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# Understanding the Right to Change Legal Gender: A Case Study of Trans Women in Sri Lanka

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APMA, The Master's Programme in Human Rights and  
Democratisation in Asia Pacific

SAITTAWUT YUTTHAWORAKOOL

UNDERSTANDING THE RIGHT TO CHANGE LEGAL GENDER:  
A CASE STUDY OF TRANS WOMEN IN SRI LANKA

## FOREWORD

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This publication includes the thesis *Understanding the Right to Change Legal Gender: A Case Study of Trans Women in Sri Lanka* written by Saittawut Yutthaworakool and supervised by Kokila Lankathilake Konasinghe, University of Colombo (Sri Lanka) and Mike Hayes, Mahidol University.

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## ABSTRACT

In Sri Lanka, the lives of trans women have faced discrimination, stigmatisation, marginalisation and criminalisation. These legal, administrative and socio-cultural factors urged the state authorities to contribute to the policy on the right to change legal gender in 2016. In theory, this policy aimed to uphold the lives of transgender people in different aspects. However, trans women in Sri Lanka, in reality, have experienced challenges of the policy implementation. At the same time, these challenges impact the lives of trans women in Sri Lanka. Drawing upon semi-structured interviews with four Sri Lankan trans women, who have experienced the implementation process and in-depth interviews with a lawyer and government officers working on trans women's rights, the research finds that although trans women are appreciative and happy with the policy, which upholds their human rights through the new identity, they continue to face difficulties during the application process. Because of the bureaucratic process, the policy is inaccessible and unaffordable. The policy is not a legal provision, and trans women are forced to follow the discretion of the administrative officers. Their birth certificate still indicates the previous gender because the state authorities refuse to issue a new document. The policy lacks standard procedures and protocols, which allows unequal treatment to take place during the service. They must follow the medical treatment, which is time-consuming and expensive before receiving the Gender Recognition Certificate. Last but not least, trans women do not have other alternatives besides male or female gender. With regards to these challenges, the research suggests that the country demedicalises transgenderism, while establishing standard guidelines and protocols for the procedures under the enacted legal provision. It also urges the state authorities of Sri Lanka to decriminalise all laws that discriminate against the LGBTIQ+ community, as well as to protect and promote their fundamental human rights. This research not only enables us to understand the right to change legal gender in Sri Lanka, but also contributes to the knowledge gaps of the gender and sexuality studies and LGBTIQ+ issues in Sri Lanka. It also suggests the further study on trans men in Sri Lanka.

*Keywords: right to change legal gender, trans women, Sri Lanka*

TABLE OF ABBREVIATIONS

AIDS	Acquired Immune Deficiency Syndrome
ECHR	European Convention on Human Rights
GRC	Gender Recognition Certificate
GS	Grama Niladhari
HIV	Human Immunodeficiency Virus
HRC	Human Rights Council
HRCSL	Human Rights Commission of Sri Lanka
ICCPR	International Covenant on Civil and Political Rights
ICD	International Classification of Diseases
LGBTIQ+	Lesbian, gay, bisexual, transgender, intersex and queer/questioning
LTTE	Liberation of Tigers of Tamil Ealam
NGOs	Non-governmental organisations
NHRAP	National Action Plan for the Protection and Promotion of Human Rights
NIC	National identity card
SOGIE	Sexual orientation and gender identity and expression
STIs	Sexually transmitted infections
TNR	Transgender Notification Register
UN	United Nations
WHO	World Health Organization
WPATH	World Professional Association for Transgender Health

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1.

INTRODUCTION

1.1 BACKGROUND

In Sri Lanka, the Penal Code 1883 and Vagrants Ordinance 1841, drafted by the British during the colonial period, have remained in its legal system. Criminalisation against consenting adult same-sex sexual relationship, according to articles 365 and 365A in the Penal Code, have not yet been repealed. Moreover, lesbian, gay, bisexual, transgender, intersex and queer/questioning (LGBTIQ+) individuals, who do not theoretically belong to the gender binary concept, become targeted by the state authorities due to their sexual orientation and gender identity and expression (SOGIE). In particular transgender persons are placed in positions of vulnerability because of not only social stigmatisation but also discriminatory legal provisions.<sup>1</sup> Section 399 in the Penal Code 1883 describes cheating by personation or misrepresentation when a person pretends to convince others through his or her false identity as another person. As a result, trans men and women, whose gender identity does not match to the biological sex assigned at birth, often face human rights violations from the state authorities.<sup>2</sup> In addition to that, transgender individuals, specifically trans women, may be subject to arbitrary arrest or detention, as stated in section 07/1841 of the Vagrants Ordinance 1841.<sup>3</sup> Thus, although they refuse the charge, Sri Lankan society has stereotyped that all trans women are sex workers and always act soliciting or with indecency in the public space.<sup>4</sup>

<sup>1</sup> Amnesty International, 'Spectrum' (Amnesty International 2019).

<sup>2</sup> Equal Ground, 'My Rights, My Responsibilities' (Equal Ground 2019).

<sup>3</sup> An Ordinance to Provide a General Penal Code for Ceylon 1883.

<sup>4</sup> Equal Ground, 'My Rights, My Responsibilities' (Equal Ground 2019).

While the debate on criminalisation targeting LGBTIQ+ community was ongoing, the Human Rights Commission of Sri Lanka (HRCSL) made a shocking introduction to the right to change legal gender to the general public in 2015.<sup>5</sup> A year later, this policy was implemented by the Ministry of Health and Indigenous Medical Services through its Circular Letter on Issuing of Gender Recognition Certificate for Transgender Community (No 01-34/2016), signed on 16 June 2016.<sup>6</sup> Any transgender persons, who wish to legally change their gender, can apply for a Gender Recognition Certificate (GRC). This certificate not only does recognise the identity of transgender persons in Sri Lanka but also allows them to legally change their gender that belongs to their identity and expression.<sup>7</sup> Furthermore, they are permitted to obtain the amendments of the national identity card (NIC) and other official documents, such as birth certificate, driving licence and/or passport, according to the Registrar General's Department's Circular Letter of Registrar General (No 06/2016), signed on 28 July 2016.

It is interesting that in the conservative society of Sri Lanka, where LGBTIQ+ are closeted, transgender persons are given an opportunity to change their legal gender. As mentioned above, legal criminalisation and social stigmatisation have played large roles and continued unequal and discriminatory practices on the grounds of SOGIE. However, initiating the right to change legal gender has pushed forward an advancing step to respect, protect and fulfil the human rights of transgender persons as well as an entire LGBTIQ+ community in Sri Lanka. In this research, trans women are selected as the major population of the study. It aims to understand the factors that contribute to the existing implementation process of the right to change legal gender and its challenges as outcomes of the process. Besides, it discusses the impacts of these challenges to the lives of trans women in Sri Lanka. Lastly, recommendations are provided for this policy.

<sup>5</sup> Issuru Parakrama, 'Into the Unknown Gender Certificate in Sri Lanka' (*Lanka News Web*, 29 September 2018) <<https://lankanewsweb.net/featured/33146-into-the-unknown-gender-certificate-in-sri-lanka>> accessed 21 April 2020.

<sup>6</sup> Ministry of Health, Nutrition and Indigenous Medicine, 'Issuing of Gender Recognition Certificate for Transgender Community' (2016) <[www.health.gov.lk/CMS/cmsmoh1/viewcircular.php?cno=01-34/2016&med=english](http://www.health.gov.lk/CMS/cmsmoh1/viewcircular.php?cno=01-34/2016&med=english)> accessed 9 September 2019.

<sup>7</sup> Issuru Parakrama, 'Into the Unknown Gender Certificate in Sri Lanka' (*Lanka News Web*, 29 September 2018) <<https://lankanewsweb.net/featured/33146-into-the-unknown-gender-certificate-in-sri-lanka>> accessed 21 April 2020.

## 1.2 RESEARCH QUESTIONS

1. What are the factors contributing to the implementation of the right to change legal gender in Sri Lanka?
2. What is the existing implementation process of the right to change legal gender in Sri Lanka?
3. What are the challenges as outcomes of the existing implementation process of the right to change legal gender in Sri Lanka?
4. How do the challenges of the right to change legal gender impact the lives of trans women in Sri Lanka?
5. What are the recommendations to the existing implementation process of the right to change legal gender in Sri Lanka?

## 1.3 RESEARCH OBJECTIVES

1. To find out the factors contributing to the implementation of the right to change legal gender in Sri Lanka.
2. To understand the existing implementation process of the right to change legal gender in Sri Lanka.
3. To analyse challenges as outcomes of the existing implementation process of the right to change legal gender in Sri Lanka.
4. To discuss impacts of these challenges that contribute to the lives of trans women in Sri Lanka.
5. To provide useful recommendations to the existing implementation process of the right to change legal gender in Sri Lanka.

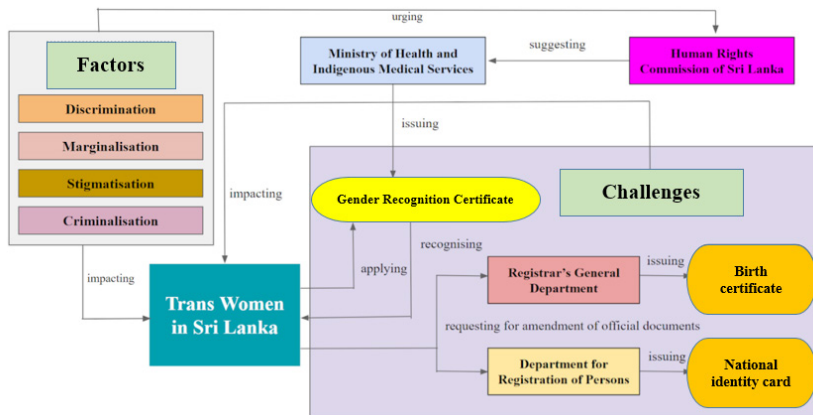
## 1.4 SCOPE OF THE STUDY

The scope of this research is the right to change legal gender in Sri Lanka for trans women. The research emphasises the existing implementation process of the right to change legal gender and its challenges. Moreover, the research connects the existing implementation to its contributing factors, challenges and impacts to the lives of Sri Lankan trans women. Besides, it provides useful recommendations to the policy. The time frame of this study starts from the policy formulation in 2015, policy implementation in 2016 until the end of the research in 2020.

## 1.5 CONCEPTUAL FRAMEWORK

In order to analyse the factors contributing to the existing implementation process of the right to change legal gender, as well as its policy challenges, and impacts to trans women in Sri Lanka, it is important to understand the entire process from the beginning. The HRCSL firstly initiated the policy in 2015. Later, the commission proposed this policy to the Ministry of Health and Indigenous Medical Services to issue a GRC in 2016 to transgender persons through the Circular Letter.<sup>8</sup>

*Figure 1 Conceptual framework on the study of the right to change legal gender in Sri Lanka*



The conceptual framework of this research begins at this stage when lives of trans women in Sri Lanka are impacted by four major factors, including discrimination, marginalisation, stigmatisation and criminalisation. In everyday life, they encounter difficulties in being part of the community because of their SOGIE. However, trans women can apply for the GRC that recognises their different gender identity from the biological sex assigned at birth. Challenges are examined from this stage. Following this step, trans women are encouraged to change their legal gender through two provided state authorities, including the

<sup>8</sup> Equal Ground, 'My Rights, My Responsibilities' (Equal Ground 2019).

Registrar's General Department and the Department for Registration of Persons. These state institutions are responsible for the amendment of official documents, which are birth certificates and NICs respectively. At the end of this step, more challenges are revealed for analysis. Furthermore, these challenges impact the lives of trans women in Sri Lanka in various dimensions.

## 1.6 HYPOTHESIS

Although Sri Lankan state authorities made an effort toward the policy on the right to change legal gender in order to uphold the lives of trans women, there are some challenges in the implementation process that obstruct trans women from accessing this right. These challenges are represented through administrative, legal and socio-cultural dimensions that have been reproduced within the Sri Lankan context. Because of these challenges, the lives of trans women in Sri Lanka are more negatively impacted by the right to change legal gender. Therefore, they continue to be subject of discrimination, stigmatisation, marginalisation and criminalisation.

## 1.7 IMPORTANCE OF THE STUDY

The research aims to contribute to the gaps as the majority of the literature focuses on the positive side of the right to change legal gender through obtaining the GRC but there are still some challenges that impact trans women's lives in Sri Lanka. In addition, trans women in Sri Lanka have encountered a long history of discrimination and stigmatisation. They are marginalised from the society where patriarchy has played a major role. The researcher believes that this research would also contribute to another perspective of the relevant studies that provides useful recommendations and creates a new body of knowledge on gender and sexuality studies as well as human rights.

## 1.8 ORGANISATION OF THESIS

This research includes five chapters altogether, which are divided as follows: Chapter One, Introduction; Chapter Two, Literature review; Chapter Three, Research methodology; Chapter Four, Findings and discussions; and Chapter Five, Conclusions.

The first chapter introduces the research background, questions, objectives, unit of analysis, conceptual framework, hypothesis, importance of the study and organisation of the thesis. The literature review is presented in the second chapter. This part contains discussions on sex, gender identity and expression; definitions and legal recognition of trans women; social exclusion and protection of trans women; right to change legal gender; and contemporary Sri Lanka post-civil war. Chapter three is research methodology, which includes data type, data sources, data collection procedure, limitations of research design and ethical considerations. Chapter four is findings and discussions, which explore the existing implementation process and challenges of the right to change legal gender in Sri Lanka. This chapter also discusses the impacts of the right to change legal gender on the lives of Sri Lankan trans women. Besides, recommendations for the existing implementation process are provided. Finally, the last chapter entails concluding remarks of the findings and discussions with suggestions on further research opportunities on the relevant issues.



## 2.

## LITERATURE REVIEW

## 2.1 SEX, GENDER IDENTITY AND GENDER EXPRESSION

The American Psychological Association defines the difference between sex and gender that sex is biologically assigned at birth as either male or female in a physical appearance, while gender is socially constructed toward roles, behaviours and activities which vary depending on different societal characteristics. On the contrary, gender identity does not resemble gender in that it is one's internal sense of being male, female or others. Therefore, gender is considered as what society expects one to perform according to its norms, values and traditions.<sup>9</sup> The African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and the United Nations (UN) refers gender identity to an internally experienced sense of one's own gender, which is normally consistent with the gender assigned at birth. On the contrary, transgender people have a different gender identity from their gender assigned at birth. However, gender identity and social expectations of gender roles may be discordant.<sup>10</sup>

Similarly, Statistics New Zealand clarifies these terms, which are often used interchangeably, that sex is biological differences in sexual characteristics, while gender is a complex social phenomenon that

<sup>9</sup> American Psychological Association, 'Answers to your questions about transgender people, gender identity, and gender expression' (*American Psychological Association*, 2014) <[www.apa.org/topics/lgbt/transgender.aspx](http://www.apa.org/topics/lgbt/transgender.aspx)> accessed 23 November 2019.

<sup>10</sup> African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations, 'Ending violence and other human rights violations based on sexual orientation and gender identity' (Pretoria University Law Press 2016) <[www.ohchr.org/Documents/Issues/Discrimination/Endingviolence\\_ACHPR\\_IACHR\\_UN\\_SOGI\\_dialogue\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf)> accessed 26 November 2019.

shapes individual gender identity and expression depending on specific society and time. Therefore, gender expression can be categorised into masculinity and femininity, while it stresses that gender identity does not need to correspond with sex. This is referred to gender non-conforming in which gender identity and expression do not conform to the socio-cultural constructed concept of gender.<sup>11</sup> The Anti-Defamation League adds that although the Western concept of gender binary seems to dominate, gender is fluid in itself.<sup>12</sup> On the contrary, cisgender defines a person whose gender identity corresponds with their biological sex and follows socio-cultural expectations.<sup>13</sup>

Recognised as one of the comprehensive documents on sexual orientation and gender identity, the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles) proposes that discrimination and abuse on the grounds of sexual orientation and gender identity must be prohibited. The Yogyakarta Principles refers to gender identity as an internal and individual experience of gender, which may or may not correspond with the sex assigned at birth.<sup>14</sup> On the other spectrum, the Yogyakarta Principles Plus 10 defines gender expression as part of gender identity through one's physical appearance such as dress, speech and manner. It reaffirms that gender expression may or may not conform to gender identity. However, gender expression must be included when discussing gender identity. In the end, states are accountable for protecting discrimination and violence on the grounds of sexual orientation and gender identity.<sup>15</sup> The Yogyakarta Principles Plus

<sup>11</sup> Statistics New Zealand, 'Gender identity Developing a statistical standard' (*Stats NZ*, 2014) <[www.stats.govt.nz](http://www.stats.govt.nz)> accessed 23 November 2019.

<sup>12</sup> Anti-Defamation League (ADL), 'Terminology Related to Transgender and Gender Non-Conforming Identity' (ADL 2014) <[www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/terminology-related-to-transgender-and-gender-non-conforming-identity.pdf](http://www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/terminology-related-to-transgender-and-gender-non-conforming-identity.pdf)> accessed 23 November 2019.

<sup>13</sup> American Psychological Association, 'Answers to your questions about transgender people, gender identity, and gender expression' (*American Psychological Association*, 2014) <[www.apa.org/topics/lgbt/transgender.aspx](http://www.apa.org/topics/lgbt/transgender.aspx)> accessed 23 November 2019.

<sup>14</sup> Sonia Onufer Correa and Vitit Muntarbhorn, 'Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity' (2007) <<https://yogyakartaprinciples.org/principles-en/>> accessed 23 December 2019.

<sup>15</sup> Mauro Cabral Grinspan and others, 'The Yogyakarta Principles Plus 10: Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (2017) <<https://yogyakartaprinciples.org/principles-en/>> accessed 23 November 2019.

10 is an extensive document to the Yogyakarta Principles which coins the term ‘sexual orientation, gender identity and expression, and sexual characteristics’. Gender expression is considered as one’s presentation through physical appearance such as dress, speech and behaviour, which may not be necessarily congruent with gender identity. When gender identity is indicated, gender expression is also part of its elements. On the other hand, sexual characteristics are physical features in relation to biological sex such as chromosomes and reproductive anatomy.

## 2.2 UNDERSTANDING TRANS WOMEN

The American Psychological Association provides the definition of transgender or trans as referring to an umbrella term for persons whose gender identity, expression and behaviour do not conform with their sex assigned at birth.<sup>16</sup> The definition is also extended to explain that gender identity belongs to the internal feeling, which is carried out through gender expression or external appearance. In terms of medical explanations, biological factors may influence the development of transgender identities. Being transgender is not a mental illness, but transgender persons may experience distress or depression from discrimination. Transgender persons may be identified to have ‘gender dysphoria’.

The United Kingdom National Health Service describe the term gender dysphoria as an uncomfortable feeling of a person who possesses a mismatch between biological sex and gender identity.<sup>17</sup> Those with gender dysphoria may behave or express themselves to their desired gender identity. To some extent, they may take hormone therapy and sex reassignment surgery to fulfil their desire. The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-5) re-identified that when sex assigned at birth is contrary to gender identity, it is considered as gender dysphoria, not gender identity disorder. However, in some cases, gender dysphoria may cause a person more distress, depression, anxiety

<sup>16</sup> American Psychological Association, ‘Answers to your questions about transgender people, gender identity, and gender expression’ (*American Psychological Association*, 2014) <[www.apa.org/topics/lgbt/transgender.aspx](http://www.apa.org/topics/lgbt/transgender.aspx)> accessed 23 November 2019.

<sup>17</sup> United Kingdom National Health Service (NHS), ‘Overview: Gender dysphoria’ (*NHS*, 2020) <[www.nhs.uk/conditions/gender-dysphoria/](http://www.nhs.uk/conditions/gender-dysphoria/)> accessed 11 June 2020.

or social isolation.<sup>18 19</sup> In 2019, the World Health Organization (WHO) reclassified gender dysphoria or gender incongruence as part of gender identity disorder to conditions related to sexual health, written in the 11th International Classification of Diseases (ICD).<sup>20</sup>

Butler explains that those who cross-identify or live as another gender are transgender. Hormone treatment and sex reassignment surgery are not considered necessary for transgender people.<sup>21</sup> Without emphasising identity and expression, Vidal-Ortiz defines that transgender is a person who refuses to be categorised in the gender binary system, while transgender is used as a medical term through the surgical procedures.<sup>22</sup> Van den Brink and Dunne term transgender as ‘trans,’ which is referred to as people who have gender identity and/or expression that is different from the birth-assigned sex.<sup>23</sup> This umbrella term includes any persons who believe in a non-binary system or may identify themselves as transsexual and transvestite or cross-dressing. From this aspect, it is not a requirement for trans people to have been undergone sex reassignment surgery or hormone therapy. Besides being called trans, persons may identify themselves as ‘gender variant,’ such as genderqueer, polygender or agender.

In some countries, transgender people are defined differently based on their locality, society, culture, religion or spiritual belief. In some countries in Asia, particularly South Asian countries, trans women are recognised as a ‘third gender,’ such as in India (hijra) or Bangladesh (thirunagai).<sup>24</sup> This

<sup>18</sup> American Psychiatric Association, ‘What is Gender Dysphoria?’ (*American Psychological Association*, 2013) <[www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria](http://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria)> accessed 11 June 2020.

<sup>19</sup> United Kingdom National Health Service (NHS), ‘Overview: Gender dysphoria’ (NHS, 2020) <[www.nhs.uk/conditions/gender-dysphoria/](http://www.nhs.uk/conditions/gender-dysphoria/)> accessed 11 June 2020.

<sup>20</sup> World Health Organization, ‘ICD-11 for Mortality and Morbidity Statistics (Version : 04 / 2019)’ (2019) <<https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/344733949>> accessed 11 June 2020.

<sup>21</sup> Judith Butler, *Undoing Gender* (Routledge 2004).

<sup>22</sup> Salvador Vidal-Ortiz, ‘Transgender and Transsexual Studies: Sociology’s Influence and Future Steps’ (2008) 2(2) *Sociology Compass* 433.

<sup>23</sup> Marjolein van den Brink and Peter Dunne, ‘Trans and intersex equality rights in Europe – a comparative analysis’ (European Commission 2018) 34 <[https://ec.europa.eu/info/sites/info/files/trans\\_and\\_intersex\\_equality\\_rights.pdf](https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf)> accessed 23 November 2019.

