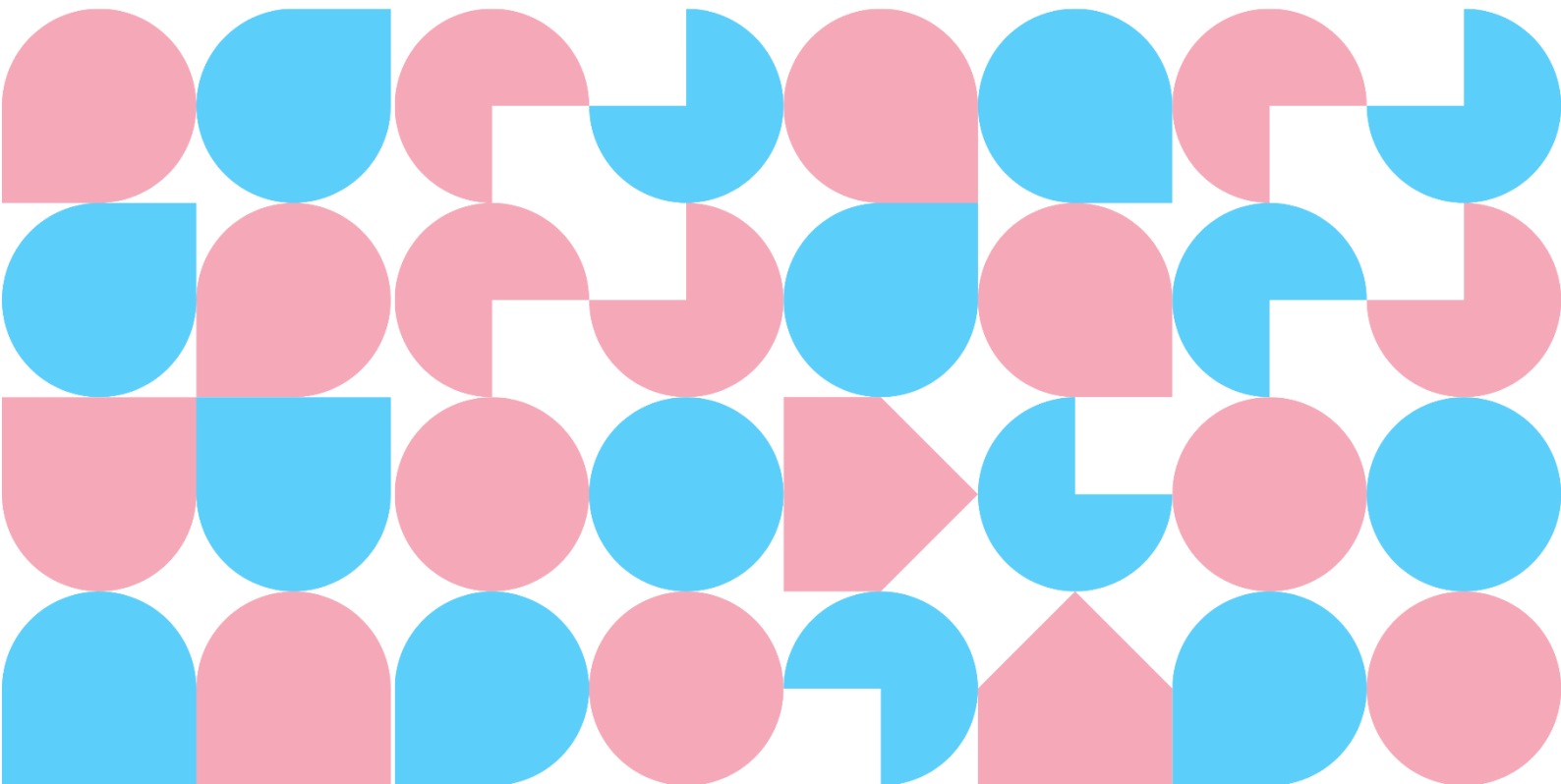




Governance and Participation
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REPORT

INTERNATIONAL EXPERIENCES ON PERSONAL AND PROPERTY RIGHTS OF TRANSGENDER PERSONS



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INTRODUCTION

Globally, transgender people continue to face challenges that hinder their equal participation in their country's political, economic, and social life. The inability to live according to one's self-identified gender often leads to mental distress, negatively impacting their physical and mental health. Further, trans people often face high levels of discrimination, social and legal exclusion, and violence, including in health-care settings. The discrimination, stigma and violence trans people face are exacerbated by the lack of a supportive legal and policy environment.

One of the key legal barriers trans people face to equal inclusion is the lack of a clear legal framework and process for changing one's legal gender, including on official documentation such as national identification and school certificates. In addition, transgender persons continue to encounter significant obstacles because their name and sex details in official documents do not match their gender identity or expression. The inability to legally change one's gender can lead to prejudice and discrimination in daily life, including in accessing employment, housing, healthcare, and public services; denial of access to crucial services like voting, banking, insurance, and social security due to discrepancies in their documents; increased negative mental health impacts due to the constant stress of facing discrimination due to discrepancies and potential rejection; inability to access government assistance programs, shelters, or medical care during emergencies like natural disasters or pandemics posing serious health and safety risks; and difficulty crossing international borders as the gender on their passports does not reflect their presented gender.

In recognition of the need to provide for a clear legal process, in 2017, the Government of Viet Nam recognized the right to legally change one's gender in Article 37 of the amended Civil Code of 2015, which explicitly states that: "*Gender reassignment is carried out in accordance with law*". Seven years after the amendments to the Civil Code of 2015, in May 2023, the Gender Affirmation Law (formerly known as the Gender Identity Law) has been approved to be included in the legislative agenda of the National Assembly for 2024. The draft law is expected to be presented for comments in October 2024 and adopted in May 2025. To support the discussion on the Gender Affirmation Law, in 2023, UNDP Viet Nam, in collaboration with the Ministry of Justice, the agency in charge of developing and monitoring the implementation of the Civil Code of 2015, organized an international workshop entitled "International Experiences on Personal and property issues of transgender persons". Taking place during the Hanoi Pride week in September 2023, the workshop successfully brought together policymakers, members of the transgender community, and academics for an important knowledge exchange and dialogue to inform

Viet Nam's first Gender Affirmation Law, particularly in relation to personal and property matters.

As a follow-up to the workshop, UNDP Viet Nam commissioned this report. This research report provides an overview of how other countries have sought to legally provide for the changing of an individual's gender on official documentation, including the procedures for changing one's gender and the legal impact on the individual's identity and property after the gender change. Based on this overview, the report outlines key recommendations for consideration by lawmakers in Viet Nam as they debate and develop the Gender Affirmation Law.

AN OVERVIEW OF RIGHTS AND GENDER AFFIRMATION LAWS IN OTHER COUNTRIES

The World Health Organization (WHO) defines “sex” as the biological and physiological characteristics that define humans as female or male.¹ According to the United Nations Development Programme (UNDP), “gender identity” refers to each person's deeply felt internal and individual experience of gender.² “Gender expression” refers to how people express femininity, masculinity, or characteristics associated with a nonbinary gender in their appearance, speech or other behaviors.³ The term “transgender” is used as an umbrella term to stand for people with gender identities other than their sex assigned at birth as well as those with gender expressions that do not match their sex assigned at birth.⁴ Gender affirmation includes legal gender recognition, access to gender-affirming health services, and the freedom from discrimination and other human rights violations. Specifically, this report defines legal gender recognition as the legal recognition of a person’s gender identity, including name, sex/gender marker and other gender-related information in social security numbers/personal identification numbers in public registries, records, identification documents and other similar documents (e.g. educational certificates).

Under international human rights law, everyone has the right to recognition as a person before the law. This right was first enshrined in Article 6 of the Universal Declaration of Human Rights (UDHR) and has since been recognized in Article 16 of the International Covenant on Civil and Political Rights (ICCPR);⁵ Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);⁶ and Article 8 of the Convention on the Rights of the Child (CRC).⁷ The UN High Commissioner for Human Rights has further recommended that States “facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to

¹ World Health Organization. Sexual Health. Available at https://www.who.int/health-topics/sexual-health#tab=tab_2

² UNDP. Advancing the Human Rights and Inclusion of LGBTI People: A Handbook for Parliamentarians (2022). Available at https://www.undp.org/sites/g/files/zskgke326/files/2022-03/UNDP_LGBTI_Handbook_Part_I_EN_0.pdf

³ Id.

