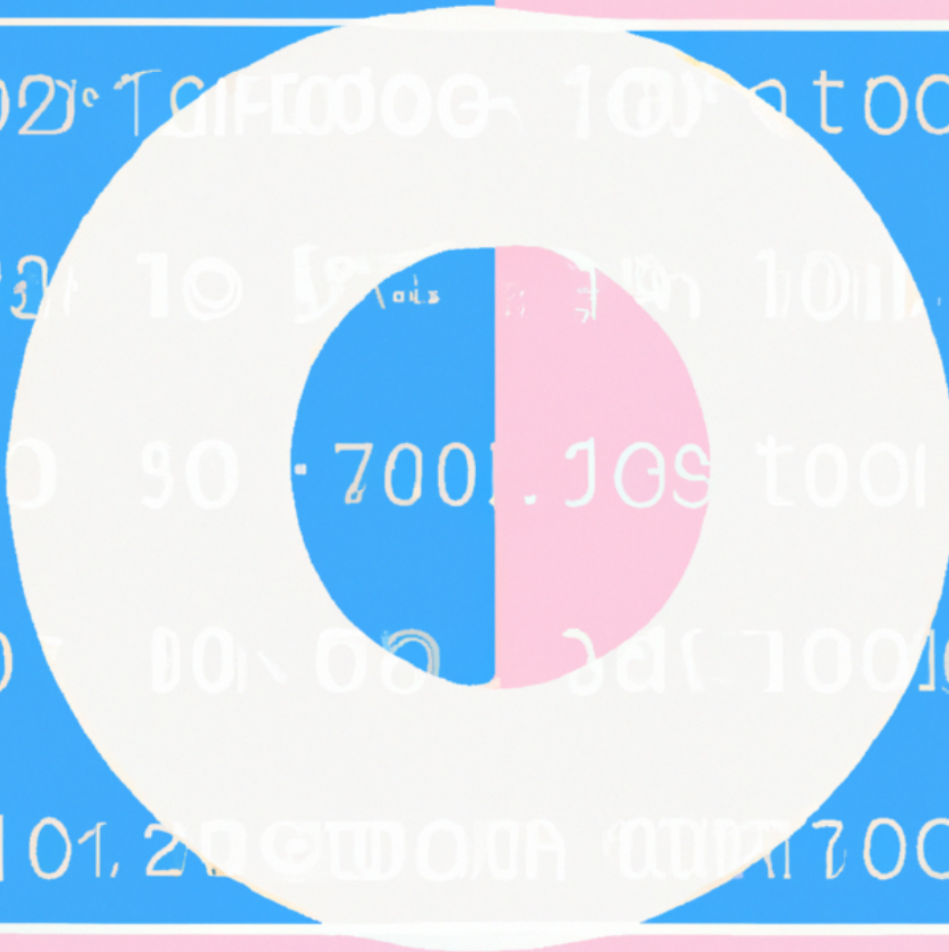


Gendering of Development Data in India: Post-Trans Act 2019

#3 Transgender as Gender Category in Law, Policy and
Data Systems



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Please read the full report here:

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1. Introduction

Part 2 of this report, *Data Challenges due to the Transgender Persons (Protection of Rights) Act 2019*, traced the developments that led to the passing of Transgender Persons (Protection of Rights) Act (Trans Act) in 2019, challenges with this statute's provisions, digitisation of the process of recording gender and name change, and the challenges that continue to exist for transgender persons to enter data systems in order to access different public and private sector services in a digital welfare state.¹ In June 2018, NITI Aayog, the apex public policy think tank of the Government of India, published the *National Strategy for Artificial Intelligence #AIForAll*,² a discussion paper outlining the five areas that NITI Aayog intends to use Artificial Intelligence (AI) for; namely healthcare, agriculture, education, smart cities and infrastructure, and smart mobility and transportation. It also acknowledges the absence of enabling data ecosystems as one of the barriers to achieving its vision.³ As seen in *Gendering of Development Data in India: Beyond the Binary*,⁴ severe data gaps on transgender persons exist due to their undercounting in the census of 2011 as well as the challenges with recording their gender and name change within data systems. In *4 Ways to Address Gender Bias in AI*,⁵ Josh Feast points to incomplete or 'skewed training datasets' and labels used for training as some of the variables that lead to bias within Machine Learning (ML) systems. "Bias means there's a greater level of error for certain demographic categories."⁶ The history of criminalisation, pathologisation and surveillance experienced by transgender persons makes it essential to study the understanding of the label 'transgender' by different structures including law, policy and data systems in India to assess the potential impact of AI on the access to different rights and services for transgender persons.

The third part of this report will examine the understanding of transgender as a gender (data) category in law, policy, and the resultant challenges with procuring and using identification documents in one's self-identified name and gender; and the possibilities and challenges with the

¹ Digital Welfare State as described by Professor Philip Alston, UN Special Rapporteur on extreme poverty and human rights in his October 2019 report to the UN General Assembly - Office of the High Commissioner, Human Rights, United Nations. (2019, October 17). World stumbling zombie-like into a digital welfare dystopia, warns UN human rights expert. Retrieved from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25156>

² NITI Aayog(2018, Jun).National Strategy for Artificial Intelligence #AIForAll. NITI Ayog. Retrieved from: <https://indiaai.gov.in/documents/pdf/NationalStrategy-for-AI-Discussion-Paper.pdf>

³ *ibid*, Pg 7

⁴ Brindaalakshmi K.(2020, June). Gendering of Development Data in India: Beyond the Binary #2, Pg.12-14. Centre for Internet & Society India. Retrieved from: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

⁵ Josh Feast(2019, Nov 20). 4 Ways to Address Gender Bias in AI. Harvard Business Review. Retrieved from: <https://hbr.org/2019/11/4-ways-to-address-gender-bias-in-ai>

⁶ *ibid*.

understanding and inclusion of transgender as a gender data category in public and private data systems to make meaningful decisions for transgender persons as a population group. As examples, this part will also trace some of the gaps in the translation of the understanding about being transgender from law into policies and consequently, as a label in data systems in a digital welfare state and the contribution of a lack of intersectionality in law and policy to the data gaps that exist.

2. Transgender: As a Gender (Category) in Law

This section looks at the conceptual understanding of the category 'transgender' within Indian law that has contributed to data gaps on transgender persons. It examines the understanding of transgender as a socially and educationally backward class category, the lack of intersectionality within statutes addressing population groups affected by specific marginalisation, and the use of public interest litigations (PIL) as a tool to influence the evolution in the understanding and inclusion of transgender persons in India.

2.1 Framing transgender as a population category under law

The Criminal Tribes Act 1871⁷ contains the first known legal mention in India denoting transgender persons, using the term, 'eunuch'. This statute called for the 'surveillance and control of certain criminal tribes and eunuchs'.⁸ Following the example of the buggery law of 1533,⁹ homosexuality was criminalised by the British in India with the introduction of Section 377 in the Indian Penal Code (IPC) in 1861.¹⁰ Although these communities mentioned in the Criminal Tribes Act were declared 'denotified' in 1952,¹¹ the language of viewing transgender persons with suspicion as criminals continued with laws such as Section 377 of the IPC, the Telangana Eunuchs Act 1919,¹² and the Karnataka Police Act 1963.¹³ The census of 2011 enumerated transgender persons for the

⁷Criminal Tribes Act 1871 (Act No. 27 of 1871). Bare Acts Live. Retrieved from: <http://www.bareactslive.com/ACA/act3164.htm>

⁸ibid

⁹ Johnson, Paul(2019, Oct 17). Buggery and Parliament. Wiley online Library. Retrieved from: <https://www.bl.uk/collection-items/the-buggery-act-1533>

¹⁰ Hunter, Sophie (2019, Jun 17). Hijras and the legacy of British Colonial Rule in India. London School Economics and Political Science. Retrieved from: <https://blogs.lse.ac.uk/gender/2019/06/17/hijras-and-the-legacy-of-british-colonial-rule-in-india/>

¹¹ <https://www.epw.in/engage/article/criminalisation-and-political-mobilisation-nomadic>

¹² Vyjayanti Vasanta Mogli & Ors. v. State of Telangana. WP (PIL) 44/2018. Centre for Legal and Policy Research. Retrieved from: <https://clpr.org.in/litigation/pil-challenging-the-constitutionality-of-the-telangana-eunuchs-act-1919/>

¹³Prakash, Rakesh(2016, Jul 15).Karnataka govt deletes 'eunuchs' from police records. Times of India.Retrieved from:

first time in Indian history under the 'Other' category. However, it did not recognise or provide legal sanction to this historically silenced community. Transgender was not distinctly recognised as a gender identity except under criminal contexts until the National Legal Services Authority of India (NALSA) Vs. Union of India verdict in 2014. This verdict legally recognised transgender as a gender identity and directed the Government of India to make provisions for the inclusion of transgender with its own gender category.

The dominant understanding of transgender under the NALSA verdict was limited in its scope and continued using the colonial framing – eunuch as well as hijra. The Supreme Court judgement primarily concerned only transgender persons who were gender assigned male at birth.¹⁴ In *Understanding Liveability/ies*, the authors observe that the NALSA verdict, a supposedly inclusive legislation continued to prioritise certain transgender identities (Hijra, male to female or MtoF) over others (FtoM or female to male), “reiterating existing power relations creating new (stigmatised) others, and/or demand sameness/normalisations that undermine the differences that constitute vibrant societies.”¹⁵

With this understanding derived from the NALSA verdict, transgender as a population group was made visible, legitimising their enumeration into different systems. In the same year, in a case concerning an intersex person, the judge expanded the scope of the NALSA verdict to also apply to individuals gender assigned female at birth (female to male or FtoM).¹⁶ The concerned individual had been certified as 'transgender by birth' by the chair of the medical board at the Government Vellore Medical College Hospital, although she was not a FtoM but a 46XY woman with androgen insensitivity syndrome.¹⁷

Subsequently, the Transgender Persons (Protection of Rights) Act 2019 (Trans Act) defined transgender as follows:

<https://timesofindia.indiatimes.com/city/bengaluru/Karnataka-govt-deletes-eunuchs-from-police-records/articleshow/53230231.cms>

¹⁴Sangameswaran, K.T.(2014, Apr 18). High Court comes to the relief of 'transsexual'.The Hindu. Retrieved from: <https://www.thehindu.com/news/national/tamil-nadu/high-court-comes-to-the-relief-of-transsexual/article5925144.ece>

¹⁵ Biswa.R, Banerjee. N, Banerjee. R, Sumita. B (2016, March 26). *Understanding Liveability/ies*. Pg 2. Sappho For Equality.