<sup>24</sup> Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme, *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions* (Asia Pacific Forum of National Human Rights Institutions and the United Nations Development Programme June 2016) <[www.asia-pacific.undp.org/content/rbap/en/home/library/democratic\\_governance/hiv\\_aids/promoting-and-protecting-human-rights-in-relation-to-sexual-orie.html](http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/promoting-and-protecting-human-rights-in-relation-to-sexual-orie.html)> accessed 9 September 2019.

means that they are neither considered male or female because there is a specific category created. In the Asia-Pacific context, Winter argues that transgender is a Western and modern terminology.<sup>25</sup> However, the term transgender has been adapted to the local contexts. There are specific terms being used for transgender people. For example, in Sri Lanka, trans women may be referred to ‘ponnaya’ and ‘nachchi’ or a person who has a feminine character. Meanwhile in Thailand, many trans women are called ‘kathoei’. Nevertheless, both local terms are derogatory slangs, which show how transgender is viewed in the heteronormative dominant society. While ponnaya or nachchi imply the person as a sex worker, kathoei represent intersex or cross-dressing people, whose past life had faced ‘karma’ or sin, regarding a Buddhist context.<sup>26 27 28</sup>

In the aspects of legal definitions of transgender, principle 3 of the Yogyakarta Principles states that everyone has the right to recognition before the law. Thus, no one shall be discriminated against, and the state shall ensure one’s rights from being invoked based on their diverse backgrounds of sexual orientation and gender identity.<sup>29</sup> As a result, sex reassignment surgery is voluntary, and it must not be necessary for one’s self-determination of gender identity. However, in reality, transgender people face some difficulties in legal recognition in which their gender identity mismatches with assigned gender in the official documents. Therefore, accessing fundamental rights, such as employment, health and education, becomes problematic.<sup>30</sup> Expression of their identity such as cross-dressing may be subject to criminalisation.<sup>31</sup>

<sup>25</sup> Sam Winter, ‘Lost in Transition: Transgender People, Rights and HIV Vulnerability in the Asia-Pacific Region’ (United Nations Development Programme 2012) <[www.undp.org/content/dam/undp/library/hivaids/UNDP\\_HIV\\_Transgender\\_report\\_Lost\\_in\\_Transition\\_May\\_2012.pdf](http://www.undp.org/content/dam/undp/library/hivaids/UNDP_HIV_Transgender_report_Lost_in_Transition_May_2012.pdf)> accessed 23 November 2019.

<sup>26</sup> Andrea Nichols, ‘Dance Ponnaya, Dance! Police Abuses Against Transgender Sex Workers in Sri Lanka’ (2010) 5(2) Feminist Criminology 195.

<sup>27</sup> Peter A Jackson, ‘Performative Genders, Perverse Desires: A Bio-History of Thailand’s Same-Sex and Transgender Cultures’ (2003) 9 Intersections: Gender, History & Culture in the Asian Context <<http://intersections.anu.edu.au/issue9/jackson.html>> accessed 11 June 2020

<sup>28</sup> Totman R, ‘The third sex: Kathoei: Thailand’s ladyboys’ (Souvenir Press 2003)

<sup>29</sup> Sonia Onufer Correa and Vitit Muntarbhorn, ‘Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity’ (2007) <<https://yogyakartaprinciples.org/principles-en/>> accessed 23 December 2019.

<sup>30</sup> Joint United Nations Programme on HIV/AIDS, *The Gap Report 2014* (UNAIDS 2014) <[www.unaids.org/sites/default/files/media\\_asset/UNAIDS\\_Gap\\_report\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/UNAIDS_Gap_report_en.pdf)> accessed 6 December 2019.

<sup>31</sup> Joint United Nations Programme on HIV/AIDS, *The Gap Report 2014* (UNAIDS 2014) <[www.unaids.org/sites/default/files/media\\_asset/UNAIDS\\_Gap\\_report\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/UNAIDS_Gap_report_en.pdf)> accessed 6 December 2019.

Chiam, Duffy and González Gil discuss different administrative procedures in different countries around the world on legal recognition of transgender persons.<sup>32</sup> This report argues that, regardless of gender identity, a person is entitled to equal protection before the law, although national legislations do not specifically emphasise transgender. Furthermore, the report suggests international human rights mechanisms can address the voices of transgender persons in various actors. First, a prominent channel is special procedures under the UN Human Rights Council (HRC). This channel includes the Independent Expert on the Protection against Violence and Discrimination on the basis of Sexual Orientation and Gender Identity. Other types of special rapporteurs on different thematic issues can also be the focal points for transgender persons to generate their concerns such as torture and woman. In addition to the HRC, UN agencies, such as the WHO and the Office of the High Commissioner for Human Rights, welcome LGBTIQ+ human rights complaints. Second, although there are no specific human rights treaty bodies for the protection of LGBTIQ+ rights, they are entitled to rights and freedoms when the state parties ratify the conventions. Last, the Universal Periodic Review, which is periodically peer-reviewed by the state members around every five years, reminds the state parties to their current states of human rights situations and urges them to be held accountable.

Winter argues that stigma and prejudice against transgender people is the result of legal conditions that fail to protect them from discrimination and promote their rights.<sup>33</sup> Winter classifies three reasons why transgender people see issues with legal recognition. First, protection mechanisms for the LGBTIQ+ community are absent. Although many countries are the state parties of the international human rights mechanisms, their domestic legislations do not yet uphold transgender people's rights. Second, domestic laws fail to take affirmative actions to recognise transgender people; hence, they lack some particular rights such as rights to marriage and adoption. Last, criminalisation against

<sup>32</sup> Zhan Chiam, Sandra Duffy and Matilda González Gil, 'Trans Legal Mapping Report 2017: Recognition before the law' (2nd ed, ILGA 2017) <[https://ilga.org/downloads/ILGA\\_Trans\\_Legal\\_Mapping\\_Report\\_2017\\_ENG.pdf](https://ilga.org/downloads/ILGA_Trans_Legal_Mapping_Report_2017_ENG.pdf)> accessed 23 November 2019.

<sup>33</sup> Sam Winter, 'Lost in Transition: Transgender People, Rights and HIV Vulnerability in the Asia-Pacific Region' (United Nations Development Programme 2012) <[www.undp.org/content/dam/undp/library/hiv/aids/UNDP\\_HIV\\_Transgender\\_report\\_Lost\\_in\\_Transition\\_May\\_2012.pdf](http://www.undp.org/content/dam/undp/library/hiv/aids/UNDP_HIV_Transgender_report_Lost_in_Transition_May_2012.pdf)> accessed 23 November 2019.

transgender people still commonly occurs in many countries across the region. Not only does it include sexual behaviours, but cross-dressers are also subject to be illegal, according to laws. Unfortunately, this puts more risks against transgender people to receive unfair treatment in the justice process.

## 2.3 TRANS WOMEN: SOCIAL EXCLUSION AND PROTECTION

### 2.3.1 *Trans women and social exclusion*

In many situations, trans women are subject to discrimination, which is referred to as unjustified or unequal treatment. The Council of Europe distinguishes three types of discrimination: direct discrimination, indirect discrimination and experienced discrimination.<sup>34</sup> In terms of trans women, these are based on SOGIE. First, direct discrimination is the direct detrimental or discriminatory practices against other persons or a group of persons who feel they are treated unequally compared to another person or a group of people. On the other hand, indirect discrimination means that a specific provision or criteria obstructs a person or a group of people to feel disadvantageous compared to others. Last, it is experienced discrimination from being discriminated.

Furthermore, transgender people confront homophobia and transphobia, which are applied to a feeling of fear or hatred towards lesbian, gay, bisexual and transgender people.<sup>35</sup> Takács researches the situations of LGBTIQ+ people in Europe and finds that they continue to face discrimination and social exclusion.<sup>36</sup> Not only are LGBTIQ+ people the main target of violence and abuses, but they are also treated unequally based on their sexual orientation and gender identity. Young

<sup>34</sup> Commissioner for Human Rights, Council of Europe, 'Discrimination on grounds of sexual orientation and gender identity in Europe: Background Document' (Council of Europe 2011) <<https://rm.coe.int/discrimination-on-grounds-of-sexual-orientation-and-gender-identity-in/16809079e2>> accessed 6 December 2019.

<sup>35</sup> African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations, 'Ending violence and other human rights violations based on sexual orientation and gender identity' (Pretoria University Law Press 2016) <[www.ohchr.org/Documents/Issues/Discrimination/Endingviolence\\_ACHPR\\_IACHR\\_UN\\_SOGI\\_dialogue\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf)> accessed 26 November 2019.

<sup>36</sup> Judit Takács, 'Social exclusion of young lesbian, gay, bisexual and transgender (LGBT) people in Europe' (ILGA Europe and IGLYO 2006) <[www.salto-youth.net/downloads/4-17-948/ReportSocialExclusionIGLYOilga.pdf](http://www.salto-youth.net/downloads/4-17-948/ReportSocialExclusionIGLYOilga.pdf)> accessed 5 December 2019.



LGBTIQ+ people become vulnerable because they are marginalised by family and society. To understand the phenomenon where LGBTIQ+ people are excluded from society, Takács brings different definitions of social exclusion. It is stated that political, economic and societal processes distance different groups of people and communities to inferior positions and obstruct them from participation of public services and social life. Takács further explains that LGBTIQ+ people are excluded because they are not legally recognised which affect their access to fundamental rights as citizens and members of communities where heteronormativity functions.

A publication by the Joint UN Programme on HIV/AIDS states that the expression of gender identity leads to social exclusion and marginalisation of transgender.<sup>37</sup> At their young age, some transgender people experience hardship in family acceptance; thus, they become homeless and face physical abuses and mental illness. As a result, they can end up becoming sex workers, while approximately 19% of the trans women around the world are affected by Human Immunodeficiency Virus (HIV). Transgender people also experience verbal abuses and violent attacks on the grounds of their gender identity and expression. With large social stigmatisation, transgender people encounter discrimination in public services such as healthcare systems. In many cases, transgender people who belong to particular ethnic minorities or are migrants are even more deeply marginalised by society.

Socias and others explain that discrimination against transgender people toward, which finally results in them becoming sex workers.<sup>38</sup> The research provided an example of Argentina, where the Gender Identity Law was introduced in 2012. The Gender Identity Law allows the change of legal gender in accordance with the right to self-defined gender. Moreover, the law supported the related official documents such as a birth certificate and an identity card to be changed accordingly. The research deployed a quantitative method by surveying 452 trans women in Argentina regarding the Gender Identity Law. The results of the study find that although the identity card assists them in accessing the right to

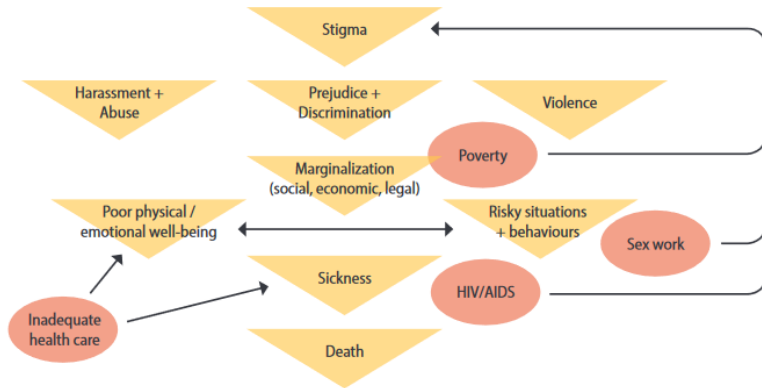
<sup>37</sup> Joint United Nations Programme on HIV/AIDS, *The Gap Report 2014* (UNAIDS 2014) <[www.unaids.org/sites/default/files/media\\_asset/UNAIDS\\_Gap\\_report\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/UNAIDS_Gap_report_en.pdf)> accessed 6 December 2019.

<sup>38</sup> Maria Eugenia Socias and others, 'Towards Full Citizenship: Correlates of Engagement with the Gender Identity Law among Transwomen in Argentina' (2014) 9(8) PLoS ONE 1 e105402 DOI 10.1371/journal.pone.0105402.



self-defined gender, the process of obtaining the identity card remains problematic toward rights to healthcare and employment. In addition, the change of legal gender helps Argentinian transgender people to give up working in the sex industry. As a result, social stigmatisation decreases, while their living status improves.

Figure 2 *The stigma-sickness slope*<sup>39</sup>



Winter presents a concept of the stigma-sickness slope in order to explain the lived experiences of transgender people in the Asia-Pacific. In the early stage, transgender people face a set of stigma, including prejudice and discrimination, harassment and abuse, and violence, which later relocate them to the society’s margins in terms of social, economic and legal conditions. At this position, transgender people engage with poor physical and emotional well-being as part of non-inclusive healthcare as well as risky situations and behaviours. In the end, they become sick and may die.<sup>40</sup> In the diagram, Winter also proposes that poverty, sex work and HIV/Acquired Immune Deficiency Syndrome (AIDS) all return to stigma where transgender people are recognised as

<sup>39</sup> Sam Winter, ‘Lost in Transition: Transgender People, Rights and HIV Vulnerability in the Asia-Pacific Region’ (United Nations Development Programme 2012) 13 <[www.undp.org/content/dam/undp/library/hivaids/UNDP\\_HIV\\_Transgender\\_report\\_Lost\\_in\\_Transition\\_May\\_2012.pdf](http://www.undp.org/content/dam/undp/library/hivaids/UNDP_HIV_Transgender_report_Lost_in_Transition_May_2012.pdf)> accessed 23 November 2019.

<sup>40</sup> Sam Winter, ‘Lost in Transition: Transgender People, Rights and HIV Vulnerability in the Asia-Pacific Region’ (United Nations Development Programme 2012) 13 <[www.undp.org/content/dam/undp/library/hivaids/UNDP\\_HIV\\_Transgender\\_report\\_Lost\\_in\\_Transition\\_May\\_2012.pdf](http://www.undp.org/content/dam/undp/library/hivaids/UNDP_HIV_Transgender_report_Lost_in_Transition_May_2012.pdf)> accessed 23 November 2019.

unnatural, mentally disordered, sexually deviant, deceptive or immoral against religious beliefs.

Lenning and Buist explore social, psychological and economic challenges that transgender individuals experience. The results find that it is difficult for some transgender persons to be accepted or included in the community. Many of them are afraid of the process of coming out, thereby, many of them conceal their identity at workplaces or schools. Still, some transgender persons cannot avoid social challenges, based on their SOGIE, for instance, job application rejection or humiliation.<sup>41</sup> Lenning and Buist point out that transgender persons may also face an economic challenge when they want to undergo hormone therapy and sex reassignment surgery, due to its high expenditure. This situation would become much harder for those that are unemployed. In addition to that, the issue of bathrooms is what transgender persons always find difficult to deal with. Using the public bathroom risks their personal safety if they are found and reported. Thus, many of them refuse to use the public bathroom to avoid future conflict. In the end, Lenning and Buist suggest that voices of transgender individuals should be empowered in order to liberate them from pain and suffering.

Delliswararao and Hangsing categorise three types of social exclusion that trans women in India (hijra) face.<sup>42</sup> Despite legal recognition in 2014, hijra remain excluded from socio-cultural participation, political participation and economic activities. First, trans women are excluded from Indian society because of the limited understanding toward sexual orientation and gender identity. Many families do not tolerate or accept trans women as their family members because they may bring shame to the families. As a result, they run away from their parents without education or employment. Public authorities, such as police and medical professionals, still discriminate against and seek advantages from trans women. In term of exclusion from political participation, without identity recognition, trans women would likely encounter many issues, ranging from the right to participate in government and decision-making process to the right to association. Lastly, trans women

<sup>41</sup> Emily Lenning and Carrie L Buist, 'Social, psychological and economic challenges faced by transgender individuals and their significant others: gaining insight through personal narratives' (2013) 15(1) *Culture, Health & Sexuality* 44.

<sup>42</sup> Konduru Delliswararao and Chingneikim Hangsing, 'Socio-Cultural Exclusion and Inclusion of Trans-genders in India' (2008) 5(1) *International Journal of Social Sciences and Management* 10.

are excluded from economic activities and social security as they are denied access to both skilled and unskilled employment. Some of them, thus, are left behind from the social welfare scheme, such as life and health insurance, provided by the state. In conclusion, Delliswararao and Hangsing suggest that the state adopt appropriate legal provisions to ensure the rights of and justice for trans women. Moreover, the state should provide for a comfortable transitioning process and emphasise physical and mental health problems that would jeopardise the lives of trans women.

Likewise, Khan and others find that transgender persons in Bangladesh (thirunangai) also confront exclusion from the society, as they are located in the extreme edge of the margin.<sup>43</sup> Their socio-political space, thus, is limited because legal gender recognition is not yet legalised. In addition to that, they become victims of physical, sexual and verbal abuses, which leads to negative impacts on their physical and mental health. Khan and others assert that trans women have faced discrimination since their early childhood from their families and schools. When they are grown up, they cannot get away from the problem of identity crisis. Some of them live as both male and female. At work, they are seen as 'sexual pollution,' which humiliates and pressures them to resign. Unemployment leaves many trans women at risk of sexually transmitted infections (STIs), specifically HIV/AIDS, as they end up working as sex workers. Access to public health is difficult when their identity is revealed. Khan and others urge that gender, sexual and citizenship rights of transgender persons in Bangladesh should be guaranteed. Male and female genders are socially constructed and should not obstruct the rights of trans women from protection.

Arlee, Cowperthwaite and Ostermeyer discuss the double discrimination and stigma faced by transgender persons as a result of the intersectionality of their sexual and racial minorities.<sup>44</sup> As double-minority populations, transgender persons continue to encounter more complex circumstances. Arlee, Cowperthwaite and Ostermeyer describe that double-minority transgender persons face a higher level

<sup>43</sup> Sharful Islam Khan and others, 'Living on the Extreme Margin: Social Exclusion of the Transgender Population (Hijra) in Bangladesh' (2009) 27(4) *Journal of Health, Population and Nutrition* 441.

<sup>44</sup> Lenore Arlee, Robyn Cowperthwaite and Britta K Ostermeyer, 'Facing Stigma and Discrimination as Both a Racial and a Sexual Minority Member of the LGBTQ+ Community' (2019) 49(10) *Psychiatric Annals* 441.

of prejudice, discrimination and social stigma, compared to those, for instance, who are middle class white transgender. Particularly in the cisgender heterosexist society, which pathologises transgender, they cannot disclose their identity and status, nor receive family and community support. Due to their identity concealment, double-minority transgender persons lack access to health care services. Arlee. Cowperthwaite and Ostermeyer emphasis that black trans women in the United States have the highest rates of HIV, compared to other racial (minority) women and trans women. Furthermore, racial minority transgender persons are targeted as victims of violence and hate crimes, due to not only their sexual minority, but also political belief, race or religion. Because of these risks of violence and discrimination, racial minority trans women end up with mental health problems, such as anxiety or distress.

Trans women deserve the protection and promotion of their human rights. In this regard, legal recognition of trans women should be stipulated in both international and domestic human rights standards. They are entitled to the same rights and freedoms in civil and political, as well as economic, social and cultural aspects, compared to males and females. The next section, thus, draws different protection mechanisms for trans women's human rights.

### *2.3.2 Human rights protection mechanisms for trans women*

Mule, McKenzie and Khan examine the roles of the UN in recognising or legitimising sexual orientation and gender identity toward the social work perspectives.<sup>45</sup> It is argued that although the issues of LGBTIQ+ people are recognised at the UN level, there is a complex and inconsistent legitimisation of advocacy at the global level due to cultural diversity and political willingness. From the perspectives of social workers, the issues of LGBTIQ+ people are not directly addressed, but they are undermined by other broad issues such as refugees or HIV. In Canada, when all human rights legislation against discrimination on the grounds of sexual orientation and gender identity were enacted, there were fewer

<sup>45</sup> Nick J Mule, Cameron McKenzie and M. Khan, 'Recognition and Legitimation of Sexual Orientation and Gender Identity (SOGI) at the UN: A Critical Systemic Analysis' (2016) 46 *British Journal of Social Work* 2245.

complaints on gender identity from transgender people.<sup>46</sup>

Even though gender identity and expression are not stipulated under international human rights laws, trans women's rights are protected by the inherent dignity and the principles of inalienable equality and non-discrimination. Thus, they can also seek justice through these mechanisms.<sup>47</sup> Van den Brink and Dunne list out various treaties and conventions. Discrimination against trans women on the grounds of sexual orientation and gender identity is considered as part of making distinction of one's rights.<sup>48</sup> Article 1 of the Universal Declaration of Human Rights clearly states that all human beings are born free and equal in dignity and rights.<sup>49</sup> Similarly, article 2 on state protection, article 3 on equal rights and article 26 on equality before the law stated in the International Covenant on Civil and Political Rights (ICCPR) are also useful for the protection of trans women's civil and political rights.<sup>50</sup> In terms of economic, social and cultural rights, article 2 on the state's progressive realisation of rights and article 3 on equal rights stated in the International Covenant on Economic, Social and Cultural Rights are the focal points of the issues.<sup>51</sup>

The HRC resolution A/HRC/RES/17/19 was adopted by South Africa in July 2011 in order to express 'grave concern' on inequality, violence and discrimination on the grounds of sexual orientation and gender identity. Discriminatory laws that penalise sexual orientation and gender identity must be removed. Moreover, discriminatory practices on fundamental rights must necessarily be revoked. There should be legal gender recognition on gender and name changes on official documents to meet preferred identities. In addition, the protection mechanisms must be established, and the state or non-state actors must hold perpetrators accountable for any human rights violations. Another

<sup>46</sup> Brenda Picard, 'Gender Identity: Developments in the Law and Human Rights Protections' (2018) 69 *University of New Brunswick Law Journal* 127.

<sup>47</sup> United Nations General Assembly Res 17/19 (14 July 2011) UN Doc A/HRC/RES/17/19.

<sup>48</sup> Marjolein Van den Brink and Peter Dunne, 'Trans and intersex equality rights in Europe – a comparative analysis' (European Commission 2018). <[https://ec.europa.eu/info/sites/info/files/trans\\_and\\_intersex\\_equality\\_rights.pdf](https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf)> accessed 23 November 2019.

