

Towards legal recognition of trans and gender diverse individuals: Three case studies in Asia

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Sex/gender recognition on individuals' legal documents is commonly restricted to two possibilities: male and female. However, partially in response to the expansion of trans and gender diverse rights, a third option (which is alternatively called 'X', 'other', 'unspecified', or 'third gender') has been made available in some nations for some documents.

In this article, we use the term 'trans and gender diverse' to refer to identities that diverge from binary sex/gender identification, embodiment, and/or presentation and may include individuals who identify as transgender, non-binary, or intersex, as well as those who may have undergone a sex/gender transition or confirmation at some point in their lives but subsequently identify along binary lines.

Australia, for example, first issued a passport identifying the holder's gender as 'X' in 2003 and later became the first country in the world to adopt this option on a wide scale in 2011. Pakistan, Nepal, Bangladesh, India, New Zealand, Iceland, Denmark, Malta, Canada, Argentina, and the United States followed suit by introducing third gender, non-binary, and 'unspecified' possibilities on passports and other official documents, of which the 'X' marker in the sex/gender field has become the most common. Despite appearing to be a step towards recognition and acceptance, it is important to also acknowledge that such documentation may also provoke

unintended consequences due to limited availability and uptake, which may compromise the safety of trans and gender diverse people.

Across Asia, the human rights and legal protection of trans and gender diverse communities have been made more difficult due to the widespread inability of many trans and gender diverse individuals to be issued accurate documents. This is despite the fact that there are long-standing traditions and cultures that do not conceptualise gender as binary and may even socially and/or legally recognise more than two genders, such as *waria* in Indonesia, *kathoey* in Thailand, *renyao* in Sinophone contexts, and *hijra* in India, Pakistan, and Bangladesh.

The Asia Pacific Transgender Network (APTN) and the United Nations Development Programme (UNDP) have been working with advocacy groups to address barriers to trans inclusion, including inequality, discrimination, and access to health and social services. While some countries in Asia name the protection of trans rights in their laws and/or constitution, broader inclusion of strong human rights principles, including the right to legal gender recognition, must be introduced.

As the APTN and UNDP detail in their joint publication 'Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia', trans and gender diverse people across Asia 'remain among the most marginalised populations in development efforts, experiencing persistent poverty, social exclusion and poor health outcomes'. By consulting with more than 220 trans people and comprehensively reviewing existing legislation and policies in nine countries across Asia, UNDP and APTN's report found that legal recognition 'is critical to ensuring trans rights and protections from discrimination and improving access to critical life services.' This sentiment has been echoed in other geographical contexts, including Australia. For instance, in a recent survey conducted by leading LGBTQ+ organisation, ACON, the ability to change legal gender and name through a simple administrative procedure was the top ranked priority out of 28 options (exceeding healthcare or employment) amongst all respondents.

A handful of countries in the region have introduced some forms of legal document recognition, including Nepal (2013, see below), India (2014), and Pakistan (2017). In 2018, Bangladesh also allowed for a third gender in voting records. Unfortunately, some of these nations still require proof of gender-affirming surgery to amend identity documents, which is a significant barrier for many trans and gender diverse people who either cannot or do not want to engage in medical interventions.

The common denominator across Asia has been and continues to be a lack of regulation and, bar a few exceptions, a general inability for trans and gender diverse people to access state-based identification that reflects gender identity. While some countries have legal gender recognition policies that purport to be inclusive of trans and gender diverse people, the majority of countries rely on sex assigned at birth and are consequently restrictive in ways that infringe on the human rights of trans and gender diverse people. This issue is particularly salient in situations such as forced migration due to political turmoil, natural disasters, and climate crises. For example, when crossing borders—including for the reason of applying for asylum—identity verification is required. As stated in the APTN and UNDP’s joint report: ‘Transgender people have been denied access to gender-segregated services or support in each of these circumstances, including because they did not have official identity documents that match their gender identity and/or gender expression’.

We look at three case studies to illustrate legal gender recognition: Nepal, Taiwan and Japan. The differences across these three jurisdictions point to both possibilities for envisioning new futures for belonging, but also challenges and obstacles (whether unintended or not) that arise when changes are instituted.

Nepal

Nepal became one of the most progressive Asian countries in relation to gender diversity when it was the first in the region to adopt a third gender category (‘O’ for

‘other’) on citizenship cards, passports, and census data, following the groundbreaking Supreme Court decision *Sunil Babu Pant and Others v. Nepal Government and Others 2007*. This decision was significant because it recognised LGBTI people as equal and able to enjoy all constitutional rights, including the right to non-discrimination.

In its decision the Court suggested that the third category was open for anyone who chose it. Indeed, self-declaration, rather than medical expert declaration or judicial decision, has overwhelmingly been lauded as the best-practice approach by international trans advocacy groups. But while self-declaration seemed to underpin the Court’s judgement, Nepalese authorities have, in practice, taken a very different approach and have instead made the third marker mandatory for all trans and gender diverse people (including those who identify with binary gender categories) seeking to update their documents. Legal scholars Stefano Osella and Ruth Rubio-Marín point out that: ‘Although the “third sex” was possibly granted on the basis of gender self-determination, gender-diverse people—including those identifying within the binary—were apparently “limited” to the third gender [...] this had consequences in terms of inclusivity, preventing trans people who identify as binary from seeking recognition’.

In this sense, Nepal actually violates the principle of self-determination by forcing transgender people into a separate category, which can inadvertently place them in an even more vulnerable position that can diminish safety and belonging. This example also reveals how changes to legal gender recognition can have unintended consequences when not negotiated carefully and without broader social, cultural, and administrative considerations.