¹⁶ Madras High Court(2014). Jackuline Mary vs. The Superintendent of Police, Karur [W.P. No.587 of 2014]. Pg 31. Orinam. Retrived from: http://orinam.net/content/wp-content/uploads/2014/05/Judge_Result_Disp.pdf

¹⁷Orinam(2014, May 6). FTM and Intersex inclusion in NALSA? Jackuline Mary vs. The Superintendent of Police, Karur . Orinam. Retrieved from: <http://orinam.net/ftm-is-inclusion-nalsa-jackuline-mary-vs-superintendent-police-karur/>

'(k) "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.'¹⁸

The understanding of being transgender under Trans Act includes trans man, trans woman and genderqueer along with other socio-cultural identities. Contradictory to this definition, Section 7 of the Act demands proof of sex reassignment surgery.¹⁹ As mentioned in Part 2 of this study, this directly impacts the ability of individuals to procure identity documents in their self-identified gender. The definition in the Act also includes persons with intersex²⁰ variations, however it does not provide any specific protection against specific violations faced by intersex persons including non-consensual surgical interventions altering the sex characteristics of intersex infants and children.

"Historically, many intersex people have not been allowed to have a say in surgical decisions. Intersex people have been assigned a sex literally at birth, sometimes with the help of a surgeon. If they have ambiguous genitalia with an organ too small to be a penis, the doctor would say that the person will not adjust successfully as a man. So let's chop it off and tell the parent to raise the child as a girl. The thing to remember is not all intersex people consider themselves as transgender or want to identify as anything other than cisgender." - Dr.L. Ramakrishnan²¹

While the inclusion of intersex within the Trans Act provides some (insufficient) legal basis regarding intersex persons, mere mention within the definition of transgender can pose an enumeration and data challenge, since not all intersex persons identify as being transgender.

¹⁸ Ministry of Law and Justice (2019, Dec 9). Transgender Persons (Protection of Rights) Act 2019. NO. 40 OF 2019. PRS India. Retrieved from: [https://prsindia.org/files/bills_acts/bills_parliament/2019/The%20Transgender%20Persons%20\(Protection%20of%20Rights\)%20Act,%202019.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2019/The%20Transgender%20Persons%20(Protection%20of%20Rights)%20Act,%202019.pdf)

¹⁹ ibid

²⁰ 'Intersex' is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male. For details, please visit: http://www.isna.org/faq/what_is_intersex

²¹ Brindaalakshmi.K, June 2020. Gendering of Development Data in India: Beyond the Binary #1, Pg. Centre for Internet & Society, India, Retrieved from: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

“If an intersex person is discriminated against in their workplace, in a formal setting, we now have a very specific law (Trans Act) to defend their case, even if they are intersex. Previously, the court read sex and people with variations in sex characteristics within the term sex of Article 15 and recognised the discrimination in different cases. Now, with the Trans Act, it's something that exists in the statute book”. - Prashant²²

The inclusion of intersex under the definition of transgender without an explanation continues to conflate the understanding of sex and gender. The Trans Act gives legislative backing to the confusion that exists in the understanding between being transgender and intersex and does not extend protection for intersex persons from violations against bodily integrity, adds Prashant. It is essential to enumerate transgender persons and intersex persons as two different categories with a clear distinction between gender and sex. *Measuring Sex, Gender Identity, and Sexual Orientation*, a book by the National Academies of Sciences, Engineering, and Medicine suggests, “Collection of data on sex as a biological variable should be limited to circumstances where information about sex traits is relevant, as in the provision of clinical preventive screenings or for research investigating specific genetic, anatomical, or physiological processes and their connections to patterns of health and disease. In human populations, collection of data on sex as a biological variable should be accompanied by collection of data on gender.”²³

2.2 Classification of transgender as a backward class instead of gender: Lack of intersectionality

Directive 3 of the NALSA verdict states, “(3) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments..(sic)” By directing the state to provide reservation for transgender persons under the socially and educationally backward classes (SEBC) of citizens in the NALSA verdict,²⁴ the Supreme Court of India classified transgender as a class category instead of gender.

“Transgender community having an unspecified fraction of the reservation within OBCs is relatively useless for transgender Dalit people, Adivasi and even OBC (Other Backward

²² Prashant is currently working with Intersex Asia (a Taiwan-based regional intersex organisation) as the Research and UN Advocacy Officer. His academic work focuses on citizenship, transitional justice and SOGIESC issues.

²³ National Academies of Sciences, Engineering, and Medicine 2022. *Measuring Sex, Gender Identity, and Sexual Orientation*. Washington, DC: The National Academies Press. Pg.19 <https://doi.org/10.17226/26424>.

²⁴ Supreme Court of India. (2014, April 15). *National Legal Services Authority Versus Union of India and others*. Writ Petition (Civil) No. 400 of 2012 with Writ Petition (Civil) No. 604 of 2013. Indian Kanoon. Retrieved from <https://indiankanoon.org/doc/193543132/>

Class) people, unlike horizontal reservation that provides for intersecting categories of caste and gender,” - Bittu Karthik²⁵

Thus treating a gender category as a class category means transgender persons do not get accounted comprehensively within the State’s data systems. Additionally, if the Government views any individual as part of the OBC category, then any intersectionality with marginalisation around caste also becomes invisible. Differing from the NALSA verdict, the Trans Act, however, has no mention of reservation in employment or education for this historically silenced community. This has been cited as one of the grounds under which the constitutionality of the Trans Act is being challenged in the Supreme Court of India.²⁶

The World Health Organisation (WHO) declassified gender dysphoria as a mental illness in 2018, classifying it under sexual health.²⁷ However, Indian law continues to pathologise transgender persons. It pathologises both persons with disability²⁸ and transgender persons by demanding a medical certificate from them to access state-sanctioned services – with periodic certification for persons with disability.²⁹ The difference between the medical certification for both these groups is that a transgender person is expected to produce a medical certificate to validate their existence in their self-identified gender and name, while a disability certificate is required to validate a certain disability and not to prove their personhood. Legal interventions to protect the rights of historically marginalised population groups like the Trans Act 2019 and the Rights of Persons with Disability Act 2016 (although passed after NALSA verdict) have no provisions to address the needs of individuals who may be transgender and living with a disability or individuals who may be intersex and living with a disability. Similarly, the marginalisation faced due to their caste identity by those who are transgender/intersex and living with a disability is also erased. The limited scope of these laws is reflected in the programmes and policies designed for the inclusion of these historically pathologised population groups.

²⁵ Brindaalakshmi K.(2020, June). Gendering of Development Data in India: Beyond the Binary #3, Pg. 11. Retrieved from: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

²⁶ Shaikh, Almas(2020, Jun 18). Grace Banu Ganeshan & Ors. v. Union of India & anr. | A constitutional challenge to The Transgender Persons (Protection of Rights) Act 2019. Centre for Legal and Policy Research. <https://clpr.org.in/litigation/grace-banu-ganeshan-ors-v-union-of-india-anr/>

²⁷World Health Organisation (2018, Jun 18). WHO releases new International Classification of Diseases (ICD 11).World Health Organisation. Retrieved from: [who.int/news/item/18-06-2018-who-releases-new-international-classification-of-diseases-\(icd-11\)](https://www.who.int/news/item/18-06-2018-who-releases-new-international-classification-of-diseases-(icd-11))

²⁸Ministry of Social Justice and Empowerment (2020, Sept 6). Transgender Persons (Protection of Rights) Act 2019 Rules, Pg.31 Rule 18. Centre for Legal and Policy Research. Retrieved from: <https://translaw.clpr.org.in/wp-content/uploads/2020/10/222096-1.pdf>

²⁹ *ibid.*, Pg.31, Rule 18(3)(ii)

“There are trans people with disabilities, intersex people with disabilities. There are intersex people with congenital disabilities that are a part of their intersex variation. For instance, with Turner Syndrome, there is a possibility that people could have a learning disability; not everyone has it but some of them can. So, if there is a learning disability that is a part of Turner Syndrome, an intersex condition, it is an already existing intersectional issue. You can't separate it from disability, nor from disability rights.” – Intersex rights activist

Anti-discrimination statutes in India such as the Rights of Persons with Disability Act 2016 (RPD Act), HIV Act 2017,³⁰ Transgender Persons (Protection of Rights) Act 2019, and Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act 1989 (PoA) do not account for multiple marginalisations experienced by individuals on account of different identities such as gender, caste, disability, and HIV status, among others. By focusing on the marginalisation due to a specific identity of an individual, these statutes address single-axis discrimination.³¹ Although the PoA Act considers gender-based violence, the understanding of gender is limited to cisgender women and doesn't include transgender persons.³²

2.3 Legal petitioning: A tool for systemic inclusion for transgender persons

While the Indian legal system functions as a useful tool to assert the fundamental rights enshrined in the Indian Constitution, the NALSA verdict and Trans Act have not automatically translated into guaranteed access to basic rights and services like healthcare, food grains, or inclusion in employment or education for transgender persons. Transgender individuals and activists are often required to approach the courts seeking legal remedy for lack of proactive measures from the Government for their inclusion. In September 2022, the Supreme Court of India ordered the Government to devise a policy framework to open up job avenues for transgender persons.³³ This order was a result of a petition filed by Shannavi Ponnusamy, a transgender person who was

³⁰ Ministry of Law and Justice (2017, Apr 21) The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act 2017 (NO. 16 OF 2017). National AIDS Control Organisation. Retrieved from: [https://naco.gov.in/sites/default/files/HIV and AIDS Act- English.pdf](https://naco.gov.in/sites/default/files/HIV%20and%20AIDS%20Act-English.pdf)

³¹ Centre for Law and Policy Research (2019, Jul 19). An Overview of the Equality Bill, 2019. Centre for Law and Policy Research. Retrieved from: <https://clpr.org.in/blog/an-overview-of-the-equality-bill-2019/>

³² *ibid.*

³³ Rajagopal, Krishnadas (2022, Sept 08). Devise policy in 3 months to open up job avenues for transgender persons: Supreme Court. The Hindu. Retrieved from: <https://www.thehindu.com/news/national/devise-policy-in-3-months-to-open-up-job-avenues-for-transgender-persons-supreme-court/article65866467.ece>

rejected by Air India as a women cabin crew member even after undergoing gender affirmative surgery.³⁴ The application form did not include transgender as a gender category. Similarly, in August 2021, the Karnataka High Court ordered the state government to provide 1% horizontal reservation in jobs for transgender persons in all state-owned corporations and statutory bodies.³⁵ In 2018, Reshma Prasad, a trans social activist from Bihar filed a petition³⁶ with the Supreme Court of India for the creation of a separate gender category on PAN (Permanent Account Number) cards due to the inability to link her Aadhaar to her PAN Card owing to gender mismatch between the two identification documents. In response to a 2013 petition, the Madras High Court directed the Tamil Nadu state government to look into the issue of percentage or post-based reservation for transgender persons in education and employment where at least one post should be available to transgender persons across different categories such as SC, ST, Most Backward Classes etc within a period of six months.³⁷ In 2015, a Government Order was issued by the Backward Classes, Most Backward Classes and Minorities Welfare Department to include Transgender or Eunuch (Thirunangai or Aravani) for reservation of seats in educational institutions and appointments of posts in the services under the state.³⁸ However, the language of this order continued to exclude trans men in the state from accessing reservation. In April 2019, the Madurai bench of the Madras High Court passed an order stating that marriage solemnised between a man and a transgender woman is valid under the Hindu Marriage Act.³⁹ In this verdict, the Court also passed a historic order directing the Secretary of Government, Health and Family Welfare Department, Government of Tamil Nadu to pass a Government Order (G.O.) prohibiting non-consensual surgeries on intersex babies.

