

Comments regarding Transgender Persons (Protection of Rights) Rules, 2020

This submission is in response to the Ministry's call for public comments and analyses the Rules from a legal perspective. In April 2020, the Ministry of Social Justice and Empowerment ("Ministry") released the Draft Transgender Persons (Protection of Rights) Rules, 2020 ("Rules") under sub-sections (1) and (2) of Section 22 of the Transgender Persons (Protection of Rights) Act 2019 for public comments. These rules primarily seek to operationalize the Act's provisions on the process of either certification as a transgender person or to *change their legal gender* also contain certain provisions relating to the socio-economic development of transgender persons in India. As women engaged in work and activism for female empowerment in India and elsewhere, we submit this document to raise some concerns with the recently notified Transgender Persons (Protections of Rights) Rules 2020.

It is clarified that the writers of this submission are not against protection or a certain legal status for transgender people. To that end we would like to affirm that

- (i) Transgender persons deserve full protection under the law and equality before the law and their marginalization requires special provisions;*
- (ii) The current legal framework does not fully enable legal recognition who do not typically present with the gender roles expected of their sex, and this causes suffering which must be alleviated;*
- (iii) The recognition of a special legal status category as envisioned by National Legal Services Authority vs Union of India¹ (hereinafter NALSA vs UOI), is necessary for their full protection, recognition, and thereby social and legal empowerment;*
- (iv) There is no suggestion or concern that transgender people, as a group, pose a threat to women and girls.*

Concerns arise because of badly drafted legal provisions that *confuse sex and gender, and have the effect of eroding legal provisions for women and girls (female human beings), with disastrous legal consequences*. It is also clarified that the writers of this are not against reservation or special measures for transgender persons, but wish to submit that confused drafting cannot impinge on the category of 'women' and their rights, and that ***such conflation is unnecessary for the protection of transgender persons.***

The Act, while attempting to ensure a concrete legal status for transgender persons and to thereby facilitate their protection by enshrining equal status under the law, has instituted a legal regime *that will profoundly damage the rights of women*. The Act has apparently sought to further concretise the legal protections envisaged in the NALSA judgment but has gone beyond affording equal rights, and has attempted to give a statutory basis to the right to self-identification and laying down procedures for recognition of a person's self-perceived identity.

¹ NALSA vs UOI (2014) 5 SCC 438

This submission highlights that, in the rush to give a legal status to transgender individuals, the law has created legal fictions and confusion **which will have disastrous effects on women's rights and status in India**, particularly their [sex based rights](#).

In order to understand why, it is **crucially important to understand the difference between sex and gender**.

I. SEX, NOT GENDER, IS THE PRIMARY BASIS FOR NON-DISCRIMINATION AND EQUALITY LAWS

Black's Law Dictionary, frequently used as the authoritative basis for legal terms and understanding in English, enshrines the definitions of 'sex' and 'gender' as follows:

SEX - "The distinction between male and female; or the property or character by which an animal is male or female."

GENDER - "Defined difference between men and women based on culturally and socially constructed mores, politics, and affairs. Time and location give rise to a variety of local definitions. Contrasts to what is defined as the biological sex of a living creature."

Male / Female, as we can see in our daily usage, describes the sex of a mammal - and is *species generic* i.e - the same terms (male/female) are used across various animals and mammals. In humans, 'sex' is used as the primary basis for categorization because it is based on objective, immutable, characteristics - biological facts. As can be seen below, in English, the words 'women' and 'men' refer to **sex, and not gender in human beings** and are defined as

[Woman](#) - An Adult Female Human Being (Oxford Dictionary, [Merriam Webster](#))

Any attempt or usage of the word 'woman' to refer to anyone but 'adult human females' has implications for the legal rights of 'women', the term used in all laws and policies.