<sup>49</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 1

<sup>50</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>51</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICESCR).

channel for mobilising concerns on human rights violations against trans women is through the appointment of the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation for a three-year term overseeing human rights issues on sexual orientation and gender identity. This is part of the auspicious historical moment of the UN General Assembly's Resolution A/HRC/RES/32/2 adopted by the HRC on 30 June 2016 on the protection against violence and discrimination based on sexual orientation and gender identity. Furthermore, the Human Rights Committee, where experts on human rights issues are appointed, is another focal point for voicing rights.<sup>52</sup>

Besides, the different themes of the conventions can be applied based on its relevance of the concerns such as the Convention on the Rights of the Child<sup>53</sup> or the Convention on the Rights of Persons with Disabilities.<sup>54</sup> According to the UN Office of the High Commissioner for Human Rights' Factsheet on International Human Rights Laws and Sexual Orientation and Gender Identity, the states have obligations to take these practical steps in order to safeguard LGBTIQ+ people as follows. First, ensure protection from homophobic and transphobic violence and prevention of torture and cruel, inhuman and degrading treatment. Second, repeal all laws that criminalise gender identity and expression as well as sexual orientation in the private sphere. Third, prohibit and prevent discrimination and stigmatisation based on sexual orientation and gender identity. Last, promote freedom in all aspects.<sup>55</sup>

Another advanced step has been taken by the Council of Europe which has stated that all member states should legalise the change of legal gender and name to reflect their identity on the official documents in order to uphold their lives.<sup>56</sup> It mentions that transgender people are vulnerable to human rights violations when their gender identity does

<sup>52</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICESCR).

<sup>53</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)

<sup>54</sup> Convention on the Rights of Persons with Disabilities (adopted 13 October 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD)

<sup>55</sup> United Nations Office of the High Commissioner, 'Fact sheet International Human Rights Law and Sexual Orientation & Gender Identity' (2017) <[www.unhcr.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf](http://www.unhcr.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf)> accessed 26 November 2019.

<sup>56</sup> Council of Europe, 'Protecting Human Rights of Transgender Persons: A short guide to legal gender recognition' (Council of Europe 2015) <<https://rm.coe.int/1680492119>> accessed 6 December 2019.

not match their legal gender on official documents. At the same time, they are likely to be excluded and mistreated from society. According to the European Court of Human Rights' judgments, *B v France*,<sup>57</sup> *Goodwin v the United Kingdom*<sup>58</sup> and *I v the United Kingdom*,<sup>59</sup> refusal of legal recognition towards transgender persons is a violation of the European Convention on Human Rights' (ECHR) article 8 on right to respect for private and family life. In 2012, the Council of Europe issued Recommendation CM/Rec(2010)5 that provides recommendations to remove discriminatory requirements and complex procedures. This document not only did mention about the right to change legal gender, but it also further ensured transgender people's right to marry.<sup>60</sup>

The Yogyakarta Principles, on behalf of a coalition of human rights organisations, addresses a variety of human rights violations faced by people with non-binary sexual orientation and gender identity.<sup>61</sup> It affirms the states' obligations to respect, protect and fulfil human rights. In addition to that, the Yogyakarta Principles Plus 10 adds more on gender expression and sex characteristics to complement the previous document. Progressive realisation such as legal recognition and economic, social and cultural rights are demonstrated in this document. Principle 33 focuses on the right to freedom from criminalisation and sanctions on the basis of sexual orientation, gender identity and expression, and sexual characteristics.<sup>62</sup> As a result, states must revoke, reform or decriminalise these laws targeting particular sexual orientation, gender identity and expression, and sexual characteristics. Furthermore, states must ensure that everyone has access to justice and remedy, while legal officers must be trained to be held accountable for criminalisation and sanction.

<sup>57</sup> *B v France* App No 13343/87 (ECtHR, 25 March 1992).

<sup>58</sup> *Goodwin v United Kingdom* App No 17488/90 (ECtHR, 27 March 1996).

<sup>59</sup> *I v United Kingdom* App no 25680/94 (ECtHR, 11 July 2002).

<sup>60</sup> *I v United Kingdom* App no 25680/94 (ECtHR, 11 July 2002).

<sup>61</sup> Sonia Onufer Correa and Viti Muntarbhorn, 'Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity' (2007) <<https://yogyakartaprinciples.org/principles-en/>> accessed 23 December 2019.

<sup>62</sup> Mauro Cabral Grinspan and others, 'The Yogyakarta Principles Plus 10: Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (2017) <<https://yogyakartaprinciples.org/principles-en/>> accessed 23 November 2019.

The International Planned Parenthood Federation published a declaration on sexual rights to promote a human rights-based approach to sexual and reproductive health rights as well as particular identities.<sup>63</sup> The declaration is composed of the preamble, seven principles and ten articles. The declaration is grounded on the principles of equality and non-discrimination. Furthermore, it demands that states have obligations to respect, protect, and fulfil sexual rights. As stated in its article 5, on the right to personal autonomy and recognition before the law, no one shall be subjected to criminalisation based on sexual orientation and gender identity. In addition to that, article 5 also adds that medical requirements for legal recognition of gender identity are unnecessary, but identity documents that reflect one's gender identity must be obtained.

## 2.4 RIGHT TO CHANGE LEGAL GENDER

In the Yogyakarta Principles Plus 10, the right to change legal gender is mentioned in Principle 31 on legal recognition without assignment or disclosure of their sexual orientation, gender identity and expression, and sexual characteristics.<sup>64</sup> Besides, they have the right to obtain identity documents that reflect their gender identity and expression without any barriers such as medical or medical proof, economic or marital status. The process must be quick, transparent and accessible, while gender marker options must be available for multiple alternatives. Second, Principle 32 on the right to bodily and mental integrity draws on self-determination and autonomy. The principle aims to address the issues of stigma, discrimination and stereotypes based on SOGIE, including children's rights. Medical or surgical modifications are voluntary and must not be used for legitimate purposes.

<sup>63</sup> International Planned Parenthood Federation (IPPF), 'Sexual rights: an IPPF declaration' (IPPF 2015) <[www.ippf.org/sites/default/files/sexualrightsiippfdeclaration\\_1.pdf](http://www.ippf.org/sites/default/files/sexualrightsiippfdeclaration_1.pdf)> accessed 26 November 2019.

<sup>64</sup> Mauro Cabral Grinspan and others, 'The Yogyakarta Principles Plus 10: Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (2017) <<https://yogyakartaprinciples.org/principles-en/>> accessed 23 November 2019.



Divan and others find that although there are international mechanisms that protect the rights of transgender people,<sup>65</sup> they encounter human rights violations from their national laws, policies and practices, including the complex procedures of obtaining the change of identity card. As a result, economic and social discrimination and exclusion against transgender people remain and lead to violence. They struggle with rights to education, healthcare services, employment and accommodation. Divan and others further analyses that transgender people may be subject to criminalisation from the laws. Thus, they are hardly able to seek justice from the authorities, while perpetrators are unpunished. Unfortunately, they are harassed by the police, who they report the cases to.

Divan and others state that transgender people must be legally recognised so that their rights are protected by the state. They must be able to choose their preferred gender and name that appear on the official documents. Furthermore, the state must decriminalise transgender people to fulfil their human rights and dignity. Divan and others also studied different legal and practical measures that many states in different regions had taken to recognise transgender people. While some countries require sex reassignment surgery, some allow transgender people without surgery to change their legal gender such as Malta, Denmark. Besides, Pakistan, India and Nepal who categorise transgender as a third gender.<sup>66</sup> At the end, the article discussed about advocacy and empowerment for transgender people to their rights.

Couch and others criticise the difficulty and frustration around changing of legal gender procedures in Australia and New Zealand because the recognition of transgender people in these two states requires sex reassignment surgery and complex series of documents.<sup>67</sup> Couch and others describe the TransNation survey conducted in 2007 which asked 287 respondents in both Australia and New Zealand about sexual orientation and gender identity. The research found that the responses varied. One group of respondents preferred to be categorised as 'male' and 'female' whereas another preferred non-binary

<sup>65</sup> Vivek Divan and others, 'Transgender social inclusion and equality: a pivotal path to development' (2016) 19(3Suppl 2) *Journal of International AIDS Society* 1

<sup>66</sup> Third gender refers to the third gender category in those states that do not follow the binary concept.

<sup>67</sup> Murray Couch and others, 'Transgender people and the amendment of formal documentation: Matters of recognition and citizenship' (2008) 17(3) *Health Sociology Review* 280.

concept is ‘transman’ or ‘transgender’.<sup>68</sup> Some transgender people in New Zealand faced a problem during their job application in which the name on the birth certificate did not match the personal appearance.<sup>69</sup> Documentation change could only happen when sex reassignment surgery is conducted and the request is submitted. Nevertheless, the change of legal gender might also cause problems of uncomfortable procedures for some transgender people. In Australia, transgender people cannot get married after they are legally recognised as ‘female’. Besides, the official documents label them as ‘previously registered in another name’. It was mentioned that ‘generally there were no problems with having my documentation changed other than the embarrassment of actually having to do it’.<sup>70</sup>

Carrera, Depalma and Lameiras select the case of the Spanish Gender Identity Law, which started in 2007 and could be complicated and inconsistent.<sup>71</sup> Even though the law permits the change of legal gender, it pathologises transgender people to gender dysphoria or gender identity disorder. Unlike other countries, transgender people in Spain who wish to have their legal gender changed are not required to undergo sex reassignment surgery. However, they must be under a medical doctor’s treatment for sex reassignment surgery for at least two years. In addition to that, the medical report identifies the stability of gender dissonance which guarantees that they will remain in the current identity. Moreover, one is required to conform to the psychological, judicial and biological justifications in order to receive the change of legal gender. At the end, the article suggests the removal of gender from the official documents to deter discrimination.

Voli criticises the relationship between transgender people, citizenship and pathologisation in Italy.<sup>72</sup> In order to acquire citizenship

<sup>68</sup> Murray Couch and others, *TranzNation: A Report on the Health and Wellbeing of Transgender People in Australia and New Zealand* (Australian Research Centre in Sex, Health and Society, La Trobe University 2007).

<sup>69</sup> Murray Couch and others, ‘Transgender people and the amendment of formal documentation: Matters of recognition and citizenship’ (2008) 17(3) *Health Sociology Review* 280.

<sup>70</sup> Murray Couch and others, ‘Transgender people and the amendment of formal documentation: Matters of recognition and citizenship’ (2008) 17(3) *Health Sociology Review* 280.

<sup>71</sup> Maria Victoria Carrera, Renee Depalma and Maria Lameiras, ‘Pathologizing gender identity: An analysis of Spanish law and the regulation of gender recognition’ (2013) 22(2) *Journal of Gender Studies* 206.

<sup>72</sup> Stefania Voli, ‘(Trans)gender citizenship in Italy: a contradiction in terms? From the parliamentary debate about Law 164/1982 to the present’ (2018) 23(2) *Modern Italy* 201 DOI:10.1017/mit.2018.8.

regarding the Law no 164/1982, transgender people are forced to accept the pathologisation as a result of their gender non-conformity diagnosed by the medical institutions. The right to change legal gender and name requires both documents and sex reassignment surgery. Voli argues that citizens' bodies should not be suppressed under the state's control because one has the right to self-determination and freedom of choice to choose their preferred gender without sex reassignment surgery. However, transgender people socially remain in the margin of the gender binary social structure.

Papic analyses the right to change legal gender legalised in 2012 by the Serbian Constitutional Court which aims to satisfy the state's intention to integrate into the European Union.<sup>73</sup> Papic refers to article 23 of the Serbian constitution<sup>74</sup> and article 8 of the ECHR in terms of violation against the right to privacy. Moreover, the state must play its role in positively realising the protection and promotion of the citizens' fundamental rights. Nevertheless, medical certification proving sex reassignment surgery is required to change the legal gender assigned at birth. The article also notes that while upholding the right to change legal gender, other related issues remain, such as marriage and adoption issues. Although the country has taken the progressive legal steps, the action plan is failed to be enforced. Finally, the article also remarks that the right to change legal gender is not widely enforced across the nation. There are only two municipalities in Belgrade working on the issue. Thus, discrimination against transgender people in Serbia remains unless they move to the designated areas.

Thomas Hammarberg, the former Council of Europe Commissioner for Human Rights, has stated that legal gender recognition is complicated from its legal and medical requirements, and legal recognition of transgender people becomes a challenge.<sup>75</sup> First, sterilisation, hormone treatment, sex reassignment surgery, psychiatric assessment and proof of staying in the new gender for an extended period of time are mandatory. In terms of legal interpretation, there are many countries such as Austria, Germany, Switzerland, the Netherlands and Sweden that declare that the requirements on sex reassignment surgery and/or psychological

<sup>73</sup> Tatjana Papic, 'Right to Privacy and Legal Recognition of Gender Identity in Serbia - Constitutional Court of Serbia at Work' (2016) 64(3) *Annals FLB - Belgrade Law Review* 113.

<sup>74</sup> Constitution of the Republic of Serbia 2006.

<sup>75</sup> Council of Europe, 'Protecting Human Rights of Transgender Persons: A short guide to legal gender recognition' (Council of Europe 2015) <<https://rm.coe.int/1680492119>> accessed 6 December 2019.

assessment are unconstitutional, and these violate the right to private life. Second, the age limit also poses discrimination against the legal recognition of transgender people. The third challenge for legal gender change is procedures. The Council of Europe emphasises that the process of legal gender and name change must be quick, transparent and accessible.

Picard discusses the difficulties in the lives of transgender people in Canada because identification documents were challenging when one's lived gender does not conform to the gender assigned at birth.<sup>76</sup> Although it is not necessary for transgender people in Canada to have surgery before obtaining the new identity, transgender people in Ontario, Canada are required to submit a doctor's certificate certifying that the sex change is appropriate.

The Council of Europe addresses the fact that even though the legal gender change procedures are established, length and transparency can be problematic.<sup>77</sup> In some places, transgender people do not have enough information or are unable to access information. Moreover, fees and supplement requirements such as court proceedings and doctor certificates are requested from the authorities as well as the insurance companies. The Council of Europe also reports that during the post-legal gender change, some transgender people are faced with a breach of their right to privacy when their medical records or personal information that indicates the previous gender are revealed. For the name change, many countries in Europe also have a similar requirement that it is compulsory to have medical confirmation for surgical treatment or diagnosis of gender dysphoria. In Malta, a transgender person must submit for court proceedings to authorise a name change.<sup>78</sup>

In South Asia, hijra has been recognised as the third gender in India since 2014 but many transgender persons find it difficult to apply. Delliswararao and Hangsing point out that the procedures of

<sup>76</sup> Brenda Picard, 'Gender Identity: Developments in the Law and Human Rights Protections' (2018) 69 *University of New Brunswick Law Journal* 127.

<sup>77</sup> Commissioner for Human Rights, Council of Europe, 'Discrimination on grounds of sexual orientation and gender identity in Europe: Background Document' (Council of Europe 2011) <<https://rm.coe.int/discrimination-on-grounds-of-sexual-orientation-and-gender-identity-in/16809079e2>> accessed 6 December 2019.

<sup>78</sup> Commissioner for Human Rights, Council of Europe, 'Discrimination on grounds of sexual orientation and gender identity in Europe: Background Document' (Council of Europe 2011) <<https://rm.coe.int/discrimination-on-grounds-of-sexual-orientation-and-gender-identity-in/16809079e2>> accessed 6 December 2019.

legal gender recognition in India are complicated.<sup>79</sup> One transgender person is required to have various proofs. As seen in this section, the right to change legal gender in many countries could be problematic and complex, even though legal recognition is in place. Specifically, various documents and steps that trans women are required to follow, for instance, psychological assessment or hormone therapy, may leave them with negative consequences.

## 2.5 SRI LANKA

Sri Lanka, officially the Democratic Socialist Republic of Sri Lanka, is an island geographically situated in the Indian Ocean and is part of South Asia. It was a colony of Portugal, Holland and Great Britain respectively under the name of Ceylon. The island's capital city is Sri Jayawardenepura Kotte, while the main city for economic transactions is Colombo. As a unitary state, Sri Lanka's political system is a semi-presidential constitutional republic. In terms of demographic statistics, Sri Lanka's total population is 21.67 million people.<sup>80</sup> Approximately 74.9% are Sinhalese and 11.1% are Sri Lanka Tamils. In terms of religions, 70.1% of the total population are Buddhist, while 12.6% are Hindu. English, according to the constitution, is a link language, whereas Sinhala and Tamil are official languages.<sup>81</sup>

After Sri Lanka became independent from the British colony in 1948, the country has been ruled by the majority Sinhalese with the ethnocentric policies, which finally led to the establishment of the extremist group, the Liberation of Tigers of Tamil Eelam (LTTE) in 1972. The LTTE is a structured ethnic armed group who fought against the Sinhalese-led government violently which resulted in casualties and destruction.

<sup>79</sup> Konduru Delliswararao and Chingneikim Hangsing, 'Socio-Cultural Exclusion and Inclusion of Trans-genders in India' (2008) 5(1) *International Journal of Social Sciences and Management* 10.

<sup>80</sup> Registrar General's Department, 'Mid-year Population Estimates by Age Group and Sex, 2014 – 2019' (*Department of Census and Statistics*, 2019) <[www.statistics.gov.lk/PopHouSat/VitalStatistics/MidYearPopulation/Mid-year%20population%20by%20age%20group.pdf](http://www.statistics.gov.lk/PopHouSat/VitalStatistics/MidYearPopulation/Mid-year%20population%20by%20age%20group.pdf)> accessed 2 December 2019.

<sup>81</sup> Department of Census and Statistics, 'Census of Population and Housing of Sri Lanka, 2012' (*Department of Census and Statistics*, 2012) <[www.statistics.gov.lk/PopHouSat/CPH2011/Pages/Activities/Reports/FinalReport/Population/Table%20A4.pdf](http://www.statistics.gov.lk/PopHouSat/CPH2011/Pages/Activities/Reports/FinalReport/Population/Table%20A4.pdf)> accessed 16 September 2019.

Although the civil war ended in 2009, the ethnic division between the Sinhalese and Tamils remain. There are contesting human rights issues influenced by identity politics and driven by the cultural and political discriminatory laws and policies.<sup>82</sup> <sup>83</sup> Moreover, the religious tension, particularly against Muslims and Christians, has risen and become an international concern. Religious and ethnic minorities are often targeted to human rights violations such as arbitrary arrest and detention.<sup>84</sup> The development of Buddhist fundamentalist groups such as Bodu Bala Sena or Buddhist Power Force presents the lack of effective legal enforcement and discriminatory treatment between different ethnic groups.<sup>85</sup> Further details related to the state of LGBTIQ+ individuals in Sri Lanka are described in Chapter 4.

<sup>82</sup> Gehan Gunatilleke, 'The Constitutional Practice of Ethno-Religious Violence in Sri Lanka' (2018) 13(2) *Asian Journal of Comparative Law* 359.

<sup>83</sup> Seni Mohamed Aliff, 'Post-War Conflict in Sri Lanka: Violence against Sri Lankan Muslims and Buddhist Hegemony' (2015) 59 *International Letters of Social and Humanistic Sciences* 109.

<sup>84</sup> Amnesty International, 'Sri Lanka 2017/2018' (*Amnesty International*, 2019) [www.refworld.org/publisher/AMNESTY/LKA\\_5a9938624.0.html](http://www.refworld.org/publisher/AMNESTY/LKA_5a9938624.0.html) accessed 2 December 2019.

<sup>85</sup> Seni Mohamed Aliff, 'Post-War Conflict in Sri Lanka: Violence against Sri Lankan Muslims and Buddhist Hegemony' (2015) 59 *International Letters of Social and Humanistic Sciences* 109.

3.

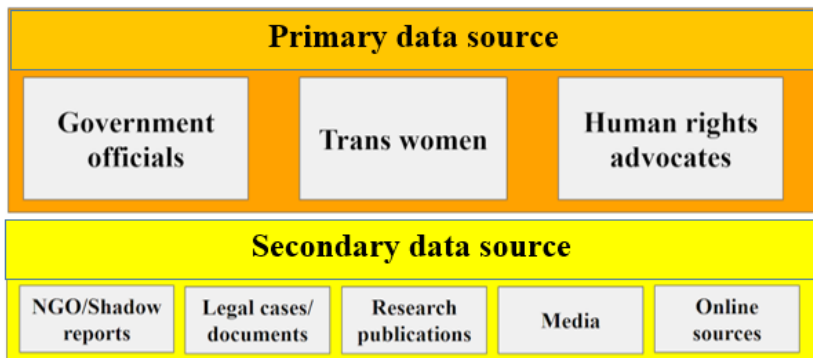
RESEARCH METHODOLOGY

3.1 DATA TYPE

This research employs a qualitative research methodology. Based on Creswell and Poth who list five different approaches to a qualitative methodology, this research is a case study research with an intrinsic category, in which it aims to understand the contemporary situations through individuals, organisations and documents.<sup>86</sup>

3.2 DATA SOURCES

*Figure 3 Data sources of this research*



<sup>86</sup> John W Creswell and Cheryl N Poth, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (SAGE Publications 2018).

The sources of data in this research consist of two types, which are primary and secondary sources. The researcher employed non-probability sampling to determine the sample size. With the case study research, this research selected the participants who include four trans women, two human rights advocates (one is also a trans woman human rights activist) and one government official. First, four Sri Lankan trans women are selected as the main informants of the study in order to explore their experiences with the procedures of the right to change legal gender. Second, human rights advocates, including a human rights lawyer and a LGBTIQ+ human rights activist, are selected to represent a group of human rights advocates for trans women's rights on legal gender change in Sri Lanka. Third, government officials, who work in the scope of human rights, are selected to be part of the primary sources. Since trans women are considered an infinite population, the researcher employed purposive sampling method by selecting four samples of trans women.<sup>87</sup> These four trans women must have the characteristics as follows; (1) be a Sri Lankan, (2) be a trans woman, (3) experience legal gender change and (4) live in Colombo. For human rights advocates, the researcher also employed a purposive sampling method by selecting two LGBTIQ+ individuals working on assisting trans women in legal gender change.

The secondary sources include five main sources shown in Figure 3 above, including (1) shadow reports from the non-governmental organisations (NGOs) submitted to the HRC and NGOs annual or activity reports, (2) legal cases and documents, (3) research publications and journal articles, (4) newspapers, television programmes, podcasts and magazines and (5) social media and websites.