³⁴Rajagopal, Krishnadas (2017, Nov 06). SC backs transgender after Air India grounds her dream. The Hindu. Retrieved from:<https://www.thehindu.com/news/national/sc-backs-transgender-after-air-india-grounds-her-dream/article19993529.ece>

³⁵Biju, Rintu Mariam (2021, Aug 18).Karnataka High Court asks State to consider providing 1% quota in jobs for transgender persons in all State owned corporations, statutory bodies. Bar and Bench. Retrieved from:<https://www.barandbench.com/news/litigation/karnataka-high-court-state-provide-1-quota-jobs-transgender-persons-state-owned-corporations>

³⁶ Socio-Legal Information Centre (2018 Mar 28). Transgender activist files petition in SC seeking provision of third gender option in PAN cards. Socio-Legal Information Centre. Retrieved from:<https://www.slic.org.in/litigation/transgender-activist-files-petition-in-sc-seeking-provision-of-third-gender-option-in-pan-cards>

³⁷ High Court of Madras(2016, Jul 05). S Swapna Vs Chief Secretary (W.P. No.31091 of 2013). Centre for Law and Policy Research. Retrieved from: <https://translaw.clpr.org.in/wp-content/uploads/2020/12/S-Swapna-v-Chief-Secretary.pdf>

³⁸ Backward Classes, Most Backward Classes and Minorities Welfare (BCC) Department (2015, Apr 06). List of Backward Classes, Most Backward and Denotified Communities - Inclusion of Transgender/Eunuch Classes (Thirunangai/Aravani) in the list of Most Backward Classes - Recommendation of Tamil Nadu Backward Classes Commission accepted - Orders issued G.O.(M.S) No 28. Centre for Law and Policy Research. Retrieved from:<https://translaw.clpr.org.in/wp-content/uploads/2019/02/TN-Govt-GO.pdf>

³⁹ Madras High Court. (2019, April 22). Arunkumar Vs The Inspector General Of Registration & Others. Retrieved from <https://indiankanoon.org/doc/188806075/>

The socio-economic situation worsened with the onset of the COVID-19 pandemic. In May 2020, in response to a petition filed by Veera Yadav, the Bihar High Court ordered the government to ensure that transgender persons are not deprived of food grains due to their transgender status or due to the lack of ration card.⁴⁰ Following the petition⁴¹ filed by Vyjayanti Vasanta Mogli, a transgender rights activist and a respondent of this study, to address the lack of appropriate schemes to protect the transgender community during COVID-19 pandemic, a division bench of the Hyderabad High Court directed the Telangana state government to provide free rations without the demand for a ration card as proof of identity,⁴² and to provide free LPG cylinders and waive electricity bills for 6 months. The court directed the government to extend the Aarogyashri government medical insurance to transgender persons. Legal recognition of transgender persons has not automatically made all laws trans-inclusive. In October 2020, the Supreme Court of India heard a plea to provide equal protection in the law for sex offences against transgender persons.⁴³

3. Towards 'Transgender' as a gender category in Policy

As seen in the previous section, legal recognition of 'transgender' as a gender category did not often automatically translate into policies or programmes for their inclusion, enabling them to enter data systems. Lack of data is often stated as the reason for lack of policies or under-allocation of funds towards transgender inclusion.⁴⁴ Kate Crawford calls the inherent assumption that large-scale data sets are the best available reference point as 'data fundamentalism' in the article *The Hidden Biases of Big Data*.⁴⁵ Crawford describes 'data fundamentalism' as the notion that sees

⁴⁰ Deepthi, Bhimanapati (2020, May 26). Patna HC - directs Government to ensure that transgender persons not possessing ration card must also benefit under social security scheme. Lawsisto. Retrieved from: <https://lawsisto.com/legalnewsread/NDk4NA==/Patna-HC-directs-Government-to-ensure-that-transgender-persons-not-possessing-ration-card-must-also-benefit-under-Social-Security-Scheme>

⁴¹ High Court of Telangana (2020).(Rule 4 (e) of the High Court of Judicature at Hyderabad for the States of Telangana and Andhra Pradesh Public Interest Litigation Rule, 2015) W.P. (PIL) NO. OF 2020. Centre for Law and Policy Research. Retrieved from: <https://clpr.org.in/wp-content/uploads/2020/05/Trans-Community-Covid-PIL-17.4.2020.pdf>

⁴²Indulia, Bhumika(2020, May 04). Telangana HC | Plight of Transgender Population: State Govt. directed to provide essential commodities, ration, etc. to transgender community without insistence on ration/white card. SCC Online. Retrieved from: <https://www.scconline.com/blog/post/2020/05/04/telangana-hc-plight-of-transgender-population-state-govt-directed-to-provide-essential-commodities-ration-etc-to-transgender-community-without-insistence-on-ration-white-card/>

⁴³ Thomas, Abraham (2020, Oct 13). Sexual offences:Govt reply sought on equal protection for transgender persons. Hindustan Times. Retrieved from: <https://www.hindustantimes.com/india-news/sexual-offences-govt-reply-sought-on-equal-protection-for-transgender-persons/story-tlbRzrccRG0800vk17FcNK.html>

⁴⁴Brindaalakshmi K.(2020, June). Gendering of Development Data in India: Beyond the Binary #3, Pg. 13. Centre for Internet & Society India. Retrieved from: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

⁴⁵ Crawford, K. (2013, April 1). The Hidden Biases of Big Data . Harvard Business Review. Retrieved from <https://hbr.org/2013/04/the-hidden-biases-in-big-data>

massive data sets and predictive analysis as always reflecting the objective truth. However, since data is human creation, data sets are bound to carry hidden biases. This section will look at the challenges with data dependency to design policies for a marginalised population group, the data consequences of inconsistent introduction of an additional gender category, along with lack of uniform introduction and implementation of policies between the union and state governments, and the mandatory requirement of transgender certification to access welfare schemes. This section will also delve into the impact of intersectionality framework, or the lack thereof, on the quality of data generated from communities facing multiple marginalisations.

3.1 Need for evidence-informed policy

The absence of data on transgender persons has often been cited as the reason for the lack of policies targeting them.⁴⁶ The census is the largest data collection exercise undertaken by the government and the data from census 2011 was supposed to help with better policy administration for the inclusion of transgender persons.

“The census data is very small and the government is using this data to design development and welfare schemes for trans people which are very slow and very pathetic. They allot only a minimum amount because the census data is just a fraction, say 5% to 10% of the actual trans population in the country. This happened because the enumerators were not well-trained. Transgender enumerators who understood the pulse of the community and can get into the pockets should have been inducted by the government. But the government did no such thing. Now the trans community is suffering because of this false data. They are not getting benefits assured by the NALSA judgement,” - Aparna Banerjee⁴⁷

Data collected from the census of 2011 was insufficient due to lack of clarity as to whether ‘Other’ as a category was necessary and sufficient to encompass transgender persons, especially in the case of binary-identified transgender persons, trans masculine persons who are less visible and not understood by many to be part of the transgender category, transgender persons who were not comfortable declaring their identity to the enumerators, and the fact that 54,854 children (0-6 years) were designated as ‘Other’ - these could have been intersex children, or simply gender-nonconforming children. The lack of sensitisation among the enumerators and lack of understanding about the distinction between sex and gender, among others, contributed to the

⁴⁶ See footnote 33

⁴⁷Brindaalakshmi K.(2020, June). Gendering of Development Data in India: Beyond the Binary #2, Pg. 13. Centre for Internet & Society India. Retrieved from: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

insufficiency of the data of census 2011.⁴⁸ Hence, this data could not be used to make efficient policy decisions for their inclusion.

The confusion between transgender and intersex persons further widens the data gap for policy making addressing the needs of transgender and intersex persons. There are 40 different intersex variations⁴⁹ and the Trans Act does not account for the different intersex variations and any associated disabilities that an intersex person may have, note respondents of this study. Apart from the insufficient information available on intersex variations, there are no specific programmes or policies to address the needs of individuals living with intersex variations, independent of their gender identity.

“Unlike transgender persons who require gender affirmative surgery and hormone replacement therapy, most intersex persons require constant medical support due to the different conditions associated with their specific variation as well as genetic structure. There is a need for additional medical aid. And they may also have a disability. I have seen intersex persons with different disabilities such as polio, deafness, and degrees of vision impairment, among others. This will require further assistance and support from the government” - Mx.Vinodhan⁵⁰

Globally, it does not appear that there is a specific standard to register an intersex child at birth. Birth certificates do not include an intersex option to register intersex children at birth in India.

