



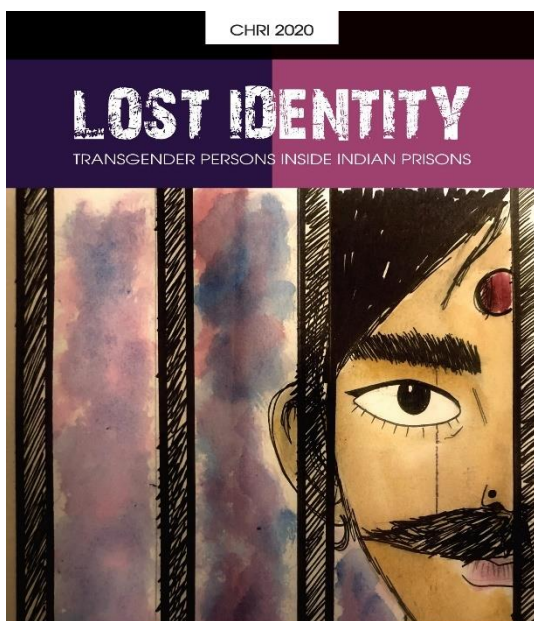
LOST IDENTITY: TRANSGENDER PERSONS IN INDIAN PRISONS

ABOUT THE REPORT

“By recognizing Transgender persons as third gender, this Court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights...Social justice does not mean equality before law in papers but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Rights and the Directive Principles of State Policy into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the Transgender persons which legitimately belongs to them.”

- NALSA vs Union of India & Ors¹

BRIEF SUMMARY



This report sheds light on issues faced by Transgender persons confined in Indian prisons. Through an analysis of the international and domestic legal frameworks, and the information received from 34 States/UTs, it provides relevant information on compliance within prisons with existing legal frameworks relevant to protecting the rights of Transgender persons in prisons, especially in terms of recognition of a third gender, allocation of wards, search procedures, efforts towards capacity building of prison administrators etc.

The recommendations of the report have been finalised through a consultative process with individuals and experts, including representatives from the community, community-based organisations as well as researchers and academicians working on this issue. This report aims to enhance the understanding of these issues among stakeholders such as prison administrators, judicial officers, lawyers, legal service providers as well as other

non-state actors in order to better inform policymaking, and ensure that decisions made with respect to LGBTI+ persons in prisons are cognizant and sensitive towards their rights and special needs.

¹ AIR 2014 SC 1863

KEY FINDINGS

- In the period between May 2018 and April 2019, a **total of 214 Transgender persons were incarcerated in different jails across the country.**
- Out of 28 states and six union territories we received responses from, on **whether data was recorded separately for Transgender persons in prisons** apart from the male/ female binary categorisation, in only 9 states data of Transgender inmates **was being recorded** apart from male and female; while in some states there existed a **lack of uniformity in regard to recording of data by jails within the state** itself.
- Some prisons and states have stated that they were maintaining their records in the **E-Prison software**, which had the option of **recording the data of Transgender persons as “eunuch”**.
- On the procedure for **placement of transgender persons in gendered prisons, non-uniformity in policy was observed not only across the states but was also observed across the jails within the same state.** The placement procedures in place include:
 - Placement based on gender mentioned in court warrant
 - Placement based the advice of the medical officer
 - Placement based on based on their genitalia
 - Male/Female/Transgender Persons are kept separately:
 - No separate provisions for placement, or no previous cases in prisons
- **No awareness programs among prisoners** were conducted since 2014, apart from the state of Karnataka, on the recognition of Transgender persons as a legal identity.
- **No Transgender persons were hired** between 1st January 2014 and 1st January 2019, the responses reveal that no Transgender person had been recruited by the prison department in any of the states or Union territories between the above-mentioned time period.
- **None of the prisons reported of inclusion of any course/module in the Prison Training Institute’s curriculum which focused on the aspect of awareness and sensitisation regarding the rights of LGBTI+ communities.** However, Karnataka, in its response, did mention that a training class was conducted in the prison training institute regarding the Transgender Persons (Protection of Rights) Bill, 2019.

² Eunuch is a term which literally means a “castrated male”. The term has been used historically to denote to “eunuchs” who were employed as guards in royal and noble households across Asia while it is also used as a translation for impotence at certain times. It is offensive to refer to a transperson as “eunuch” as it has nothing to their gender identity.

KEY RECOMMENDATIONS

A. Ascertaining that prison processes are inclusive and take into account the special needs of transgender persons

I. Central Government/Ministry of Home Affairs

- The central government may formulate a model policy on ascertaining special needs of transgender persons in prisons, and outline guidance on documentation, search procedures, placement, medical facilities and recreational/welfare/educational activities within prisons.
- The central government may direct the BPR&D to prepare the model policy, in consultation with expert groups and individuals.
- The central government may direct BPR&D to revise the Model Prison Manual 2016, to be inclusive of transgender persons, and provide specific provisions for their proper care and treatment inside prisons.
- The central government may direct the National Crime Records Bureau to include data on Transgender persons in their annual statistics on prisons and crime i.e. Prison Statistics India and Crimes in India.
- The central government may direct the National Informatic Centre (NIC) to refrain from classifying persons as 'eunuchs', and incorporate a non-binary approach in data records.
- The central government may strengthen coordination and communication between the National Council for Transgenders, National Human Rights Commission and other prison oversight bodies including official/ non- official visitors.