### 3.3 DATA COLLECTION

According to the research plan, the researcher aimed to collect data in the field from March to May 2020 in Sri Lanka. The research employs the field data collection using semi-structured interviews with four trans women. For human rights advocates and a government official, in-depth

<sup>87</sup> Lawrence A Palinkas and others, 'Purposeful sampling for qualitative data collection and analysis in mixed method implementation research' (2018) 42(5) *Adm Policy Ment Health* 533 DOI 10.1007/s10488-013-0528-y.



interviews are conducted by the researcher. As the topic is sensitive, the researcher declared guidelines to data collection, which are presented in the ethical consideration part. Besides the experiences collected from trans women and the relevant stakeholders, documentary review on legal enforcement and policy implementation are necessary in order to answer the research questions. The secondary data collection is derived from five sources shown in Figure 3 above. The researcher began with the literature review over these documents, then summarises and synthesises for analysis.

### 3.4 LIMITATIONS OF RESEARCH DESIGN

There are some limitations of research design in which the researcher has to be concerned. First, non-conforming gender identity and expression in Sri Lanka are considered criminalised. Thus, the issue the researcher studies is sensitive as gender stigmatisation and discrimination exist. Ethical considerations must be carefully employed. Second, Sri Lanka is a multicultural society in terms of religions, ethnicities, languages and gender identities. Since the researcher has never conducted any in-depth study about Sri Lanka, it is necessary to prepare some understandings of the socio-cultural contexts of the research site. Third, there are time constraints due to the nature of a one-year study programme.

Fourth, the researcher is not a native speaker of either Sinhala or Tamil. Therefore, it was necessary to ensure accurate data collection by having an interpreter assist in interviews and documentary reviews. Hence, the interpreter must be reliable and have expertise in field research on this issue. This issue is also related to budget limitations as the researcher must be aware of budget allocation for translation expenses. Fifth, the researcher encountered difficulty in conducting field data collection because of the COVID-19 pandemic. There were some barriers to accessing some key informants ranging from trans women to healthcare professionals, as well as government officials. As a result, the research is more focused on documentary reviews and narrative-based analysis.

### 3.5 ETHICAL CONSIDERATION

The research is approved by the Institutional Review Board of the Institute for Population and Social Research, Mahidol University, prior to the data collection procedures. During the field research, the researcher must first receive consent from the interviewees and assure them that their identities remain confidential. In addition, the research background, objectives, questions and procedures are explained and must be communicated to the interviewees before the data collection. Moreover, the researcher requested the interviewee's permission for voice recording and hand-written notes, which are further permanently destroyed. All interviewees have their own right to refuse to answer any questions or/and withdraw from the interview at any time they feel uncomfortable. For an interviewee who prefers either Sinhala or Tamil as the medium of conversation, the researcher ensured that there was a reliable interpreter who has experience in the issue and the field research for prompt interpretation. Furthermore, the interpreter must comprehensively understand the research background, objectives, questions and ethical consideration before conducting the procedures. At the end of the interview, each interviewee was given a small gift for appreciation. The interviewees were divided into two groups as follows.

First, four trans women were chosen as a case study of this thesis. The primary concern is their security and privacy in terms of gender identity and expression. Particularly for trans women whose gender identity and expression do not conform with their legal gender, they might become further marginalised and vulnerable to discrimination and stigmatisation. The researcher kept their names confidential by asking the interviewees to provide their alias. Their personal information, such as addresses or workplaces, are not disclosed. Second, as the research explores the challenges and impacts of legal enforcement and policy implementation of the right to change legal gender, the relevant NGOs working on the issue of LGBTIQ+, particularly trans women, are selected as informants. The interview process was similar to the previous group, regarding confidentiality. Although most of the NGOs in Sri Lanka communicate in English daily, the interpreter must be ready at the interview procedure.

## 4.

## FINDINGS AND DISCUSSIONS

This chapter is a core of the research where findings and discussions are entailed. It begins with a narrative background of trans women in the post-civil war Sri Lanka in order to understand their dynamics of continuities and changes from legal to socio-cultural perspectives. After that, the chapter explains the existing implementation process of the right to change legal gender in Sri Lanka from the policy formulation to implementation and procedure. As a result, challenges of the existing implementation process of the right to change legal gender are unfolded. Later on, impacts of the aforementioned challenges to the lives of trans women in Sri Lanka are also discussed. In the end of this chapter, it also provides recommendations to the policy implementation.

## 4.1 LIVING LIVES AS TRANS WOMEN IN THE POST-CIVIL WAR SRI LANKA

4.1.1 *Legal and administrative perspective*4.1.1.1 *Constitution of Sri Lanka*

Unfortunately, none of the provisions in Sri Lanka's constitution explicitly protects and promotes the human rights of the LGBTIQ+ community, whereas SOGIE is not yet written.<sup>88</sup> Nerin Pulle, Deputy Solicitor General at the Attorney General's Department of Sri Lanka, stated that it is possible for the new constitution to guarantee sexual orientation.<sup>89</sup> Although Sri Lanka has ratified all international

<sup>88</sup> Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

<sup>89</sup> Lahiru Pothmulla, 'SL committed to non-discrimination based on sexual orientation: Nerin Pulle' (*Daily Mirror Online*, 17 November 2017) <[www.dailymirror.lk/article/SL-committed-to-non-discrimination-based-on-sexual-orientation-Nerin-Pulle-140616.html](http://www.dailymirror.lk/article/SL-committed-to-non-discrimination-based-on-sexual-orientation-Nerin-Pulle-140616.html)> accessed 8 April 2020.

human rights treaties and optional protocols, the country has not yet transcended them to domestic mechanisms.<sup>90</sup> Nevertheless, chapter 3 of the constitution is grounded on the fundamental rights of persons living in the country. Particularly, article 12 ensures that every person in Sri Lanka is legally equal before the law and entitled to equal protection of the law as stated below.<sup>91</sup>

Article 12(1) All persons are equal before the law and are entitled to the equal protection of the law.

Article 12(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds of race, religion, language, caste, sex or any one of such grounds.

Article 12(3) No person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

Besides article 12, chapter 3 of Sri Lanka's constitution can also be claimed when one's rights are violated. There are four main articles which might be found relevant to many of the human rights violations against LGBTIQ+ community in Sri Lanka:<sup>92</sup>

Article 10 Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

Article 11 No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 13 Every person is granted the freedom from arbitrary arrest, detention and punishment, and prohibition of retrospective penal legislation.

Article 14 Every person is entitled to freedom of speech, assembly, association, occupation, and movement.

<sup>90</sup> Women's Support Group, Sri Lanka, 'Not Gonna Take it Lying Down' (*Women and Media Collective*, 2014) <<https://womenandmedia.org/not-gonna-take-it-lying-down/>> accessed 10 April 2020.

<sup>91</sup> Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

<sup>92</sup> Equal Ground, 'My Rights, My Responsibilities' (Equal Ground 2019).

Although constitutional provisions are in place to protect and promote human rights of every person in Sri Lanka, criminalisation against LGBTIQ+ community is clearly stated in the Penal Code 1883 and Vagrants Ordinance 1841. The next section describes the legal elements that criminalise LGBTIQ+ community.

#### 4.1.1.2 *Penal Code 1883 and Vagrants Ordinance 1841*

With regards to the 1978 constitution and the 2017-2021 National Action Plan for the Protection and Promotion of Human Rights (NHRAP), as previously mentioned in the first chapter of this research, Sri Lanka's Penal Code<sup>93</sup> and Vagrants Ordinance<sup>94</sup> have still criminalised consenting adult same-sex sexual relations. Nerin Pulle, Deputy Solicitor General at the Attorney General's Department of Sri Lanka, stated that the reformed Penal Code is still in process, and it would erase the provisions that target and criminalise LGBTIQ+ individuals, in order to uphold international human rights standards.<sup>95</sup> In addition to that, the LGBTIQ+ community is often vulnerable to criminal charges against four major provisions as listed below:

Section 365 (Penal Code 1883) Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be punished with fine and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for injuries caused to such person.

<sup>93</sup> An Ordinance to Provide a General Penal Code for Ceylon 1883.

<sup>94</sup> An Ordinance to Amend and Consolidate the Law Relating to Vagrants 1841.

<sup>95</sup> Lahiru Pothmulla, 'SL committed to non-discrimination based on sexual orientation: Nerin Pulle' (*Daily Mirror Online*, 17 November 2017) <[www.dailymirror.lk/article/SL-committed-to-non-discrimination-based-on-sexual-orientation-Nerin-Pulle-140616.html](http://www.dailymirror.lk/article/SL-committed-to-non-discrimination-based-on-sexual-orientation-Nerin-Pulle-140616.html)> accessed 8 April 2020.

Section 365A (Penal Code 1883) Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of any act of gross indecency with another person, shall be guilty of an offence, and shall be punished with imprisonment of either the description for a term which may extend to two years or with fine or with both and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person.

Section 399 (Penal Code 1883) A person is said to 'cheat by personation' if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Section 07/1841 (Vagrants Ordinance 1841) (a) any person in or about any public place soliciting any person for the purpose of the commission of any act of illicit sexual intercourse or indecency, whether with the person soliciting or with any other person, whether specified or not; (b) any person found committing any act of gross indecency, or found behaving with gross indecency, in or about any public place; shall be guilty of an offence, and shall be liable on summary conviction to imprisonment of either description for a period not exceeding six months, or to a fine not exceeding one hundred rupees, or to both.

Table 1 above summarises the characteristics of these four sections that target LGBTIQ+ individuals. It is inevitable that transgender persons, particularly trans women, are among the most vulnerable to be subject against all charges.

*Table 1 Summary of the characteristics of laws that affect the lives of LGBTIQ+ individuals in Sri Lanka*

Section	Offence	Punishment
365 (Penal Code 1883)	Carnal intercourse against the order of nature with any man, woman or animal	Fine and maximum ten-year imprisonment If committed to a person younger than 18, fine and ten to 20-year imprisonment will be applied with compensation to the victim
365A (Penal Code 1883)	Act of gross indecency with another person in both public and private spaces	Fine and maximum two-year imprisonment If committed to a person younger than 18, fine and ten to 20-year imprisonment will be applied with compensation to the victim
399 (Penal Code 1883)	Cheat by personation by pretending to be another person or identity	Fine or maximum one-year imprisonment or both (section 400 Penal Code 1883)
07/1841 (Vagrants Ordinance 1841)	Act of public place soliciting and gross indecency	Maximum 100-rupee fine or six-month imprisonment or both

Although the Penal Code and the Vagrants Ordinance remain, the state authorities in Sri Lanka have made an effort throughout a series of legal and practical reforms towards more recognition of and less discrimination on the grounds of sexual orientation, gender identity and expression. According to the United States Department of State's Country Reports on Human Rights Practices for 2010, the Sri Lankan police do not actively charge LGBTIQ+ individuals with the section 365 and 365A criminal offences as they seem to violate the right to privacy, and it creates differences with the other two laws.<sup>96</sup> Moreover, in terms of legal progress, the Sri Lankan Supreme Court made some recommendations in the case of *Officer-in-Charge, Police Station, Maradana v Wimalasiri and Jeganathan*, in which sections 365 and 365A were deemed unenforceable despite the fact it had no authorised power to do so according to the constitution.<sup>97</sup> It mentioned that criminalisation

<sup>96</sup> United States Department of State, 'Country Reports on Human Rights Practices - Sri Lanka' (2010) <[www.refworld.org/docid/4da56d87c.html](http://www.refworld.org/docid/4da56d87c.html)> accessed 11 November 2019.

<sup>97</sup> *Case Maradana v Wimalasiri and Jeganathan* [2016] SC Appeal No 32/1, SC SPL LA No 304/2009, HCMCA no 595/04, Magistrate's Court of Maligakanda No 7923/C.

against LGBTIQ+ people on the grounds of same-sex sexual orientation would be inappropriate, and thus, the law is considered dormant.<sup>98</sup> However, the judges mixed sections 365 and 365A together as sodomy and buggery.<sup>99</sup> Finally, the result turned out that consensual adult same sex sexual relations should not be policed by the state nor should it be grounds for criminalisation.<sup>100</sup> Despite this fact, the laws are yet to be repealed.

Besides the efforts from the above mentioned case law, Sri Lanka's Supreme Court emphasised twice in 2014 and 2017 that sections 365 and 365A are contradictory to the constitution, particularly article 12(2), as no one shall be discriminated on the grounds of sex, although it does not explicitly mention SOGIE.<sup>101</sup> <sup>102</sup> Unfortunately, during the 112th Session of the UN Human Rights Committee on civil and political rights in 2014, Sri Lanka reported that sections 365 and 365A aimed to protect public morality away from an unnatural sex and acts of gross indecency.<sup>103</sup> <sup>104</sup> In the latest 3rd cycle of the Universal Periodic Review in 2017, Sri Lanka rejected recommendations to abolish these laws.<sup>105</sup> The Sri Lanka government also rejected the requests from Canada in 2012 and another from the United Kingdom on same-sex marriage in 2014.<sup>106</sup>

<sup>98</sup> Sarah Hannan, 'Road to reform – LGBTIQ rights in Sri Lanka' (*The Sunday Morning*, 16 September 2018) <[www.themorning.lk/road-to-reform-lgbtqi-rights-in-sri-lanka/](http://www.themorning.lk/road-to-reform-lgbtqi-rights-in-sri-lanka/)> accessed 11 November 2019.

<sup>99</sup> Amra Ismail, 'SL should take guidance from Indian counterparts' (*Daily Mirror Online*, 18 September 2018) <[www.dailymirror.lk/article/-SL-should-take-guidance-from-Indian-counterparts--155639.html?fbrefresh=1548276576](http://www.dailymirror.lk/article/-SL-should-take-guidance-from-Indian-counterparts--155639.html?fbrefresh=1548276576)> accessed 8 April 2020.

<sup>100</sup> *Case Maradana v Wimalasiri and Jeganathan* [2016] SC Appeal No 32/1, SC SPL LA No 304/2009, HCMCA no 595/04, Magistrate's Court of Maligakanda No 7923/C.

<sup>101</sup> Outright Action International, 'Sri Lanka Government says LGBT rights are constitutionally protected' (*Outright Action International*, 20 October 2014) <<https://outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>> accessed 11 November 2019.

<sup>102</sup> Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

<sup>103</sup> United Nations Office of the High Commissioner for Human Rights, 'CCPR - International Covenant on Civil and Political Rights 112 Session (07 Oct 2014 - 31 Oct 2014)' (2014) <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=811&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=811&Lang=en)> accessed 11 November 2019.

<sup>104</sup> Outright Action International, 'Sri Lanka Government says LGBT rights are constitutionally protected' (*Outright Action International*, 20 October 2014) <<https://outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>> accessed 11 November 2019.

<sup>105</sup> Human Rights Watch, *World Report 2018* (Human Rights Watch 2018) <[www.hrw.org/sites/default/files/world\\_report\\_download/201801world\\_report\\_web.pdf](http://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf)> accessed 8 April 2020.

<sup>106</sup> Dinusha Panditaratne, 'Decriminalizing Same Sex Relations in Asia: Socio-Cultural Factors Impeding Legal Reform' (2016) 31(2) *The American University Journal of International Law and Policy* 171.



In the third cycle of Universal Periodic Review of Sri Lanka, the Stakeholder Report indicates that the Penal Code, Vagrants Ordinance and Brothels Ordinance of 1889 marginalise and allow discrimination against LGBTIQ+ people.<sup>107</sup> They are also prohibited from the full enjoyment of accessing fundamental rights, especially the right to housing and right to work. NGOs such as Equal Ground face reiterated harassing actions from the authorities, including delaying bureaucratic procedures and interfering public events. Likewise, the Compilation of UN Information reports that social media is a prominent tool in which threats and attacks against LGBTIQ+ people are dispersed.<sup>108</sup> While calling for the termination of criminalisation of sections 365, 365A and 399, the report suggests Sri Lankan authorities to strengthen protective measures for LGBTIQ+ people from violations and unequal treatments. Despite these facts, in the National Report submitted to the HRC none of the text mentions LGBTIQ+ rights and issues.

Nevertheless, Panditaratne argues that Sri Lanka has the misconception that the continuous enforcement of these sections is necessary in dealing with child abuse cases, particularly with boys.<sup>109</sup> As seen as a popular destination of child sex tourism, the punishment was increased from ten to 20 years in 1995 to penalise the perpetrators. As a result, LGBTIQ+ people are prejudiced by their sexual behaviours. Sri Lankan NGOs working towards LGBTIQ+ issues also confront pressures. Equal Ground, the leading LGBTIQ+ NGO in Sri Lanka, was asked to terminate its tasks in 2013 by the Criminal Investigations Department, which claimed that homosexuality belongs to Western values.<sup>110</sup> This links to the Buddhist values and patriarchal dominance that the majority of Sri Lankans uphold both in the constitution and society. Whereas section 9 of the constitution emphasises the active role of the state to protect and foster Buddhism, gender discrimination and

<sup>107</sup> United Nations Human Rights Council, 'UPR Sri Lanka' (2017) <[www.upr-info.org/en/review/Sri-Lanka/Session-28---November-2017](http://www.upr-info.org/en/review/Sri-Lanka/Session-28---November-2017)> accessed 26 November 2019.

<sup>108</sup> UNGA 'Compilation on Sri Lanka Report of the Office of the United Nations High Commissioner for Human Rights' UN HRC Doc A/HRC/WG.6/28/LKA/2

<sup>109</sup> Dinusha Panditaratne, 'Decriminalizing Same Sex Relations in Asia: Socio-Cultural Factors Impeding Legal Reform' (2016) 31(2) *The American University Journal of International Law and Policy* 171.

<sup>110</sup> Dinusha Panditaratne, 'Decriminalizing Same Sex Relations in Asia: Socio-Cultural Factors Impeding Legal Reform' (2016) 31(2) *The American University Journal of International Law and Policy* 171.

bias are widely practiced across religious and ethnic norms.<sup>111</sup>

However, section 399 of the Penal Code and section 07/1841 of the Vagrants Ordinance are still enforced against LGBTIQ+ people, particularly trans women and trans men. Section 399 is the most popular law which the police use against trans women whose gender assigned at birth does not conform with their expression such as the cross-dressing acts. Similarly, section 07/1841 targets trans women if they are suspected of soliciting or loitering in the public.<sup>112</sup> This section intends to punish those involved in sex work or prostitution. Trans women are sometimes falsely arrested by the police, while walking along the streets, despite having no relations to sex work or prostitution. These situations happen because they are always subject of being stereotyped from their gender identity and expression.<sup>113</sup> In some cases, they are arrested because they cannot prove their legal gender change or new identity. Consequently, some trans women may be required to bribe the officers in order to be released from custody after being taken to the men's cell at the police station.<sup>114</sup> As a result of these remaining laws, LGBTIQ+ persons, specifically trans women, are threatened by arbitrary arrests, sexual and physical assaults and harassments, and monetary extortion.<sup>115</sup>

The next section explores the NHRAP, which has been said to be more progressive for practical implementation on LGBTIQ+ rights.<sup>116</sup>

#### *4.1.1.3 National Action Plan for the Protection and Promotion of Human Rights (2017-2021)*

Besides the constitution, the Government of Sri Lanka introduced its NHRAP for the years of 2017-2021 in order to ensure the practices of equality and non-discrimination on the grounds of different categories,

<sup>111</sup> Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

<sup>112</sup> Outright Action International, 'Sri Lanka Government says LGBT rights are constitutionally protected' (*Outright Action International*, 20 October 2014) <<https://outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>> accessed 11 November 2019.

<sup>113</sup> Amnesty International, 'Spectrum' (Amnesty International 2019).

<sup>114</sup> International Gay and Lesbian Human Rights Commission, 'Violence Against Lesbians, Bisexual Women and Transgender Persons in Sri Lanka' (International Gay and Lesbian Human Rights Commission 2015) <<https://outrightinternational.org/sites/default/files/SriLanka1014WCover.pdf>> accessed 9 April 2020.

<sup>115</sup> United States Department of State, 'Sri Lanka 2019 Human Rights Report' (2019) <[www.state.gov/wp-content/uploads/2020/03/SRI-LANKA-2019-HUMAN-RIGHTS-REPORT.pdf](http://www.state.gov/wp-content/uploads/2020/03/SRI-LANKA-2019-HUMAN-RIGHTS-REPORT.pdf)> accessed 8 April 2020.

<sup>116</sup> Interview with a government official (Colombo, 3 March 2020).

including sex.<sup>117</sup> The texts are clearly described in the section on civil and political rights that it is the state's obligations 'to ensure the right to non-discrimination in all spheres of life, and protection from unfair discrimination'.<sup>118</sup> However, it does not stipulate SOGIE as part of its objective. On the contrary, in the section on economic, social and cultural rights, it is surprisingly found that the term sexual orientation and gender identity is written as part of the right to access healthcare services, mainly on sexual and reproductive health. At this clause, it is interesting to learn that it is to ensure that hormone therapy and sexual reassignment surgery for transgender persons, prior to obtaining a GRC, are reachable. 'This is the first time that sexual orientation and gender identity is there to support the transgender people', said a government official.<sup>119</sup>

#### 4.1.2 Socio-cultural perspective

The lives of LGBTQ+ people in Sri Lanka are inside the closet. From family to school and workplace, they have to hide their real identity, while some of them are forced into heteronormative marriage and later encountered domestic violence as well as divorce. Homophobia and transphobia, which play significant roles in Sri Lankan society, further stimulate violence.<sup>120 121</sup> Trans women remain marginalised and vulnerable in Sri Lankan society. They are the main target of discrimination and stigmatisation from the state authorities and societies.<sup>122</sup> Many NGOs report that trans women in Sri Lanka have experienced wide ranges of arbitrary arrests and detentions, physical and sexual abuses, tortures, ill-treatment and extra-judicial killings because of their non-conforming

<sup>117</sup> National Action Plan for the Protection and Promotion of Human Rights 2017.

<sup>118</sup> National Action Plan for the Protection and Promotion of Human Rights 2017.

<sup>119</sup> Interview with a government official (Colombo, 3 March 2020).

<sup>120</sup> Damith Chandimal, 'Sexual orientation and Gender Identity Rights in Sri Lanka' in INFORM Human Rights Documentation Centre (eds), *Human Rights Situation in Sri Lanka: August 17, 2015 - August 17, 2016* (INFORM Human Rights Documentation Centre 2016).