“Children who are evidently intersex at birth should definitely be registered as intersex. They should be assigned a social worker and a mental health professional, right then. Sometimes you don't know that you're intersex at birth. You get to know during puberty or when you don't get pregnant.” - Intersex Rights Activist

“In Kerala, there is a stipend for transgender children. It is clearly mentioned as ‘transgender children’ in that government order. What is a transgender child? It is intersex only. Only transgender [persons] are receiving money when intersex children are not getting any

⁴⁸ *ibid.* Pg.12

⁴⁹ Carpenter M. Intersex Variations, human rights, and the International Classification of Diseases. *Health Hum Rights.*2018;20:205-214

⁵⁰ Mx. Vinodhan is based in Coimbatore. They are a poet, writer, and social activist who studied Applied psychology, Masters in Human Genetics and an activist for issues of persons with intersex variations, persons with disability and dalit community. Vinodhan is a co-founder of Intersex Human Rights India (IHRI), a CREA and UN Mechanism Fellow for 2022_23 and 3rd Intersex Asia fellow Member of Intersex Asia, they were a lead of VOIS INDIA collective group for South Indian Dalit Disability, intersex, Queer moment, they have been a part of one of the LGBTIQ+ policy drafting committee constituted by the Government of Tamil Nadu.

amount. They use the term 'transgender children'. There exists only intersex children and the benefits are going to the transgender community, not to the intersex community. The central government put together the Transgender Protection Act. Unfortunately when they termed transgender, they included intersex under the transgender umbrella. Because of this, we can't fight the state government saying that it is not transgender children but it is intersex children." - Respondent, Intersex Asia Study on the rights of intersex persons in India⁵¹

Despite the data gaps, some states have been proactive in policy making for transgender persons. Kerala drafted a policy for transgender persons in 2015.⁵² Karnataka,⁵³ Andhra Pradesh,⁵⁴ and Orissa⁵⁵ have a policy or draft version while a policy for the inclusion of transgender persons is under works in the state of Tamil Nadu.⁵⁶ The state government of Rajasthan prepared a draft plan for the inclusion of transgender persons in 2021⁵⁷ and Assam's draft transgender policy⁵⁸ was approved by the state government in February 2020.⁵⁹ However, all state governments did not proactively introduce transgender inclusive policies following the NALSA verdict. Policy formulation for transgender inclusion has been inconsistent across Indian states. However, without

⁵¹ Brindaalakshmi K(under review). Interpreting Intersex in India. Intersex Asia

⁵²Government of Kerala (2015, Sept 22). Social Justice Department - Transgender Policy - approved - orders issued. Centre for Law and Policy Research. Retrieved from: <https://translaw.clpr.org.in/wp-content/uploads/2019/01/State-Policy-for-Transgenders-in-Kerala-2015.pdf>

⁵³Government of Karnataka (2017).Karnataka State Policy on Transgenders. Karnataka State Women's Development Corporation. Retrieved from: https://kswdc.karnataka.gov.in/uploads/media_to_upload1655970330.pdf

⁵⁴ Staff Reporter (2017, Dec 30). Government clears policy for transgenders. The Hindu. Retrieved from: <https://www.thehindu.com/news/national/andhra-pradesh/government-clears-policy-for-transgenders/article22335804.ece>

⁵⁵ Mission Shakti, Government of Odisha (2021).Draft Odisha State Transgender Persons Policy 2021. Government of Odisha. Retrieved from: <https://missionshakti.odisha.gov.in/sites/default/files/2022-04/document.pdf.6996301b4148f8603e7128a1c9960fda.pdf>

⁵⁶ Shanmughasundaram J (2022, Apr 16).Tamil Nadu govt to come up with policy for transgender community. Times of India. Retrieved from: <https://timesofindia.indiatimes.com/city/chennai/tamil-nadu-govt-to-come-up-with-policy-for-transgender-community/articleshow/90876656.cms>

⁵⁷ TNN (2021, Jul 28). Rajasthan govt: Rs 9 crore approved for the uplift of transgender community. Times of India. Retrieved from: <https://timesofindia.indiatimes.com/city/jaipur/rajasthan-govt-rs-9-crore-approved-for-the-uplift-of-transgender-community/articleshow/84813287.cms>

⁵⁸ Social Welfare Department, Government of Assam (2019, Mar).Draft State Policy on Transgenders. Centre for Law and Policy Research. Retrieved from: https://translaw.clpr.org.in/wp-content/uploads/2020/07/Draft_Transgender_Policy.pdf

⁵⁹Das, Gaurav(2020, Feb 13). Assam Government Approves Draft Policy for Transgender Community. The Wire. Retrieved from: <https://thewire.in/communalism/assam-approves-draft-policy-transgender-community>

safety measures and trans-inclusive policies, it remains unsafe for transgender persons to disclose their gender identity. Lack of proactive measures for transgender inclusion has led to their uneven inclusion into different data systems.

“Transgender persons don’t want to assert their rights for reservations or employment or fight for their rights as transgender people in the state of Meghalaya because making [identity documents] as transgender was easy but they wonder in fear whether their state will really give them the benefit of being a transgender person. So there are no policies or programs or any legal protection schemes or reservation for them in educational institutions or employment. So they wonder what the point is in procuring [identity documents] with a transgender identity. It is upon the state to formulate a policy irrespective of the number so that people can come out once they know that the government is working towards their welfare. This will definitely encourage them to come out.” - Rebina Subba⁶⁰

3.2 Policy inconsistencies between the union and different state governments: cause of data discrepancies?

Policies for the inclusion of transgender persons may be exclusive or inclusive. Inclusive benefits would require different government departments to recognise transgender as a valid gender category for individuals to access any welfare scheme. “Gender affirmative surgery is an exclusive benefit while other healthcare services is an inclusive benefit, where anybody has a right to access a government hospital for treatment; same conditions as everybody else. Owing to population group specific reservations in education and employment such as caste reservations, reservation for women, and reservations for people with a disability, there is a need to document each individual’s specific identity or category. The issue of having to prove oneself, and be visible in order to claim a benefit, is more for schemes that are exclusively reserved for a specific category,” explains Dr.L.Ramakrishnan.⁶¹

Recognition of transgender persons for inclusive benefits requires the introduction of an additional gender category. There has been a significant increase in the introduction of an additional gender category after the Trans Act, note respondents, although the terminology used to capture the

⁶⁰ See footnote 43

⁶¹ Dr. L. Ramakrishnan is an integrative biologist by training, and has been associated with the public health NGO SAATHII for the past 20 years. He works towards inclusive healthcare, justice and social protection for marginalised communities such as LGBTIQ+ communities and those vulnerable to HIV. He has advocated successfully for LGBTIQ inclusion in state policies, and was part of the team consulted by the Madras High Court in the Sushma and Seema vs. Commissioner of Police landmark orders of 2021.

gender information of transgender persons continues to remain inconsistent. There is interdependency of existing identity documents⁶² to procure other identity documents.⁶³ Caste certificate as well Unique Disability ID (UDID) are examples of identification documents that require a copy of other identity documents making it a continued challenge for transgender persons, further marginalising them. Application to procure caste certificate requires individuals to establish their family's caste lineage by submitting the caste certificate of an individual's parents.⁶⁴ This is an additional barrier for transgender persons who are estranged from their natal families due to their gender identities. In the state of Bihar, government documents do not include a third gender category because this inclusion would cost the government an additional Rs. 70 crores noted Reshma Prasad, research scholar and member of the Bihar Transgender Welfare Board during the Symposium on Legal Support For Accessing Transgender Rights in 2018.⁶⁵

Some exclusive policies targeting transgender persons have been introduced by the union government as well as some state governments. Tamil Nadu was the first state to set up a transgender welfare board known as the Aravani Welfare Board in 2008 to issue identification documents to transfeminine women.⁶⁶ Other state like Kerala⁶⁷ and Karnataka⁶⁸ introduced policies after the NALSA verdict, while newer set of policies have been introduced by the union government after the enactment of the Trans Act such as scholarships,⁶⁹ medical health,⁷⁰ and skill

⁶² Brindaalakshmi K.(2023, Nov). Gendering of Development Data in India: Post-Trans Act 2019 #2, Pg. 19. Association for Progressive Communications

⁶³Brindaalakshmi K.(2020, June). Gendering of Development Data in India: Beyond the Binary #3, Pg. 11. Centre for Internet & Society India. Retrieved from: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

⁶⁴ Staff Desk(2023, May 9). What Are the Documents Required for Caste Certificate?. Vakil Search. Retrieved from: <https://vakilsearch.com/blog/documents-required-for-caste-certificate/>

⁶⁵ Human Rights Law Network & Solidarity and Action against the HIV Infection in India. (2018, February 14). Meeting Report from Symposium on Legal Support for Accessing Transgender Rights . Retrieved from <https://slic.org.in/uploads/2018/05/Transgender-Consultation-Report.pdf>

⁶⁶ Brindaalakshmi K.(2020, June). Gendering of Development Data in India: Beyond the Binary #2, Pg.6 . Centre for Internet & Society India. Retrieved from: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

⁶⁷ See footnote 51

⁶⁸ See footnote 52

⁶⁹ Scholarships. National Portal for Transgender Persons, Department of Social Justice and Empowerment. Retrieved from: <https://www.transgender.dosje.gov.in/Applicant/Registration/DisplayForm2>

⁷⁰Medical Health. National Portal for Transgender Persons, Department of Social Justice and Empowerment. Retrieved from: <https://www.transgender.dosje.gov.in/Applicant/Registration/DisplayForm4>

development & training⁷¹ following the Trans Act, as have some states like Rajasthan,⁷² and Assam.⁷³

Tamil Nadu has introduced an app for the registration of transgender persons known as Thirunangai App (Trans woman app). Although the app is called Thirunangai App (Trans woman app), the options Thirunangai (trans woman), Thirunambi (trans man) and Idayinam (intersex) are available on this app⁷⁴ for trans women, trans men and intersex persons, respectively, to register and to procure a Trans identity card. This process is independent of the process established by the union government through the National Portal for Transgender Persons. Individuals from Tamil Nadu register themselves on the app for an identity card in order to become eligible to access any Tamil Nadu-specific schemes that the state government may introduce in the future, notes Grace Banu.⁷⁵ Unlike the national transgender identity card, this state-specific card includes an additional option for intersex persons, although it conflates gender and sex categories combining the data on both under gender category. Thus national and state level data sets may have discrepancies due to the difference and inconsistency in gender categories used for data collection.

Evidently, transgender persons are expected to register and undergo the identification process for multiple transgender ID cards and enter multiple transgender-specific databases in anticipation of probable welfare access in the foreseeable future. “When Aadhar was introduced, it was not mandatory but now we can’t do anything in this country without one. The same thing is likely to happen with the Trans ID card,” Grace Banu adds. This is likely to pose privacy challenges for transgender persons who may be under different names in different data sets due to systemic challenges with the document changing process. The resultant data mismatch and the continued interdependency of documents to officially change gender and name further debunks the purpose of a digital ID as a single identifier for marginalised population groups.