II. State Governments/Prison Departments

- State governments/prison departments should make available the facility for inmates to self-identify as Transgender and facilitate the process of acquiring the Transgender certificate as per section 5 of the Transgender Persons' (Protection of Rights) Act, 2019 from the District Magistrate, if such a request is made by the person concerned.
- State governments/ prison departments should devise recruitment processes which include the recruitment of Transgender Persons including sensitive and responsive guidelines/ qualifications for physical fitness and attributes for Transgender Persons.
- State governments/prison department should review their existing acts or rules to ensure that the special needs of transgender persons are taken into account, including recognition to 'third gender' as a separate category in documentation, special search procedures and define the placement criteria, with specific emphasis on '*identity-based placement*' instead of '*genitalia-based placement*'. Medical facilities including access to hormone therapy or sexual re-assignment surgery, should also be included. They must also ensure that the recreational/welfare/educational activities undertaken in all prisons within the state/union territory are inclusive of transgender persons.
- State governments/prison departments should designate a complaint officer in each prison or at the prison headquarter, in compliance with Sec 11 of the Transgender Persons' (Protection of Rights) Act.
- State governments should designate members of Transgender Welfare Board established under the NALSA v. Union of India judgment as part of the Board of Visitors.

- All procedures provided in the state prison rules must be administered on transgender persons based on their self-identity, for example, medical examinations and reference to outside hospitals, requisition of police escorts to court/hospital, etc.
- Prison monitors, particularly, the official visitors like the District Magistrate, the District & Sessions Judge and the representatives of National/ State Human Rights Commissions, must interact with transgender persons, if any, during their periodic visits to the prison to ensure that their rights are protected at all times.

B. Raising awareness among prisoners regarding transgender persons

I. National Legal Services Authority/State Legal Services Authority

- NALSA and SLSAs may develop awareness programmes for sensitisation of prisoners on issues related to gender identity and sexual orientation, which can be organised inside prisons on a regular basis. These can either be stand-alone programmes, or included in existing awareness programmes.
- NALSA/SLSAs may direct the jail visiting lawyers and paralegal volunteers who operate the prison legal aid clinics to report and document any discrimination or rights violations faced by transgender prisoners to the concerned DLSA.
- NALSA/SLSAs may develop legal awareness posters and pamphlets documenting standards applicable for transgender prisoners, and make them available in local languages inside prison libraries.

II. Prison Departments

- Prison departments may develop awareness programmes for sensitisation of prisoners on issues related to gender identity and sexual orientation.
- Prison departments may develop and display awareness posters and pamphlets documenting standards applicable for transgender prisoners, inside prisons and make available copies of relevant resources in the prison libraries.

C. Strengthening of training programmes for officers and warders

I. Central Government/Ministry of Home Affairs

- The central government may direct the BPR&D to prepare compliance report on adaptation of BPRD Training Manual, with prison training institutions across the country.
- The central government may direct the BPR&D to revise and update Unit 6 (Rights of special categories of prisoners), which contains a module on rights of transgender persons, to include recent developments.

II. State Governments/Prison Departments

- State governments/prison departments should ensure that training curriculums for prison officers and warders include specialised courses on '*Gender Identity and Sexual Orientation: Protection of rights of LGBT+ persons in prisons*'.

D. Improved Documentation of Experiences of Transgender persons in detention:

In addition to these initiatives, it is also important to document experiences of transgender persons, as well as others from the LGBT+ community, who have been confined within prisons. It is hoped that community-based organisations, media, researchers, academicians and others undertake these efforts. These include: -

- a) Documentation of instances of discrimination or targeted violence against the prisoners from LGBTI+ communities,
- b) Documentation of instances of privacy violations in regard to search violations, access to separate washrooms, and maintaining confidentiality of sensitive information on medical history (such as person suffering from HIV+ or AIDS),
- c) Documentation of issues faced by the community in police custody, observation homes, court processes etc,
- d) Documentation of cases where the community could not access free legal assistance, or was provided poor quality of legal services, and
- e) Documentation of issues arising out of the intersectional impact of the stigma based on gender identity and sexual orientation.

Documentation of these experiences, would enable the assessment and evaluation of ground realities. This knowledge would enable organisations and individuals to effectively address the situation on the ground, and ensure that prisons are administered in a manner that duly acknowledges the rights of transgender persons.

KEY GUIDING PRINCIPLE

Yogyakarta Principles 2007, Principle 9: The Right to Treatment with Humanity while in Detention

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall:

- A. Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;
- B. Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;
- C. Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;
- D. Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

- E. Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;
- F. Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;
- G. Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.
- H. Adopt and implement policies to combat violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression or sex characteristics faced by persons who are deprived of their liberty, including with respect to such issues as placement, body or other searches, items to express gender, access to and continuation of gender affirming treatment and medical care, and “protective” solitary confinement;
- I. Adopt and implement policies on placement and treatment of persons who are deprived of their liberty that reflect the needs and rights of persons of all sexual orientations, gender identities, gender expressions, and sex characteristics and ensure that persons are able to participate in decisions regarding the facilities in which they are placed;
- J. Provide for effective oversight of detention facilities, both with regard to public and private custodial care, with a view to ensuring the safety and security of all persons, and addressing the specific vulnerabilities associated with sexual orientation, gender identity, gender expression and sex characteristics.

You may Download the report [here](#).

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