The immediate, and consequent implication of the distinction shown above is to recognize how the distinction is maintained in law and policy in our society. **The extreme, crucial importance of not confusing or conflating sex and gender cannot be understated.**

1. The Constitution of India enshrines equality on the basis of SEX

Fundamental Rights in the Constitution of India - particularly Article 15 and Article 16, enshrining equality and prohibiting discrimination only mentions **sex** in its enumeration of characteristics.

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

Article 15 - "15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, **sex**, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, **sex**, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

Article 16(2) - (2) No citizen shall, on grounds only of religion, race, caste, **sex**, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

Beyond the Constitution of India, human rights law has also **recognized and used** 'sex' - the immutable biological distinction between the two biological sexes, as the basis of legal and political categorisation.

2. International Human Rights Law Enshrines Non-Discrimination and Other Rights On the Basis of SEX, not GENDER

Article 2 of the International Covenant on Civil and Political Rights (ICCPR)

Article 2 - "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, **sex**, language..."

The extreme, crucial importance of this distinction for women's rights and empowerment can be seen from the use of 'sex' as the basis in international treaties regarding women's rights - these treaties are applicable in Indian law.

Article 1 of the Convention on the **Elimination of All Forms of Discrimination Against Women recognizes that 'sex' not 'gender'** is the primary basis for oppression, discrimination towards, and subjugation of women and girls.

Article 1

"For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction **made on the basis of sex** which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

Moreover, Article 5 of CEDAW prohibits stereotypes on the basis of sex and states that

States Parties shall take all appropriate measures:

1. To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

Stereotypical roles for men and women have been variously described as 'gender' **The Gender Equality Glossary of UN Women** recognizes that 'gender' in English, refers to "the roles, behaviors, activities, and attributes that a given society at a given time considers appropriate for men and women... These attributes, opportunities and relationships are socially constructed and are learned through socialization processes." This is distinct from sex i.e the state of being a man or a woman.

Conclusion - 'Sex' thus, is the primary basis for non-discrimination, and is different from the newer concept of gender - ***used interchangeably, sometimes synonymously with sex (wrongly) but sometimes in its original meaning*** i.e of describing social and cultural traits associated with men and women (sex). The terms male and female, both in the scientific sphere *as well as in legal and policy documents across the world* refer to the two sexes in humans i.e language describing their reproductive anatomy.

That 'gender' is therefore derived from sex is clear from its very definition. Gender ***is used to describe the social and cultural traits, as opposed to biological ones, of being a man / woman.***

Replacing references to the category of sex, which is biological, with the language of '[gender](#)', which refers to stereotyped sex roles, in United Nations documents, strategies, and actions, has led to confusion which ultimately risks undermining the protection of women's human rights.

II. THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) RULES 2020 CONFLATE SEX AND GENDER AND HAVE ILL EFFECTS FOR SOCIETY

1. Rule 7, operationalising Section 7 of the Act, confuses Sex and Gender

Our concerns are primarily centered around Section 7 of the Act and the consequent Section 7 of the Rules. According to Section 7 of the rules, which give effect to Section 7 of the Act,

7. Issue of certificate of identity under section 7:

(1) The District Magistrate shall issue to the applicant seeking change in gender under Section 7, a revised certificate of identity in form – 4 **of these rules indicating the gender of such a person as male or female, as the case may be.**

Rule 7(1) conflates, and confuses, the concepts of sex and gender, using 'gender' to describe male / female which in fact are terms relating to sex, as shown above.

The distinction between the sexes is hugely important, and is necessary for accurate distinction between men and women. The Transgender Persons (Protection of Rights) Act 2019 and the Transgender Persons (Protection of Rights) Rules 2020, in fact acknowledge this **DISTINCTION** in several instances

(i) the term 'transgender' in S. 2(k) of the Act, defining 'transgender persons' as ***including persons whether or not they have undergone sex reassignment surgery***)

(ii) S. 15 of the Act, which mandates that the appropriate government shall take 'measures' to provide for **sex reassignment surgery**, hormonal therapy before and after **sex reassignment surgery**, and a healthcare manual related to sex reassignment surgery.