⁷¹ Skill Development & Training. National Portal for Transgender Persons, Department of Social Justice and Empowerment. Retrieved from: <https://www.transgender.dosje.gov.in/Applicant/Registration/DisplayForm3>

⁷² See footnote 56

⁷³ See footnote 58

⁷⁴ Social Welfare and Nutritious Meal Programme Department(2021, Feb 04). Moondram Paal App: TG’s User Manual. Thirunangai App <https://play.google.com/store/apps/details?id=com.isky.admin.tgwelfare&pli=1>

⁷⁵ Emerging from lived experiences as a Dalit Trans Woman, Grace Banu has worked with the traditional Trans women community in Tamil Nadu and with various levers of the government to ensure young trans individuals (especially folks from rural-oppressed caste backgrounds) can find a supportive chosen family, continue their secondary and tertiary education, and join public sector jobs - all without having to hide their gender identity. Grace has been able to create many role-models from within the community who are college graduates and are working in aspirational government jobs - including Tamil Nadu’s first openly Trans Sub-inspector of Police.

3.3 Mandatory Transgender Certification and document changing process to access state schemes and other services

According to the National Portal for Transgender Persons,⁷⁶ it is mandatory for individuals to possess a Transgender Certificate issued through this portal to access any policy/scheme – scholarships,⁷⁷ medical health,⁷⁸ skill development & training⁷⁹ – introduced by the union government. The application to procure a certificate of identity required to access any state scheme is to be approved by the District Magistrates (DM) in each state. This requires active state involvement in the administrative process of changing identification documents. As seen earlier, there are several challenges with this process. Lack of clear communication exists between the union government and state governments leading to implementational challenges. Respondents attribute this lack of clear communication to the existing animosity between political parties in power. This is also the case in states with the same ruling (political) party as the union government. Therefore there is an urgent need for decentralisation of the name and gender change process from the union to the state level to provide faster access to valid identity documents for individuals, observe respondents.

Individuals who legally transitioned prior to the Trans Act are not required to repeat the legal transitioning process as required by this statute. The inability to prove their gender identity due to a lack of an identity document with transgender as gender marker could mean exclusion from data sets for those dependent on the state for welfare, thereby continuing to undercount transgender persons. Prevention of eligible individuals from claiming benefits results in primary ‘non-take ups’, as described by the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter.⁸⁰ Individuals with transgender on their identity documents are reflected in datasets on transgender

⁷⁶ Certificates and Identity Cards, National Portal for Transgender Persons. Ministry of Social Justice and Empowerment. Retrieved from: <https://transgender.dosje.gov.in/Applicant/Registration/DisplayForm1>

⁷⁷ Scholarships, National Portal for Transgender Persons. Ministry of Social Justice and Empowerment. Retrieved from: <https://www.transgender.dosje.gov.in/Applicant/Registration/DisplayForm2>

⁷⁸ Medical Health. National Portal for Transgender Persons. Ministry of Social Justice and Empowerment. Retrieved from: <https://www.transgender.dosje.gov.in/Applicant/Registration/DisplayForm4>

⁷⁹ Skill Development and Training, National Portal for Transgender Persons. Ministry of Social Justice and Empowerment. Retrieved from: <https://www.transgender.dosje.gov.in/Applicant/Registration/DisplayForm3>

⁸⁰ Human Rights Council Fiftieth session 13 June–8 July 2022, Non-take-up of rights in the context of social protection, Report of the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter

persons like in the case of COVID-19 vaccination⁸¹ whereas individuals identifying within the binary tend to be excluded.

Owing to challenges with accurate estimation of transgender persons, which is often needed to budget for schemes and programmes, many within the transgender community are against the provisions in the Trans Act that allow for identifying within the gender binary, notes Dr.L.Ramakrishnan. This tends to be a challenge for trans men since most of them identify as male. Trans men also face the brunt of many challenges, notes Sowmya.⁸² Only individuals with the privilege of foregoing state welfare have the agency to self-identify their gender within the gender binary. “Legal system in India privileges the indigenous categories a little more today. However, the access still remains higher for the global north (binary) trans categories,” observes Debjyoti Ghosh⁸³ on the need to disclose transgender status to access state welfare.

Individuals are expected to submit a proof of identity in their assigned name and gender as part of the documentation changing process. Mismatch between documents leads to disclosure of an individual’s transgender status, especially within workplaces. Changing name and gender on school certificates and birth certificates continues to be a serious challenge. “The problem is CBSE (Central Board of Secondary Education) by-laws or even State Board regulations allow only typographical corrections in the educational certificates, and not substantial changes like change in name or gender. After the Transgender Persons (Protection of Rights) Act, 2019 and Rules, 2020, now there is a statutory right granted to transgender persons who can now change their educational certificates. However, the CBSE is still not following the mandate. We have filed two petitions in Delhi High Court challenging the by-laws, and are hoping for a positive order soon,” notes Amritananda Chakravorty.⁸⁴ Fearing breach of privacy and ensuing discrimination and

⁸¹ Murali, Malavika (2021, Aug 04). No data on vaccinated transgender people: Govt in Lok Sabha. Hindustan Times. Retrieved from: <https://www.hindustantimes.com/india-news/no-data-on-vaccinated-transgender-people-govt-in-ls-101628048737988.html>

⁸² Sowmya is a passionate individual and she is always loud & clear regarding her gender identity. She had two decades of experience working with LGBTQ communities. She started her career working as a field worker and now working at policy making level. Right now working with the Network of Transgender Persons as Project Director. She effectively demonstrates her skills in empowering communities and providing them technical expertise to help them advocate for equal rights across the country with community based Organisations.

⁸³ Debjyoti Ghosh (he/him) is an Indian human rights lawyer and academic, currently based at the Centre for Asian Studies in Africa, affiliated with the Department of Sociology, University of Pretoria, South Africa. His area of work includes HIV, queer health, with a particular focus on access in India, Brazil and South Africa, and is expanding into studying decriminalisation of same-sex sexual behaviour in Southern Africa.

⁸⁴ Amritananda Chakravorty is a lawyer based in New Delhi, India, with extensive experience in LGBTI rights litigation and advocacy. As part of Lawyers Collective, Ms. Chakravorty has been involved in several landmark cases, including challenging the mandatory death penalty for drug offences, removal of the anti-sodomy law, recognition of transgender persons, commutation of death sentences, and challenging the beef ban. Presently, she is handling many strategic cases, including challenging the termination of a transgender woman from the Indian Navy, medical negligence,

violence, many transgender persons who are graduates do not apply for jobs in the formal sector. They choose to be employed in the informal sector under unsafe working conditions, limiting their access to economic sustenance and better quality of life. Thus, owing to implementational, policy, and procedural differences among different Indian states, many transgender persons continue to remain with limited or no access to their rights.

3.4 Lack of intersectionality in policy making

Presently, policies for the inclusion of different historically marginalised communities like transgender persons, persons with disabilities, and Dalit communities exist in silos disconnected from each other. There is no room to address individuals facing multiple marginalisations due to several historically marginalised identities – gender, caste, and disability, among others. As mentioned earlier, the Trans Act has no provision for caste-based horizontal reservation for transgender persons who are also Dalit. In December 2021, Trans Rights Now Collective in the state of Tamil Nadu urged the union government to institute a mechanism to provide horizontal reservations for transgender persons. “We are not all OBC category people. We have different caste backgrounds and many of us are facing caste-based oppression within our own community too,” said Grace Banu, Founder and Director of the Trans Rights Now Collective.⁸⁵

The Central Sector Plan of Umbrella Scholarship Scheme ‘Scholarships for Students with Disabilities,’ issued by the Department of Empowerment of Persons with Disabilities, includes a 50% reservation slot for pre-matric, post-matric, and top class education along with a 30% reservation of slots in National Overseas Scholarship for female students.⁸⁶ The provision for gender within schemes targeting persons with disabilities is limited to cis women. There is no specific reservation for transgender persons with disabilities. The scholarship support available to transgender persons provided by the Ministry of Social Justice and Empowerment through the National Portal for Transgender Persons states that candidates receiving any other central or state government funded Pre-Matric/Post-Matric Scholarship will not be eligible for this scholarship. However, they are allowed to accept free lodging, monetary help for meeting other expenses such as books, equipment, boarding and lodging expenses from the state government.⁸⁷ The skill

discrimination in employment, challenging educational bye-laws that exclude trans persons, discrimination in access to insurance, and seeking reservation for transgender persons in public employment.

⁸⁵Mankatalia, Dhriti (2021, Dec 07). 'Don't Have Just One Identity': Transgender People Urge Govt to Rethink Quota Under OBC Category. The Wire. Retrieved from: <https://thewire.in/rights/dont-have-just-one-identity-transgender-people-urge-govt-to-rethink-quota-under-obc-category>

⁸⁶ Department of Empowerment of Persons with Disabilities (2018, July 3). Office Memorandum Central Sector Plan of Umbrella Scholarship Scheme "Scholarships for Students with Disabilities,". Pg 5 Ministry of Social Justice. [https://disabilityaffairs.gov.in/upload/uploadfiles/files/scholarship2\(1\).pdf](https://disabilityaffairs.gov.in/upload/uploadfiles/files/scholarship2(1).pdf)

⁸⁷ See footnote 74

development and training support provided for transgender persons requires that beneficiaries 'should not be receiving such benefits from any other Centre/ State scheme'.⁸⁸ In states with specific programmes that address transgender persons and persons with disability separately, programmes tend to be mutually exclusive. Individuals are expected to choose between the two without acknowledging the impact of multiple marginalisation in the life of an individual who may be transgender and living with a disability.

"As a person living with disability and as a transgender person, we must be able to access the benefits that address both these groups. However, we are expected to choose between the two programmes." - Kiran Nayak B.⁸⁹

The rules of the Rights of Persons with Disabilities Act 2016 mandate the submission of an individual's Aadhaar⁹⁰ to apply for a certificate of disability. This leads to continued interdependence of identification documents as well as demand for biometrics for a population group for whom it doesn't always work for registration as well as verification.⁹¹ Owing to this logical flaw in data capture, these datasets continue to remain insufficient to make impactful policy decisions for the inclusion of transgender persons who may be facing multiple marginalisations.