⁴ Id.

⁵ Viet Nam acceded to the ICCPR on 24 Sep 1982.

⁶ Viet Nam ratified CEDAW on 17 February 1982.

⁷ Viet Nam ratified the CRC on 28 February 1990.

be reissued reflecting preferred gender and name, without infringements of other human rights.”⁸

The issue of legal gender recognition also impacts other fundamental human rights, including:

- **The right to non-discrimination and equality before the law**

United Nations (UN) treaty bodies have consistently held that gender identity is a prohibited ground of discrimination under international law.⁹ The principle of non-discrimination and the right to be equal before the law are interdependent. Concerning the process legal gender recognition, special attention should be paid to ensure that transgender people do not face additional or more burdensome barriers than other groups when trying to obtain official documentation.

- **The right to privacy**

When transgender people are unable to change their name or sex details to match their gender identity, this undermines their right to privacy as set out in Article 17 of the ICCPR.¹⁰ As noted in the Yogyakarta Principles: “[e]veryone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference... The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one’s sexual orientation or gender identity.”

- **The right to health**

The right to health requires health services to be accessible, available, acceptable and of good quality, and States are required to progressively realize the right to health, to the maximum of their available resources. The UN Committee on Economic, Social and Cultural Rights has expressed concern at barriers trans people face in accessing their sexual and reproductive health rights noting such barriers would violate the right to health guaranteed under Article 12 of the International Covenant on Economic, Social and Cultural Rights.¹¹

⁸ United Nations High Commissioner for Human Rights. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (2011). Available at http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf.

⁹ See e.g. UDHR, art. 12; ICCPR, art. 2(1), ICESCR, art. 2(2), CEDAW, art. 3, CAT, art. 1(1), CRC, art. 2; Committee against Torture. General Comment No. 2: Implementation of Article 2 by States Parties, (23 November 2007), section V; Human Rights Committee. General Comment, No. 18: Non-discrimination, (10 November 1989).

¹⁰ See also UDHR, Art. 12; ICCPR, Art. 17; CRC, Art. 16.

¹¹ Committee on Economic, Social and Cultural Rights. General Comment No. 22: The right to sexual and reproductive health (2016).

- **Freedom from torture and other cruel, inhumane or degrading treatment or punishment**

Torture and other cruel, inhuman or degrading treatment are prohibited not only under Article 5 of the Universal Declaration of Human Rights and Article 7 of the ICCPR, but also under the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has noted that in many countries transgender people are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender in violation of the right to be free from torture and other cruel, inhuman and degrading treatment.¹²

At the national level, the development of legislation supporting legal gender change has received increasing attention.¹³ According to statistics from Equaldex as of December 2023, an individual can change their legal gender in at least 78 countries and territories:¹⁴

- 38 out of 50 countries and territories in Europe;
- 25 out of 44 in Asia;
- 16 out of 35 in America and Latin America (including Cuba; some US states¹⁵);
- 9 out of 54 in Africa;
- 4 out of 16 in Oceania and Antarctica (including Australia and New Zealand).

Of the at least 78 countries and territories that do provide for the right to legal gender change, 38 countries do not require surgery or medical diagnosis prior to a legal gender change:

- 19 European countries and territories;
- 3 in Asia (Taiwan, Israel and Pakistan);
- 11 in South and North America; and
- 3 in Oceania; and
- 3 in Africa.

Twelve countries and territories require a medical diagnosis prior to a legal gender change:

- 2 in Asia;

¹² Council of Europe. Thematic Report on Legal Gender Recognition in Europe. Available at <https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3>

¹³ Plummer, K. *Cosmopolitan sexualities: Hope and the humanist imagination*. London: Polity (2015)

¹⁴ Equaldex. *Changing Gender*. Available at <https://www.equaldex.com/issue/changing-gender>

¹⁵ Thirty-five out of 50 states in the United States allow gender reassignment.

- 8 in Europe;
- 1 in Africa; and
- 1 in the Americas¹⁶.

Forty countries and territories require surgery prior to a legal gender change:

- 21 in Asia;
- 11 in Europe;
- 3 in the Americas; and
- 5 in Africa.

There is no right to legal gender change in 68 countries and territories:

- 12 in Asia;
- 10 in Europe;
- 16 in the Americas;
- 24 in Africa; and
- 5 in Oceania.¹⁷

¹⁶ Equaldex. Changing Gender. Available at <https://www.equaldex.com/issue/changing-gender>

¹⁷ Id.

RECOMMENDATIONS

The Gender Affirmation Law should cover the following with respect to legal gender recognition: fundamental concepts and principles;¹⁸ the procedure and requirements for recognizing legal gender changes; and the rights and responsibilities of individuals after legal change in gender. In addition, it is essential to clearly identify the other laws, policies and regulations that will need to be amended or supplemented to ensure consistency and effectiveness in the legal framework.

Based on a comparative analysis of the legal frameworks in various countries and Viet Nam's socio-economic conditions, this report recommends the following for developing and issuing regulations on gender affirmation in Viet Nam.

Conditions for Gender Reassignment

Legal Age

The minimum age at which a person can legally change their gender without any parental consent should be 18 years old in line with the Viet Nam's domestic legislation, the Law on Civil Status of 2015. Further, Viet Nam should consider permitting legal gender change for individuals 16-17 years of age with parental consent in line with Ireland, India and the Netherlands.

Further, in line with the UN Convention on the Rights of the Child (CRC), which Viet Nam ratified in 1990, the following guiding principles should guide the legal framework relating to children under 18 years old:

- The best interests of the child are a primary consideration (Article 3);
- Non-discrimination (Article 2);
- The need to respect the evolving capacity of a child to make decisions about their life (Article 5); and
- Children's views are to be listened and given appropriate weight, in accordance with the age and maturity of the child (Article 12).

Article 8 of the CRC provides children's right to identity and requires that whenever a child is illegally deprived of elements of their identity, a country must provide appropriate assistance and protection. This is critical as legal gender recognition can also play a pivotal role in protecting and fulfilling other rights in the Convention, including a child's right to

¹⁸ This would include defining particular terms, such as transgender, transexual, gender identity, gender dysphoria.

development (Article 6), to privacy (Article 16), to education (Article 28) and to the highest attainable standard of health (Article 24).

Legal Gender Recognition Process

Viet Nam should adopt a self-determination model with little or no requirement of medical interventions or medical or psychological assessments of a person's gender identity for legal gender recognition as all persons are best placed to identify their gender. To require medical interventions or assessments would reinforce the pathologization of transgender identities and can lead to significant mental and physical harm, which has been rejected by the WHO.¹⁹ In the WHO in the International Classification of Diseases and Related Health Problems (ICD-11) replaced the outdated term "gender identity disorder" with "gender incongruence." This change represents a significant step forward in recognizing and respecting transgender identities. "Gender incongruence" acknowledges that transgender individuals may experience a discrepancy between their gender identity and the sex assigned at birth. It emphasizes that this is a natural human variation, not a disorder or illness, making it clear that being transgender alone does not constitute any illness or disorder. This decision erased the stigma surrounding transgender identities, dismantling the outdated label of "disorder", and focusing on gender incongruence.

The Authority and Gender Reassignment Procedure

The Authority to Grant Legal Gender Change

There are currently three primary authorities under which countries provide for legal gender recognition: (1) administrative procedures (e.g. Norway, the Netherlands, Ireland, the UK, and China); (2) judicial procedures (e.g. India, Japan); and (3) as a factual declaration.

Based on an analysis of the legal regimes in other countries, countries handling gender change requests through administrative authorities often have modern civil registration and administrative management systems, such as Norway and China. Judicial procedures are often more burdensome and costly than administrative procedures.²⁰ Transgender people also reported the arbitrary nature of court decisions on whether to grant legal recognition,

¹⁹ For instance, in the Netherlands, the government has apologized for previously requiring surgeries, including sterilization for legal gender recognition and is considering providing compensation to those who underwent surgeries for this purpose.

²⁰ For example, in the Netherlands, under the old regulations, the district court had competence to make rulings. However, with the enactment of new law, this mission shifted to the civil registration agency. According to explanations, the Netherlands has an efficient and advanced Municipal Personal Records Database (GBA). Therefore, designating the civil registration agency to make administrative decisions recognizing transgender individuals was deemed more convenient, faster, and simpler due to the effective GBA system.

with some judges requiring more evidence or documents than others. Administrative procedures can ensure the removal of unnecessary barriers to legal gender change, and thus, legal gender change in Viet Nam should be under the purview of administrative agencies, such as the Ministry of Health or the Ministry of Justice, following the examples of Ireland and Norway.