This distinction is extremely important. The word 'gender' is relatively new in linguistic development, and is defined as many different concepts - **gender in a grammatical sense** (in some languages, as Latin, French, German, English, etc.: each of the classes (typically masculine, feminine, neuter, common) of nouns and pronouns distinguished by the different inflections) and **gender as describing expectations associated with a sex** (the collective attributes or traits associated with a particular sex, or determined as a result of one's sex).

S. 7 conflates 'sex' and 'gender', stating that a District Magistrate may, after 'sex reassignment surgery' issue a certificate of change of legal *gender* - using two separate, distinct concepts in the same clause. This is clearly not possible. The Rules effectuate a legal fiction, a legal lie, that 'reassignment surgery' has changed sex - a biological, and realistic impossibility.

Allowing the change of sex, i.e allowing persons who are not female to be certified as 'women' will impact women's rights in the areas of scholarships, hospital wards, prisons, women's hostels, women's colleges, women's quotas and crime statistics.

The basic marker in identification documents, such as Driving Licenses, Voters ID, Aadhar and Passports, is sex (M/F). While a person's self perceived gender, and status according to it, are relevant questions, gender / gender identity are not to be confused with sex.

S. 7 in the Act, and the Rules, in fact run contrary to the assumptions of S. 6 of the Act and Rules, which distinguish between sex and gender identity. Thus,

S. 6(1) of the Act states "(1) The District Magistrate shall issue to the applicant under section 5, a certificate of identity as transgender person after following such procedure and in such form and manner, within such time, as may be prescribed ***indicating the gender of such person*** as transgender."

2. Rule 5, operationalising Section 6 of the Act, conflicts with the implications of Section 7 and Rule 7

Rule 5 of the giving effect to S. 6 of the Act, further adds to and worsens the confusion;

"5. Issue of certificate of identity for transgender person under section 6:

(1) The District Magistrate shall issue to the applicant, following the procedure under rule 4, a certificate of identity in form – 3 of these rules, **indicating the gender of such person as transgender.**"

Rule 5(3) further adds to the confusion, stating that - “(3) The certificate of identity issued under sub-rule (1) shall entitle the applicant to **record or change the gender** as well as name, if so necessitated”.

Read together with S. 7 of the Act, and Rules 6 and 7 of the Rules, the Rules conflate ‘sex’ and ‘gender’, applying the same rights and entitlements to *two different legal status of identity*.

Given that Rules 5(1) and 5(3), give effect to S. 6 of the Act, dealing with ‘certification as transgender’, that they refer to the ‘Certificate of Identity as ‘Transgender’ envisioned in S. 6 of Act. S. 6, uses ‘self-identification’ as the basis for granting of the certificate, uses the concept of ‘gender identity’ - a self-perceived sense of expression.

However it uses the exact same terms, confusingly, in S. 7 of the Act, and Rules 6 and 7 in the Rules, when referring to ‘change of legal gender’ after ‘sex reassignment surgery’.

Two very different, and important identities have been confused and interchanged here, with disastrous effects for women’s rights.

Both rules, Rule 5(7) and Rule 7(7) are the same and both state that,

“(7) Any official document wherein gender of transgender is revised based on the said certificate of identity shall bear the same serial or reference number as in the original official document of such transgender person who seeks change in the name and/or the gender in the official documents.”

Rule 5 of the Rules attempt to give effect to S. 6 of the Act, allowing a person to apply for a certificate of identity as ‘transgender’. Rule 7 attempt to give effect to S. 7 of the Act which deal with the ***change of legal sex (confusingly referred to as gender)***.

Yet both rules use the same phrasing and language, stating that the official documents would change the gender of transgender individuals. It is unclear then, how S. 7 of the Act gives effect to a different legal status from S. 6 of the Act.

