

# LEGAL GENDER RECOGNITION

## A Multi-Country Legal and Policy Review in Asia



ASIA PACIFIC  
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# Forewords

Transgender people in the Asia-Pacific region – and globally – remain among the most marginalized populations in development efforts, experiencing persistent poverty, social exclusion and poor health outcomes. This represents a fundamental barrier to inclusive development and the achievement of the Sustainable Development Goals. To actively address this marginalization, the United Nations Development Programme (UNDP) has established strong relationships with the Asia Pacific Transgender Network (APTN) and other transgender advocates to foster inclusion, address inequality and discrimination, and promote universal access to health and social services.

Throughout all our interactions, a primary concern echoed repeatedly by our partners was the barrier created by a lack of legal gender recognition for transgender people. In national and regional consultations, transgender people have reiterated that the right to legal recognition of self-defined gender identity and gender expression are basic aspects of self-determination, dignity and freedom. It is profoundly important to transgender people's sense of self-worth and legal protection that they enjoy the legal right to have their gender identity officially registered. Legal gender recognition is also fundamental to the enjoyment of many other human rights, and a crucial step for achieving a number of Sustainable Development Goals including gender equality and ensuring healthy lives.

This report, entitled *Legal Gender Recognition: A Multi-Country Legal and Policy Review*, is based on a comprehensive review of existing laws, policies and practice conducted over 18 months in 9 countries in Asia. Additionally, over 220 transgender people from more than 80 civil society groups added their voice and lived realities to the study's findings. This report is premised on the belief that detailed assessments of relevant laws, regulations, court decisions and policies, including the context within which they have developed, provide a robust basis for strategic planning on how to overcome the barriers that transgender people face.

This report shows that the vast majority of transgender people in the region do not have access to legal gender recognition, either because no such provisions exist in their country or due to practical limitations in how court judgments or parliamentary decisions have been implemented. But the portrait is not wholly grim. Progress continues to be made in countries across the region and efforts are now ongoing in many countries to review existing laws and policies, as well as propose new legislation and clear procedures for legal gender recognition. We have an incredible opportunity to ensure that these new pieces of legislation are based on good practices, are accessible, and support equality and inclusion.

Legal gender recognition is an essential step on a long path to the full realization of the human rights of transgender people, precisely because it touches on so many parts of a transgender person's life. UNDP remains committed to working with transgender people and their representative organizations, governments and development partners in the region to ensure that human rights are protected and health disparities addressed and overcome. This is essential if the ultimate inclusive mission of the Sustainable Development Goals to "leave no one behind" is to be achieved.



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Since its founding in 2009, APTN has published several key reports, policy and technical briefs that have been used to inform programmes, policy and laws. Legal gender recognition deeply impacts the livelihood of trans and gender diverse people and is critical to ensure their dignity, rights and security. APTN is committed to working to ensure that so long as gender exists as a legal classification, that all people in Asia and the Pacific have access to identity documents that reflect their self-defined gender.

Without accurate documents, trans people's access to critical and fundamental legal and human rights is infringed. This impacts their access to meaningfully participate in society that many people take for granted, including the right to vote, to health care, to work, to travel, the right to find a family, movement, and many others. As this report shows, legal gender recognition is critical to ensuring trans rights and protections from discrimination and improving access to critical life services.

This report, in collaboration with UNDP, is the first of its kind in the region, researching the specifics of legal gender classifications and their changes, both from the perspective of the law as it is written and from community members as they navigate laws and policies. We strongly value the consultative processes with the trans communities we serve, and this is deeply embedded in the work we do, regardless of the size, cultural and geographical challenges. The process of developing the report included dialogues and reviews with civil society and stakeholders in each of the countries involved.

Legal gender recognition in Asia shares one widely common trait: lack of regulation. Where there are regulations in place, they are largely restrictive, requiring the consent of third parties, the oversight of doctors, or a diagnosis with a mental illness. Each of these requirements violates the human rights of trans people as outlined in the Universal Declaration of Human Rights. In some countries that do have policies of legal gender recognition, the laws are not implemented and legal gender recognition remains inaccessible and discriminatory.