Further, a number of countries, such as the United Kingdom, have councils comprised of medical and gender experts to assess each application. Lawmakers should consider requiring the Gender Determination Council to be comprised of individuals with medical or other qualifications.

Gender Reassignment Procedures

The procedure for legal gender recognition should be treated as an “other civil matter” and follow an expedited procedure to ensure the process is simple, accessible, and transparent. Further, regulations should provide for the preservation and confidentiality of personal information before and after gender reassignment. For instance, the civil registration database must establish a connection between the original birth certificate and the one issued after gender reassignment, as done in the United Kingdom and Ireland.

Legal Rights after Legal Change of Gender

After an individual legally changes their gender, they should be entitled to full rights and responsibilities accorded their preferred gender. Specific provisions in the regulations should address the following:

- Family relationships: familial relationships established prior to a legal change in gender be maintained. Any legal gender change would not affect the parental status of a person regarding a child born before the legal change in gender.²¹
- Property relationships: all rights and obligations established or incurred by the individual before the legal change in gender will not be affected, interrupted, and will be carried forward for implementation.
- Data privacy: the regulations should provide individuals the right to data privacy before, during, and after a legal change in gender.²² This would include healthcare facilities, doctors performing medical interventions, authorities, and officials handling gender recognition procedures, and those managing the process of updating

²¹ Countries like the Netherlands and Ireland have chosen this approach to ensure the stability of relationships that individuals undergoing gender reassignment have established before the transition.

²² See discussion of Ireland’s legal framework.

information for transgender persons, among others, being responsible for maintaining privacy and confidentiality.

- Other rights: to the extent relevant, there should be regulations to ensure reproductive rights, maternity leave, and insurance for individuals who have legally changed their gender.

Other Recommendations

The Discriminatory Regulations

Based on the analysis of the legal framework in other countries, it is evident that regulations prohibiting discrimination and implementing measures aimed at addressing discrimination towards transgender individuals, as well as raising awareness about legal gender recognition, is critical. Despite the general provisions against discrimination in the Constitution and related laws, laws specifically prohibiting discrimination on the basis of gender identity and laws guaranteeing privacy and confidentiality of health and other relevant information are needed to ensure a protective legal framework. Therefore, the Gender Reaffirmation Law should have specific regulations regarding the rights and responsibilities of relevant stakeholders to effectively protect against and provide redress for disclosures of confidential information, prevent and provide redress for discrimination against transgender individuals and enhance awareness and understanding of transgender issues to minimize and eliminate prejudice against them. For example, the regulations should do the following:

- Affirm the right of everyone to live in accordance with their preferred gender and express their gender identity; and require the government to take active steps to minimize prejudice and discrimination against transgender people.
- Affirm the right of transgender people to privacy and confidentiality.
- Provide redress or penalties for discrimination on the basis of an individual's real or perceived gender identity and violations of a transgender person's privacy.

The Amendment and Supplementation of Related Legal Documents

To ensure that the legal framework is clear with respect to the rights of transgender people, it is necessary to conduct a comprehensive review of the legal framework in Viet Nam as it relates to the rights and obligations of transgender individuals. The reviewed laws, policies and regulations should be categorized into three groups: (i) laws, policies and regulations that do not need further amendment or supplementation; (ii) laws, policies and regulations that require amendment or supplementation to better safeguard the rights and obligations of transgender people; and (iii) laws, policies and regulations that need to be amended or supplemented, but do not necessarily need transgender-specific provisions.

The documents that need to be reviewed include: the 2013 Constitution; the Civil Code; the Labor Code; the Marriage and Family Law; the Civil Status Law; the Military Service Law; the Law on Enforcement of Detention and Temporary Custody; the Criminal Execution Law; the Identification Law; the Criminal Procedure Code; the Forensic Examination Law; the Health Insurance Law; the Nationality Law; the Residence Law; the Immigration Law; and the Land Law.

In addition, a review of administrative procedures, especially those related to issuing personal documents and property registration certificates, is necessary to identify where amendments would be needed. Transgender people and their organizations should be consulted at every stage in the development, revision or amendment of laws and policies that may directly affect them.

The process of reviewing the legal framework to identify laws and regulations that need to be amended is not a simple task. Poorly conducted reviews can lead to a confusing legal environment for all parties involved, including transgender individuals. Therefore, a comprehensive legal review should be commissioned.

CONCLUSIONS

In Viet Nam, the issue of legal gender recognition was first recognized in the Civil Code 2015. Article 37 of the Civil Code states: “Gender reaffirmation is carried out in accordance with the law. Persons who have undergone gender reaffirmation have the right and obligation to register changes in their civil status registration in accordance with the law on civil status registration; they have rights related to personal relationships corresponding to the gender that has been converted according to this Law and other relevant laws”. However, this is the initial step in recognizing transgender people in the legal framework of Viet Nam and changing the general perception of Vietnamese society.

Transgender individuals are part of society, and their human rights must be respected, including the right to legal recognition of their gender. The lack of legal recognition for transgender person has contributed to the high rates of violence and discrimination transgender people face resulting in negative health consequences. Countries around the world are working towards legal gender recognition as governments are beginning to fulfill their commitments to the human rights of everyone, including transgender individuals. Viet Nam can learn and adapt from the experiences of other countries to establish a modern and humane Gender Affirmation Law.

Moreover, as part of the third cycle of the Universal Periodic Review, Viet Nam received various encouraging recommendations regarding the rights of LGBTI persons and organizations, and their protection against discrimination and violence. Notably, Viet Nam supported the recommendation by Chile to develop legislation to combat discrimination based on sexual orientation and gender identity, as well as the recommendation by Malta to take further steps to protect LGBTI persons against violence and discrimination.

While being a member of the United Nations Human Rights Council for the term 2014-2016, Viet Nam was also one of the countries that voted in favor of the Resolution on the establishment of an Independent Expert on Combating Violence and Discrimination based on sexual orientation and gender identity.

In 2023, Viet Nam currently serves as a member of the United Nations Human Rights Council for the 2023 – 2025 period. Therefore, the formation and adoption of a rights-respecting gender affirmation law, which is in line with international best practices can help the country to stand out as a regional leader on transgender rights.

COMPARATIVE LEGAL REGIMES FOR LEGAL GENDER RECOGNITION

Compendium of Countries with a “Progressive” Approach

Overview

Determining whether a law or regulation on legal gender recognition is rights-based cannot adhere to a one-size-fits-all approach. Ideally, jurisdictions with progressive laws and policies for legal gender recognition should:

- Rely on self-defined gender identity rather than verification by others.
- Offer more than two sex/gender options to accommodate individuals identifying outside the binary categories of male and female.
- Be applicable to all residents, including those born overseas.
- Align with broader human rights, particularly ensuring access to health services that facilitate the transition for individuals choosing that medical path.

The European Court of Human Rights (ECHR) has found that everyone has a right to legal gender recognition, and thus, countries are obligated to take steps to guarantee that right. Further, the ECHR has found that requiring any irreversible medical procedure, including sterilization, for legal gender recognition would violate the right to physical integrity and the right to private life.²³ Countries with a “progressive” approach to gender recognition often require minimal or no medical interventions prior to changing one’s legal gender. This approach in many of these countries has evolved over time as more has been understood about the impact of requiring irreversible medical procedures on the rights and mental well-being of transgender people. For instance, in the Netherlands, the government has apologized for previously requiring surgeries, including sterilization for legal gender recognition and is considering providing compensation to those who underwent surgeries for this purpose.²⁴ Apart from empowering transgender people to change their legal gender without medical evaluations and procedures, these regulations have the advantage of providing a transparent, accessible, and swift legal recognition process, making legal gender recognition more accessible to all transgender people, including those who do not wish to or cannot undergo medical interventions, ensuring the principle of leaving no one behind and compliance with international human rights.

Ireland

²³ Council of Europe. Thematic Report on Legal Gender Recognition in Europe. Available at <https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3>.