<sup>121</sup> Institute for Participatory Interaction in Development, 'Rapid Situation Assessment of Transgender Persons in Sri Lanka' (Institute for Participatory Interaction in Development 2016) <[www.aidsdatahub.org/sites/default/files/publication/Sri\\_Lanka\\_Rapid\\_Situational\\_Assessment\\_of\\_TGs\\_2017.pdf](http://www.aidsdatahub.org/sites/default/files/publication/Sri_Lanka_Rapid_Situational_Assessment_of_TGs_2017.pdf)> accessed 10 April 2020.

<sup>122</sup> Immigration and Refugee Board of Canada, 'Responses to Information Requests (RIRs)' (LKA102743.E 2008) <[www.justice.gov/sites/default/files/coir/legacy/2014/03/06/LKA102743.E.pdf](http://www.justice.gov/sites/default/files/coir/legacy/2014/03/06/LKA102743.E.pdf)> accessed 8 October 2019.

sexual orientation, gender identity and expression.<sup>123</sup> It is reported that Tamil and Muslim LGBTIQ+ communities are likely to face more discrimination and stigmatisation in the Sinhala-Buddhist majority society, while LGBTIQ+ people in rural areas rarely reveal their SOGIE to the public.<sup>124</sup> Therefore, they decided to leave their hometown for major cities such as Colombo, Galle, Jaffna and Kandy.<sup>125</sup>

There are various reasons contributing to the challenges of legal recognition of transgender people in Sri Lanka. First, its legal system is pluralistic due to its multicultural community, which is composed of Buddhist, Hindu, Muslim and other religious beliefs.<sup>126</sup> Moreover, the country is constituted with multi-ethnic groups, including Sinhalese, Sri Lankan Tamil, Indian Tamil, Dutch Burgher, Malay and others. Even though the constitution is the highest legal framework in the state, there are five important sources of laws in Sri Lanka, which include two common laws, (1) Roman-Dutch law (2) English law and three other customary laws, (3) Kandian law, (4) Thesavalamai law and (5) Muslim law.<sup>127</sup> Therefore, recognising transgender persons in Sri Lanka require different communities' acceptance.<sup>128</sup> Second, the politicians lack positive steps to protect transgender people's rights because they are aware of their political popularities and personal interests. It is also added that transgender people only represent a small group of people, and legal recognition of transgender may not contribute to the benefit of the entire society.<sup>129</sup> In March 2016, a group of Buddhist monks protested against an appointment of the new trans woman Governor

<sup>123</sup> Human Rights Watch, *All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka* (Human Rights Watch, 2016).

<sup>124</sup> Immigration and Refugee Board of Canada, 'Responses to Information Requests (RIRs)' (LKA102743.E 2008) <[www.justice.gc.ca/sites/default/files/coir/legacy/2014/03/06/LKA102743\\_E.pdf](http://www.justice.gc.ca/sites/default/files/coir/legacy/2014/03/06/LKA102743_E.pdf)> accessed 8 October 2019.

<sup>125</sup> Adaderana, 'SL faces increase in homosexuals' (*Adaderana*, 21 September 2011) <[www.adaderana.lk/news.php?nid=15105](http://www.adaderana.lk/news.php?nid=15105)> accessed 9 April 2020.

<sup>126</sup> Dhanushka Elpitiya, 'Legal Recognition and protection of Human Rights of transgender People in Sri Lanka' (2017) Working Paper <[www.academia.edu/38555931/Legal\\_Recognition\\_and\\_protection\\_of\\_Human\\_Rights\\_of\\_transgender\\_People\\_in\\_Sri\\_Lanka\\_Dhanushka\\_Elpitiya\\_LL.B\\_Hons\\_Attorney\\_at\\_Law](http://www.academia.edu/38555931/Legal_Recognition_and_protection_of_Human_Rights_of_transgender_People_in_Sri_Lanka_Dhanushka_Elpitiya_LL.B_Hons_Attorney_at_Law)> accessed 4 December 2019.

<sup>127</sup> LJM Cooray, 'Common Law in England and Sri Lanka' (1975) 24(3) *The International and Comparative Law Quarterly* 553.

<sup>128</sup> Interview with a government official (Colombo, 3 March 2020).

<sup>129</sup> Dhanushka Elpitiya, 'Legal Recognition and protection of Human Rights of transgender People in Sri Lanka' (2017) Working Paper <[www.academia.edu/38555931/Legal\\_Recognition\\_and\\_protection\\_of\\_Human\\_Rights\\_of\\_transgender\\_People\\_in\\_Sri\\_Lanka\\_Dhanushka\\_Elpitiya\\_LL.B\\_Hons\\_Attorney\\_at\\_Law](http://www.academia.edu/38555931/Legal_Recognition_and_protection_of_Human_Rights_of_transgender_People_in_Sri_Lanka_Dhanushka_Elpitiya_LL.B_Hons_Attorney_at_Law)> accessed 4 December 2019.

of Central Province of Sri Lanka.<sup>130</sup> It shows that although transgender identity does not exist in Buddhist context, they have been recognised as inappropriate in holding a highly political position.

The lives of transgender individuals in Sri Lanka are also complex according to the research conducted by Pullat. The study finds that transgender people face pressure from their families and discrimination from society.<sup>131</sup> Trans women are struggle with the process of ‘coming out of the closet’ and sexual reassignment surgery because of the cis-heteronormative culture of Sri Lankan society.<sup>132</sup> Transgender people often deal with difficulties at home with their family members’ attitudes.<sup>133</sup> Patriarchal structure plays a significant role in shaping family expectation, and it discourages women’s empowerment.<sup>134</sup> Although section 23 of the Prevention of Domestic Violence Act 2005 protects the victims of violence to seek redress, the court hearing process is open to the public.<sup>135</sup> As a result, those trans women may be afraid of bringing their cases because it will retraumatise and humiliate them.<sup>136</sup>

In addition to that, Sri Lankan society follows a gender binary concept, in which two socially constructed genders, male and female, exist.<sup>137</sup> As a psychiatrist, Malalagama also mentions that many transgender people face gender dysphoria, which substantially drives stigma toward them. Moreover, transgender people have difficulty in access to fundamental rights, including rights to employment, housing,

<sup>130</sup> Colombo Telegraph, ‘Maha Sanga Protests Appointment Of First Transgender Governor’ (*Colombo Telegraph*, 26 March 2016) <[www.colombotelegraph.com/index.php/maha-sanga-protests-appointment-of-first-transgender-governor/](http://www.colombotelegraph.com/index.php/maha-sanga-protests-appointment-of-first-transgender-governor/)> accessed 10 April 2020.

<sup>131</sup> Urmila Pullat, ‘Transgendered in Sri Lanka: Gender Identity and the Law in Sri Lanka and India’ (2012) Working Paper <<https://ssrn.com/abstract=2425503>> accessed 16 September 2019.

<sup>132</sup> Ayodhya Malalagama, ‘The shifting landscape of Gender Identity and the situation in Sri Lanka’ (2017) 3(1) Sri Lanka Journal of Sexual Health and HIV Medicine 45.

<sup>133</sup> Sarah Hannan, ‘Road to reform – LGBTIQ rights in Sri Lanka’ (*The Sunday Morning*, 16 September 2018) <[www.themorning.lk/road-to-reform-lgbtqi-rights-in-sri-lanka/](http://www.themorning.lk/road-to-reform-lgbtqi-rights-in-sri-lanka/)> accessed 11 November 2019.

<sup>134</sup> Independent Advisory Group on Country Information, ‘Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity’ (Home Office 2018).

<sup>135</sup> Prevention of Domestic Violence Act 2005.

<sup>136</sup> International Gay and Lesbian Human Rights Commission, ‘Violence Against Lesbians, Bisexual Women and Transgender Persons in Sri Lanka’ (International Gay and Lesbian Human Rights Commission 2015) <<https://outrightinternational.org/sites/default/files/SriLanka1014WCover.pdf>> accessed 9 April 2020.

<sup>137</sup> Pabasari Ginige and Ayodhya Malalagama, ‘An update on transsexuality’ (2018) 9(2) Sri Lanka Journal of Psychiatry 4 DOI <<http://doi.org/10.4038/slipsyc.v9i2.8179>> accessed 11 November 2019

health and education.<sup>138</sup> As a result, they may become involved in the prostitution sector to earn a living. STIs, such as HIV/AIDS, can be discovered among transgender people and leads to the situation of transphobia.

Transgender people have difficulties accessing fundamental rights, including the rights to education, adequate housing, work and health. Finally, they may become mentally traumatised by encountering distress and depression, while some attempt to commit suicide.<sup>139</sup> It is said that because their gender identity is visible identifiable, transgender persons are vulnerable in Sri Lanka.<sup>140</sup> Chandimal conducts a comprehensive interview with transgender people themselves and relevant stakeholders in districts of Anuradhapura and Colombo.<sup>141</sup> The research finds that many transgender people experienced abuses, particularly sexual abuses. Most of the discrimination, stigma and violence happened in their families and schools, while once at adult age, transgender people are discriminated at workplaces and healthcare services. Their sexual orientation and gender identity were also targeted by the police arrests, followed by physical violence and harassment. According to a report by Human Rights Watch, many transgender people have experienced police abuses.<sup>142</sup>

In the wake of globalisation, transgender people face not only daily abuse, but also online harassment. It was reported that one trans woman was harassed by a doctor, while some were delayed in services at the government hospital.<sup>143</sup> The report also claims that treatments in the government health service sector violates the right to privacy because their data are kept separately from those gender-conforming people and leaked to other hospital staff. Some are told that they were mentally ill.

<sup>138</sup> Ayodhya Malalagama, 'The shifting landscape of Gender Identity and the situation in Sri Lanka' (2017) 3(1) Sri Lanka Journal of Sexual Health and HIV Medicine 45.

<sup>139</sup> Miyuru Chandradasa, 'Suicidal ideation in gay adolescents in the context of cultural stigma and criminalized homosexuality in Sri Lanka' [2018] International Journal of Social Psychiatry 1 DOI <<https://10.1177/0020764018812921>> accessed 11 November 2019.

<sup>140</sup> Australian Government Department of Foreign Affairs and Trade, 'DFAT Country Information Report Sri Lanka' (4 November 2019) <[www.dfat.gov.au/sites/default/files/country-information-report-sri-lanka.pdf](http://www.dfat.gov.au/sites/default/files/country-information-report-sri-lanka.pdf)> accessed 10 July 2020.

<sup>141</sup> Damith Chandimal, 'Sexual orientation and Gender Identity Rights in Sri Lanka' in INFORM Human Rights Documentation Centre (eds), *Human Rights Situation in Sri Lanka: August 17, 2015 - August 17, 2016* (INFORM Human Rights Documentation Centre 2016).

<sup>142</sup> Human Rights Watch, *All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka* (Human Rights Watch 2016).

<sup>143</sup> The Women and Media Collective, Sri Lanka, 'Discrimination of Lesbians, Bisexual Women and Transgender Persons in Sri Lanka' (2017).

Furthermore, transgender persons have limited access to information regarding sex reassignment surgery (SRS), while this special service for them is limited throughout the country.<sup>144</sup>

Workplaces are also a main place for shame, stigma and violence. There are various types of violence faced by LGBTIQ+ community in Sri Lanka, including emotional, physical, sexual, cultural and gender norm, intimate partner, verbal, economic and cyber violence.<sup>145</sup> When any violent actions occur with them, transgender people may avoid reporting the incidents to the police because they are afraid of being revictimised.<sup>146</sup> In some workplaces, they encounter unfair treatment and discrimination from co-workers or even dress code policy.<sup>147</sup> Some employers are reluctant to hire transgender persons due to their sexual orientation and gender identity. Some are unfairly terminated from their current employment.<sup>148</sup>

Transgender civil partnership and marriage are not legally recognised in Sri Lanka, as compared to those heterosexual couples.<sup>149</sup> It also contributes to the denial of socio-economic benefits. On the contrary, forced heterosexual marriage is commonly found among Sri Lankan families. Rosanna Flamer-Caldera, Executive Director of Equal Ground, one of the largest LGBTIQ+ NGOs in Sri Lanka, clarifies in her interview that LGBTIQ+ youths face forced marriage by their parents.<sup>150</sup> In schools, trans girls also suffer from abuses and bullying from their classmates and teachers. Some of them are afraid to report

<sup>144</sup> Women's Support Group, Sri Lanka, 'Not Gonna Take it Lying Down' (*Women and Media Collective*, 2014) <<https://womenandmedia.org/not-gonna-take-it-lying-down/>> accessed 10 April 2020.

<sup>145</sup> The Women and Media Collective, Sri Lanka, 'Discrimination of Lesbians, Bisexual Women and Transgender Persons in Sri Lanka' (2017).

<sup>146</sup> Immigration and Refugee Board of Canada, 'Responses to Information Requests (RIRs)' (LKA102743.E 2008) <[www.justice.gc.ca/defautl/files/coir/legacy/2014/03/06/LKA102743.E.pdf](http://www.justice.gc.ca/defautl/files/coir/legacy/2014/03/06/LKA102743.E.pdf)> accessed 8 October 2019.

<sup>147</sup> Women's Support Group, Sri Lanka, 'The Status of Lesbians, Bisexual Women and Transgendered Persons in Sri Lanka NGO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women' (2011) <[www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG\\_SriLanka48.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG_SriLanka48.pdf)> accessed 9 April 2020.

<sup>148</sup> Australian Government Department of Foreign Affairs and Trade, 'DFAT Country Information Report Sri Lanka' (4 November 2019) <[www.dfat.gov.au/sites/default/files/country-information-report-sri-lanka.pdf](http://www.dfat.gov.au/sites/default/files/country-information-report-sri-lanka.pdf)> accessed 10 July 2020.

<sup>149</sup> Women's Support Group, Sri Lanka, 'The Status of Lesbians, Bisexual Women and Transgendered Persons in Sri Lanka NGO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women' (2011) <[www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG\\_SriLanka48.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG_SriLanka48.pdf)> accessed 9 April 2020.

<sup>150</sup> Groundviews, 'Colombo Pride: The History' (*Groundviews*, 15 June 2017) <<https://groundviews.org/2017/06/15/colombo-pride-the-history/>> accessed 9 April 2020.



to the school counsellors or parents because of their gender identity. A report by Equal Ground, Center for International Human Rights of Northwestern University's Northwestern Pritzker School of Law and Global Initiatives for Human Rights of Heartland Alliance for Human Needs & Human Rights illustrates a case from one boys' school that the perpetrators, which happened to be classmates, never received punishments from the school after bullying a feminine boy.<sup>151</sup>

Public understanding regarding transgender identity is still blurred. In a conversation with Nivendra Uduman, a trained counselling psychologist and psychotherapist, Hannan explains that sometimes transgender people are requested to display their genitals at the health service sector in order to prove their identity.<sup>152</sup> Sometimes, they are humiliated among the public while receiving services in public hospitals because their gender identity is disclosed without personal consent.<sup>153</sup> In term of the right to housing, trans women also struggle with rejection while renting accommodations. Some of them are forcibly evicted due to gender identity and expression.

Nevertheless, LGBTIQ+ in Sri Lanka have been made visible to the public in various occasions. LGBTIQ+ organisations, such as Equal Ground, National Transgender Network, Venasa Transgender Network, Jaffna Sangam, Jaffna Transgender Network and Heart to Heart Lanka often organise workshops, seminars and meetings. One of the prominent annual events is Colombo PRIDE, which has been continuously held since 2005.<sup>154</sup> LGBTIQ+ entertainment can also be seen, especially in Colombo and surrounding neighbourhoods.<sup>155</sup> As part of the LGBTIQ+

<sup>151</sup> Equal Ground, Sri Lanka and Center for International Human Rights of Northwestern Pritzker School of Law, 'Violations by Sri Lanka of the Economic, Social And Cultural Rights of Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning (LGBTIQ) People' (2017) <[www.ecoi.net/en/file/local/1402111/1930\\_1498131440\\_int-cescr-css-lka-27401-e.pdf](http://www.ecoi.net/en/file/local/1402111/1930_1498131440_int-cescr-css-lka-27401-e.pdf)> accessed 4 December 2019.

<sup>152</sup> Sarah Hannan, 'Road to reform – LGBTIQ rights in Sri Lanka' (*The Sunday Morning*, 16 September 2018) <[www.themorning.lk/road-to-reform-lgbtiq-rights-in-sri-lanka/](http://www.themorning.lk/road-to-reform-lgbtiq-rights-in-sri-lanka/)> accessed 11 November 2019.

<sup>153</sup> Equal Ground, Sri Lanka and Center for International Human Rights of Northwestern Pritzker School of Law, 'Violations by Sri Lanka of the Economic, Social And Cultural Rights of Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning (LGBTIQ) People' (2017) <[www.ecoi.net/en/file/local/1402111/1930\\_1498131440\\_int-cescr-css-lka-27401-e.pdf](http://www.ecoi.net/en/file/local/1402111/1930_1498131440_int-cescr-css-lka-27401-e.pdf)> accessed 4 December 2019.

<sup>154</sup> Groundviews, 'Colombo Pride: The History' (*Groundviews*, 15 June 2017) <<https://groundviews.org/2017/06/15/colombo-pride-the-history/>> accessed 9 April 2020.

<sup>155</sup> Gscene, 'Spice and everything that's nice. That's what Sri Lanka is made of: By Alan Stables' (*Gscene*, 8 October 2013) <[www.gscene.com/features/spice-and-everything-thats-nice-thats-what-sri-lanka-is-made-of/](http://www.gscene.com/features/spice-and-everything-thats-nice-thats-what-sri-lanka-is-made-of/)> accessed 10 April 2020.



community, trans women in Sri Lanka have been negatively affected by both legal and administrative and socio-cultural conditions. These factors lead to the right to change legal gender, initiated by the HRCSL, in order to protect and promote transgender's rights. The next section aims to describe policy formulation and implementation and procedure of the right to change legal gender in Sri Lanka.

## 4.2 RIGHT TO CHANGE LEGAL GENDER IN SRI LANKA

### 4.2.1 Policy formulation

Before the year 2015, there was a lack of a structured system that allowed transgender persons to legally change their gender on the official documents.<sup>156</sup> However, both World Politics Review<sup>157</sup> and Chandimal<sup>158</sup> have stated that legal gender recognition is the breakthrough in Sri Lanka.

In March 2015, Sashini, a transgender woman in Colombo, petitioned the HRCSL through its official channel urging the government to recognise her gender identity as a woman. Later in January 2016, two other transgender persons followed Sashini to petition. The recognition she requested is the legal gender change on her official documents because she had previously faced discrimination and harassment during the unclear amendment process.<sup>159</sup> Furthermore, having an identity that does not reflect his or her own gender identity seems problematic for all

<sup>156</sup> Women's Support Group, Sri Lanka, 'The Status of Lesbians, Bisexual Women and Transgendered Persons in Sri Lanka NGO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women' (2011) <[www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG\\_SriLanka48.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG_SriLanka48.pdf)> accessed 9 April 2020.

<sup>157</sup> World Politics Review, 'What's at Stake for LGBT People as Sri Lanka Reforms Its Constitution' (*World Politics Review*, 1 August 2017) <[www.worldpoliticsreview.com/trend-lines/22851/what-s-at-stake-for-lgbt-people-as-sri-lanka-reforms-its-constitution](http://www.worldpoliticsreview.com/trend-lines/22851/what-s-at-stake-for-lgbt-people-as-sri-lanka-reforms-its-constitution)> accessed 19 April 2020.

<sup>158</sup> Damith Chandimal, 'Sexual orientation and Gender Identity Rights in Sri Lanka' in INFORM Human Rights Documentation Centre (eds), *Human Rights Situation in Sri Lanka: August 17, 2015 - August 17, 2016* (INFORM Human Rights Documentation Centre 2016).

<sup>159</sup> Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme, *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions* (Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme June 2016) <[www.asia-pacific.undp.org/content/rbap/en/home/library/democratic\\_governance/hiv\\_aids/promoting-and-protecting-human-rights-in-relation-to-sexual-orie.html](http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/promoting-and-protecting-human-rights-in-relation-to-sexual-orie.html)> accessed 9 September 2019.

transgender persons in getting access to basic services.<sup>160</sup>

As a result, the HRCSL consulted with the civil society groups Equal Ground and Heart to Heart on this matter in May 2015. Moreover, the HRCSL met with the relevant authorities and other concerned persons to discuss about the appropriate and standard administrative and medical procedures, regarding international practice in June 2015.<sup>161</sup> The HRCSL recommended the Ministry of Health and Indigenous Medical Services to issue a circular to permit transgender persons to change their gender in their personal official documents, such as NIC, driving licence, birth certificate and passport.<sup>162</sup> Therefore, in 2016, the Ministry of Health and Indigenous Medical Services issued the General Circular No 01-34/2016, dated on 16 June 2016, to eight major designations across health sector in Sri Lanka, including (1) provincial health secretaries, (2) provincial directors of health services, (3) regional directors of health services, (4) directors of teaching hospitals, (5) medical superintendents of hospitals, (6) heads of specialised campaigns, (7) heads of health institutions and (8) deans of medical faculties. This circular addressed the topic of ‘Issuing of Gender Recognition Certificate for Transgender Community’.

Presented in three different languages, English, Sinhala and Tamil, the circular is separated into four sets of information. First, it states the definition of transgender according to the WHO’s 11th version of the ICD, which eliminated the branding of transgender as gender identity disorder. Transgender is a term for a person whose gender identity does not belong to the sex assigned at birth.<sup>163</sup> Additionally, it explains that transgender people are marginalised and vulnerable throughout different aspects ranging from legal, political, economic to social conditions. Thus, according to the circular, it is necessary to amend the sex assigned at birth

<sup>160</sup> Australian Government Department of Foreign Affairs and Trade, ‘DFAT Country Information Report Sri Lanka’ (4 November 2019) <[www.dfat.gov.au/sites/default/files/country-information-report-sri-lanka.pdf](http://www.dfat.gov.au/sites/default/files/country-information-report-sri-lanka.pdf)> accessed 10 July 2020.

<sup>161</sup> Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme, *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions* (Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme June 2016) <[www.asia-pacific.undp.org/content/rbap/en/home/library/democratic\\_governance/hiv\\_aids/promoting-and-protecting-human-rights-in-relation-to-sexual-orig.html](http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/promoting-and-protecting-human-rights-in-relation-to-sexual-orig.html)> accessed 9 September 2019.

<sup>162</sup> Equal Ground, ‘My Rights, My Responsibilities’ (Equal Ground 2019).