We look forward to this report being utilized by trans communities and civil societies in Asia and the Pacific to engage in greater dialogue surrounding legal gender recognition with policymakers, government officials, and health providers. It is vital that the real life impacts and implementation of legal gender recognition continue to be documented, and that the voice of trans communities throughout the region are the focus and are meaningfully engaged in the revisions of policies, reports and law.



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Being LGBTI in Asia is a regional programme aimed at addressing inequality, violence and discrimination on the basis of sexual orientation, gender identity or intersex status, and promotes universal access to health and social services. It is a collaboration with governments, civil society, regional institutions and other stakeholders to advance the social inclusion of LGBTI people. The programme recognizes that LGBTI people are highly marginalized and face varied forms of stigma and discrimination based on their distinct sexual orientations, gender identities and expressions. The programme is supported by UNDP, the Embassy of Sweden in Bangkok, the United States Agency for International Development (USAID) and Faith in Love Foundation (Hong Kong).

# Acronyms

APCOM	Asia Pacific Coalition on Male Sexual Health
APF	Asia Pacific Forum of National Human Rights Instruments
APTN	Asia Pacific Transgender Network
CAT	Convention/Committee Against Torture and other Cruel, Inhuman and Degrading Treatment
CEDAW	Convention/Committee on the Elimination of all forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
HPP	Health Policy Project
HR Committee	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICD	International Classification of Diseases and Related Health Problems
ICJ	International Commission of Jurists
ID	Identification Document
IDLO	International Development Law Organization
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
NADRA	National Database and Registration Authority
NALSA	National Legal Services Authority
NGO	Non-Governmental Organization
NHRI	National Human Rights Institutions
OHCHR	Office of the High Commissioner for Human Rights
PAHO	Pan American Health Organization
PAP	Psychological Association of the Philippines
TGEU	Transgender Europe
TvT	Transrespect versus Transphobia Worldwide
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United National Population Fund
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UNODC	United Nations Office of Drugs and Crime
WHO	World Health Organization
WPATH	World Professional Association for Transgender Health

# Executive summary

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## 1. INTRODUCTION

In most Asian countries, the vast majority of transgender people cannot obtain any official identification documents that reflect their gender identity. Instead, their listed title, name, sex and/or gender is based on the individual's sex assigned at birth. In some countries, the numbering system for official documents is also categorized in this way.

Identification documents are increasingly required for many activities in daily life, including routine tasks such as entering a shopping mall or collecting a parcel from the post office. In practice, a transgender person's ability to live in dignity, equality and security is severely compromised if they do not have the option of legal gender recognition.

The discrimination and exclusion that transgender people face is exacerbated when they are required to use an identity document that does not match their gender identity or gender expression. This discrimination may involve threats to a transgender person's safety, or mean they are marginalized when trying to participate in virtually any area of life. This includes exclusion from school, vital health services, employment and housing, and from receiving access to social assistance and private banking, credit or mortgage facilities. Therefore, legal gender recognition is one vital component of the legal protection that transgender people require in order to enjoy the full realization of their human rights.

Often, such identity verification is required at times when people are particularly vulnerable, including when faced with a medical emergency, in natural disasters, or when they are homeless or are crossing borders. Transgender people have been denied access to gender-segregated services or support in each of these circumstances, including because they did not have official identity documents that match their gender identity and/or gender expression.<sup>1</sup>

As this report demonstrates, transgender people's dignity, equality, privacy and security are severely compromised if their gender identity and expression is not recognized through legal and administrative processes. On its own, however, legal gender recognition does not eliminate discrimination against transgender people. Legal gender recognition is strongly linked to the enforcement and implementation of laws, regulations and policies that enable transgender people's gender identity and expression to be respected and protected in all areas of life and that provide remedies and redress if human rights violations occur.