²⁴ Government Offers Apologies for Old Transgender Act (30 Nov 2020). Available at <https://www.government.nl/latest/news/2020/11/30/government-offers-apologies-for-old-transgender-act>

In Ireland, legal gender change is regulated by the Gender Recognition Act 2015 (*An Tacht um Inscne a Aithint, 2015 - Gender Recognition Act 2015*). The Act consists of 5 parts and 38 sections, with the main contents as follows: Part I - General Provisions; Part II - Procedures for Gender Recognition; Part III - Gender Recognition Certificate; Part IV - Birth Registration; Part V - Other Provisions. This legislation establishes a process that allows for legal gender recognition with no prerequisites for adult applicants.

Conditions for Legal Gender Recognition

A person seeking gender reassignment must be at least 18 years old. However, an individual aged 16 or 17 can change their gender on official documentation if that person meets the following criteria:

(1) Obtains parental or guardian consent.²⁵

(2) Obtains the professional opinion of a physician who has conducted a medical assessment, demonstrating that the applicant:

- Is of sufficient maturity to make a decision regarding gender recognition;
- Has considered and fully understood the consequences of that decision; and
- Has made the decision without coercion or undue influence.²⁶

(3) An endocrinologist or psychiatrist, without any prior relationship with the applicant, provides the court with a written statement that his/her medical opinion concurs with the medical opinion of the physician mentioned above.²⁷

For those aged 18 and over, Ireland does not require any medical intervention or mental health diagnosis for legal gender recognition. However, applicants must demonstrate a clear and serious intention to live in their desired gender for the rest of his/her life, understanding the consequences of gender reassignment; and must voluntarily submit the application.²⁸

Under the Birth Register, Adopted Children Register, or Foreign Birth Register, only individuals who fall into one of the following categories can apply to change their gender on their birth certificate:

- Those whose birth certificate is registered in Ireland.

²⁵ Section 12(4)(a) of the Irish Gender Recognition Act.

²⁶ Id. at section 12(4)(b)(i).

²⁷ Id. at section 12(4)(b)(ii).

²⁸ Id. at section 10.

- Individuals who have been and are currently resident in Ireland for at least one year, including those who have been registered as adopted children (including internationally adopted children) in Ireland.
- Those whose birth certificate was registered in a foreign country, but have been found eligible to change their gender on official documentation abroad.

Authority and Procedures for Gender Recognition

The Minister for Social Protection has the authority for legal gender recognition.

A person desiring to legally change their gender can submit an application to the Minister to obtain a gender recognition certificate. The application for gender recognition must be in written form, including electronic formats as specified. There is no fee for processing the registration application.

Under section 8(3) of the Gender Recognition Act, the Minister can either grant or refuse a gender recognition certificate. In cases of denial, the Minister must, under section 8(5), notify the applicant of the reasons for that decision and inform him/her of the right to appeal to the Family Court. The appeal must be filed within 90 days from the date of notification.

In cases of approval, the gender recognition certificate will be issued within two to three working days from the date of the decision.²⁹ The Minister for Social Protection is obligated to notify the Registrar of the decision to approve the application. Upon receiving the notification and the issuing of the gender recognition certificate, the Registrar will amend the record accordingly.

Section 38 of the Passport Act 2008 stipulates that a person with a gender recognition certificate can apply to the Minister for Foreign Affairs and Trade to obtain a passport with the name and gender specified on the certificate.

Where a person with a gender recognition certificate wishes to revert to their original gender, section 15 of the Gender Recognition Act outlines the process by which he/she can apply to the Minister to revoke the certificate.

Legal rights after legal change of gender

From the date of issuance of the gender recognition certificate, the gender reflected on the certificate becomes the individual's legally recognized gender.³⁰

²⁹ The Gender Recognition Act of Ireland also stipulates that the Minister has the authority to revoke the Gender Recognition Certificate if it is examined in practice that the certificate should not have been originally issued.

³⁰ Section 18(1) of the Irish Gender Recognition Act.

Regarding rights and obligations in marital and family relationships, a person who has undergone a legal change in their gender is allowed to marry a person of the opposite gender or enter a civil relationship with someone of the same gender.³¹ For familial relationships, any legal gender change does not affect the parental status of a person regarding a child born before the issuance date of the certificate.³²

The issuance of the gender recognition certificate does not affect the handling or division of assets according to a will (including any codicil – a document supplementing a will) or other forms carried out before the Gender Recognition Act came into force. Further, a trustee or personal representative is not required to enquire whether a gender recognition certificate is issued before conveying or distributing property.³³ Individuals adversely affected in the handling of assets according to a will due to the issuance of the gender recognition certificate can appeal to the High Court.

Regarding the right to information confidentiality, according to the Gender Recognition Act, gender recognition registration is not public. Only the registered individual or close relatives in the event of the individual's death are allowed to access this information. The person issued the gender recognition certificate is under no obligation to present this certificate as evidence of gender or personal identity for any purpose unless required by law.

The Netherlands

The Netherlands was one of the earliest countries to legally provide for changes to one's gender in Europe and globally. The Netherlands Civil Code regulates legally changing of one's gender.

Conditions for Legal Gender Recognition

Under Article 1(28) of the Netherlands Civil Code "[a] Dutch citizen aged 16 and above, desiring a gender different from the gender on their birth certificate, can make a declaration to change their gender in the municipal register and related personal identity documents. If [their] birth certificate is not registered in the Netherlands, [they] can send information about the gender change to the registration of the municipality of The Hague".

A non-citizen may file a request if he or she has a valid residence permit and has had their domicile in the Netherlands for at least one year before filing the request.³⁴

³¹ Id. at section 18(3).

³² Id. at section 19.

³³ Id. at section 21.

³⁴ Article 1:28(3) of the Netherlands Civil Code.

Currently, there are no mandatory conditions, such as surgery or sterilization before requesting a change to one's gender on official documentation. However, individuals seeking gender recognition must have confirmation from an expert on the Gender Council, affirming the person's permanent conviction to belong to a gender different from the one recorded in their birth certificate. The members of the Gender Council are appointed by the Minister of Justice and Security based on recommendations from a selection committee. The selection committee typically consists of medical professionals with expertise in gender identity, legal experts, and representatives from lesbian, gay, bisexual, transgender and queer+ organizations.³⁵

Additionally, that person must understand the consequences of the decision to change his or her gender identity. This confirmation must be completed within a period not exceeding 6 months at the time of application.³⁶

The legal regime for changing one's gender on official documents in the Netherlands was amended in 2013 when the requirement for a court order before any changes to one's gender was amended to requiring affirmation from the Gender Council. This not only simplified the conditions and procedures but also transformed the legal gender recognition process into an administrative procedure, rather than a court procedure, making it more accessible for transgender individuals and saving costs for the government.

Authority and Procedures for Gender Recognition

The authority for gender reassignment in the Netherlands lies with the civil registry office.³⁷ Persons born in the Netherlands who wish to change their gender submit an online application to the civil registry office where they were born or to the registration office in The Hague if they were born abroad.

Once an application has been made, a Gender Council is established, consisting of experts with the sole task of providing their professional opinions on the application. They have the authority to grant or deny the issuance of a certificate to the applicant if they find the applicant's gender statement uncertain or unusual. The Gender Council is responsible for the accuracy of their confirmatory opinions. The certificate from the Gender Council is

³⁵ Government of the Netherlands. National Government Organization. Available at <https://www.rijksoverheid.nl/onderwerpen/rijksoverheid/organisatie-rijksoverheid>

³⁶ Article 1:28 of the Netherlands Civil Code.

³⁷ Before the Dutch Gender Recognition Act of 1985 was promulgated, the procedures for recognizing gender reassignment were carried out in district courts.

only valid when confirmed within 6 months from the date of filing the gender reassignment application.³⁸

Based on the Gender Council's decision, the civil registry office will assess whether the application meets the legal requirements. If the application is successful, the civil registry office, where the person was born, will amend the birth certificate and notify the local government where the person resides at the time of the change. Subsequently, the municipality of the person's current residence will update his or her data in the Personal Records Database.

Furthermore, if a person requests full name change, the civil registry office can also change the applicant's name.³⁹ In the case of an individual whose birth certificate is not registered with the Dutch civil registry office, the request for a name change is processed at the registration office in The Hague administrative center.

