How should gendered laws be modified – Where do we need gender neutrality and where do we need gender specificity?
- In which cases should identity documents and forms carry a gender marker and where can gender markers be removed.
- Language that must be used to refer to transgender persons in laws and policies. Further, do we need an additional category i.e. “unspecified gender”?
- Reservations - the form and extent.

- **Issues that need to be explored**

- There is a need to explore the flexibility in existing laws such as marriage laws, domestic violence law, etc. and bring transgender persons within their ambit.
- The categories of “gender”, “sex” and “sexuality” and their relationship with the law need to be studied, and laws and policies on these issues must be informed.
- Identify further laws, schemes and policies that continue to

operate on the binary of male and female.

- Birth certificates which provide for recording of binary sexes of male and female upon birth also lead to assignment of gender within such binary. How can this be addressed?

Queering the



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