



ID Accurately Reflecting One's Gender Identity Is a Human Right

Andrew Cray and Jack Harrison December 18, 2012

This past week our nation joined others around the globe in celebrating International Human Rights Day, which marked the 64th anniversary of the U.N. Declaration of Human Rights, signed on December 10, 1948. This document declares that “inherent dignity” and “equal and inalienable rights” are the foundation for a just, peaceful, and free world.¹ Decades later these principles continue to guide human rights policies established around the world, acting as a foundation for the evolving global understanding of what it means to acknowledge the equality of all people.

Transgender people, however, continue struggling to attain this innate right to dignified treatment and equality. As the Council of Europe's Commissioner for Human Rights has stated, “It is clear that many transgender persons do not fully enjoy their fundamental rights both at the level of legal guarantees and that of everyday life.”² One way in which transgender people have struggled is in accessing identity documents that provide legal recognition of their gender identities. The failure of governments to acknowledge the gender identities of *all* people represents a rejection of the fundamental rights of self-determination, dignity, and freedom.³

Moving forward as a global community, it is essential that all people—transgender or not—be given access to official documents that accurately reflect each individual's gender identity and that respect the rights belonging to each of us as humans.

The daily importance of identity documents

Having access to identity documents is important because of the very reason they are taken for granted: They are an integral part of daily life in most cultures. Identity documents are needed for many activities of daily life—working, voting, traveling, accessing government institutions, and proving that one is who one claims to be. Yet for many transgender people, accessing this basic proof of identity is out of reach, pushing them further into the margins of society. Historically, many obstacles have been placed in the

way of obtaining accurate ID. For many transgender people, these financial, medical, and legal barriers are impossible requirements to satisfy.⁴

Adding an additional layer of complexity to this landscape is the wide variety of identity requirements that citizens are required to have in many countries. In the United States alone, for example, most people need consistent access to accurate birth certificates, driver's licenses, passports, and social security cards. The requirements for these documents are set by different levels of government—both federal and state—often require different standards for amending the information they reflect, and utilize different administrative processes for amendment.

The two most common forms of identity documents used by people across the globe, however, are birth certificates and passports. There is currently no international standard for verifying or amending the information contained on birth certificates. Moreover, the standards that are in place are set by each nation or by sub-jurisdictions within that nation. Similarly, standards for passport documentation are set at the national level. Passports, however, are subject to a foundational set of international standards established by the International Civil Aviation Organization. The standards set by this organization dictate that passports must include an individual traveler's name, date of birth, nationality, and sex. In the "sex" field, the standards dictate that permissible options are "M" for male, "F" for female, or "X" for unspecified gender.⁵ Countries, therefore, are given significant leeway to establish policies that affirm the identities of transgender and gender nonconforming citizens, and this flexibility should be exercised in a way that protects the human rights of the diverse people in each nation.

Transgender people face significant consequences from policies preventing access to accurate identification

When a government agency is unwilling to issue identification that reflects a person's identity, they are making a value judgment on the legitimacy of that identity and, as an extension, on an individual's right to citizenship. Yet being forced to live, move, and contribute in society without accurate, updated identification have impacts for transgender people that go far beyond an administrative lack of access.

Presenting inaccurate identification all too often becomes a trigger for various forms of abuse and discrimination. Transgender people who may otherwise move through the world undetected by those who would discriminate against them are often "outed" by an old gender marker, an old name, or an old photograph.

The results of the National Transgender Discrimination Survey, conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force, reveal how common these outcomes are in the United States. Forty percent of respon-

dents who reported presenting ID that did not match their gender identity experienced harassment—3 percent were physically assaulted and 15 percent were asked to leave the premises where the ID had been presented.⁶ Furthermore, those respondents who were unable to update their driver’s licenses reported much higher rates of discrimination in hiring and housing.⁷

Even when antitransgender bias is not specifically at play, a perceived mismatch between an individual and the information on a presented ID can trigger heightened scrutiny and create barriers to accessing services and spaces. This has been the case for many transgender voters in the United States. Leading up to the 2012 presidential election, Jody Herman, Peter J. Cooper public policy fellow at the Williams Institute at the University of Los Angeles School of Law, estimated that as many as 25,000 transgender voters in states with strict photo ID voter requirements could be disenfranchised, not just because of antitransgender bias but also because they simply may not have appeared to be the person on their ID.⁸

Transgender people are frequently subjected to excessive requirements to access accurate identity documents

Many countries impose restrictive standards that require individuals seeking recognition of their gender to undergo unnecessary or unwanted medical procedures. In other countries, transgender people may be barred in some situations from changing their identity documents to accurately reflect their gender. And some places, including some jurisdictions in the United States, bar transgender people from changing their legally recognized gender under any circumstances. These are the harsh realities felt by transgender people throughout many parts of the world.