Legal rights after legal change of gender

Rights and obligations are established from the date the civil registry office confirms the gender change on the individual's birth certificate. This timing is the same in cases of a full name change.⁴⁰

Regarding family relationships, the relationships established prior to the change in one's gender on official documentation are maintained as well as any rights, powers and duties due to these familial relationships.⁴¹

In terms of reproduction after a legal change to one's gender, as the Netherlands Civil Code does not require an individual to undergo surgery or sterilization as a prerequisite, it is entirely possible for someone to have children after a gender transition. In such cases, the resulting parental responsibilities are based on the biological gender before the legal gender change. According to Dutch law, an individual is referred to as the father or mother of a child based on their biological gender at the time of birth.⁴²

Norway

In 2016, Norway became the fourth European country to legally provide for legal gender recognition through the passage of the Gender Recognition Act. The Gender Recognition

³⁸ Article 1:28 of the Netherlands Civil Code.

³⁹ *Id.* at Article 1:28b.

⁴⁰ *Id.* at Article 1:28c.

⁴¹ *Id.* at Article 1:28c(2).

⁴² *Id.* at Articles 198-199.

Act allows individuals to legally change their gender,⁴³ with no requirement of medical intervention, required diagnosis or sterilization.⁴⁴ The scope of Norway's Gender Recognition Act covers the concept of legal gender, individuals eligible for gender change, the procedure for changing one's legal gender, issues related to legal gender recognition in children, and the legal consequences of legal gender change.

Conditions for Legal Gender Recognition

Any person 16 or older is eligible to legally change their gender.⁴⁵ The Gender Recognition Act does not require the person to undergo a medical evaluation or medical interventions prior to changing their legal gender. Children aged 6 to 16 can choose to change their legal gender with the consent of all their legal guardians, which generally is both parents.⁴⁶ If only one legal guardian consents, the child may only change their legal gender with the approval of the responsible County Governor, if the Governor determines that the application is in the best interest of the child.⁴⁷ Children under 6 are allowed to determine their gender (not to change or transition) if there is a medical certificate indicating the child has uncertain somatic sex development.⁴⁸

Under the Gender Recognition Act, people who are resident in Norway can change their legal gender.⁴⁹ The Ministry of Health and Care Services can apply this law to Norwegian citizens living abroad.

⁴³ Section 4 of the Gender Reaffirmation Act in Norway defines "legal gender" as "[l]egal gender is the gender that a person is registered with in the National Registry". The legal gender is recorded by the National Registry based on information reflected in the birth certificate, usually documented by healthcare personnel when a child is born, often relying on the visual inspection of the child's appearance. Legal gender can be either female or male.

⁴⁴ Previously, in Norway, a prerequisite for gender recognition was sterilization through surgical removal of reproductive organs. By 2013, the Norwegian Ministry of Health and Care Services appointed a group of experts to provide recommendations on this prerequisite for a legal change in gender. In their 2015 report, the group of experts stated that they found no medical justification for requiring surgical sterilization for legal gender change.

⁴⁵ Section 4 of the Gender Recognition Act.

⁴⁶ There are instances where only one parent can submit the application for the child.

⁴⁷ The primary factors affecting this assessment include the age and maturity of the child, the gender expression the child has demonstrated, the ways in which this is done, the duration of such expressions, and the consistency with which the child has expressed his/her gender identity.

⁴⁸ Id.

⁴⁹ United Nations Entity for Gender Equality and the Empowerment of Women. Comparative Analysis of Gender Recognition Laws (2019), pg 25.

Authority and Procedures for Gender Recognition

The National Registry oversees the process of legal gender change in Norway. The procedure for changing one's legal gender is as follows:

- A person wanting to change their legal gender will submit a self-declaration. Specifically, anyone over 16 can submit independently; even if they are under guardianship under the Guardianship Act, they can submit independently as legal gender affirmation for a person is "entirely a personal matter".⁵⁰ For persons under 16, their legal guardian(s) must submit.⁵¹
- If successful, the person will have his/her new legal gender recorded at the National Registry and registered in the Population Register. They will obtain a new identification number which will serve as the basis for obtaining a new passport and a new national identity card. This process is straight forward, however, requiring a new identification number creates significant obstacles, as all personal documents and forms of identification (such as BankID) need to be updated separately.
- If an application is rejected, the decision may be appealed in accordance with the rules set forth in the Public Administration Act. Complaints are considered by the County Governor of Oslo and Viken, on behalf of all the counties in Norway.⁵²

Individuals can also revert to their previous gender through the same procedure. Norwegian law does not limit the number of times an individual can legally change their gender. A review of legal gender recognition policies and practices in Europe found no evidence of a significant increase in fraud or administrative burden in countries allowing multiple changes compared to those with one-time change policies. The report concluded that allowing multiple changes prioritizes individual rights and autonomy without causing major logistical problems.⁵³

Legal rights after legal change of gender

Regarding parental rights and obligations, Article 2 of the Gender Recognition Act states that the "gender at birth must continue to be assumed if necessary to establish parent-child and guardianship relationships under the Children's Act".

⁵⁰ Article 21(4) of the Guardianship Act.

⁵¹ Article 4 of the Gender Recognition Act.

⁵² Id. at Article 5.

⁵³ Council of Europe. Review of Legal Gender Recognition Policies and Practices in Europe (2022). Available at <https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3>.

In Norway, one's legal gender will be presumed in the application of laws and other legal provisions where gender is crucial.⁵⁴ Further, the rights and responsibilities "that apply to a woman giving birth also apply equally to a person who gives birth after changing their legal gender"⁵⁵ Thus, for instance, in terms of maternity leave benefits and insurance for persons who have changed gender and given birth, the regulations applicable to a woman giving birth also equally apply to a person giving birth after a legal gender change.

The United Kingdom

The issue of gender recognition in the United Kingdom (UK) is currently regulated by the Gender Recognition Act 2004, effective from April 4, 2005. The Gender Recognition Act specifies the procedures and processes for changing gender⁵⁶ on legal documents, and the legal implications of gender identity changes, including addressing privacy concerns.

Conditions for Legal Gender Recognition

To qualify to change one's legal gender under the Gender Recognition Act, an applicant must meet the following conditions:⁵⁷

- The person must be 18 years old or older.
- There has to be a medical diagnosis of gender dysphoria. The medical report, if available, should detail any medical treatments received, such as hormone therapy or surgery, whether in the UK or another country. Medical treatments, like hormone therapy or surgery, are not a mandatory requirement for legal gender recognition. However, if the applicant has undergone such treatments, the details should be included in the health report submitted with their application.
- Evidence demonstrating that he/she has lived as the preferred gender for at least 2 years (e.g. bank statements, utility bills, pay slips) and has the intention to continue living as the preferred gender until death.
- He/she needs to make a legal declaration expressing their intention to live in the preferred gender until death.

⁵⁴ For example, the regulations on gender quotas: The Court Act stipulates that members and deputy members of the Mediation Board must include both men and women (Article 27), and lay judges must be selected separately for women and men (Articles 64 and 65). The Gender Equality Act establishes gender balance in public committees, executive boards, councils, and requires at least 40percent women in the executive boards of corporations (Article 13). The Biotechnology Act includes provisions using terms such as "women" and "men".

⁵⁵ Id.

⁵⁶ GPA does not provide the concept of legal gender but uses the term "acquired gender", which refers to the gender that the applicant is currently living as and seeking legal recognition for.

⁵⁷ Section 1 of the Gender Recognition Act.

- He/she is either single or, if married, has the consent of their spouse. If the spouse does not agree, a temporary Gender Recognition Certificate with a validity of 6 months can be issued to terminate the marriage.

Authority and Procedures for Gender Recognition

The competent authority overseeing the request for a legal gender change is the Gender Recognition Panel, who can issue a Gender Recognition Certificate (GRC). The procedure to obtain a GRC is as follows:

- Complete the application form.
- Provide an original birth certificate.
- Provide confirmation from a doctor or a psychologist specializing in gender dysphoria that the applicant is transgender, and the change is likely to be permanent.
- Provide “evidence” that the individual has been “living in the desired gender” for 2 years (e.g. passport, driving license, utility bills, salary slips, letters).
- Two medical reports, one of which must be conducted by a doctor from the “approved list”. The applicant must self-cover the cost of these health examinations.
- A person in a marital relationship must provide a marriage certificate along with written consent from their spouse. If the spouse does not consent, a temporary GRC may be issued for 6 months to allow for the termination of the marriage.
- A fee of 5 pound Sterling.
- Additionally, details on medical intervention and the timing need to be provided; genital surgery is not mandatory, but if performed, detailed information must be submitted.