Taiwan

In 2019, Taiwan became the first country in Asia to legalise same-sex marriage. While Taiwanese democratisation and sociopolitical liberalisation over the past 35

years have transformed the landscape of LGBTQ+ rights and visibility, as in many societies, trans and gender diverse people continue to struggle for acceptance and legal recognition.

In 2008, Taiwan's Ministry of Interior issued an executive order that required an individual to supply medical evidence of having specific reproductive organs surgically removed in order to legally change gender categories. This was challenged in the Taipei High Administrative Court, which in 2021 ruled in favour of the plaintiff, a trans woman named Xiao E, that she not be required to submit medical proof of surgery to legally change her gender. In November that year she became the first trans person in Taiwan to have done this without surgery, a milestone in trans rights. However, as lawyer Victoria Hsu explained, 'even though the ruling is significant in terms of human rights, it is only legally effective for Xiao E and does not extend to other cases. If the Ministry of Interior refuses to amend the unconstitutional executive order, other transgender people still will not be able to legally change their gender without providing proof of surgery.'

In early 2018 Taiwan's cabinet hinted that it was considering introducing a third gender or 'X' option for passports and national identity cards. Unfortunately, to date, no substantive progress has been made on this issue and official government-issued identification documents only offer two gender options. The exception seems to be that foreign passport holders with an X gender marker can have that indicated on their Taiwan-issued identification.

Despite legal obstacles, social awareness of diverse gender identities is growing. In May 2020, for example, a group of Taiwanese and international students from National Taiwan University—calling themselves the 'Taiwan Non-binary Queer Sluts' (台灣非二元酷兒浪子)—organised the publication of a Chinese-English bilingual book entitled "What Binary? A Collection of genderqueer stories" (去你的二元世界：看見性別酷兒故事) to share their experiences with people who were unfamiliar with the term 'non-binary'. They have also been active on social media, including an awareness campaign with major Taiwanese LGBTQ+ organisations to show support

by celebrating International Non-Binary People's Day on 14 July. Like the legalisation of same-sex marriage and other matters of social justice in Taiwan, activists have been the drivers of social and legal change. Despite nascent opposition, the efforts of Taiwan's LGBTQ+ activist and legal community (including the increasingly inclusive views of many young people) are gradually taking the country in the direction of more capacious equality.

Japan

In 2003, Japan passed the *Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder*, widely known as the Gender Identity Disorder law (GID). As Anthropologist S.P.F. Dale explains, 'in order to change one's legal gender, the individual must be above the age of 20, must not be presently married, must not have children, must be sterilised, and must have genitals that resemble that of the other sex (i.e. the sex organs associated with the gender to which they desired to legally transition).' The Act was slightly amended in 2007 to allow those with adult children to undergo surgery, but no further changes have been made to this antiquated law that undermines the dignity and human rights of trans and gender diverse people in Japan.

One of the consequences of the medicalisation of trans people suffering from 'Gender Identity Disorder' (*seidōitsu seishōgai*) has been the proliferation in queer circles of X-gender (x-jendā) as an identity category that has emerged since the late 1990s. In Japan x-jendā is a contested and amorphous category that ranges in usage from those who understand it to mean the gender to which one has transitioned; to those who appropriate it to mean 'genderqueer' or simply non-binary (the English term 'non-binary' is also used); to those who push for it to be medically recognised as a Gender Identity Disorder category. Unfortunately, as cultural studies scholar Mark McLelland points out, the overemphasis in Japanese society on GID has led to a dominant 'discourse of transsexualism as a medical condition [that] has enabled a new understanding that, once treated for their condition, transsexuals can regain

admittance to the category of ‘normal’.

In July 2023, the Supreme Court in Japan appeared to have made a small step in the direction of recognising the pain and suffering that many trans people experience daily with something as basic as using bathrooms. The decision overturned a May 2021 decision by the Tokyo High Court and ruled that it was illegal to bar a trans female employee at the Ministry of Economy, Trade and Industry from using the women’s bathroom. However, at the same time, they did not extend this ruling to include public bathrooms but rather argued that ‘specific circumstances of the individual’ should be considered when it comes to weighing in on the rights and dignity of sexual minorities. In a subsequent landmark ruling by Japan’s Supreme Court on 25 October 2023, the sterilisation requirement for changing one’s legal gender was struck down as unconstitutional. While this decision requires the Japanese government to reconsider the GID law enacted two decades ago, how the law will be amended in practice remains to be seen.

Ultimately, despite the presence of a longstanding and robust LGBTQ+ activist tradition in Japan, the ruling Liberal Democratic Party in Japan is dominated by socially conservative politicians who present the largest obstacle towards a more humane way for trans and gender diverse individuals to access legally inclusive identification documents.

Conclusion

While legal gender recognition does not rectify all forms of discrimination and marginalisation, it can go a long way to respecting the dignity of trans and gender diverse communities and to overcoming administrative barriers that gender diverse people experience in their everyday lives. Further research is needed to explore the human rights effects of allowing for non-binary and ‘third-gender’ recognition as well as how colonial and postcolonial legacies may both open up and foreclose legal gender recognition. The case studies we have put forth from Nepal, Taiwan, and

Japan illuminate the intermingling of both progress and prejudice that continue to shape the vicissitudes of legal approaches to trans and gender diverse people and rights across Asia. We look forward to a more equal future in Asia when heteronormative and cisnormative socio-legal expectations—that is, those systemic constructs that impose heterosexuality and gender normativity—no longer criminalise, medicalise, or thwart the development of trans and gender diverse people who long to live with greater personal dignity and the legal protections that help make that possible.

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Image: Flag from Taiwan Trans March in Taipei. Credit: Adam Chen-Dedman.