<sup>163</sup> World Health Organization Regional Office for Europe, ‘WHO/Europe brief – transgender health in the context of ICD-11’ (*World Health Organization*, 2011) <[www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/who-europe-brief-transgender-health-in-the-context-of-icd-11](http://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/who-europe-brief-transgender-health-in-the-context-of-icd-11)> accessed 11 November 2019.

in the official documents to reflect their gender identity and expression. Transgender is an umbrella term for all people whose internal sense of their gender (their gender identity) is different from the sex they were assigned at birth. For example, a transgender woman is someone assigned male at birth who identifies as female.<sup>164</sup>

Second, the circular describes the implementation process for the officials to issue the GRC. It is stated that services for transgender communities will be established in all institutions to which this circular addressed to. It also ensures that there will be psychiatric care provided by a consultant psychiatrist. The roles of the consultant psychiatrist are to provide assessment, counselling and issuance of a GRC. The circular also mentioned that the Directorate of Mental Health will arrange a system on transgender information management to maintain and monitor services. In this system, two documents will be stored, including the GRC and a Transgender Notification Register (TNR). TNR is a database that stores personal information of the applicants. It will be kept at the psychiatric unit of the particular institution, while GRC will be kept with three entities, which are the applicant, the institution and the Directorate of Mental Health.<sup>165</sup>

Third, it lists the basic requirement that any transgender person whose age is older than sixteen can apply for the GRC, which identifies the preferred gender of the applicant. Also, it is certified by the consultant psychiatrist and head of the institution where a person submits his or her application. Fourth, the circular describes that the right to change legal gender was implemented through an issuing of GRC.

The right to change legal gender has not yet become a law but a person can amend his or her gender and name on the official documents after the Circular No 06/2016, dated 28 July 2016, issued by the Registrar-General's Department to guide all registrars across the island to change the sex and name on the birth certificate of any transgender persons, who obtain the GRC.<sup>166</sup> This amendment is based on the two major

<sup>164</sup> Ministry of Health, Nutrition and Indigenous Medicine, 'Issuing of Gender Recognition Certificate for Transgender Community' (2016) <[www.health.gov.lk/CMS/cmsmoh1/viewcircular.php?cno=01-34/2016&med=english](http://www.health.gov.lk/CMS/cmsmoh1/viewcircular.php?cno=01-34/2016&med=english)> accessed 9 September 2019.

<sup>165</sup> Ministry of Health, Nutrition and Indigenous Medicine, 'Issuing of Gender Recognition Certificate for Transgender Community' (2016) <[www.health.gov.lk/CMS/cmsmoh1/viewcircular.php?cno=01-34/2016&med=english](http://www.health.gov.lk/CMS/cmsmoh1/viewcircular.php?cno=01-34/2016&med=english)> accessed 9 September 2019.

<sup>166</sup> Isuru Parakrama, 'Into the Unknown Gender Certificate in Sri Lanka' (*Lanka News Web*, 29 September 2018) <<https://lankanewsweb.net/featured/33146-into-the-unknown-gender-certificate-in-sri-lanka>> accessed 21 April 2020.

sections in the Birth and Death Registration Ordinance 1954, including section 27(I) and section 52(1). These sections describe the registration and amendment procedures due to the incorrect information including name and gender:<sup>167</sup>

Section 27(I): Where the birth of any person has been registered without a name being specified in the registration entry at the time of the registration or if his name has been altered after that time, the Registrar-General or the appropriate District Registrar or the Additional District Registrar may, on application made in writing in accordance with the provisions of subsection (2), amend, after such inquiry as he may consider necessary, the birth registration of such person, by the substitution, addition, insertion or omission of particulars relating to his name.

Section 52: (1) Where—

(c) the particulars relating to a birth, death or still-birth registered under this Act or under any past enactment has been entered in the wrong register; or

(h) there is any other error or omission of fact or substance in a birth registration entry, or where the informant has failed to furnish or has omitted, or erroneously furnished any particulars in a birth registration entry, not being an error or omission of fact or substance which can be amended under the other provisions of this Act.

#### *4.2.2 Implementation and procedure*

Before someone can amend their official documents, it is necessary to obtain the GRC. Wijayath explains that transgender persons must follow two steps as follows.<sup>168</sup> First is that they will meet the consultant psychiatrist for psychiatric assessment as well as physical readiness.<sup>169</sup> In case the person is not ready, the consultant psychiatrist will prescribe

<sup>167</sup> Births and Deaths Ordinance of Sri Lanka 1954.

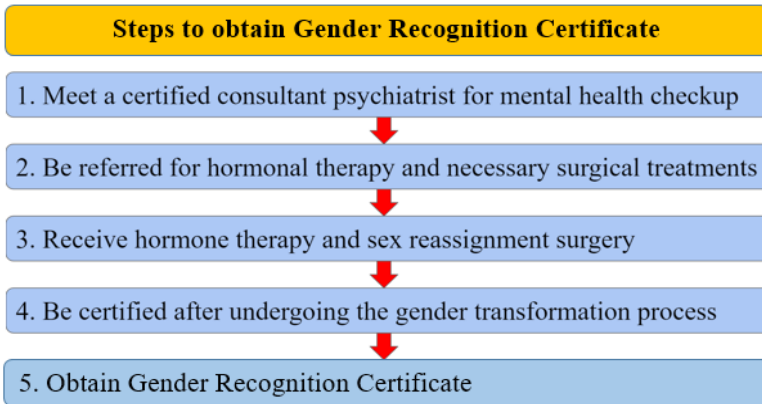
<sup>168</sup> AH Wijayath, 'Sexual Diversity and Gender Identity in Sri Lankan Perspective with Special Reference to Rights and Position of Sexual Minorities in Criminal Justice System of Sri Lanka' (2018) 3(1) Proceedings of the 4th World Conference on Women's Studies 53 DOI 10.17501/wcws.2018.31045.

<sup>169</sup> Isuru Parakrama, 'Into the Unknown Gender Certificate in Sri Lanka' (*Lanka News Web*, 29 September 2018) <<https://lankanewsweb.net/featured/33146-into-the-unknown-gender-certificate-in-sri-lanka>> accessed 21 April 2020.

what is needed to be supplemented. At this stage, the psychiatrist will certify that ‘the person was referred for hormonal therapy and necessary surgical treatments’.

Second, they have to undergo the appropriate hormone therapy and sex reassignment surgery. After completing these two steps, the applicants will eventually receive the GRC.<sup>170</sup> The hormone therapy process can take up to a few months, or in some cases a year.<sup>171</sup> The lawyer added that trans women have to visit the free clinics in some government hospitals around the island to receive the free hormones. Trans women will be asked to provide their preferred name that will show on the documents. At an appropriate time, they will be called in for surgery when their health is checked whether it is ready for the operation. The government subsidises the operation of the upper part of the body, as it is free-of-charge. On the contrary, they are suggested to visit the private hospitals or overseas for the lower body part.<sup>172</sup> Following the previous step, transgender applicants will be certified that they ‘underwent the gender transformation process’, and the GRC will eventually be given.

*Figure 4 Steps to obtain Gender Recognition Certificate*



<sup>170</sup> AH Wijayath, ‘Sexual Diversity and Gender Identity in Sri Lankan Perspective with Special Reference to Rights and Position of Sexual Minorities in Criminal Justice System of Sri Lanka’ (2018) 3(1) Proceedings of the 4th World Conference on Women’s Studies 53 DOI 10.17501/wcws.2018.31045.

<sup>171</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>172</sup> Interview with a lawyer (Colombo, 16 March 2020).

Parakrama details how sex reassignment surgery can be completed at some government clinics, such as the General Hospital of Colombo and the Teaching Hospital of Kandy.<sup>173</sup> The lawyer also adds hospitals in Galle, Ragama and Colombo South Teaching Hospital. However, in Jaffna, there is a hospital which is accessible for only hormone therapy process.<sup>174</sup> Despite this fact, government clinics for transgender persons have not yet been accessible nationwide. The first sex reassignment surgery in Sri Lanka was in 2017 at Kalubowila Government Hospital near Colombo, which is known as a transgender-friendly hospital. According to the Australian Government Department of Foreign Affairs and Trade, the hospital was known as a transgender-friendly hospital.<sup>175</sup> Although sex reassignment surgery can take place in Sri Lanka, Chamara suggests that it is rarely carried out, due to the lack of practitioners' experiences, resources and facilities.<sup>176</sup>

When the GRC is ready, trans women must visit their hometown to amend their birth certificate and other related documents. To amend their sex and name on the birth certificate, there are certain steps, according to the Births and Deaths Registration Ordinance 1954.<sup>177</sup> It is the role of the District Registrar to amend the errors. Article 52(ii) states that:

the Registrar-General, upon the production of a declaration made in accordance with the provisions of subsection (3), or of his own motion, and after such inquiry as he may think necessary, may— amend or rectify the entry, or direct the appropriate District Registrar to amend or rectify the entry, by the correction of errors or by the supplying of omissions or by the restoration of particulars that are missing, illegible or in danger of becoming illegible.

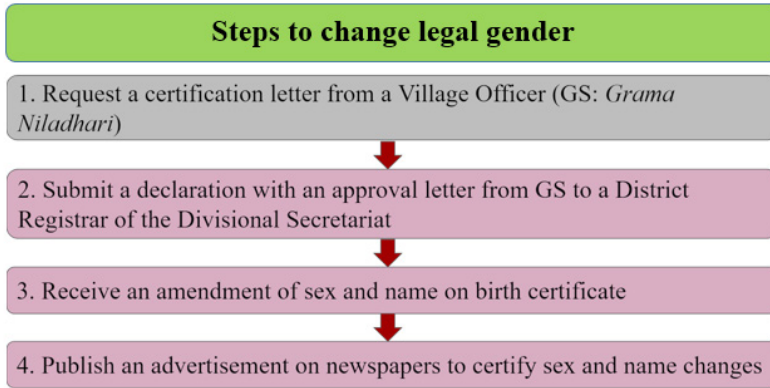
<sup>173</sup> Isuru Parakrama, 'Into the Unknown Gender Certificate in Sri Lanka' (*Lanka News Web*, 29 September 2018) <<https://lankanewsweb.net/featured/33146-into-the-unknown-gender-certificate-in-sri-lanka>> accessed 21 April 2020.

<sup>174</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>175</sup> Australian Government Department of Foreign Affairs and Trade, 'DFAT Country Information Report Sri Lanka' (4 November 2019) <[www.dfat.gov.au/sites/default/files/country-information-report-sri-lanka.pdf](http://www.dfat.gov.au/sites/default/files/country-information-report-sri-lanka.pdf)> accessed 10 July 2020.

<sup>176</sup> Sumudu Chamara, 'Transitioning, But Still People' (*Ceylon Today*, 23 February 2020) <<https://ceylontoday.lk/print-more/52728>> accessed 23 November 2019.

<sup>177</sup> Births and Deaths Ordinance of Sri Lanka 1954.

*Figure 5 Steps to change legal gender*

Trans women are advised to follow these following steps to change their legal gender. First, they need to request a certification letter from the Village Officer (GS: *Grama Niladhari*) to certify that they were born within the particular area. Second, they have to submit a declaration letter with an approval letter from GS to a District Registrar of the Divisional Secretariat. The role of District Registrar is to register and amend the birth certificate. When all documents are correct, transgender persons will eventually have the amended version of their old birth certificate with sex and name changes. The processing fee of 50 rupees will be collected.<sup>178</sup> As the last step, they have to put an advertisement in the newspaper identifying that they have changed their name and sex. However, when that trans woman is under 21, some doctors are advised to request their parents' permissions. This is not stated in the law, but it is what has been practiced. Trans women in Sri Lanka are likely to prefer to change sex rather than name because their names are neutralised, neither male nor female.<sup>179</sup> At this stage, the lawyer explains the reason they need to go back to their villages that their names are registered in the districts. Although there is a big computerised system

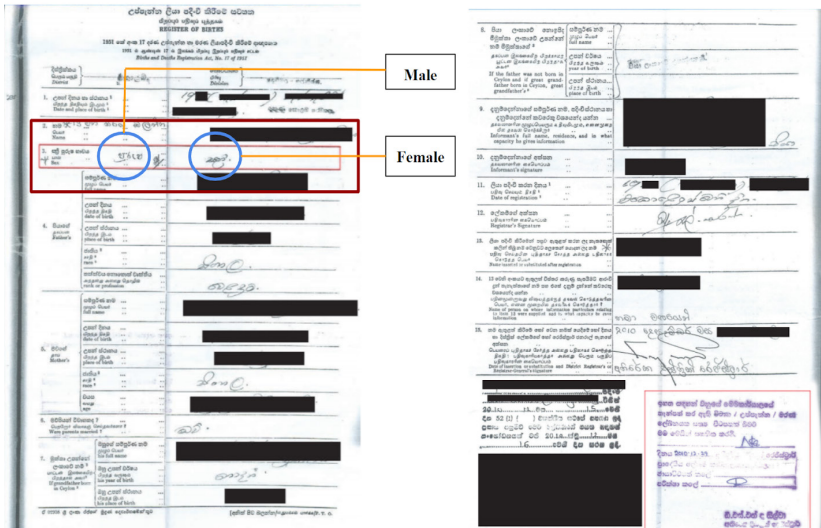
<sup>178</sup> Registrar General's Department, 'Birth Registration' (*Registrar General's Department*, 2020) <[www.rgd.gov.lk/web/index.php/en/services/civil-registration/birth-registration.html#alteration-of-information-in-a-birth-register](http://www.rgd.gov.lk/web/index.php/en/services/civil-registration/birth-registration.html#alteration-of-information-in-a-birth-register)> accessed 23 April 2020.

<sup>179</sup> Interview with a lawyer (Colombo, 16 March 2020).



at the moment, documents are not yet put in place. If they want to receive the birth certificate, they cannot visit the office in Colombo. Instead, they have to go back to change it.<sup>180</sup>

Figure 6 A sample of birth certificate after an amendment of gender from female to male<sup>181</sup>



When the amendment of gender and name is approved, transgender persons will receive a copy of birth certificate. Nevertheless, it is not a completely new certificate. Instead, one will be given a certificate that still lists a previous gender in the history section.<sup>182</sup> For some transgender persons, they experienced the officers labelling their gender and stating the related laws with the new gender and name, while some experienced the officers crossing out the previous gender and writing their preferred gender as a substitute.<sup>183</sup>

<sup>180</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>181</sup> Human Rights Watch, *All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka* (Human Rights Watch 2016).

<sup>182</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>183</sup> Human Rights Watch, *All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka* (Human Rights Watch 2016).



#### 4.3 CHALLENGES AND IMPACTS OF THE RIGHTS TO CHANGE LEGAL GENDER IN SRI LANKA

In order to analyse challenges of the right to change legal gender and its impacts on the lives of trans women in Sri Lanka, this research employs semi-structured interviews with four trans women, who have experienced the policy on legal gender change.<sup>184</sup>

The first trans woman is **Niroshna**. She is 28 years old. She currently recognises herself as a female. At the same time, her community and workplace also look at her as a feminist. However, Niroshna realises that not everyone fully accepts her as the female feminist, but third gender. She has experienced the legal gender change procedures and has undergone sex reassignment surgery and hormone therapy. Although Niroshna has lived herself as a normal woman, she feels that discrimination always appears in society. She experienced employment rejection twice and faced difficulty in getting promotion to a higher position in the place where she is now employed.<sup>185</sup>

**Monisha** is the second trans woman. She is 21 years old. Her experience in social acceptance is different from Niroshna. While her workplace accepts her as a female, she is still facing challenges of acceptance from her family and community. Monisha tells that she felt like a woman at the age of fourteen. 'Before that I had some confusion about my gender. Gradually I realised that I am a transgender', says Monisha. She has experienced the change of legal gender procedures and hormone treatment, but not sex reassignment surgery. Monisha mentions that since the facilities for surgery are not available in Sri Lanka, her opportunity of receiving sex reassignment surgery is impossible. Besides the right to health, she wishes that other civil, political, economic, social and cultural rights of trans women in Sri Lanka being protected and promoted. From her perspective, many fundamental rights are denied, and discrimination from government officials is high.<sup>186</sup>

The third trans woman identifies herself as **Kavya**. She is 23 years old. Kavya partially discloses herself as a trans woman, but people can notice her as a third gender when they observe her gender expression. Kavya tells her growing up childhood experience that she always

<sup>184</sup> All names of trans women provided in this research are aliases.

<sup>185</sup> Interview with Niroshna (online, 26 April 2020).

<sup>186</sup> Interview with Monisha (online, 29 April 2020).

felt uncomfortable being with other boys and doing ‘boys’ activities. Moreover, she started to feel very much different from other boys that she would like to dress as a girl. ‘I didn’t like to wear male clothes at any time’, says Kavya. She has experienced the procedures of legal gender change only with hormone therapy, not sex reassignment surgery. In term of social exclusion, Kavya has encountered unequal treatment in various situations throughout her life as a trans woman.<sup>187</sup>

**Angel** is the last trans woman being selected for part of this research. She currently leads a civil society organisation working on the rights of transgender persons in Sri Lanka. As a 27 years old trans woman, Angel has experienced the procedures of legal gender change and recognised herself as a female. In this interview, she speaks on behalf of the trans woman community in Sri Lanka that has been experiencing many difficulties, particularly on the right to change legal gender. Despite the organisation’s young age, Angel has led the community to transgender’s rights consciousness for a period of time. She emphasises that it is still difficult to have conversation directly with doctors. Therefore, her organisation educates as many transgender people as it can about legal gender change.<sup>188</sup>

After data are collected and analysed, it is found that there are five challenges of the right to change legal gender and its impacts to the lives of trans women in Sri Lanka as follows.

#### 4.3.1 *Is a new identity a new life?*

Later, I learnt that Gender Recognition Certificates are issued by the Ministry of Health allowing us to change the gender in our documents. So, I went to the Divisional Secretariat Office and got all the official documents to change my gender. My new name is Tharaka. Tharaka means ‘star’ and I think my future will be as bright as a star.<sup>189</sup>

A GRC not only paves the way for transgender persons in Sri Lanka to change their legal gender on official documents and for a new life, but it also reduces the feeling of gender dysphoria among them.<sup>190</sup> During

<sup>187</sup> Interview with Kavya (online, 12 May 2020).

<sup>188</sup> Interview with Angel (online, 5 May 2020).

<sup>189</sup> S Fernando, S Wanniarachchi, and J Vidanapathirana, *Montage of Sexuality in Sri Lanka* (College of Community Physicians of Sri Lanka, United Nations Population Fund, Sri Lanka 2018).

<sup>190</sup> Pabasari Ginige and Ayodhya Malalagama, ‘An update on transsexuality’ (2018) 9(2) Sri Lanka Journal of Psychiatry 4 DOI <<http://doi.org/10.4038/slipsyc.v9i2.8179>> accessed 23 April 2020

the interview, the lawyer supports the success of this policy. However, she mentions about a problem that even though it is medically accepted, some people will not accept it because people in the society do not include them into the community.<sup>191</sup> Angel asserts that society and culture also shape how the policy drives. She also agrees that the policy on legal gender changes enables trans women to transform themselves to fully become women. When their gender change is fulfilled, they are likely to face less problems, such as false charging or threatening. However, many problems remain.<sup>192</sup>

In the interview with the government officer, he mentions that the right to change legal gender is a progressive step of Sri Lankan authorities to protect and promote the rights of transgender community and the entire LGBTIQ+ community. He says that if a person feels he or she is discriminated or treated unequally, article 12 of the constitution allows he or she to pursue a lawsuit or positive discrimination can sometimes be used with the children or women or people with disabilities. Nonetheless, he thinks that amending the laws is difficult because it requires two steps to do it, pass with two-thirds or pass with referendum.<sup>193</sup>

Although Niroshna has some general knowledge regarding the legal provisions in Sri Lanka, she learnt about the procedures of legal gender change from the trans woman community. After she had learned about this right, she spent six months before making her decision to change her legal gender. Niroshna says that she always wanted to live as a woman, and that she should change her identity first. Six months after her application, Niroshna received the GRC without any assistance. She tells that it is compulsory for her to take hormone medicine, which is hardly affordable and accessible. Nevertheless, regardless of obstacles, she supports the hormone therapy and sex reassignment surgery, because both processes enable trans women to fully become women. When she has all documents changed, Niroshna feels that she is legally a woman as she wanted. 'I am happy after I changed my identity', says Niroshna.<sup>194</sup>

<sup>191</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>192</sup> Interview with Angel (online, 5 May 2020).

<sup>193</sup> Interview with a government official (Colombo, 3 March 2020).

<sup>194</sup> Interview with Niroshna (online, 26 April 2020).

Monisha mentions how her friend, Angel, had changed her legal gender before. As a result, she decided to follow the process and found that the hospital in Jaffna was in a state of lacking knowledge about transgenderism. She explains the reason behind wanting to change her legal gender is that while she looks like a woman from gender identity and expression, her legal identity is in contrast. She is worried when someone asks for her NIC and becomes confused. As a Tamil minority, she is afraid that her mismatched gender identity would further marginalise her. Therefore, having a legal identity that reflects her gender identity and expression would guarantee her safety and security in the society. However, her pathway throughout the process was not easy as she struggled for a year and a half with the medical process, when she received hormone treatment, in order to receive a GRC. Later on, she went to the divisional secretariat to hand over the GRC for birth certificate amendment, in which she was waiting for one month to complete the process. Even though Monisha has experienced challenges and difficulties during the process, after the change of her legal gender, she has become more happy.<sup>195</sup>

Kavya knew about the right to change legal gender from her friend. It took her approximately six months before she delivered her decision to follow the procedures by visiting the clinic by herself. Kavya sees the significance of the GRC as a legal document to prove her transition from male to female. Also, having the new official documents prove that her gender identity and expression is not illegal. Moreover, she wants people to recognise trans women as normal persons, not mentally affected persons by pursuing the new legal identity. Kavya, at the same time, finds this policy helpful in term of handling legal issues, in case any trans women encounter them. At this moment, Kavya is still in the process of acquiring the GRC, where she is receiving the hormone therapy. Kavya is the only respondent that does not agree that hormone therapy and sex reassignment surgery must be compulsory for all trans women, but she does not specify her reason behind this. Furthermore, she is more appreciable living as a trans woman, rather than a woman. She explains that although she is on the legal gender change process to female, her gender identity is still a trans woman.<sup>196</sup>

<sup>195</sup> Interview with Monisha (online, 29 April 2020).