Given this context, UNDP provided a process and methodology to comprehensively assess laws, regulations and policies in relation to legal gender recognition in nine countries in Asia. UNDP oversaw assessments in seven of those countries: Bangladesh, China, India, Nepal, Pakistan, the Philippines and Thailand. APTN conducted equivalent assessments in Indonesia and Malaysia.

The objective of this nine-country project was to demonstrate how laws and policies related to gender recognition can play a key role in upholding human rights and promoting transgender people's well-being in different legal, political and cultural settings. It also aimed to observe how provisions that are not consistent with human rights standards present barriers to transgender people's well-being. This detailed assessment of relevant legal, regulatory and policy provisions, and the context within which they have developed, aims to benefit strategic planning on how to overcome the barriers that transgender people face.

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1 Health Policy Project (HPP) (2015). *Blueprint for the Provision of Comprehensive Care for Trans Persons and their Communities in the Caribbean and other Anglophone Countries*; APTN & UNDP (2015). *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities*, pp. 62–63.

## 2. THE CONTENT OF THE REPORT

This regional report starts with an Introduction (Section 1) and an explanation of the methodology for the project (Section 2), followed by six sections focused on the substantive human rights issues related to legal gender recognition that were examined in each of the nine countries. These six sections start with a human rights context, followed by an analysis of laws, court decisions, policies and practices, before ending with the following conclusions and policy considerations.

### Defining gender identity, gender expression and transgender populations in laws and policies

Section 3 outlines how laws and policies that define ‘transgender’ or local identity terms, including those for third gender identities, have a significant impact on whether and to what extent all transgender people’s human rights are universally recognized and protected under national laws. Similarly, definitions of terms such as ‘sex’, ‘gender’, ‘gender identity’ and ‘gender expression’ can either recognize or limit the universal and inclusive application of human rights to all transgender people. Examples from the nine countries reviewed show evidence of both approaches, when constitutions, court decisions, laws or policies, or their interpretation, recognize all transgender people or are limited to certain gender identities or expressions and exclude others. They also illustrate a worrying concern about the conflation of terms describing transgender people and intersex variations in ways that obscure the specific experiences and distinct human rights issues affecting each group.

### Policy considerations

- Ensure that definitions in laws and policies of terms such as ‘gender’, ‘gender identity’, ‘gender expression’, ‘transgender’, or specific transgender identities are inclusive of diverse genders, gender identities and expressions, and are based on self-determination.
- Avoid conflating transgender and intersex terms and definitions in laws, regulations and policies, and promote the use of human rights-based terms such as sex characteristics to describe the relevant prohibited grounds of discrimination for intersex people.
- Develop confidential data collection methods that enable the diversity and size of transgender populations to be measured accurately in order to monitor and address barriers to the full realization of transgender people’s human rights.

### Recognition of the human rights of transgender people in laws and policies

Section 4 of the report emphasizes that human rights protections under international, constitutional and national laws apply to transgender people. The prohibition of discrimination on the basis of ‘other status’ includes other attributes such as gender identity and gender expression, whether or not they are specifically mentioned as prohibited grounds of discrimination. The report notes that in all countries reviewed, human rights are recognized in constitutions and laws in various forms. Therefore, whether or not the protection of transgender people is mentioned explicitly, States are required to take all measures to eliminate discrimination against transgender people and to protect their human rights in all aspects of their lives.

Depending on the political and legal system of the given country, human rights protections for transgender people can be provided in various forms. Some countries in the region specifically recognize the protection of transgender rights in their laws and Constitution while, in other countries, courts apply the overarching human rights principles set out in the Constitution or other laws. The report also provides examples of countries where laws or regulations provide explicit human rights protections to transgender people, making a significant positive impact on their everyday life experiences.

## Policy considerations

- Ensure that transgender people are protected under human rights and anti-discrimination provisions of the Constitution and relevant laws, including that gender, gender identity and gender expression should be understood as prohibited grounds for discrimination.
- Audit existing and proposed laws, regulations and policies, including those that make distinctions based on a person's sex or gender, to ensure that they do not discriminate against transgender people, but provide respect and protection for their human rights.
- Provide protections and remedies for transgender people under violence, domestic violence, sexual violence and rape laws, whatever their gender identity, gender expression, legal gender marker, or surgical status.