European Union: Requiring surgical sterilization for transgender people seeking accurate ID

The European Union Agency for Fundamental Rights, or FRA, has noted that applicable standards require that the states of the European Union grant legal recognition to the gender identity of transgender people following “complete” transition.⁹ This point is also emphasized by the Council of Europe’s Committee of Ministers, which recommends that states take measures to guarantee “full legal recognition of a person’s gender reassignment,” including in official documents.¹⁰ But the approaches taken by EU member states to meet this requirement vary significantly. Several states do not require medical intervention to obtain documents reflecting an individual’s gender identity,¹¹ but in opposition to these progressive policies are 17 EU member states that require transgender people to undergo surgical procedures resulting in sterilization before obtaining accurate documentation.¹²

These requirements are reflective of many policies both abroad and here in the United States that require transgender people to undergo excessive, unnecessary, and sometimes unwanted surgeries in order to obtain identity documents that reflect their gender presentation.¹³ These policies are relatively unique in the way that they link access to legal and administrative processes with medical procedures, which is an area normally left to patient and doctor. Aside from obstructing transgender people's access to identity documents, standards requiring surgical sterilization have been widely criticized as violating their right of self-determination and forcing them to make an untenable choice between forming biological families and having their identity documents rectified to reflect their correct gender.¹⁴

Japan: Restricting the rights of transgender people with families

In addition to requiring that transgender people undergo certain medical procedures in order to access legal rights, other identity documentation laws restrict the ability of transgender people with families to access accurate IDs. Japan's Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder contains two such restrictions. First, transgender people who are married when they apply to have their identity documents changed are considered ineligible to do so.¹⁵ Second, those transgender individuals who have children under the age of 19 are similarly considered ineligible to be granted legal recognition of their gender.¹⁶

These requirements are particularly onerous in that they seem to require the dissolution of even the most supportive families before transgender individuals can have their identities recognized by the government. It's worth noting that the requirement with regard to parentage was originally established on the belief that "children may be confused" by a parent's legally recognized change of gender.¹⁷ Despite framing these onerous standards as being in the best interest of a child, restricting access to identity documents not only rejects the support of children who stand in solidarity with their transgender parents, but also places these families at a material disadvantage precisely because of the restricted access to identity documents. Transgender people who are not allowed to change their gender documents face difficulties in accessing housing because they do not have access to required documents accurately reflecting their gender identity. This is true in Japan and many other countries.¹⁸ It penalizes both transgender people and also their families, and it does so with seemingly no administrative benefit.

United States: Placing barriers to birth certificate changes, including outright prohibition

U.S. states are permitted to set their own policies for the amendment of birth certificates, which creates a divided system of policies between state and federal identification docu-

ments. Even more confusing is the wide variation in state standards. First, some states issue entirely new birth certificates upon amendment, whereas others offer amended birth certificates, which make it apparent that an individual's gender has been changed, triggering privacy and safety concerns for many transgender people.¹⁹ Among those states offering some option for changing the gender marker indicated on a birth certificate, standards can range from having no requirement for specific medical treatments to requirements relating to genital surgery. The result is a system where a person would be eligible to have their birth certificate amended in one state but deemed ineligible to do so if they had born in a neighboring state.

These arbitrary variations between state standards, however, are not the most disconcerting aspect of birth certificate policies in the United States. Most egregious are the states that refuse to issue amended birth certificates altogether.²⁰ Though several states in practice refuse to allow transgender people access to birth certificates that accurately reflect their gender identity, Tennessee is the only state that has a statute specifically prohibiting the amendment of birth certificates for transgender people.²¹ But regardless of how these policies have been adopted, the intent and the effect are the same: Transgender people are specifically and intentionally isolated from the processes available to others to obtain accurate identity documentation.

Thankfully, however, many jurisdictions in many countries have moved beyond discriminatory policies targeting transgender people to offer more equitable access to IDs that correspond with an individual's gender identity.

Many countries have taken steps to promote the right of transgender people to access accurate identity documents

In the last several years, many countries have taken significant steps to allow transgender citizens access to accurate identity documents through policies that reduce or eliminate barriers to accessing gender-identity affirming IDs. Recent actions taken in Argentina, Nepal, and the United States provide a view of the spectrum of changes that have taken place on the global stage.