The applicant may choose to submit the application online. After submitting the documentation, the Gender Recognition Panel will review the application and decide whether to approve or reject it. If approved, the person will be granted a GRC. In the case of a married applicant seeking a GRC without their spouse’s consent, he/she will be issued an “Interim Gender Recognition Certificate”. This certificate can be used to annul a marriage. After the annulment becomes effective, the full GRC will be issued.

Applicants can appeal the decision of the Gender Recognition Panel to the High Court.

If a person who has obtained a full GRC later wishes to revert to their birth gender, they must submit a new GRC application and meet the same legal requirements as outlined above.

Legal rights after legal change of gender

Regarding the rights and obligations of an individual in general after obtaining a GRC, the holder is considered by law to be of their acquired gender as indicated in the GRC from

the date of issuance onwards. The GRC is not retrospective, so it does not alter a person's gender history or affect any actions they took before its issuance.

Regarding rights of marriage and family, a legal gender change will not affect the legal status of parents and the fulfillment of parental responsibilities.⁵⁸ Regarding marriage, a person who has undergone gender reassignment can marry an individual of either gender. For a marriage that existed prior to the enactment of the Same-Sex Marriage Act in 2013, the marriage could be considered a same-sex marriage with the consent of the spouse. In cases where an agreement between spouses cannot be reached and divorce is not desired, a civil partnership is also an option.

Regarding retirement, the holder will be able to retire at the age appropriate to their acquired gender and receive a state pension from that age. Further any legal gender change will not affect the determination or division of property under a will or other documents established before the date of designation.⁵⁹

Regarding data security rights, under Article 22 of the Gender Recognition Act, the disclosure of protected information obtained in an individual's official capacity is considered an offense. "Protected information" is defined as information concerning an application an individual has made for a GRC and information related to the person's gender.⁶⁰ However, Article 22 also lists a number of exceptions for disclosing information, including if the person has agreed to the disclosure.⁶¹

Compendium of Other Countries' Approach

Overview

While political, legal and social contexts play an important role in determining legal possibilities in a country, laws and policies for legal gender recognition should not:

- Require a medical diagnosis of gender identity disorder, gender dysphoria or transsexualism;
- Require transition-related medical treatment, such as hormonal therapy or gender-affirming surgeries;
- Require sterilization, either explicitly or by requirement of medical procedures that result in sterilization;
- Require living continuously or permanently in one's gender identity;

⁵⁸ Id. at section 12.

⁵⁹ Id. at section 15.

⁶⁰ Id. at Article 22(2).

⁶¹ Id. at Article 22(4).

- Require divorce or dissolution of a civil partnership or marriage;
- Prohibit parenting now or in the future;
- Be governed by age restrictions. Options for children and youth should recognize their evolving capacities in line with international norms and standards.

Proponents of less progressive regulations on conditions and procedures for legal gender recognition argue that they are necessary to limit disruptions to societal order. Further, they note that legal gender recognition does not merely mean the changing of one's gender on official documentation, but has an impact on personal rights, family relations, and property rights, and thus, opting for a stringent solution provides greater safety and coherence.

However, others have criticized the requirement for gender-affirming surgery and medical and psychological counselling prior to legal gender recognition for a number of reasons. First, medical interventions, including gender-affirming surgeries may be too expensive for most individuals creating a barrier for individuals to legally change their gender. Second, critics note that strict requirements can infringe the right to physical integrity and right to privacy and other basic human rights.⁶² Requiring medically unnecessary surgery as a prerequisite to enjoy legal recognition of a transgender individual's preferred gender have been condemned by the Committee against Torture as violating the right to be free from torture and other cruel, inhuman or degrading treatment.⁶³ Further, critics question the age at which individuals can legally change their gender in countries with a less progressive approach as studies have shown that gender identity can be affirmed at a very early age, and gender transition at the right time can reduce depression and stigma from those around the transgender.⁶⁴

China

The Ministry of Public Security Order No. 478 (2008) and the Ministry of Public Security Order No. 131 (2002) provide guidance to local departments for managing the process of

⁶² China Women's University and UNDP. Legal Gender Recognition in China: A Legal and Policy Review (2018). Available at https://www.undp.org/sites/g/files/zskgke326/files/migration/asia_pacific_rbap/UNDP-CH-Legal-gender-recognition---China-180805.pdf

⁶³ Committee Against Torture. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (1 February 2013), paras. 76-79, 88

⁶⁴ See e.g. Martin CL, Ruble DN. Patterns of gender development. *Annu Rev Psychol.* 2010;61:353-81.

legal gender recognition.⁶⁵ In China, gender on the national identification card and birth certificates is limited to two categories: male and female.

Conditions for Legal Gender Recognition

In China, individuals can legally change their gender if they meet the following criteria:

- The applicant must be over 20 years old and possess full civil capacity according to the Civil Code.⁶⁶ Since 2009, the government has made it illegal for minors to legally change their gender stating that only persons over 20 years old can undergo the gender-affirming surgery necessary to legally change one's gender.⁶⁷
- The applicant must have publicly lived as the preferred gender for at least 3 years before surgery and must complete the surgical process before changing his/her documents.
- The applicant is unmarried.
- The applicant has undergone gender-affirmation surgery.

The conditions for gender-affirming surgery in China are strictly regulated.⁶⁸ Most gender-related healthcare services are not covered by the health insurance system. Transgender persons often have to cover medical consultations, clinical examinations, tests,

⁶⁵ 王洁怡, 葛治华. 变性人性别变更权及其衍生权利限制与保护. [J] 长江师范学院学报. 2019, 3:107; China Women's University and UNDP. Legal Gender Recognition in China: A Legal and Policy Review (2018).

⁶⁶ The General Office of the Ministry of Health requires candidates for gender-affirmation surgery to be "over 20 years old and [have] full civil capacity". However, this regulation is currently considered inconsistent with the Chinese Civil Code, as this law stipulates that an individual aged 18 and above have full civil capacity.

⁶⁷ Jun, Pi. Transgender in China. *Journal of LGBT Youth*. 2010-10-09, **7** (4): 346–351.

⁶⁸ To undergo gender affirmation surgery, a transgender person in China must meet the following requirements:

- Obtain confirmation from the local police that the patient has no criminal record (Regulation of the General Office of the National Health and Family Planning Commission states that candidates for gender affirmation surgery must submit a "crime-free record issued by the local police" to prevent individuals suspected of or previously convicted of crimes from undergoing the procedure). It is worth noting that this regulation has been a subject of controversy and criticism regarding its fairness and reasonableness.
- Obtain confirmation from a psychologist or psychiatrist regarding the diagnosis of gender dysphoria.
- Undergo psychological or psychiatric treatment for more than 1 year before the surgery without improvement.
- Be unmarried.
- Have a written confirmed request for surgery.
- Verify that the patient has informed and obtained the consent of their family or workplace regarding the gender affirmation surgery. The requirement for family consent is quite strict and applies regardless of the candidate's age. The hospital working regulations (issued by the Ministry of Health on April 7, 1981) explicitly state that "before performing the surgery, written consent must be obtained from the patient's family or workplace unit".

hormone therapy, hair removal, and/or surgery themselves. Further, the government imposes strict conditions on the healthcare facilities performing such surgery.⁶⁹

Authority and Procedures for Gender Recognition

The authority to legally change an individual's gender lies with the Ministry of Public Security. To legally change one's gender, the individual must complete the following documents and submit them to the local police agency where he/she has registered permanent residence:

- Completed application form;
- Household registration book and national identification card;
- Certificate confirming gender reassignment surgery issued by the hospital along with the confirmation from the judicial authorities; and

⁶⁹ In 2009, the Ministry of Health of the People's Republic of China issued the "Technical Management Standards for Gender Reassignment Surgery (Trial)", which standardized the technical evaluation and clinical application management of gender reassignment surgery. This was an initial step to ensure the quality and safety of healthcare in the process of performing gender reassignment surgery. Beijing Normal University. Gender Reassignment Surgery. Available at

<https://baike.baidu.com/item/percentE6percent80percentA7percentE5percent88percentABpercentE9percent87percent8DpercentE7percentBDpercentAEpercentE6percent89percent8BpercentE6percent9CpercentAF/1301503>)

In 2017, the Health Commission of the People's Republic of China issued the "Management Standards for Gender Transition Technology (2017 version)" and the "Quality Control Indices for Clinical Applications of Gender Transition Technology (2017 version)." According to these documents, in addition to the conditions that transgender individuals must meet for surgery, healthcare facilities and surgeons must also meet a series of conditions as follows:

- Have functions, responsibilities, and capabilities suitable for performing gender-affirming surgeries;
- Be registered and approved for diagnostic, therapeutic, cosmetic surgery, urological, and obstetric/gynecological activities by the health regulatory authority and family planning department;
- Have independent supporting departments such as anesthesia, emergency intensive care, and blood transfusion;
- Have an Ethics Committee consisting of experts in medicine, law, ethics, and other relevant fields in accordance with the standard management procedures.