"Intersectionality is so important for us. You receive the same amount, whether you are a man who is 100% blind, living in a big city with other resources or a trans person living in a remote area with any kind of disability. It is simply unfair." - Shampa Sengupta⁹²

There exists a disconnect between disability rights and transgender rights movements. There is a need for Civil Society Organisations (CSOs) working on gender, caste, and disability issues to work together to address the gaps that exist for transgender persons living with disability as well as marginalised caste identities.

⁸⁸ See footnote 76

⁸⁹ Kiran Nayak B is a disability, equity and gender equality activist. Kiran is a passionate, industrious and a competent disabled transman keen to enhance skills as a disability, gender and sexuality rights activist. Kiran is currently the General Secretary of Society for Transmen Action & Rights (STAR) and the General Secretary of Vikalachethanara Samasthe (CBO of Persons with disabilities) in Chikkaballapura, Karnataka.

⁹⁰ See footnote 27, Pg.30.

⁹¹ Singhal, Sowmya (2021, July). Aadhaar, Accessibility, and Ableism: Gauging the Responsiveness of Public Services Framework towards PwDs. Social and Political Research Foundation. Retrieved from: https://sprf.in/wp-content/uploads/2021/08/SPRF-2021_Comm_Aadhaar-and-Ableism_Final.pdf

⁹² Shampa Sengupta is the Director of Sruti Disability Rights Centre

“When we talk about the disability rights movement, we hardly talk about caste and gender. People from different movements do not talk to each other very often so we don’t know how to look at gender or caste. Disability rights organisations are still not open to different challenges faced by women with disabilities. So transgender then becomes the next step of sorts. A full gender understanding is lacking in the disability rights movement. We have seen that caste and disability and poverty are all interlinked. When we work at the grassroots level within the disability rights movement, most individuals are from marginalised caste backgrounds. We do have people calling us and asking if I should use my caste or disability identity to get the reservation.” - Shampa Sengupta

4. Transgender as a gender data category in data systems

As seen so far in this part of the report, an inconsistent and limited understanding of transgender in law and policy continues to contribute to systemic biases against this population group. This section will trace the translation of this biased understanding into data systems with data sets collected through public and private services, the evolution of a lexicon for transgender, and the consequent possibilities and potential understanding of transgender as a gender category by Artificial Intelligence (AI) systems for decision-making.

4.1 Understanding of transgender from data sets

Introduction of a biometric based digital ID has changed the understanding of personhood to mean the existence of a person digitising one’s body using different biometrics,⁹³ especially to access essential services like abortion and Antiretroviral (ART) treatment.⁹⁴ Thus, datafication and ‘recolonisation’ through public policies including digital citizenship policies as described by Paola Ricaurte⁹⁵ has been introduced in India with the use of Aadhaar. Unique Identification Authority of India (UIDAI) claims to have a registration rate of 99.5%.⁹⁶ UIDAI holds one of the largest data sets of both biometric information and demographic information of individuals including gender. This

⁹³ Biometrics may be defined as “any automatically measurable, robust and distinctive physical characteristic or personal trait that can be used to identify an individual or verify the claimed identity of an individual” - Alan Gelb and Julia Clark(2013, Jan). Identification for Development: The Biometrics Revolution. Page 8. Centre for Global Development Retrieved from https://www.cgdev.org/sites/default/files/1426862_file_Biometric_ID_for_Development.pdf

⁹⁴ Brindaalakshmi K (2021, May 15). Is digital colonisation redefining the understanding of agency, bodily autonomy and being human. TARSHI. Retrieved from:<https://www.tarshi.net/inplainspeak/is-digital-colonisation-redefining-the-understanding-of-agency-bodily-autonomy-and-being-human/>

⁹⁵ Ricaurte, P. (2019). Data Epistemologies, The Coloniality of Power, and Resistance. *Television & New Media*, 20(4), 350–365. <https://doi.org/10.1177/1527476419831640>

⁹⁶ PTI (2021,Dec 03) UIDAI plans to go global; 99.5% in India have Aadhaar. Deccan Herald. Retrieved from: <https://www.deccanherald.com/national/uidai-plans-to-go-global-995-in-india-have-aadhaar-1057182.html>

information is used to verify individuals while accessing any right or service provided by the public and private sector. An individual's Aadhaar number is now mandatorily linked to other identification documents⁹⁷ such as PAN Card,⁹⁸ ration card,⁹⁹ health ID,¹⁰⁰ and more recently Voter ID,¹⁰¹ indirectly affecting an individual's ability to access services using other documents. Receiving a COVID-19 vaccination using Aadhaar meant automatic creation of a digital health ID without consent.¹⁰² Accessing any service is usually a process that requires two criteria to be satisfied for transgender individuals identifying outside the binary. The service provider's system must recognise transgender as a valid gender category, and individual identification documents must contain transgender as a gender option. Accessing any service becomes a challenge for transgender persons unless these two criteria are met. As seen earlier, the continued struggles of transgender persons to verify their identity prevents them from being enumerated into different datasets that can be used for any development decisions concerning them.

In *4 Ways to Address Gender Bias in AI*,¹⁰³ Josh Feast notes that incomplete or 'skewed training datasets' are created when demographic categories are missing from training data. "Models developed with this data can then fail to scale properly when applied to new data containing those missing categories."

"The 2011 census is flawed in many ways. Some trans individuals have their identity as female and other as transgender. I don't know if they were issued based on the NALSA judgement. I got my Voter ID before the NALSA judgement. I am addressed as female in my Voter ID. So I would have entered the census as a woman and not a trans woman. So

⁹⁷6 Documents that must be linked with your Aadhar card. Economic Times. Retrieved from: <https://economictimes.indiatimes.com/6-documents-that-must-be-linked-with-your-aadhar-card/tomorrowmakersshow/70240225.cms>

⁹⁸ FE Online(2017, Jul 05).Who is exempt from PAN card Aadhaar card linking. Financial Express. Retrieved from: <https://www.financialexpress.com/money/aadhaar-card-pan-card-linking-find-out-who-are-exempted/750596/>

⁹⁹ Dutta, Siraj (2019, Feb 08). Refusing to Learn From Tragedy, Jharkhand Demands Aadhaar for Rations. The Wire. Retrieved from: <https://thewire.in/government/refusing-to-learn-from-experience-jharkhand-makes-aadhaar-mandatory-for-ration>

¹⁰⁰ Dogra, Sarthak (2021, May 24). Took Covid vaccine using Aadhaar? Your National Health ID has been created without your permission. IndiaToday. Retrieved from: <https://www.indiatoday.in/technology/features/story/took-covid-vaccine-using-aadhaar-your-national-health-id-has-been-created-without-your-permission-1806470-2021-05-24>

¹⁰¹ Sequeira, Newton (2022, Aug 23).Drive to link Aadhaar to voter ID begins, BLOs say its manda. Times of India. Retrieved from: <https://timesofindia.indiatimes.com/city/goa/drive-to-link-aadhaar-to-voter-id-begins-blos-say-its-mandatory/articleshow/93716954.cms>

¹⁰² See footnote 92

¹⁰³ See footnote 5

how then can one expect accurate census data with respect to transgender individuals in the country?" - Sankari¹⁰⁴

Primary Census Abstract data of 2011 identifies a total population of 4,87,803 persons in India who identified their gender as 'Other', that is neither as 'Male' nor as 'Female'. This number included 54,584 children.¹⁰⁵ The Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, clarifies that the 'category of "Other" would not only include transgender but also any person who desired to record sex under the category of "Other' ... [and] that transgenders might have returned [sic] themselves either male or female depending on their choice.' Although trans women were issued Voter ID cards in 1993-94, female was the gender marker on the Voter ID cards,¹⁰⁶ leading to gross undercounting of transgender persons and misrepresentation of different gender identities. Evidently, census 2011 is a skewed training dataset to understand transgender persons. Introduced in 2016, Unique Disability ID (UDID) is required for persons with disabilities to access any state welfare for persons with disability. According to the Department of Empowerment of Persons with Disabilities in the Ministry of Social Justice and Empowerment, 59.19 lakh Unique Disability ID (UDID) have been issued in India as on 28.07.21¹⁰⁷ as opposed to 2.68 crore persons with disabilities¹⁰⁸ enumerated in the census of 2011. This data reflects the access gap that exists for persons with disabilities to access their identity specific state welfare. The next census in India was scheduled to be in 2020 but was indefinitely postponed due to COVID-19. Though the timeline is unclear, the next census has been announced as an e-census with self-enumeration using a mobile phone.¹⁰⁹ Without the use of alternative enumeration methods, e-census could lead to continued undercounting and exclusion of individuals from marginalised population groups owing to the existing digital access gap.

¹⁰⁴ Brindaalakshmi K(2020, June). Gendering of Development Data in India: Beyond the Binary #2 Legal Rights and Enumeration Process Pg. 12. Centre for Internet & Society India Retrieved from: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

¹⁰⁵ Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Government of India. Primary Census Abstract Data for Others (India & States/UTs). Retrieved from https://web.archive.org/web/20220307201619/https://www.censusindia.gov.in/2011census/PCA/PCA_OTH_0000_2011.xlsx

¹⁰⁶ See footnote 96 Pg.4

¹⁰⁷ Rajya Sabha Question by Dr.V.Sivadasan to the Ministry of Social Justice and Empowerment, Session 254: Unstarred question number 1917 on 04.08.21

¹⁰⁸ Press Information Bureau, Government of India, Ministry of Social Justice & Empowerment (2015, Mar 03).2.68 Crore Persons with Disabilities as per Census 2011. Press Information Bureau. Retrieved from: <https://www.pib.gov.in/newsite/PrintRelease.aspx?relid=116318>

¹⁰⁹ FP Explainers (2022, May 10). Explained: How the e-Census will change the way India's population is counted. Firstpost. <https://www.firstpost.com/india/explained-amit-shah-e-census-online-india-population-10655591.html>

4.2 A lexicon for transgender

Josh Feast highlights labels used for training datasets as a cause for AI bias.¹¹⁰ Since labels are human made, often data labelled to train models exhibit the same human biases encoding them into Machine Learning (ML) systems. Several different terms have been used over time to issue transgender persons different identification documents as well as to enumerate them. Along with systemic and bureaucratic challenges, the trajectory of the evolution of being transgender and the terms used under different contexts have contributed to shaping the understanding of who a transgender person is, thereby influencing the system's understanding of transgender persons.