## Legal gender recognition: name change and guarantees, eligibility criteria, and procedural requirements for changing gender markers

Section 5 summarizes whether, and to what extent, the nine countries reviewed enable transgender people to change their name or gender marker. This includes analysing those that impose restrictive or abusive eligibility requirements or administrative processes that limit access to changing gender markers.

In most of the countries reviewed, transgender people struggle to amend their names to match their gender identity or expression. While name-change provisions exist, most are silent on how they apply to transgender people. In a context where significant stigma prevails against transgender people, prejudice, ignorance or misinformation can easily translate into discriminatory practices. These include the imposition of barriers that have a disproportionately negative impact on transgender people.

In parts of this region, there has been some significant progress in guaranteeing the right to legal gender recognition, including through Supreme Court decisions in India and Nepal. All four countries reviewed in South Asia – Bangladesh, India, Nepal and Pakistan – have Supreme Court judgments or Cabinet decisions recognizing a third gender on specific documents; however, in many of these countries implementation measures have been inconsistent. India is the only South Asian country whose Supreme Court decision affirms transgender people's rights to identify as male, female or as a third gender identity. However, eligibility criteria are still imposed through administrative practices. This includes requiring evidence of gender-affirming surgeries in order to amend details on a passport. Nepal's commitment to third gender recognition is embedded in the Constitution, and is gradually being rolled out across a range of government documents. It remains, however, focused solely on a third gender identity, with no option for transgender women to be recognized as female or transgender men to be recognized as male.

None of the four countries reviewed in Southeast Asia provide a clear pathway for changing gender markers. Malaysia has a precedent-setting Court of Appeal decision prohibiting such changes, and there are no legal or policy avenues available in the Philippines or Thailand. In Indonesia, the only available option is attempting to use a generic administrative provision for registering 'other important events'.

China has laws and policies setting out a clearer process for amending name and gender markers on documents; however, these set heavy and restrictive eligibility criteria, as outlined in the regional report.

## Policy considerations

- Guarantee the right to legal gender recognition through laws, policies or regulations, based solely on self-determination.
- Ensure that the right to legal gender recognition is not undermined through eligibility criteria that violate human rights including, but not limited to, criteria that discriminate on any grounds including marital or family status, age, or criminal record or that require a mental health diagnosis, medical treatment, or family or community approval.

- Ensure rights-based procedures for legal gender recognition that are accessible, non-discriminatory, consistent across various documents, apply to both new and existing documents, and respect transgender people's dignity and privacy.
- Consider whether it is necessary to gather sex or gender details on administrative records or identification documents and, where necessary, ensure that administrative gender categories reflect the diversity of transgender populations, including, but not limited to, options of identifying as female, male, third gender, or non-binary.
- If identity verification processes are required, ensure these are based on human rights standards and do not discriminate or impose eligibility requirements for legal gender recognition.

## Gender recognition in various areas of life

Section 6 of the report demonstrates that legal gender recognition can be a pivotal factor affecting whether transgender people have equal access to education, employment and marriage, and can lead a life with dignity, free from stigma and discrimination. Lack of legal gender recognition can negatively impact on transgender people's ability to stay at school and graduate, and gain and keep a job, resulting in economic and social exclusion. Without legal gender recognition, it is harder for transgender people to access general and transition-related health services, although in some countries undergoing transition-related services is a precondition of legal gender recognition. Exercising rights under gender-specific laws is also difficult in many countries without legal gender recognition, including those that only allow heterosexual marriage, or provide protection only for women against sexual violence, although these laws are themselves problematic with their narrow legal scope from the perspective of equality.

In some countries reviewed, the requirement to implement human rights for transgender people in relation to education, employment or health are set out in national laws or court decisions, such as the Nepal Constitution and the National Legal Services Authority (NALSA) judgment in India. In countries where there is no such overall national directive, provisions that cover a specific sector or part of the country can create an enabling environment for recognizing transgender people's gender identity and expression in that context.