Surgeons performing gender confirmation surgeries must meet the following conditions:

- Possess a "Medical Practitioner's License" and be registered at a healthcare facility with a scope of practice including surgery;
- Have over 10 years of clinical diagnosis and treatment experience in the specialized field of cosmetic surgery and a technical qualification of at least Deputy Chief of Department for over 5 years.
- Independently complete no fewer than 10 cases of genital reconstruction surgery (for those performing gender transition from female to male, they need to independently complete no fewer than 5 cases of phalloplasty).
- After receiving systematic training in gender transition technology at a designated training institution by the provincial health and family planning department, they must have the ability to perform the gender transition surgery.

- Notification of permission for the modification from the human resources department of his/her organization, institution, school, business, or other working units (if the individual belongs to that unit).

The police agency in the area where the applicant is registered has 50 working days to review and process the application. If the application is successful, the applicant's gender will be changed on their personal documents, their citizen identification number will be reissued, and the change will be recorded in the "Changing and Amending" section on the back of the permanent residence registration form. For those who have a citizen identification card, the police can process a new citizen identification card with their updated identification information.

Changing names and gender markers on diplomas, certificates, and other academic credentials is extremely challenging because educational institutions lack the authority to carry out such changes. The absence of clear guidance from the Ministry of Education on changing gender markers on certificates and educational degrees means that many transgender individuals face difficulties in reflecting their preferred gender in their current or future workplaces and may consequently experience significant discrimination in the workplace. Further, if they are unable to change their gender on their school certificates, it may render the certificates invalid as the certificate does not match their gender on their new identification.

Legal rights after legal change of gender

There is no law that specifically addresses the rights of transgender persons after legal gender recognition. The law only contains some regulations prohibiting discrimination based on "gender", primarily in the workplace and education settings.

India

Legal gender recognition in India is governed by the Transgender Persons (Protection of Rights) Act (TPA), passed on December 5, 2019. The TPA covers six main content areas: (1) the definition of transgender persons; (2) prohibition of discrimination; (3) gender identity certificates; (4) residency rights; (5) education and healthcare; and (6) government welfare for transgender persons.⁷⁰ Notably, the TPA also establishes the National Council for Transgender Persons (NCT) with the responsibility of implementing the 2019 Transgender Persons Act and advising the Central Government on formulating and

⁷⁰ Preamble of the TPA.

evaluating policies, programs, legislation, and projects for the welfare of the transgender community.⁷¹

Since 2014, transgender persons have been legally recognized as a third gender or “other” gender in India based on a court ruling.⁷² The TPA officially recognized “transgender” as a formal gender in India. Under the TPA, the definition of transgender encompasses the following groups: (1) persons with a gender identity inconsistent with the sex assigned at birth; (2) transgender women; (3) transgender men; (4) intersex individuals; (5) individuals with genderqueer identities; and (6) individuals with different gender identities, including individuals with culturally and socially recognized identities such as kinner, hijra, jogta.⁷³ Under the TPA, the definition of transgender individuals does not require the individual to have undergone gender-affirming surgeries.

Conditions for Legal Gender Recognition

Indian citizens have the legal right to choose their gender regardless of class, race, gender, or religion. Under the TPA, an individual can legally change their gender to transgender without any prerequisites.⁷⁴ However, if an individual wishes to legally change their gender to male or female, he or she must undergo gender-affirming surgery.⁷⁵

Individuals 18 years and older can apply independently to legally change their gender.⁷⁶ A parent or guardian of a minor child can apply for a certificate of identity as a transgender person on behalf of a person under 18 years of age.⁷⁷ With respect to gender-affirming

⁷¹ The National Council for Transgender Persons in India comprises the following members:

- The Minister of Social Justice and Empowerment serves as the Chairperson of the Council.
- The Minister of State for Social Justice and Empowerment serves as the Vice-Chairperson of the Council.
- The Secretary and Joint Secretary of the Ministry of Social Justice and Empowerment for the Government of India.
- One representative from each Ministry, such as Health and Family Welfare, Home Affairs, Rural Development, etc.
- One representative each from the National Human Rights Commission (NHRC) and the National Commission for Women (NCW).
- Representatives from the Northern, Southern, Eastern, Western, and Northeastern regions of India, including representatives from the governments of states and union territories in the Union.
- Five representatives from the transgender community from these regions.
- Five experts from non-governmental organizations or associations involved in welfare activities for transgender persons.

⁷² Section 16 of the TPA.

⁷³ Id. at Article 1.

⁷⁴ Id. at section 4.

⁷⁵ Id. at section 7.

⁷⁶ Id. at section 5.

⁷⁷ Id.

surgery, in *Bidhan Baruah* (2012), the Mumbai Supreme Court observed that there is no law prohibiting gender-affirming surgery in India, and thus, adults (over 18 years old) can undergo gender reassignment surgery without parental consent.

Authority and Procedures for Gender Recognition

The District Magistrate is responsible for overseeing applications for legal gender recognition. The procedure for legal gender recognition under the TPA is as follows:

Step 1: The applicant applies for legal gender recognition to the District Court where he/she resides. The application form and the required documents may vary by each district. In some districts, this can be a lengthy and difficult process as they require proof of residence and witnesses, which may be impossible for the applicant. For a minor, the application will be submitted by a parent or legal guardian.⁷⁸

Step 2: The District Magistrate, based on the advisory opinion of the district-level Screening Committee,⁷⁹ will decide whether to grant a certificate of identity for the applicant. If the application is successful, the applicant's gender will be recorded as "transgender" on all official documents. The certificate will serve as legal evidence of the transgender person's identity.⁸⁰

Step 3: The "transgender" gender status will be documented in the official records maintained by the Office of the District Magistrate.

Step 4: If the applicant undergoes gender reaffirmation surgery, he/she may apply to legally change their gender. They would need to apply to the District Magistrate and include a certificate from the Medical Superintendent or Chief Medical Officer of the institution that performed the gender-affirming surgery.⁸¹

Step 5: Once the applicant receives a certificate confirming their new gender identity, the applicant can change their first name in the birth certificate and all other official documents related to their identification.⁸²

The TPA does not provide for any appeals or review of decisions of the District Magistrate.

⁷⁸ Id.

⁷⁹ An administrative agency in India consists of the following components: (i) Director of Health; (ii) District Social Welfare Officer; (iii) psychologist or psychiatrist; (iv) representative of the transgender community; and (v) an official from the relevant government authority.

⁸⁰ Section 6 of TPA

⁸¹ Id. at section 7(1).

⁸² Id. at section 7(3).

India has established the National Portal for Transgender Persons (NPTP) as required under the TPA and the Rules on Transgender Persons (Protection of Rights) of 2020. The NPTP is operated and managed by the Ministry of Social Justice and Empowerment of India. The portal aims to support transgender individuals to register for identity certificates online from anywhere in the country.

Legal rights after legal change of gender

The TPA prohibits discrimination against transgender persons in education, employment, healthcare and housing, among others, and requires employers, educational institutions and others to take steps to ensure non-discrimination.⁸³

Concerning the right to adopt children, although the Juvenile Justice Act in Section 41(6) stipulates that anyone can adopt a child – the prerequisite for adoption is that the adopting couple must be officially recognized. It is unclear whether couples where one or both identify as transgender would be officially recognized. Further, the Hindu Adoption and Fostering Act only recognizes adoption by a “male” or “female” and thus it is unclear whether Hindu transgender persons would be able to adopt.

With respect to property rights, the law is unclear. In India, inheritance law is governed by personal religious laws. This poses difficulties for transgender persons in claiming inheritance rights as the law only recognizes gender as male or female. Although this issue has been raised several times with the Indian Law Commission, there has been no concrete action taken to address these legal provisions.⁸⁴

Japan

The Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (性同一性障害者の性別の取扱いの特例に関する法律), hereinafter referred to as the Gender Affirmation Law, governs legal gender recognition in Japan.⁸⁵ It consists of four Articles that regulate the conditions and procedures for legal gender recognition, along with some supplementary provisions related to its implementation.⁸⁶

⁸³ Id. at sections 3, 9-15.