3. Rules 5 and 7 enable erasure of legal history, and therefore misrepresentation and identity fraud on society.

Rules 5(7) and Rules 7(7) also give effect to further dangerous consequences by facilitating the **complete erasure of a person’s legal history.**

According to the effect of Rules 5(7) and Rules 7(7) the new documents issued under these Rules, **would bear the same serial number or reference number as in the original official documents of the applicant.**

In effect, this would lead to the issue of identity documents that would overlay the original identity documents, and hence data related to it. With a new name, and new sex marker

(wrongly referred to as gender), this enables the erasure and denial of a person's legal history, and information connected to it. In effect then, a person who changes their gender gets a new name, attached to the same serial number / reference number, and the previous legal identity will disappear.

This will have disastrous effects on all involved, especially when it comes to accurate information pertaining to crime statistics, legal offences, defaults, bank records etc, as the earlier identity is 'disappeared' legally, and for all intents and purposes, that identity is equivalent to a person who has died - although the individual is still alive, just under a new name and new identity documents.

This legal maneuvering is **unprecedented in the history of laws regarding identity and records.**

It is a fundamental requirement for a civilized society to have accurate, unfalsifiable records regarding the *objective* identity of its citizens. Major ID documents such as driving license, voters ID, and passport, use name, parents names and sex as primary parameters. By issuing documents containing the same serial / reference number of the applicant, these Rules give effect to a completely new legal identity which erases and **replaces** the former named legal identity of the individual.

III. THE NALSA JUDGMENT DOES NOT ENVISION OR JUSTIFY S. 7 OF THE ACT AND RULE 7

1. The NALSA Judgment also conflates Sex And Gender, As Well As Intersex Conditions and Transgender People

The judgment of the Supreme Court of India in NALSA v Union of India ("NALSA") recognised that transgender persons are to be accorded a legal status under equal constitutional status under Indian laws. The Transgender Persons (Protection of Rights) Act, 2019 ("Act") whose provisions came into force on 10 January 2020 is a culmination of the efforts to give effect to NALSA and to enact a legislative framework to protect the rights of the transgender community at the central level.

The Court took into account certain international guidance and laws, which are not of uniform status i.e the Court extensively uses the Yogyakarta principles, which, it must be highlighted are not international law, nor indeed, best practice.

The Judgment of the Supreme Court in NALSA vs UOI conflates sex and gender², and also, atrociously conflates Disorders of Sexual Development (DSDs) (sometimes called intersex) with socio-cultural ideas of 'gender'.³ It is crucial to note here that the existence of persons with DSDs, do not negate the *utility of sex as a basis for categorisation and non-discrimination*. Persons with DSDs ([0.02% of the population](#)) are still identifiable as one of the two sexes. DSDs are an

² Para 2, *NALSA vs UOI (2014) 5 SCC 438*

³ Para 17, *Ibid*

objective and immutable medical condition, a difference of sex development having nothing to do with *gender*. It cannot be self-chosen; thus, it is vitally important not to conflate persons with DSDs (intersex people) with transgender people.

2. NALSA vs UOI only envisioned a third gender, not change of sex

The Supreme Court did recognize the difference between ‘sex’ and ‘gender’ and recognized that “Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender”.

And defined ‘gender identity’ as “Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth”⁴

While the Supreme Court, very confusingly and irresponsibly interchanged sex descriptors (women / men) with ‘gender identity’ - it only guaranteed **the right to be a third ‘gender’** (the surrounding context makes it clear they’re talking about sex, as in male or female).⁵ Nothing in the Judgment provides the basis for a legal change of sex, as envisioned in Section 7 of the Act and the Rules. The test laid down by the Supreme Court, stating ‘psychological basis’ rather than biological facts (sex) runs counter to the Constitution of India. ⁶

The claimants in NALSA did not make a claim to change sex, but **only recognition as a third category (sex, not gender)**.⁷