<sup>196</sup> Interview with Kavya (online, 12 May 2020).

As a person working with trans women community in Sri Lanka, Angel has seen positive impacts of the right to change legal gender in that it fulfils civil rights, such as the right to vote. When trans women obtain NICs that reflect their own identity, they no longer hide themselves behind. They, thus, feel that they can exercise a full citizenship. Furthermore, they have freedom of movement because they are no longer afraid when asked to present their official identity to the officers. The change of legal gender allows trans women to practice partial feminine identity in their daily life, such as in the community and workplace. Unfortunately, the right to employment of trans women has not yet been protected. Even though they obtain a new identity, many of them are still unemployed. Application for government employment is challenging since they are required to present the birth certificate, where previous gender at birth is still written.<sup>197</sup> Jayasinha similarly addresses that some personal questions, related to sexual orientation, such as ‘So do you have a penis?’ and ‘Can you satisfy a woman?’, are asked during the job interviews, despite their changed identity.<sup>198</sup>

#### *4.3.2 Problematic procedures: trans women are retraumatised*

Even when one has successfully changed legal gender and received the new NIC and relevant official documents, the previous gender assigned at birth and name remains in the documents.<sup>199</sup> Also, during the procedures, transgender persons are likely to face discrimination from the authorities and society, as well as risk of violence.<sup>200</sup> First, a GRC issued by the relevant organisations is problematic because it requires psychiatric evaluation or parental confirmation.<sup>201</sup> This creates negative stereotypes toward transgender persons in Sri Lanka as they are seen to have a mental illness. Even the GRC itself must be issued and

<sup>197</sup> Interview with Angel (online, 5 May 2020).

<sup>198</sup> Anukshi Jayasinha, ‘What It Means To Be Transgender In Sri Lanka’ (*Roar Media*, 6 October 2016) <<https://roar.media/english/life/reports/means-transgender-sri-lanka/>> accessed 11 November 2019.

<sup>199</sup> Human Rights Watch, *All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka* (Human Rights Watch 2016).

<sup>200</sup> Independent Advisory Group on Country Information, ‘Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity’ (Home Office 2018).

<sup>201</sup> Law & Society Trust, ‘The State of Economic, Social and Cultural Rights in Sri Lanka: A Joint Civil Society Shadow Report to the United Nations Committee on Economic Social and Cultural Rights’ (2017) <[https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT\\_CESCR\\_CSS\\_LKA\\_27228\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT_CESCR_CSS_LKA_27228_E.pdf)> accessed 4 December 2019.

kept in a different system at the Directorate of Mental Health. Some transgender persons, who have left home for such a period of time, also find it difficult to return to their hometown after the officers requested parental consents.<sup>202</sup>

Second, Angel adds that the procedures are the major issues and need to be changed. She begins by saying that initially all trans women who expect to receive the legal gender change service are required to visit Colombo, because hospitals in other districts do not have sufficient facilities and personnel. Furthermore, doctors in district hospitals are reluctant to accept trans women for sex change treatment. Likewise, some doctors have insufficient knowledge on transgenderism. Therefore, traveling to Colombo requires high logistical spending.<sup>203</sup> Niroshna also realises that it is difficult to change legal gender in Sri Lanka. However, when she was applying for the GRC, she did not feel being obstructed as there were a lot of trans women applied for it.<sup>204</sup> In contrast, Monisha faced unnecessary expenses when she visited the divisional secretariat to amend her birth certificate and this process took her for one month.<sup>205</sup> Angel points out that many doctors are unaware about the delayed process and high cost, which occur at all times.<sup>206</sup> In the case of Monisha, she found that the Jaffna Teaching Hospital lacks knowledge about the GRC in the first place. Consequently, it took her a year and a half until she finally received the GRC.<sup>207</sup>

Third, discrimination may also derive from the lack of awareness and understanding about transgenderism.<sup>208</sup> Some doctors may inquire about personal information that can retraumatise transgender persons, regarding their SOGIE. This factor can also lead to the delayed process of legal gender change and prolong societal discrimination and social stigmatisation against particular transgender persons. Kavya criticises that sometimes the government officers are not aware of the legal gender change policy. Thus, when trans women approach them for

<sup>202</sup> Human Rights Watch, *All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka* (Human Rights Watch 2016).

<sup>203</sup> Interview with Angel (online, 5 May 2020).

<sup>204</sup> Interview with Niroshna (online, 26 April 2020).

<sup>205</sup> Interview with Monisha (online, 29 April 2020).

<sup>206</sup> Interview with Angel (online, 5 May 2020).

<sup>207</sup> Interview with Monisha (online, 29 April 2020).

<sup>208</sup> Sumudu Chamara, 'Transitioning, But Still People' (*Ceylon Today*, 23 February 2020) <<https://ceylontoday.lk/print-more/52728>> accessed 23 November 2019.

government affairs, issues always come up.<sup>209</sup> The lawyer adds during the interview that some trans women, who go back to their hometown for a legal gender change, face traumatisation again because they have already left the place for a long period of time. She comments that these trans women are afraid to go back to their hometown because most of them were expelled from the family. That is why encountering someone who they have seen in their childhood reminds them of the past experiences.<sup>210</sup> As a result, some of them end up not visiting their hometown for the sex and name changes.

Fourth, besides the procedures that can retraumatise transgender persons, the official documents themselves are problematic. Even though transgender persons are happy to receive their new documents, following their legal gender change, the previous gender is still written in the new documents.<sup>211</sup> After all, the right to change legal gender would mean nothing but likely makes them more vulnerable and puts them in uncomfortable situations of discrimination, such as job interviews, public or banking services, or educational applications. Even though a small number of employers ask trans women to present their NIC, several government offices or private organisations require them to clarify their identity.<sup>212</sup> From their experience after legally changing their gender, Niroshna and Monisha still feel that they are treated unequally when people realise their previous identity at work or community. They recognise that government employment and social recognition need to be improved.<sup>213</sup>

During the process of application, some trans women cannot get away from the police personnel, who question their gender identity and expression that does not match with their gender specified on a NIC.<sup>214</sup> Monisha once was stopped and inquired by the police unnecessarily about her presence. Fortunately, she has never experienced the use of arbitrary charges/detain/arrest from the Penal Code and Vagrants

<sup>209</sup> Interview with Kavya (online, 12 May 2020).

<sup>210</sup> Interview with a government official (Colombo, 16 March 2020).

<sup>211</sup> Frontpage, 'Sri Lanka: Road Towards LGBT Rights, Constitutional reforms recommended to reduce vulnerability of sexual minorities' (*Frontpage*, 23 September 2016) <[www.frontpage.lk/page/Sri-Lanka-Road-Towards-LGBT-Rights-/17664](http://www.frontpage.lk/page/Sri-Lanka-Road-Towards-LGBT-Rights-/17664)> accessed 21 April 2020.

<sup>212</sup> Interview with a government official (Colombo, 16 March 2020).

<sup>213</sup> Interview with Monisha (online, 20 April 2020); Interview with Niroshna (online, 26 April 2020).

<sup>214</sup> Interview with Angel (online, 5 May 2020).



Ordinance.<sup>215</sup> All of these queries remind them about traumatised history. The lawyer agrees with this issue that trans women have been traumatised, although the channel of legal gender changed is open. She lists ‘One is birth certificate. Second is education certificate. Third is when you are legally married, you can still get arrested for homosexuality. And they put these women to men’s jail’. The lawyer also adds that the police identify biological sex, instead of gender identity. Therefore, charging and threatening trans women is still happening in Sri Lanka.<sup>216</sup>

#### 4.3.3 Sex and gender under official discretion and regulation

In the early stage of the policy implementation, the right to change legal gender itself is not inclusive because transgender persons must follow the procedures set by the authorities.<sup>217</sup> Besides its unclear description, it is criticised as a long and complex process.<sup>218 219</sup> It is difficult to receive sex reassignment surgery because it is expensive and inaccessible, as well as poor quality.<sup>220 221</sup> Trans-friendly medical practitioners, such as plastic surgeons and endocrinologists, in Sri Lanka are also rare in both public and private hospitals.<sup>222</sup> Necessary hormone therapy for internal replacement are scare, while some hormones cannot be found in any local drugstores. Angel comments that trans women are forced to drink hormone therapy medicine, despite its market shortage.<sup>223</sup> The lawyer is also concerned about this issue that there are no estrogenic hormones provided in Sri Lanka for trans women. They have to use contraceptive

<sup>215</sup> Interview with Monisha (online, 29 April 2020).

<sup>216</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>217</sup> Anukshi Jayasinha, ‘What It Means To Be Transgender In Sri Lanka’ (*Roar Media*, 6 October 2016) <<https://roar.media/english/life/reports/means-transgender-sri-lanka/>> accessed 11 November 2019.

<sup>218</sup> Australian Government Department of Foreign Affairs and Trade, ‘DFAT Country Information Report Sri Lanka’ (4 November 2019) <[www.dfat.gov.au/sites/default/files/country-information-report-sri-lanka.pdf](http://www.dfat.gov.au/sites/default/files/country-information-report-sri-lanka.pdf)> accessed 10 July 2020.

<sup>219</sup> Human Rights Watch, *All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka* (Human Rights Watch 2016).

<sup>220</sup> AH Wijayath, ‘Sexual Diversity and Gender Identity in Sri Lankan Perspective with Special Reference to Rights and Position of Sexual Minorities in Criminal Justice System of Sri Lanka’ (2018) 3(1) Proceedings of the 4th World Conference on Women’s Studies 53 DOI 10.17501/wcws.2018.31045.

<sup>221</sup> Independent Advisory Group on Country Information, ‘Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity’ (Home Office 2018).

<sup>222</sup> Sumudu Chamara, ‘Transitioning, But Still People’ (*Ceylon Today*, 23 February 2020) <<https://ceylontoday.lk/print-more/52728>> accessed 23 November 2019.

<sup>223</sup> Interview with Angel (online, 5 May 2020).



tablets to make themselves look different. Nevertheless, the tablets do not work well with chest, voice or hair.<sup>224</sup>

Even if one has health insurance, it does not cover sex reassignment surgery, which might cost approximately four million rupees.<sup>225</sup> <sup>226</sup> Without the hormone therapy, transgender persons will be rejected by the authorities from obtaining the GRC, which is the way to amend their official documents. Specifically, for trans women, sex reassignment surgery is much more difficult, compared to female to male surgery, which is considered as ‘routine operations’.<sup>227</sup> When asked about the most difficult step during the process, Niroshna mentions about the medical checkups and hormones medicine during the first six months.<sup>228</sup> The lawyer provides that it is easier for a woman to become a man, unlike the other way round. She says:

You can just cut your breast out. But putting the silicone to make the boobs is difficult as sometimes it goes wrong, so you have to do several surgeries. Some people want the boobs to be perfect. If you want it big, you have to buy the silicone on your own. Removing is easier, doctors can do it without so many tools. But to create boobs, you need a plastic surgeon.<sup>229</sup>

Unfortunately, the above practice is opposite to international obligations, regarding legal recognition of a person. Transgender persons shall be treated under article 26 of the ICCPR, and they have a right to self-determination without discrimination on SOGIE.<sup>230</sup> Hormone therapy and sex reassignment surgery, thereby, are against international standards and domestic legislation (article 12 of the constitution) which

<sup>224</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>225</sup> Institute for Participatory Interaction in Development, ‘Rapid Situation Assessment of Transgender Persons in Sri Lanka’ (Institute for Participatory Interaction in Development 2016) <[https://aidsdatahub.org/sites/default/files/publication/Sri\\_Lanka\\_Rapid\\_Situational\\_Assessment\\_of\\_TGs\\_2017.pdf](https://aidsdatahub.org/sites/default/files/publication/Sri_Lanka_Rapid_Situational_Assessment_of_TGs_2017.pdf)> accessed 3 December 2019.

<sup>226</sup> Anukshi Jayasinha, ‘What It Means To Be Transgender In Sri Lanka’ (*Roar Media*, 6 October 2016) <<https://roar.media/english/life/reports/means-transgender-sri-lanka/>> accessed 11 November 2019.

<sup>227</sup> Independent Advisory Group on Country Information, ‘Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity’ (Home Office 2018).

<sup>228</sup> Interview with Niroshna (online, 26 April 2020).

<sup>229</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>230</sup> Coalition of NGOs for UPR – Sri Lanka (SOGI), ‘Joint Submission for 3rd Cycle UPR Review of Sri Lanka’ (*ILGA*, 2017) <[https://ilga.org/downloads/stakeholders\\_report\\_SriLanka\\_UPR28.pdf](https://ilga.org/downloads/stakeholders_report_SriLanka_UPR28.pdf)> accessed 20 April 2020.

all persons are equal before the law.<sup>231 232</sup> In addition, it contradicts the General Comment 22 of the UNHRC and principle 3 of the Yogyakarta Principles on self-determination.<sup>233</sup> Besides, hormone therapy and sex reassignment surgery must not be barriers for legal gender change, according to the World Professional Association for Transgender Health (WPATH) Statement on Legal Recognition of Gender Identity.<sup>234</sup>

Because obtaining the GRC depends on the discretion of the authorities, sometimes the officers call for an additional charge or they do not know the procedures. This causes bureaucratic delays at the municipal council level in transferring the GRC to the birth certificate amendment.<sup>235</sup> The interview from Human Rights Watch quotes an experience of one victim, 'If your officer does not want to give it to you, you are not going to get it'.<sup>236</sup> In some situations, the officer who is unwillingly to process the request from transgender persons tries to convince them not to obtain the GRC and legally change their gender.<sup>237</sup> Similarly, due to the lack of standard procedures, the officers can request transgender persons provide different documents, while some are told to take hormones, prior to their psychiatrist certification by the officers. Eventually, these result in time-consuming delays.<sup>238</sup>

When trans women successfully obtain the official documents that reflect their gender identity, sometimes they still face vulnerability, humiliation, discrimination and harassment.<sup>239</sup> Especially at the public

<sup>231</sup> Ayodhya Malalagama, 'The shifting landscape of Gender Identity and the situation in Sri Lanka' (2017) 3(1) Sri Lanka Journal of Sexual Health and HIV Medicine 45.

<sup>232</sup> Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

<sup>233</sup> Law & Society Trust, 'The State of Economic, Social and Cultural Rights in Sri Lanka: A Joint Civil Society Shadow Report to the United Nations Committee on Economic Social and Cultural Rights' (2017) <[https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT\\_CESCR\\_CSS\\_LKA\\_27228\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT_CESCR_CSS_LKA_27228_E.pdf)> accessed 4 December 2019.

<sup>234</sup> World Professional Association for Transgender Health, 'WPATH 2015 Statement on Gender Identity Recognition' (*Transgender Europe*, 19 January 2015) <<https://tgeu.org/wpath-2015-statement-on-gender-identity-recognition/>> accessed 22 April 2020.

<sup>235</sup> Interview with Angel (online, 5 May 2020).

<sup>236</sup> Human Rights Watch, *All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka* (Human Rights Watch 2016).

<sup>237</sup> Anukshi Jayasinha, 'What It Means To Be Transgender In Sri Lanka' (*Roar Media*, 6 October 2016) <<https://roar.media/english/life/reports/means-transgender-sri-lanka/>> accessed 11 November 2019.

<sup>238</sup> Human Rights Watch, *All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka* (Human Rights Watch 2016).

<sup>239</sup> AH Wijayath, 'Sexual Diversity and Gender Identity in Sri Lankan Perspective with Special Reference to Rights and Position of Sexual Minorities in Criminal Justice System of Sri Lanka' (2018) 3(1) Proceedings of the 4th World Conference on Women's Studies 53 DOI 10.17501/wcws.2018.31045.

institutions where everyone is required to identify themselves using the official documents, transgender persons are likely to encounter an uncomfortable environment. Kavya asserts that the society in Sri Lanka is not ready to welcome trans women at some situations, such as employment, medical service or even legal service. She adds that many trans women feel unsecured when presenting themselves in society. Several times they have entered a police station to make some complaints, the police hesitate to protect trans women or give them equal service, ‘sometimes the police misbehave with us’, Kavya feels disappointed.<sup>240</sup> Similarly, when they apply for job positions, their employers question the use of a falsified document.<sup>241</sup> Likewise, Monisha tells of her experience during the election period where her male gender and name are still written on the election card although her NIC reflects her female identity. She mentions that people stared at her strangely when she presented her personal identification card to the election officers.<sup>242</sup>

#### *4.3.4 Right to change legal gender: policy, not law*

First, the right to change legal gender in Sri Lanka is an administrative policy that later can be amended and is unsustainable.<sup>243</sup> It has also been criticised that it does not enable a clear path because it is under the state’s policy, not a law.<sup>244</sup> As a result, the officials’ discretions are influential throughout the process, which affirms that the legal gender change procedure in Sri Lanka is complicated.<sup>245</sup> According to an interview with a member of civil society on LGBTIQ+ community in

<sup>240</sup> Interview with Kavya (online, 12 May 2020).

<sup>241</sup> Interview with Angel (online 5 May 2020).

<sup>242</sup> Interview with Monisha (online, 29 April 2020).

<sup>243</sup> Law & Society Trust, ‘The State of Economic, Social and Cultural Rights in Sri Lanka: A Joint Civil Society Shadow Report to the United Nations Committee on Economic Social and Cultural Rights’ (2017) <[https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT\\_CESCR\\_CSS\\_LKA\\_27228\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT_CESCR_CSS_LKA_27228_E.pdf)> accessed 4 December 2019.

<sup>244</sup> AH Wijayath, ‘Sexual Diversity and Gender Identity in Sri Lankan Perspective with Special Reference to Rights and Position of Sexual Minorities in Criminal Justice System of Sri Lanka’ (2018) 3(1) Proceedings of the 4th World Conference on Women’s Studies 53 DOI 10.17501/wcws.2018.31045. accessed 11 November 2019.

<sup>245</sup> Equal Ground, Sri Lanka and Center for International Human Rights of Northwestern Pritzker School of Law, ‘Violations by Sri Lanka of the Economic, Social And Cultural Rights of Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning (LGBTIQ) People’ (2017) <[www.ecoi.net/en/file/local/1402111/1930\\_1498131440\\_int-cescr-css-lka-27401-e.pdf](http://www.ecoi.net/en/file/local/1402111/1930_1498131440_int-cescr-css-lka-27401-e.pdf)> accessed 4 December 2019.

Sri Lanka, she stresses, ‘it is also only a circular letter, so when there is a change in administration, it is possible that this circular letter will be cancelled, or undermine the practices’.

Another issue is that the policy on the right to change legal gender resulted from the lack of all other stakeholders’ inclusion.<sup>246</sup> The lawyer only witnesses the National Transgender Network that has pushed forward for the Transgender Bill to happen. She warns that all stakeholders must ensure that the Transgender Bill will not backfire later on the trans’ community.<sup>247</sup> In addition, the right to change legal gender has never been publicised by the authorities. Thus, some transgender persons do not realise their rights.<sup>248</sup> This factor also brings a question on the right to access information in Sri Lanka, which has failed to reach its people, although two main legal documents identify this right. One is article 14A(1) of the constitution, whereas another is the Right to Information Act No 12 of 2016. Both of these documents affirm that every citizen shall have the right to access information, which protects citizen’s rights. Based on the Ministry of Health and Indigenous Medical Services’ General Circular No 01-34/2016 and the Registrar-General’s Department’s Circular Letter 06/2016, trans women should be informed or able to access to information relating to the right to change legal gender they are entitled to.

Kavya sees this as a drawback of this policy, as she mentions that many trans women are not aware of the existence of this right to change legal gender.<sup>249</sup> In the same way, Angel feels that the clarity of the policy is not found in the northern part of Sri Lanka, particularly Tamil-speaking trans woman community. She gives an example of trans woman community in Jaffna because the policy was not provided in Tamil language. She, thus, demands the government pay more attention to the trans woman community in other regions, besides Colombo.<sup>250</sup>

Besides the lack of accessible information regarding the right to change legal gender in Sri Lanka among transgender community, transgender

<sup>246</sup> Pabasari Ginige and Ayodhya Malalagama, ‘An update on transsexuality’ (2018) 9(2) Sri Lanka Journal of Psychiatry 4 DOI <<http://doi.org/10.4038/slipsyc.v9i2.8179>> accessed 11 November 2019

<sup>247</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>248</sup> Isuru Parakrama, ‘Into the Unknown Gender Certificate in Sri Lanka’ (*Lanka News Web*, 29 September 2018) <<https://lankanewsweb.net/featured/33146-into-the-unknown-gender-certificate-in-sri-lanka>> accessed 21 April 2020.

<sup>249</sup> Interview with Kavya (online, 12 May 2020).

<sup>250</sup> Interview with Angel (online, 5 May 2020).

persons are challenged by socio-cultural norms. The interview with the government officer provides that Sri Lanka is a multicultural society, where law amendments are based on socio-cultural factors, specifically religious influence. He says that it is not easy to amend the law, according to the cultural factor. Fortunately, there is an encouragement from the Supreme Court, which is progressive and mindful to refrain from enforcing these laws against the LGBTIQ+ community.<sup>251</sup> In addition to that, the government officer extended that Sri Lanka needs to balance rights and freedoms for people in all religions, both individuals and groups. Moreover, judges can only comment or express their views toward legal provisions, not amend the laws.

To obtain a new NIC and passport, one has to obtain the amended birth certificate, which is upon the discretion of the registrar. Different requirements are dependent on different local authorities. This difficulty may also encourage the abolishment of the policy in the future. It also mentions that the law on the change of legal gender is unclear. Pullat explains that trans women can also be obstructed by the NIC and physical appearance, which are not consistent. Therefore, in order to enhance rights and freedom to transgender people, the article proposed the third gender as a solution.<sup>252</sup>

#### 4.3.5 *Is legal gender change what all trans women want?*

Sekaram describes how discrimination remains against trans women even if a GRC has been issued.<sup>253</sup> Parakrama adds that the right to change legal gender shows that Sri Lanka is not yet ready to go beyond the existing gender norms of binarism, although the policy seems to be a revolutionary advancement for transgender communities in the country.<sup>254</sup> Because Sri Lanka is a gender binary society, heteronormative

<sup>251</sup> Interview with a government official (Colombo, 3 March 2020).

<sup>252</sup> Urmila Pullat, 'Transgendered in Sri Lanka: Gender Identity and the Law in Sri Lanka and India' (16 April 2014) <<https://ssrn.com/abstract=2425503>> accessed 16 September 2019.