This regional report considers five main areas of life where relevant laws or policies were identified in the nine countries under review. These are education, employment, access to health services, marriage, and issues for transgender people in places of detention.

## Policy considerations

### Education

- Develop rights-based regulations and policies allowing transgender people to amend their gender marker on education records, based on self-determination and with no other eligibility requirements, and obtain new education documents with the appropriate gender marker.
- Audit policies in schools and other educational institutions, including uniform and registration policies, so they are inclusive of students of all gender identities and expressions, and transgender and gender-diverse students can participate fully in all educational activities.
- Document the vulnerability of transgender students to bullying and violence due to their gender identity or expression, and develop clear anti-bullying and anti-violence regulations and policies covering the actions of students or staff, focused on effective prevention, support and complaints mechanisms.

### Employment

- Develop equal employment opportunity laws, regulations and policies that extend fully to transgender people, including through affirmative action.
- Ensure that anti-discrimination laws, regulations and policies fully encompass and address pre-employment and workplace discrimination that transgender people experience based on their gender identity or expression.

- Ensure workplace policies enable transgender people to participate fully at work, including through the choice of appropriate name, title and gender marker on employment records, a workplace dress code that matches their gender identity and/or expression, and access to safe bathroom facilities.

## Health services

- Ensure that health care policies, ethical standards and standards of care focus on eliminating discrimination and violence against transgender people in health care settings, including when these are linked to a discrepancy between transgender people's gender markers on medical records and their gender identity or expression.
- Ensure that access to gender-affirming health services is based on informed consent and choice and without restrictive or abusive eligibility criteria, including those that discriminate on the basis of age or marital status, require a mental health diagnosis or authorization from a third person, or that exclude those with a criminal record.
- Adapt or develop national clinical guidelines for gender-affirming health services for local contexts in response to the needs of specific trans populations, reflecting international human rights standards and building on international guidance from the World Professional Association for Transgender Health (WPATH) and the World Health Organization (WHO), and regional guidance including the Asia Pacific Trans Health Blueprint.
- Build the capacity and capability of health professionals to provide general and gender-affirming health care services to transgender people, including by integrating technical skills and cultural competency into medical education and in-service training for health care professionals, and focusing on required competencies rather than length of service, seniority or position.
- Monitor and publicly critique the practice of 'conversion' or 'reparative' therapies (which aim to change a person's gender identity, gender expression or sexual orientation), highlighting that such treatment is no longer considered ethical.
- Make gender-affirming health services affordable for transgender people, including through public health care systems, and public and private health insurance schemes that do not discriminate based on a person's gender identity or expression.

## Marriage

- Ensure that laws and regulations provide marriage equality to transgender people on an equal basis with other citizens.
- Ensure that existing laws and regulations governing the institution of civil marriage are clarified and extended to encompass third gender and transgender people on an equal basis.
- Enable a gender marker change achieved through any official administrative process to be used as a primary identity document in marriage applications.

## Places of detention

- Ensure that human rights standards relevant to people in detention apply in practice for all detainees including those who are transgender, without discrimination.
- Develop rights-based national policies about transgender people in detention (including in relation to placement, safety, name and gender marker on records, search processes, and access to rehabilitation and health care) that recognize transgender people's gender identity and expression, irrespective of whether they have had gender-affirming surgeries, and that provide opportunities for transgender people to participate meaningfully in decisions about their detention.
- Ensure access to and continuity of health care services, including transition-related health services, without discrimination and at a level equivalent to that available in the community.

- Establish independent monitoring mechanisms of detention facilities and provide training for those working in prisons about transgender people’s human rights.