IV: THE RULES FACILITATE MEDICAL EXPERIMENTATION ON VULNERABLE MINORS

1. Rule 10, operationalising S. 15 of the Act, does not provide for protection against experimentation

Rule 10 mandates State governments to provide for Welfare measures, education, social security and health of transgender persons by appropriate Government under sections 8, 13, 14 and 15 of the Act. S. 15(b) of the Act demands provision for hormonal therapy, S. 15(k) demands coverage of insurance for hormonal therapy and S 15(c) only specifies ‘hormonal therapy counselling. However, *firstly*, the medical research on ‘sex reassignment surgery’ as being a ‘good outcome’ for transgender people is highly disputed, with emerging medical research on its [ineffectiveness as a solution to mental distress and long-term ill effects](#).

Secondly, S. 15 has no prohibitions against prescription of hormonal therapy to minor children i.e human beings under the age of 18. Some of the common hormones used are [documented to have ill effects on the normal development of teenagers](#), as it retards the regular process of

⁴ Para 19 *Ibid*

⁵ Para 70-75 *Ibid*

⁶ Para 34 *Ibid*

⁷ Para 4 *Ibid*

growth. The effects, and wisdom of hormonal therapy on teenagers and 'gender dysphoric' children is also questioned and disputed by [emerging medical research](#). Given the shifting nature of the medical developments on this, and the fact that previous 'medical consensus' on hormonal therapy for teenagers has been recently reversed, Rule 10, and therefore Section 15 of the Act **does not provide for protection from unethical medical experimentation and gender-confused children being given hormones that have long term ill effects, and [retard the normal, healthy development of human bodies](#)**. It is necessary to highlight here, that hormones play a vital role not only in sexual development, but in [general development as well](#), and S. 15 of the Act, with Rule 10, do not protect children from being given harmful drugs with long-term ill effects.

Conclusion: The Rules, and the Act, therefore has attempted to create a separate set of legal statuses without an impact assessment for the effects on the rest of society, particularly women. Additionally, it contains a number of provisions that enable the erasure of legal history, and hence misrepresentation, while facilitating unethical experimentation on children. These problems arise because the basis for the recognition of the identity weakens the overall framework of protection.

Recommendations

- 1. Rule 7 of the Act has to distinguish between sex and gender, and cannot permit the change of 'male to female'**
- 2. Rules 5(7) and 7(7) cannot enable the erasure of legal history, legal records, and hence perpetrate fraud on society.**
- 3. Rule 10 has no provision to stop unethical medical experimentation on children.**
- 4. NALSA vs Uol's conflation of sex and gender has to be scrutinised, and the Rules amended to safeguard women and girls - the human female sex, from being confused with gender identity.**

Signatories:

Vaishnavi Sundar, Filmmaker, Activist, WHRC Country Contact, Chennai

Linda Louis, Lawyer, NLSIU Batch '12, Chennai

Poorva Shrivastava, Engineer, Indore

Shefali Sequeira, Teacher, Bangalore,

Vidya Kesavan, PhD Candidate, Kerala

Sonia Balamurugan, Engineer, Tirunelveli

Krittika Chakraborty, Student

Navya Udaya, Molecular Biologist, Bangalore

Krithika B, Software Engineer, Chennai

Dr. Amrita Daniel, Orthopedic Surgeon, Chennai,

Nidhi S, Student, Delhi

Darshita Bhatt, Physiotherapist, Ahmedabad

Anuja T, Feminist, Delhi

Aishwarya S, Writer, Bangalore

Bhavani, Software Engineer, Chennai

Anjanna R, Software Engineer, Chennai

Pavithra, P.R Executive, Chennai

Spruha Pandya, Content Writer, Vadodara, Gujarat

Dhanalakshmi, Finance Officer, Chennai

And other Indian signatories to the [Declaration on Women's Sex Based Rights](#), available in Hindi [here](#) and in Tamil [here](#)