Argentina: Adopting a policy of self-determination

In May 2012 a law passed by the Argentine Senate and signed by President Cristina Fernández de Kirchner broke new ground by proclaiming that all persons have the right to recognition of their gender identity, and “particularly, to be identified in that way in the documents proving their identity.”²² The legislation is believed to be the first of its kind in permitting transgender people a complete right to self-determination in the name and gender reflected on all national documents—identity card, passport,

and birth certificate.²³ Adults need only submit to Argentina’s National Bureau of Vital Statistics a request for amendment of their document and supply the new first name they wish to have reflected on their identification.²⁴ Importantly, the law prohibits requiring any proof of medical treatment, and imposes no additional legal or administrative procedures before clerks complete the identification change.²⁵

This legislation, which passed by a vote of 55 to 0,²⁶ has been widely hailed as a victory for gay and transgender activists in Argentina. The right of citizens to obtain identity documents reflecting their identity without cost, administrative burden, or medical intervention reflects the principle that individuals have a right to control their own bodies and identities. It is the latest example of a growing international trend to recognize this right for transgender people.²⁷

Nepal: Thinking beyond a gender binary

While Argentina’s law reflects the principle of freedom to amend identity documents from one sex to the other, other countries have adopted policies that support the right to identify outside of the “gender binary” that restricts individuals to an identity of male or female. Through judicial action, policymakers in Nepal have been pressed to adopt identity documentation standards that permit citizens to assume a legally recognized third gender consistent with culturally specific articulations of trans-identities in these countries.

In Nepal, “third gender” is a commonly understood identity that reflects the experiences of people whose gender identity or expression differs from the sex that individual was assigned at birth.²⁸ Activists seeking recognition of this identity initiated the case of *Sunil B. Pant and others v. the Government of Nepal*, which resulted in a decision ordering the Nepalese government to establish a third gender category for government-issued identification documents.²⁹ The standards established by the court are similar to those adopted by lawmakers in Argentina: Under the decision, Nepali people have a right to select the “third gender” marker based on “self-feeling,” and may not be required to seek medical treatment as a prerequisite to changing their identity documents.³⁰

While the government of Nepal now has a mandate to establish administrative procedures for obtaining third-gender markers on identity documentation, institutional change has not been easy. Since the *Pant* decision in 2007, reports suggest that only three people have obtained documents with this designation, and the original complainant has been unable to obtain a passport reflecting the third gender option, despite international standards accommodating such a designation.³¹

United States: Adopting more accessible medical standards

While many state policies are disjointed and discriminatory when it comes to the rights of transgender people, there are clear signs of domestic progress. In June 2010 the U.S. Department of State announced a new policy easing the burden on transgender people seeking to amend their gender marker on their U.S. passports.³² Under the revised standards, if an applicant has no identity documents with their desired gender marker, amended passports reflecting an individual's current gender will be issued upon submission of a certification from a physician confirming clinical treatment appropriate for that individual's gender transition, along with processing fees. If all other identity verification documents submitted with the amendment request show the correct gender for that individual, the applicant does not need to submit a physician certificate.³³ The new policy, which does not require any specific types of treatment, replaces previous standards that required documentation of sex reassignment surgery, which was a significant barrier for transgender people.³⁴

Though this standard does not allow as much freedom of self-determination as the policies of other countries, it nonetheless represents significant progress, moving away from genital anatomy as the determinate of legally recognized gender. And for many transgender people who live in states where corrected or amended birth certificates or drivers licenses may not be available, having access to a passport with a corrected gender marker is a significant step forward.³⁵

Access to identity documents that reflect a person's gender identity is a human right

Without a doubt, access to identity documents that reflect one's gender identity is a human right for transgender people. It is essential to the right to work, the right to be counted as a citizen, the right to learn, and the right to live without being "forced to suppress or deny who they are to protect themselves from harm."³⁶ Transgender people around the world deserve access to gender markers on their documents that uphold their right to bodily autonomy and self-determination. They deserve to have their privacy respected when there is no legitimate purpose for collecting medical or gender information. Just as importantly, they deserve fair, equal, and respectful access to the same legal systems regularly utilized by nontransgender citizens. A call for anything less would be to dismiss the invocation of International Human Rights Day: To work toward a world where all people have the chance to live in dignity.³⁷

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