<sup>253</sup> Sharanya Sekaram, 'What of our transgender comrades in this state of security?' (*The Sunday Morning*, 13 May 2019) <[www.themorning.lk/what-of-our-transgender-comrades-in-this-state-of-security/](http://www.themorning.lk/what-of-our-transgender-comrades-in-this-state-of-security/)> accessed 11 November 2019.

<sup>254</sup> Isuru Parakrama, 'Into the Unknown Gender Certificate in Sri Lanka' (*Lanka News Web*, 29 September 2018) <<https://lankanewsweb.net/featured/33146-into-the-unknown-gender-certificate-in-sri-lanka>> accessed 21 April 2020.

practice and values are largely influenced in the society.<sup>255</sup> Consequently, it is challenging for some transgender persons as they may be unwilling to choose to become either male or female. As Wijayath mentions, the third gender category is hardly accepted, compared to India, where the roles of hijra are visible in the society.<sup>256</sup> This correlates with what RMS Sarath Kumura, a Commissioner of the Department of Registrations of Persons, a government institution in Sri Lanka that issues NICs, explains in his interview with Daily Mirror Sri Lanka:

The Government also does not accept the third gender concept for transgendered persons because it will affect the culture of our society. We are providing a new ID card with a new registration number if they handed over the relevant documents to us. Without required surgery letters and the amended birth certificates it is not possible to issue new IDs.<sup>257</sup>

The lawyer questions that not everyone supports the third gender category because it is not in the culture. It is surprising for her that India has and supports the third gender (hijra), while Sri Lanka does not have it. She compares Sri Lanka to India as both used to be colonised by the British at the same time but each has ended up with different mind-sets of transgenderism.<sup>258</sup> However, she observes that third gender category is not popular and visible in Sri Lankan gender binary society. She notes that there are people who support third gender, but they are not visible. The lawyer herself does not think people like this concept as people do not talk about this topic in general. In the same way, Angel does not support the third gender category, as the community only wants the female identity. She says, ‘We want to reveal that we are transgender, when appropriate’.<sup>259</sup>

<sup>255</sup> AH Wijayath, ‘Sexual Diversity and Gender Identity in Sri Lankan Perspective with Special Reference to Rights and Position of Sexual Minorities in Criminal Justice System of Sri Lanka’ (2018) 3(1) Proceedings of the 4th World Conference on Women’s Studies 53 DOI 10.17501/wcws.2018.31045.

<sup>256</sup> AH Wijayath, ‘Sexual Diversity and Gender Identity in Sri Lankan Perspective with Special Reference to Rights and Position of Sexual Minorities in Criminal Justice System of Sri Lanka’ (2018) 3(1) Proceedings of the 4th World Conference on Women’s Studies 53 DOI 10.17501/wcws.2018.31045.

<sup>257</sup> Daily Mirror, ‘Who am I?’ (*Daily Mirror*, 15 February 2016) <[www.dailymirror.lk/105419/Who-am-I](http://www.dailymirror.lk/105419/Who-am-I)> accessed 21 April 2020.

<sup>258</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>259</sup> Interview with Angel (online, 5 May 2020).

From the lawyer's experience, she has only met one or two people that wanted to have the third gender category. Most of them are trans women because most trans men do not like this idea. She points that basically, when we normally talk about third gender, we think about trans women like those who wear saris. The lawyer also adds that trans women are comfortable with the current policy on legal gender change and that is why the third gender category is not much more acceptable in Sri Lanka.<sup>260</sup> Likewise, Niroshna and Monisha agree that living herself as a woman is better than as a trans woman.<sup>261</sup> 'Transgender people are more oppressed. The community refuse to accept. So, being a woman is partly accepted by the society', says Monisha.<sup>262</sup>

Besides the third gender category, some transgender persons do not prefer to change their legal gender, due to different reasons. The lawyer asks, 'what they are going to be if they do not want to lie in the other spectrum? Can they be in between? There are identity creations. Do you want to accept them as trans persons or blame those organisations and processes? How do we incorporate them in our society?'. She adds that transgender community has existed in the history for a period of time. No matter what they are, trans women or trans men, all want to perform their gender roles. She criticises that those who do not understand 'estrogenic hormones' are challenging the societal norms, not the transgender community.<sup>263</sup>

To some extent, in Sri Lanka, even though a person can obtain a new identity, the society retains a stereotypical attitude towards them as sex workers. Therefore, they may hide themselves and remain in the same gender they would not rather prefer. The lawyer emphasises that trans women are seen as sex workers in the media. Even though sometimes they are not that, but they are considered sex workers. Therefore, it becomes another problem that makes it more difficult for them to get documentation changed because of the social stigma. Some trans women do not want to visit the government officials to have documentation changed. They feel that there is an obstacle when people look at them strangely.<sup>264</sup>

<sup>260</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>261</sup> Interview with Niroshna (online, 26 April 2020); Interview with Monisha (online, 29 April 2020).

<sup>262</sup> Interview with Monisha (online, 29 April 2020).

<sup>263</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>264</sup> Interview with a lawyer (Colombo, 16 March 2020).



#### 4.4 RECOMMENDATIONS TO THE RIGHT TO CHANGE LEGAL GENDER IN SRI LANKA

According to the research findings, there are five major recommendations to overcome the challenges of the policy on the right to change legal gender, which impact the lives of trans women in Sri Lanka.

##### *4.4.1 Improve legal and social understandings toward gender diversity*

When a woman acts like a man, you do not laugh that much. But when you see a man looks like a woman, you laugh. So, you can see the difference. People think that the person is presenting something not worthy.<sup>265</sup>

In Sri Lanka, women are one of the most vulnerable groups of people in the patriarchal society.<sup>266</sup> No matter whether they are straight women, trans women, trans men, lesbian or bisexual women, they should not be undermined. Gay men or bisexual men do not only represent diversity in SOGIE when discussing the LGBTIQ+ community. Being a trans and a woman in society, trans women face discrimination and stigmatisation in their daily lives. Improving legal and social conditions on transgenderism is significant to socially include them as part of the society. In a similar way, the right to change legal gender in Sri Lanka requires improvements on these circumstances. First, Sri Lanka should repeal all legal provisions in the Penal Code and Vagrants Ordinance that criminalise against the LGBTIQ+ community. These legal provisions, including sections 365, 365A and 399 of the Penal Code and section 07/1841 of the Vagrants Ordinance, are obstacles for trans women coming out in society. Removing these sections would provide trans women and the entire LGBTIQ+ community access to the rights and freedoms they are entitled to. This is, thus, the most significant step, prior to legal gender change.

Although the right to change legal gender fulfils transgender rights, they can still be subject to the criminalisation of homosexuality laws of Sri Lanka. To clarify the previous claim, the lawyer illustrates a recent case of a couple of trans men who have been charged with homosexuality,

<sup>265</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>266</sup> Interview with a lawyer (Colombo, 16 March 2020).



despite the fact that they have changed their legal gender already. The couple are married and had had a long relationship. Then the police sued them using article 365 claiming that it was a homosexual relationship. Finally, the couple won the case. The judge educated the police on what homosexuality and transgenderism are. Still, the negative attitude flows around and the law is very far behind.<sup>267</sup>

Second, state authorities should change their attitudes toward trans women and the LGBTIQ+ community. Dr Prathiba Mahanamahewa, former human rights commissioner of Sri Lanka, expresses that the police and public officers should be trained to treat the vulnerable groups equally with dignity.<sup>268</sup> Monisha emphasises that some government authorities reject the applications on the grounds of SOGIE, although the GRC and legal gender change are obtained. Moreover, government officials should be aware that trans women are also human beings. They are entitled to rights and freedoms as men and women. Monisha suggests that any government officials who violate human rights of trans women should be given punishments.<sup>269</sup> Angel asserts that all relevant government officers should be educated about these processes, since some people face a lot of problems when they approach government services at the district level. However, Angel adds that the general public are the key changer for the society. The rights awareness should also be encouraged.<sup>270</sup>

Third, the right to change legal gender should be the initiative for the recognition of the existence and rights of the non-binary group in Sri Lanka, where gender binary or heteronormative culture performs. However, the current policy on legal gender change only provides male and female genders.<sup>271</sup> The third gender category can be an alternative gender for trans women in Sri Lanka to represent their identity and expression.

<sup>267</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>268</sup> Daily Mirror, 'Who am I?' (*Daily Mirror*, 15 February 2016) <[www.dailymirror.lk/105419/Who-am-I](http://www.dailymirror.lk/105419/Who-am-I)> accessed 21 April 2020.

<sup>269</sup> Interview with Monisha (online, 29 April 2020).

<sup>270</sup> Interview with Angel (online, 5 May 2020).

<sup>271</sup> Ayodhya Malalagama, 'The shifting landscape of Gender Identity and the situation in Sri Lanka' (2017) 3(1) Sri Lanka Journal of Sexual Health and HIV Medicine 45.

#### 4.4.2 *Establish standard guidelines and protocols for the procedures*

The current legal gender change procedures should be made simple so that trans women can easily possess the new birth certificate that identifies the preferred gender and name, based on their gender identity and expression.<sup>272</sup> First, there are no clear guidelines in terms of practice and requirements.<sup>273</sup> The lawyer addresses that the process of going back to obtain documents from the village should be terminated. It would be easier to have the process completed in Colombo or the place where the person is currently residing. Therefore, the self-identity verification process should be based on human rights standards. Parents or government officials cannot intervene in the process or a trans women's willingness to change their legal gender.

Besides, the birth certificate should be newly issued, instead of amending the existing certificate. Trans women can struggle becoming a new person, as the old identity is still shown. The lawyer comments that this practice must be changed definitely. She questions why the authorities cannot deliver the newly issued birth certificate, unlike the NIC and passport.<sup>274</sup> Monisha adds that the procedures need to be made easier at the medical steps, prior to receiving the GRC.<sup>275</sup>

Third, from a transgender rights movement's perspective, Angel believes that the policy on the right to change legal gender should be brought to the attention of trans women, whether living in the north or the south. Angel criticises that every service is centralised in Colombo. She, as part of the Tamil speaking community, did not have any awareness of their rights.<sup>276</sup> Furthermore, Angel proposes that medical officers, who receive trainings on transgenderism, should be appointed in all districts of Sri Lanka, as the current number of medical professionals are inadequate. She suggests that the state authorities collaborate with other stakeholders in order to assist trans women to achieve legal gender change. Angel points out that the roles of LGBTIQ+ NGOs should not be exclusive and limited. They should provide necessary assistance to any

<sup>272</sup> Equal Ground, Sri Lanka and Center for International Human Rights of Northwestern Pritzker School of Law, 'Violations by Sri Lanka of the Economic, Social And Cultural Rights of Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning (LGBTIQ) People' (2017) <[www.ecoi.net/en/file/local/1402111/1930\\_1498131440\\_int-cescr-css-lka-27401-e.pdf](http://www.ecoi.net/en/file/local/1402111/1930_1498131440_int-cescr-css-lka-27401-e.pdf)> accessed 4 December 2019.

<sup>273</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>274</sup> Interview with a lawyer (Colombo, 16 March 2020).

<sup>275</sup> Interview with Monisha (online, 29 April 2020).

<sup>276</sup> Interview with Angel (online, 5 May 2020).

person, regardless social status, casts and religions.<sup>277</sup>

Fourth, Monisha does not agree that the current policy on right to change legal gender is affordable and accessible for all trans women. She argues that hormone therapy and sex reassignment surgery are essential for all trans women to live their lives as women. Thus, they should be locally found at the pharmacies at a cheap cost.<sup>278</sup> Likewise, the procedures should respect trans women's privacy and dignity.<sup>279</sup> Therefore, the state authorities should no longer store the GRC, TNR and other personal information of the applicants in a specific database, as this may lead to social stigmatisation against trans women. This database is controlled by the psychiatric unit of the particular hospital and the Directorate of Mental Health.<sup>280</sup>

#### 4.4.3 *De-medicalise transgenderism*

Another important recommendation for the right to change legal gender in Sri Lanka is that it should de-medicalise transgenderism. As mentioned in paragraph 4.2.2 on steps to obtain a GRC, one must meet a certified consultant psychiatrist for mental health check-up. Then, it is compulsory to take hormonal therapy and surgical treatments for some necessary body parts. Later, certification from the psychiatrist to ensure transformation process will be provided. It is suggested that Sri Lankan authorities should follow international standards on self-determination, stipulated in article 26 of the ICCPR, General Comment 22 of the UNHRC and principle 3 of Yogyakarta Principles, as well as the WPATH Statement on Legal Recognition of Gender Identity.<sup>281</sup>

Furthermore, these medical steps not only stigmatise trans women as persons with mental health issues but also force them to undergo procedures that are inaccessible and unaffordable. Similarly, the Law &

<sup>277</sup> Interview with Angel (online, 5 May 2020).

<sup>278</sup> Interview with Monisha (online, 29 April 2020).

<sup>279</sup> United Nations Development Programme and Asia Pacific Transgender Network, 'Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia' (United Nations Development Programme and Asia Pacific Transgender Network 2017) <[www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv\\_aids/rbap-hhd-2017-legal-gender-recognition.pdf](http://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2017-legal-gender-recognition.pdf)> accessed 9 September 2019.

<sup>280</sup> Ministry of Health, Nutrition and Indigenous Medicine, 'Issuing of Gender Recognition Certificate for Transgender Community' (2016) <[www.health.gov.lk/CMS/cmsmoh1/viewcircular.php?cno=01-34/2016&med=english](http://www.health.gov.lk/CMS/cmsmoh1/viewcircular.php?cno=01-34/2016&med=english)> accessed 9 September 2019.

<sup>281</sup> World Professional Association for Transgender Health, 'WPATH 2015 Statement on Gender Identity Recognition' (*Transgender Europe*, 19 January 2015) <<https://tgeu.org/wpath-2015-statement-on-gender-identity-recognition/>> accessed 22 April 2020.

Society Trust detail how in some cases, parents of trans women are also involved and informed in the process of their child's legal gender change as trans women. It also comments that physical condition should not be only the main criteria to apply for legal gender change.<sup>282</sup> Malalagama adds that besides hormone therapy and necessary surgical treatments, 'social gender role transition' should not also be required for trans women who wish to change their legal gender, due to the contradiction with the international best practice.<sup>283</sup>

Angel finds the requirement that hormone therapy should be compulsory uncomfortable because it can be expensive for many trans women. She claims that some of trans women face the side effects of the medicines. Therefore, she suggests that it would be easier that they receive treatment at the hospital shortly after they have realised their preferred gender.<sup>284</sup> In addition to that, Angel also recommends that the government hospital issue the GRC to trans women immediately, when the psychiatric consultation finishes. 'No one should be asked to wait for six months or two years to receive the Certificate', says Angel.<sup>285</sup> In her point of view, Kavya agrees with Angel that the GRC should be issued after the psychiatric assessment so that it legally proves her gender identity. She also suggests that sex reassignment surgery should be affordable, whereas hormone medicines should be made accessible.<sup>286</sup>

#### *4.4.4 Enact the right to change legal gender as a law*

The existing right to change legal gender in Sri Lanka should be legalised as a law, not an administrative policy. As mentioned in paragraph 4.2 on policy formulation and implementation, the right to change legal gender was approved through the issuance of the General Circular No 01-34/2016, dated on 16 June 2016, under the Ministry of Health and Indigenous Medical Services. Furthermore, the policy is implemented, based on the Circular No 06/2016, dated 28 July 2016, issued by the Registrar-General's Department to all local registrar-general's offices

<sup>282</sup> Law & Society Trust, 'The State of Economic, Social and Cultural Rights in Sri Lanka: A Joint Civil Society Shadow Report to the United Nations Committee on Economic Social and Cultural Rights' (2017) <[https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT\\_CESCR\\_CSS\\_LKA\\_27228\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT_CESCR_CSS_LKA_27228_E.pdf)> accessed 4 December 2019.

<sup>283</sup> Ayodhya Malalagama, 'The shifting landscape of Gender Identity and the situation in Sri Lanka' (2017) 3(1) Sri Lanka Journal of Sexual Health and HIV Medicine 45.

<sup>284</sup> Interview with Angel (online, 5 May 2020).

<sup>285</sup> Interview with Angel (online, 5 May 2020).

<sup>286</sup> Interview with Kavya (online, 12 May 2020).

island wide. Therefore, problems could arise if there is any change in executive body or policy, which could lead to the termination or amendment of this right.<sup>287</sup> Likewise, Equal Ground and the Center for International Human Rights of Northwestern Pritzker School of Law suggests that since it is not a law, all steps are dependent on the discretion of the authorities.<sup>288</sup> As a result, the time each person spends to receive a GRC is different because the individual discretion of the state official plays an influential role in approval or rejection. As a result, the relevant authorities should enact the policy into law so that standard guidelines are officially provided, while trans identities are legally recognised.

#### 4.5 SUMMARY

The lives of Sri Lankan trans women remain in legal and administrative, as well as socio-cultural challenges, despite the existing right to change legal gender. Although trans women are appreciable and grateful for the policy, which upholds their human rights through the new identity, they continue to face difficulties during the application process. Because of the bureaucratic process, the policy is inaccessible and unaffordable. The policy is not a legal provision, and trans women are forced to follow the discretion of the officers. Their birth certificate still indicates the previous gender because the state authorities refuse to issue a new document. The policy lacks standard procedures and protocols, which allows unequal treatment to take place during the service. They must follow the medical treatment, which is time-consuming and expensive before receiving the GRC. Last but not least, trans women do not have other alternatives, besides male or female gender. With regards to these challenges, this chapter provides useful recommendations to the current policy, in order to ensure that the rights of trans women are protected and fulfilled.

<sup>287</sup> Law & Society Trust, 'The State of Economic, Social and Cultural Rights in Sri Lanka: A Joint Civil Society Shadow Report to the United Nations Committee on Economic Social and Cultural Rights' (2017) <[https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT\\_CESCR\\_CSS\\_LKA\\_27228\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT_CESCR_CSS_LKA_27228_E.pdf)> accessed 4 December 2019.

<sup>288</sup> Equal Ground, Sri Lanka and Center for International Human Rights of Northwestern Pritzker School of Law, 'Violations by Sri Lanka of the Economic, Social And Cultural Rights of Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning (LGBTIQ) People' (2017) <[www.ecoi.net/en/file/local/1402111/1930\\_1498131440\\_int-cescr-css-lka-27401-e.pdf](http://www.ecoi.net/en/file/local/1402111/1930_1498131440_int-cescr-css-lka-27401-e.pdf)> accessed 4 December 2019.

## 5.

## CONCLUSION

Living lives as trans women in post-civil war Sri Lanka is challenging. Not only for a long time have they not been legally recognised in any legal documents, but they also may be subject to criminalisation. In addition to that, trans women in Sri Lanka have encountered discrimination, stigmatisation, and marginalisation, due to its socio-cultural influence. Despite these challenges, since 2016 trans women have enjoyed the right to change legal gender, in which they can obtain a GRC. This certificate later allows them to change their name and gender on official documents to reflect their current gender identity and expression, particularly NICs and birth certificates. Although the policy enables trans women to obtain a new identity, which is different to the sex assigned at birth, this research finds that there are five challenges of this policy. At the same time, these challenges inevitably impact lives of trans women in Sri Lanka.

This research aimed to find out the factors contributing to the existing implementation of the right to change legal gender in Sri Lanka. It also sought to analyse the policy challenges and discuss impacts of these challenges to the lives of Sri Lankan trans women. In the end, the research provides useful recommendations to improve the current implementation of the right to change legal gender in Sri Lanka. It is found that discrimination, marginalisation and stigmatisation in Sri Lankan society are socio-cultural factors that urge the state authorities to implement the right to change legal gender. On the other hand, criminalisation, as part of legal and administrative factors, contributes to the protection of transgender rights, because they are one of the most vulnerable groups of people in the country.

Employing semi-structured interviews with four trans women, who have pursued the legal gender change experience, the research

concludes that trans women are appreciable of having their identity changed. They no longer hide themselves from state authorities or the community. At the same time, they feel that their civil and political rights are protected and can be exercised through their new identity in daily life. Nevertheless, in terms of economic, social and cultural rights, trans women have continuously encountered discrimination and stigmatisation when their previous identity is discovered. Another challenge is the problematic procedures, which can retraumatise trans women in different directions. The issue of trans women becomes medicalised, as it contrasts to the heteronormative norm of Sri Lankan society. In addition to that, the procedures are complex and centralised, due to the shortage of medical professionals and facilities. As a result, the policy is inaccessible and unaffordable for trans women outside Colombo. Likewise, there are no standard procedures and protocols in place. This leads to lack of awareness from state authorities towards trans women who are likely to face discrimination and criminalisation. At the end of the process, trans women do not receive a new birth certificate. Instead, it is the amended certificate, in which the previous gender is crossed out.

Furthermore, trans women are forced to follow the regulations set by the state authorities, such as taking hormone therapy and the necessary surgical treatment. Also, since it is not a law, trans women are required to follow the discretion of officials, both at the hospital and local registrar office. This is why some trans women spend six months prior to receiving a GRC, whereas some take almost two years to get it. Because of the amount of time and expenditure, the right to change legal gender has not yet reached every trans woman in Sri Lanka. Last but not least, the policy may not favour those who believe in gender non-binary and third gender categories. Only male and female are recognised on the official gender spectrum. However, this impacts only a small group of trans women, because many of them want to live their lives as female.

In the last part, the research proposes recommendations to the existing policy. As one of the most vulnerable groups of people in the island, better legal and social understandings toward gender diversity should be pushed forward in the society. The authorities should repeal all legal provisions that criminalise the LGBTIQ+ community. Moreover, social acceptance should be encouraged, while open discussion on gender diversity should be normalised. The policy should be legalised as a law with standard guidelines and protocols in order to make the

procedures simple. This includes the de-medicalisation of legal gender change, but self-identity verification, based on international standards. However, the authorities should guarantee that all medical requirements are reachable and affordable island wide without any distinction, particularly language barriers. Also, the authorities should issue a new birth certificate, instead of amending it, so that trans women fully obtain the new identity. Lastly, the state authorities should collaborate with non-state actors to assist trans women from the beginning to the end of the process.

The researcher believes that this thesis would assist in fulfilling the gaps of research on LGBTIQ+ in Sri Lanka. The researcher would like to encourage other researchers to further explore and analyse the related issues of the right to change legal gender in Sri Lanka towards trans men.



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