A timeline of some of the terms used to recognise and enumerate transgender persons and issue identity documents to them:

Year	Term	Purpose
1871	Eunuch	To surveil them under Criminal Tribes Act 1871 ¹¹¹
1993-94	Female	Some transgender persons identifying as hijra were issued Voter ID with female gender marker ¹¹²
1990s	MSM (men who have sex with men)	Data collection under the HIV Programme as a high-risk group ¹¹³
2000s	Transgender	HIV data under NACP-IV ¹¹⁴
2004	Transgender and Male	In Tamil Nadu, Voter ID was issued to some trans women and one trans man ¹¹⁵
2008	Aravani	Aravani Welfare Board was set up in Tamil Nadu to issue Aravani identity cards ¹¹⁶
2009	Other	Election Commission of India introduced Other as a third gender option on Voter ID ¹¹⁷

¹¹⁰ See footnote 5

¹¹¹ See footnote 7

¹¹² Brindaalakshmi K.(2020, June). Gendering of Development Data in India: Beyond the Binary #2, Pg.4. Centre for Internet & Society India. Retrieved from: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

¹¹³ ibid

¹¹⁴ Laxmi T., et al. (2011, May 05). Transgender - Hijra Strategy. National AIDS Control Programme IV Working Group. National AIDS Control Organisation. <http://www.naco.gov.in/sites/default/files/4%20TG%20Strategy.pdf>

¹¹⁵ Brindaalakshmi K(2020, June). Gendering of Development Data in India: Beyond the Binary #2, Pg 4. Centre for Internet & Society India Retrieved from: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

¹¹⁶ https://www.c-sharp.in/research_policy/Download/CaseStudyReport_TGWB_2013.pdf - Pg 20 footnote

¹¹⁷BBC News (2009, Nov 13). Indian eunuchs given separate IDs. BBC News. Retrieved from: http://news.bbc.co.uk/1/hi/world/south_asia/8358327.stm

2011	Other	Census ¹¹⁸
2014	Hijra, Eunuch, Transgender	NALSA Vs Union of India verdict ¹¹⁹
2015	Transgender or Eunuch (Thirunangai or Aravani)	Backward, Most Backward Classes and Minorities Welfare Department, Tamil Nadu included transgender or eunuch (Thirunangai or Aravani) as a category for reservation in education and state employment ¹²⁰
2015	Third gender	Reserve Bank of India directed banks to include an option in all forms ¹²¹
2019	Transgender, Trans Man, Trans Woman, Intersex, Hijra, Kinner, Jogta and genderqueer	Transgender Persons (Protection of Rights) Act 2019 ¹²²
2021	Thirunangai (trans woman), Thirunambi (trans men) and Idayinam (intersex)	Thirunangai app was introduced by the state government of Tamil Nadu with three gender options including intersex to register transgender persons ¹²³

The above list may not be exhaustive owing to the absence/non-recognition of different region-specific indigenous identities, such as Nupi Manbi from Manipur.¹²⁴ Similarly, there is also a gap in the language to understand intersex realities due to several reasons including conflation of gender identity and sexual characteristics and lack of sufficient information about intersex conditions, among others, note respondents. Deeper studies are required to develop a lexicon to understand and articulate intersex realities within data systems. This list is illustrative of the variations in the terminology and the understanding of being transgender as a data label. Data collection on transgender persons began as a surveillance measure during the colonial era and has contributed to associating this population group with criminalisation and medicalisation. 'Registers

¹¹⁸ Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Government of India. Brief Introduction to Primary Census Abstract Data for 'Others'. Census India. Retrieved from: <http://censusindia.gov.in/2011census/PCA/Primary%20Census%20Abstractother.pdf>

¹¹⁹ See footnote 23

¹²⁰ See footnote 37

¹²¹ Reserve Bank of India (2015, Apr 30). Rights of Transgender Persons - Changes in Bank Forms / Applications etc.. Reserve Bank of India. Retrieved from: <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/PCBRCB3004201590EDA10EA5A0410B964C6094DF97254A.PDF>

¹²² See footnote 18

¹²³ Social Welfare and Nutritious Meal Programme Department(2021, Feb 04). Moondram Paal App: TG's User Manual. Thirunangai App <https://play.google.com/store/apps/details?id=com.isky.admin.tgwelfare&pli=1>

¹²⁴ Dutta, Srishti B (2023, Aug 26). Nupi Maanbi : Transgenders Of Manipur Who Went From Being Accepted To Ostracised To Now Finding Own Voices. Indiatimes. Retrieved from: <https://www.indiatimes.com/news/india/nupi-maanbi-transgenders-of-manipur-who-went-from-being-accepted-to-ostracised-to-now-finding-own-voices-606294.html>

of Eunuchs' were maintained to gradually eliminate them using the 1871 Criminal Tribes Act¹²⁵ and it called for the 'surveillance and control of certain criminal tribes and eunuchs.'¹²⁶ Although this law was repealed later, the practice of transgender surveillance continued with other laws which were read down only after the NALSA verdict in 2014. No efforts were made to recognise the rights of transgender persons until 2014. In 2008, Tamil Nadu became the first state to set up a transgender welfare board called Aravani Welfare Board to provide an Aravani identity card¹²⁷ to transfeminine women. In 2009, the Election Commission of India introduced 'Other' option¹²⁸ on Voter IDs for transfeminine women who were then still addressed as 'eunuchs'. Data collection under the HIV programme elided the data on a gender identity by initially clubbing transfeminine women with men who have sex with men (MSM) i.e combining gender identity data with data on sexual behaviour based on sexual orientation.¹²⁹

"Even the SACS (State AIDS Prevention and Control Societies) have not mentioned anything specifically about trans men and there is still a common notion that transgender means only trans women." - Amrita Sarkar¹³⁰

In 2015, the Reserve Bank of India directed banks to include a third gender option for the financial inclusion of transgender persons.¹³¹ Owing to the popular understanding of a transgender person being someone who identifies with different cultural identities such as hijra, kinnar, and aravani, among others, the language and understanding of other transgender identities especially for those who were gender assigned female at birth has been limited. F to M (Female to Male) was one of the common terms that emerged within the queer-feminist movement to address individuals gender assigned female at birth, although available language has been limited for these individuals to self-identify themselves.¹³² The Trans Act 2019 includes trans men within its definition.

¹²⁵ Hinchy, Jessica(2019, Apr 29).Registers of eunuchs in India. History Workshop. Retrieved from: <https://www.historyworkshop.org.uk/registers-of-eunuchs-in-colonial-india/>

¹²⁶See footnote 7

¹²⁷ United Nations Development Programme (2012). The case of Tamil Nadu Transgender Welfare Board: Insights of Developing Practical Models of Social Protection Programmes for Transgender Persons in India. United Nations Development Programme. Pg 20. Retrieved from: https://www.c-sharp.in/research_policy/Download/CaseStudyReport_TGWB_2013.pdf

¹²⁸ See footnote 117

¹²⁹ Asha Achuthan (2021): Gender-affirmative technologies and the contemporary making of gender in India, Pg. 4 Economy and Society, DOI: 10.1080/03085147.2021.1883322

¹³⁰ Brindaalakshmi K.(2020, June). Gendering of Development Data in India: Beyond the Binary #2,, Pg.5. Centre for Internet & Society India. Retrieved from: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

¹³¹See footnote 113

¹³²Shah, Chayanika. Merchant, Raj. Mahajan, Shals. Nevatia, Smriti (2015). No Outlaws in the Gender Galaxy, Pg xxvi - xxviii.Zubaan Books. ISBN 9789384757687, 9384757683.

Gender categories shown on different identification documents such as ration card, PAN card, Aadhaar, UDID, and Voter ID, among others, continue to remain different. Further, some state specific application forms such as caste certificate in some states including Gujarat,¹³³ and Madhya Pradesh¹³⁴ have only two gender options. Similarly, gender options are in the binary on the application form for a certificate of death issued by the New Delhi Municipal Council.¹³⁵ Aadhaar offers the option 'transgender' on its application form and card. The continued lack of gender options and differences among available options for transgender persons to self-identify their gender on different (digital) IDs continue to misrepresent them within different data systems.

4.3 Potential understanding of 'Transgender' by Artificial Intelligence (AI) based decision making systems

Machine learning (ML) is a subfield of artificial intelligence, which is broadly defined as the capability of a machine to imitate intelligent human behaviour¹³⁶ and artificial intelligence (AI), is the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings.¹³⁷ Data is at the centre of ML and AI. Evidently, government generated data sets on transgender persons are insufficient to train automated decision making systems (ADMS) owing to the quality of training data. In the recent years, the global development agenda has attempted to fill this data gap by pushing for increased Public Private Partnerships for common good¹³⁸ by sharing 'Big Data for Sustainable Development'.¹³⁹ Large technology systems built by big tech companies are primarily built in English by English speaking individuals targeting English speaking global north individuals. These companies continue to grapple with the challenge

¹³³ Director, Developing Castes Welfare, Government of Gujarat. Application form for obtaining caste certificate to Nomadic & Denotified Tribes. Retrieved from: https://sje.gujarat.gov.in/ddcw/downloads/vicharti_jati_form.pdf

¹³⁴ Government of Madhya Pradesh. Lok Seva Guarantee, Service Forms available on the portal. As of 2023, Aug 18. Retrieved from: <http://mpedistrict.gov.in/MPL/DisplayServiceForm.aspx?ParamDownloadForm=MfThVrwPgSU=>

¹³⁵ New Delhi Municipal, Application for Certificate of Death. As of 2023, Aug 18. Retrieved from: https://www.ndmc.gov.in/downloads/DownloadableForms/forms/Health/birth_death/death.pdf

¹³⁶ Brown, Sara(2021, Apr 21).Machine Learning Explained. MIT Management Sloan School. Retrieved from: <https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained>

¹³⁷ Copeland, B.J.(2023, Nov 8). Artificial Intelligence. Britannica. Retrieved from: <https://www.britannica.com/technology/artificial-intelligence>

¹³⁸ World Economic Forum(2019, Apr).Data Collaboration for the Common Good Enabling Trust and Innovation Through Public-Private Partnerships .World Economic Forum. Retrieved from: https://www3.weforum.org/docs/WEF_Data_Collaboration_for_the_Common_Good.pdf