⁸⁴ Id. at section 3

⁸⁵ The Japanese law still uses the outdated term “Gender Identity Disorder” despite the WHO transitioning the terminology to “Gender Incongruence” in the ICD-11. (The unofficial English translation is available at: <https://www.japaneselawtranslation.go.jp/ja/laws/view/2542/je>).

⁸⁶ Article 1 specifies the subject of regulation. Article 2 defines the concept of “Persons with Gender Identity Disorder”. Article 3 outlines the conditions for individuals with gender identity disorder to petition the Family Court for a decision recognizing a gender change. Article 4 stipulates the application of laws related to individuals who have received a decision on gender change.

Conditions for Legal Gender Recognition

Eligibility for legal gender recognition is narrow under the Gender Affirmation Law.⁸⁷ To be eligible, the applicant must meet the following criteria:

- The applicant must be a “person with gender identity disorder”⁸⁸ defined in Article 1 as “someone who can clearly determine their biological sex but continuously believes that they belong to another gender and has the will to make oneself congruent with that gender both physically and socially, diagnosed by at least two experienced and knowledgeable doctors based on widely recognized medical knowledge”.⁸⁹
- Be 18 years of age or older.⁹⁰
- Be single.⁹¹

⁸⁷ They only include:

- Those who are “able to clearly determine their biological gender”. Individuals who, since birth, have conditions related to gender development disorders that make it impossible to determine their biological sex immediately after birth are not within the scope of this law. It is important to note that the provisions in the Gender Affirmation Law primarily aims to adjust the gender in a civil status register. Individuals with disorders affecting gender development, leading to an inability to determine gender, can leave the gender section in the civil status register blank until it can be accurately determined. Therefore, if no gender is recorded in the civil status register, the performance of surgeries or other medical interventions by the relevant person to live according to a specific gender does not fall under the regulation of this Law.

- Those who “continuously believe that they belong to a different gender and have the will to make themselves congruent with that gender both physically and socially” whether or not there is a conclusion from “at least two experienced and knowledgeable doctors providing a consistent diagnosis based on widely recognized medical knowledge”. Therefore, assessing the actual gender of a person relies not only on internal beliefs and behavior in their life but is primarily based on the conclusion of doctors with knowledge and experience. However, the requirement for confirmation from at least two doctors may introduce additional complexity for those seeking gender reaffirmation. Article 3(2) of the Gender Reaffirmation Law explicitly states that individuals seeking legal gender recognition must submit a gender status confirmation along with the treatment process and results. Therefore, the individuals recognized by Japanese law as undergoing gender change is limited to those diagnosed with gender identity disorder, not based on the individual’s self-identification.

⁸⁸ As of January 2024, the Japanese version of ICD-11 is still under development. English versions of ICD-11 codes are currently being used for training and coding in healthcare settings. The full transition to the Japanese version of ICD-11 is expected to be completed by March 2024. 性同一性障害者/Gender Identity Disorder.

⁸⁹ WHO. International Classification of Diseases 11th Revision (2022). Available at <https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/411470068>

⁹⁰ Article 3(1)(1) of the Gender Affirmation Law. Previously, the Japanese Civil Code of 1876 stipulated the age of adulthood as 20 years old. However, after amendments of the Civil Code in 2017, the age of adulthood was lowered to 18 years old to align with international conventions on children’s rights. Consequently, the Gender Identity Disorder Law was also amended in 2018 to be in accordance with the revised Civil Code.

⁹¹ Article 3(1)(2) of the Gender Affirmation Law. The Supreme Court of Japan addressed a case where the petitioner sought gender change while being in a married status. In that case, aside from the marital status condition, the petitioner fulfilled all other requirements. Therefore, the petitioner requested the court

- The applicant does not have any adolescent children (under age 20).⁹²
- The applicant must not have functional or permanently active gonads.⁹³ This provision has raised considerable controversy and legal challenges. In a recent judgment issued on October 25, 2023, the Supreme Court has expressed sharp criticism regarding the necessity and constitutionality of this regulation. The Supreme Court concluded: “The current demand for restricting the right to bodily autonomy as stipulated by this provision has decreased, and the degree of restriction has become severe and cannot be considered reasonable. Therefore, this provision can be said to violate Article 13 of the Constitution”. This can be considered a significant turning point in Japan’s judicial practice, easing the stringent conditions for legal gender recognition in the country.
- The applicant must have a physical form that is “endowed with genitalia that closely resemble the physical form of an alternative gender”.

The Gender Affirmation Law was enacted in 2003 and fails to comply with recent understandings of best practices for transgender persons and legal gender recognition and international human rights standards.

to declare the marital status condition in the gender change procedure as a violation of Articles 13 and 14 of Japan’s current constitution. In response to this request, the Supreme Court of Japan stated: the marital status condition in the Gender Identity Law “was issued based on the concern that recognizing gender change for individuals in a married status would disrupt the current order of marriage, which currently only recognizes marriages between individuals of different genders. It cannot be considered unreasonable, so it cannot be said to exceed the legislative authority of the National Assembly or violate Article 13, Paragraph 1, Article 14 of the Constitution...” (Ruling dated March 11, 2020, by the Supreme Court of Japan [清野幾久子 「性同一性障害者特例法3条1項2号の性別のための非婚要件の合憲性」新・判例解説Watch・憲法No.215 [Available at http://lex.lawlibrary.jp/commentary/pdf/z18817009-00-012152298_tkc.pdf])

⁹² Article 3(1)(3) of the Gender Affirmation Law. This condition has sparked much debate in both research circles and practical court proceedings in Japan. While this provision is based on concerns that recognizing gender reassignment for someone with underage children might impact the mental and physical development of the children when suddenly their “dad becomes a woman” or their “mom becomes a man”, there are opposing views. Some argue that in many practical cases, individuals with gender identity disorder have lived according to beliefs and habits of a gender different from their biological one before undergoing gender change procedures. If they have children, the children are already accustomed to this, or at least there would be no sudden change disrupting the children’s everyday life. (中曾久雄 「性同一性障害者特例法3条1項3号の合憲性」新・判例解説Watch・憲法No.197 (Available at http://lex.lawlibrary.jp/commentary/pdf/z18817009-00-011972146_tkc.pdf)

⁹³ Article 3(1)(4) of the Gender Affirmation Law.

Authority and Procedures for Gender Recognition

The Family Court has the authority to legally change an individual's gender.⁹⁴ It is a standard civil procedure.

The Gender Affirmation Law requires a diagnosis of gender identity disorder (GID) before any transgender person can apply to seek legal recognition of their gender identity. The process requires the person to receive concurrent diagnoses from two or more physicians equipped with the necessary knowledge and experience to give accurate diagnoses on this matter.

The fourth edition of the Diagnosis and Treatment Guidelines for "Gender Identity Disorder," published by the Japan Society for Psychiatry and Neurology and last revised in January 2018, recommend three tests for a GID diagnosis:⁹⁵

- A gender identity test, which is based on the testimony of the individual;
- A biological gender test, which can contain an examination of chromosomes, an examination of hormonal action, an inspection of internal and external genitals, and "other examinations that doctors find necessary;" and
- An exclusion of other diagnoses test to confirm that the denial of gender identity/request for the surgery is not coming from schizophrenia nor other cultural, social, or occupational reasons.

Transgender people also must undergo surgeries to alter the appearance and function of their bodies to meet criteria to apply for legal recognition.

Legal rights after legal change of gender

Once legal gender transition has been approved by the Family Court, all rights and duties will apply according to the person's changed gender, unless otherwise provided by law⁹⁶. However, rights and obligations arising before the legal gender change will not be affected by the change in legal gender.⁹⁷

⁹⁴ Id. at Article 3(1).

⁹⁵ Human Rights Watch. "The Law Undermines Dignity": Momentum to Revise Japan's Legal Gender Recognition Process (2021), pg 21. Available at https://www.hrw.org/sites/default/files/media_2021/05/japan0521_report.pdf

⁹⁶ Article 4 of the Gender Affirmation Law

⁹⁷ Id. at Article 4(1)(3).