¹³⁹ Big Data for Sustainable Development. United Nations. Retrieved from: <https://www.un.org/en/global-issues/big-data-for-sustainable-development>

of customising their technology to detect hate speech and other malicious content in languages other than English.¹⁴⁰

Similarly, real world biases related to being transgender are also present on online platforms developed by big tech companies perpetuating 'hidden bias' as described by Crawford.¹⁴¹ An example would be the translation of the word 'transgender' on Google translate to one of the Indian languages – Tamil. Tamil is a language that has coined specific terms to denote trans woman (thirunangai) and trans man (thirunambi).¹⁴² However, the word transgender translates to திருநங்கை (*thirunangai* meaning trans woman)¹⁴³ on Google Translate. Apart from erasing other identities under the transgender umbrella, this translation also highlights the manner in which Google's ML has learnt the term. Further, a Google translation of trans man shows டிரான்ஸ் மென் (trans man), a literal translation (trans-literation). Similarly, the Bhojpuri (another Indian language) translation of the word transgender showed the following result – किन्नर के नाम से जानल जाला (it is known by the name kinnar) earlier on October 17, 2022. This phrase points to only those identifying as kinnar to be transgender. On August 27, 2023, the translation of transgender in Bhojpuri showed ट्रांसजेंडर के नाम से जानल जाला (it is known by the name transgender). Using Google Translate to translate the word 'transgender' into different Indian languages highlights both the understanding of the word by Google's ML system as well as the lack of an unbiased word in some Indian languages to describe transgender identities. It is also important to note that not all Indian languages have appropriate words coined to denote transgender and intersex persons. The terms used to denote transgender persons are often used as slurs, even on social media platforms.¹⁴⁴ A search of the term hijra¹⁴⁵ and aravani¹⁴⁶ on X (formerly Twitter) shows results of tweets with these

¹⁴⁰ Moy, Tian & Raheem, Mafas & Logeswaran, Rajasvaran. (2021). Hate Speech Detection in English and Non-English Languages: A Review of Techniques and Challenges. *Webology*. 18. 929-938. 10.14704/WEB/V18SI05/WEB18272

¹⁴¹ See footnote 44

¹⁴² Tamil Nadu Government Gazette (2022, Aug 20). Notifications or Orders of specific character or of particular interest to the public issued by Secretariat Departments. Government of Tamil Nadu. Retrieved from: <https://www.paalputhumai.com/wp-content/uploads/2022/08/Glossary-for-addressing-LGBTQIA-Community-2022-by-TN-SW-Dept.pdf>

¹⁴³ Checked on August 27, 2023

¹⁴⁴ Mentioned by respondents in the participatory study done in 2021 by Centre for Internet & Society, India and Tattle as part of the Digital Society Challenge supported by Omidyar Network. The study was done to develop a plugin to filter online gender-based violence on Twitter. The respondents that I interviewed shared experiences of using Tamil Twitter.

¹⁴⁵ Some examples of hijra used as a slur word as on Aug 27, 2023 - <https://twitter.com/jhonny6sins/status/1695440645303705622> , <https://twitter.com/smdtanbirhasan/status/1695498446017601572> ,

¹⁴⁶ Some examples of aravani used as a slur word, as on Aug 27, 2023 https://twitter.com/search?q=aravani&src=recent_search_click <https://twitter.com/KaarthiVjStr/status/1694976548628234700> , <https://twitter.com/KaarthiVjStr/status/1694764250877902884>

words used as slur. This also contributes to the understanding of different terms when user-generated data is used to train ML systems¹⁴⁷ by different platforms.

The insufficiency in capturing the gender of users has also been observed by Rena Bivens¹⁴⁸ in the context of continued latent binary gendering of Facebook's user base despite introducing 56 gender options beyond the binary. Although seemingly progressive, Facebook's gender data continues to 'misgender users when it translates those identities into data to be stored in the database'.¹⁴⁹ This gender data mismatch is further perpetuated when a Facebook login is used to access other online services. All online commercial/ financial transactions are linked to an individual's bank account. Access to a bank account continues to remain a challenge for transgender persons due to lack of valid identification documents as well as valid proof of address.¹⁵⁰ Similarly, instances of racism and misogyny have been seen in ML developed using data from Twitter.¹⁵¹ These biases are not limited to ML from language models. Other AI based technologies like facial recognition systems further perpetuate bias against transgender persons. The imagination of gender and race by facial recognition systems can be traced to the colonial understanding of masculinity and femininity and gender asserting White and Western supremacy.¹⁵² Driver accounts of several transgender Uber drivers in the US were suspended due to a security feature on Uber that required drivers to upload a selfie verifying their identity¹⁵³. Use of facial recognition systems instead of document based identification systems for a population group who undergo gender affirmation processes further strengthens the systemic bias and transphobia. It further strengthens the need to pass as a certain gender which falls back into the binary understanding of gender identity and gender expressions.

Use of AI and development of algorithms for AI in a black box with no transparency on the logic behind an algorithm has been repeatedly questioned. "Many AI systems don't have user facing

¹⁴⁷ See footnote 5

¹⁴⁸ Bivens, R. (2016, January 27). Programming Violence: Under a Progressive Surface, Facebook's Software Misgenders Users. Retrieved from <https://renabivens.com/programming-violence-under-a-progressive-surface-facebooks-software-misgenders-users/>

¹⁴⁹ Ibid

¹⁵⁰ Brindaalakshmi K (2021, Nov 30). Trans Lives Under Surveillance. Heinrich Boell. Retrieved from: <https://in.boell.org/en/2021/11/30/trans-lives-under-surveillance>

¹⁵¹ Beres, Damon (2016, Mar 24). Microsoft Chat Bot Goes On Racist, Genocidal Twitter Rampage. Huff Post. Retrieved from: https://www.huffpost.com/entry/microsoft-tay-racist-tweets_n_56f3e678e4b04c4c37615502

¹⁵² Scheuerman, M. K., Pape, M., & Hanna, A. (2021). Auto-essentialization: Gender in automated facial analysis as extended colonial project. *Big Data & Society*, 8(2). <https://doi.org/10.1177/20539517211053712>
<https://journals.sagepub.com/doi/full/10.1177/20539517211053712>

¹⁵³ Urbi, Jaden (2018, Aug 8). Some transgender drivers are being kicked off Uber's app. CNBC. Retrieved from: <https://www.cnn.com/2018/08/08/transgender-uber-driver-suspended-tech-oversight-facial-recognition.html>

interfaces at all. Instead they are integrated into the backend processes of institutional decision making, unseen and often unknown to those whose lives and opportunities they influence,” says *Discriminating systems - Gender, Race and Power in AI*, a report by AINow Institute.¹⁵⁴ Thus AI in both the public and private sector could discriminate against individuals with protected characteristics like gender identity, sexual orientation, disability status, caste, and religion, among others. Increasingly, it seems that AI systems for decision making are being introduced by the Government of India.¹⁵⁵

UIDAI’s website¹⁵⁶ lists over 95 different types of errors with the Aadhaar authentication system. Use of Aadhaar’s biometric based identification systems to access state welfare has proven to exclude marginalised population groups like poor students,¹⁵⁷ rural women, their children¹⁵⁸ and others. The continued inability to authenticate one’s identity using biometrics leads to ‘non-take ups’ due to rejection errors¹⁵⁹ and deletion from the state’s data lists. A sample survey by the Abdul Latif Jameel Poverty Action Lab has found that close to 88% of the deleted ration cards owing to biometric authentication failures belonged to genuine households.¹⁶⁰ The aggressive push for datafication of individuals using a digital ID does not guarantee state welfare even for individuals with a valid Aadhaar in the correct name and gender. The present identification system continues to perpetuate the struggles of transgender persons by design and without any guarantees of access. The current system is not inclusive by design and incompetent to make decisions that make sense for the realities of transgender (and intersex) persons. This makes automated decision-making ineffective for transgender (and intersex) community, one with a history of criminalisation, medicalisation and erasure. The state expects individuals to disclose their specific identities such as caste, gender, and disability status to access identity specific schemes, although

¹⁵⁴ West, S.M., Whittaker, M. and Crawford, K. (2019). *Discriminating Systems: Gender, Race and Power in AI*. AI Now Institute. Retrieved from: <https://ainowinstitute.org/publication/discriminating-systems-gender-race-and-power-in-ai-2>

¹⁵⁵ See footnote 2

¹⁵⁶ What are error codes. Unique Identification Authority of India. Retrieved from: <https://uidai.gov.in/en/305-faqs/aadhaar-online-services/aadhaar-authentication-history/10779-what-are-error-codes.html>

¹⁵⁷ Rethink Aadhaar (2020, Nov 25). Yet another Aadhaar-enabled scam: When will the Government wake up?. Rethink Aadhaar. Retrieved from: <https://rethinkaadhaar.in/blog/2020/11/25/yet-another-aadhaar-enabled-scam-when-will-the-government-wake-up>

¹⁵⁸ Barik, Satyasundar (2020, Dec 12). With opaque PDS, Odisha’s brides fall through food security net. The Hindu. Retrieved from: <https://www.thehindu.com/news/national/other-states/unresponsive-pds-erases-odishas-brides/article33315173.ece>

¹⁵⁹ Transfer Program Complexity and the Take-Up of Social Benefits By Henrik Jacobsen Kleven and Wojciech Kopczuk* American Economic Journal: Economic Policy 3 (February 2011): Pg 54–90 <http://www.aeaweb.org/articles.php?doi=10.1257/pol.3.1.54>

¹⁶⁰ Muralidharan, Karthik. Niehaus, Paul. Sukhtankar, Sandip (2021, Sept). Identity Verification Standards in Welfare Programs: Experimental Evidence from India. National Bureau of Economic Research. Retrieved from: https://www.nber.org/system/files/working_papers/w26744/w26744.pdf

policies do not account for multiple marginalisations faced by an individual. Contrary to the principles of human rights, data on an individual's different identities may be utilised by the state using AI to provide or deny their Constitutional rights. Further, the lack of sufficient data on a particular population group along with mass surveillance of the said group could lead to the civil death of individuals at the margins.¹⁶¹

¹⁶¹India Today Tech (2018, Aug 20). Aadhaar is mass surveillance system, will lead to civil death for Indians: Edward Snowden. India Today. Retrieved from: <https://www.indiatoday.in/technology/news/story/aadhaar-is-mass-surveillance-system-will-lead-to-civil-death-for-indians-edward-snowden-1319121-2018-08-20>