## Unjust use of criminal laws and punitive provisions

Section 7 investigates whether, how and for what reasons criminal laws are being used to penalize transgender people’s gender expression and how other forms of criminalization disproportionately target or impact on transgender people. The report points out that although criminalization of gender expression has been condemned by human rights bodies, many countries in the region criminalize transgender people’s gender expression, either through directly criminalizing ‘cross-dressing’ or by using various criminal or other penal provisions of the law – for example immorality, public indecency, vagrancy and loitering provisions – against transgender people. Other forms of criminalization that particularly affect transgender people include the criminalization of sex work, same-sex sexual activity, and other activities connected to the marginalization of transgender people, such as begging.

## Policy considerations

- Audit criminal laws and punitive sanctions of other laws to eliminate various forms of penalization of gender identity or expression, including criminalization of ‘cross-dressing’, ‘prohibition of posing as a woman or man’, ‘wearing women’s clothing’, ‘female impersonation’ and ‘male impersonation’.
- Audit and prevent the application of indecency and immorality penal provisions against transgender people’s gender expression.
- Investigate, recognize and address the severe negative impact of criminalizing sex work, same-sex sexual activity and begging.
- Cease the harassment, arrest and prosecution of transgender people based on the often-false profiling of them as sex workers simply because of their gender identity and expression.

## Accountability for progressing legal gender recognition

Section 8 describes the importance of identifying duty bearers and accountability mechanisms for progressing legal gender recognition.

This nine-country review identifies the complex relationship between laws, policies, regulations and court decisions and their implementation that impact on legal gender recognition and the human rights of transgender people. Even when positive legal provisions exist, implementation measures including administrative practices or unjustified eligibility criteria for affirmative action can impose abusive requirements that amount to human rights violations. The country assessments document the growing diversity and visibility of transgender people and the need for their effective participation in decisions that affect every aspect of their lives, and for meaningful access to remedies and redress when human rights violations occur.

Particular aspects of accountability that the report addresses include progressive realization, human rights-based implementation, identification of duty bearers, participation, and affirmative action or special measures.

## Policy considerations

- Develop comprehensive plans and strategies on how to implement human rights-based laws and policies on legal gender recognition, including clear timeframes, and monitoring and evaluation processes.
- Ensure that duty bearers are appointed, with clearly assigned roles and responsibilities for the development and implementation of laws and policies, and effective mechanisms are set in place for monitoring progress.

- Ensure meaningful participation of transgender people from planning through to implementation, enabling representation from a diverse range of transgender people including those who identify as a third gender or non-binary, transgender women who identify as female, transgender men who identify as male, and vulnerable groups.
- Train duty bearers (including law enforcement officers, judges and government officials), National Human Rights Institutions (NHRIs) and civil society organizations on how anti-discrimination protections and other human rights standards apply to transgender people.
- Consider introducing affirmative action or special measures to address the marginalization of transgender people, ensuring that any eligibility criteria do not impose norms that exclude or discriminate against certain transgender populations or result in other forms of human rights violations.
- Introduce effective remedies and redress mechanisms that comprehensively address the needs and rights of transgender people and provide them equal opportunities for accessing justice without discrimination.

## WAYS FORWARD

This report illustrates that there are many avenues and levers for progressing legal gender recognition and transgender people’s human rights in this region. It notes that the growing visibility of the diversity of gender identities in the countries reviewed provides a strong rationale for ensuring that laws, policies and regulations provide protection to all transgender people, whatever term they use to describe their gender identity or expression.

The report points to strong statements by professional public health and human rights bodies against the depiction of gender diversity as an illness, and in support of depathologization, including in relation to legal gender recognition. It notes positive regional and national-level practices, including increasing collaboration between transgender organizations and health care providers to address barriers to transgender people’s health and human rights.

The report welcomes the progressive steps countries have taken to implement human rights standards in laws and policies, including through targeted affirmative action, mainstreaming of human rights provisions, and through sectoral policies. It calls for the elimination of legal and policy barriers to gender recognition that remain in many countries, including those that require gender-affirming surgeries, sterilization, forced divorce, or other eligibility criteria that violate human rights and contribute to stigma and discrimination against transgender communities. The report highlights the need to repeal laws that criminalize gender expression and to refrain from unjustified application of punitive laws against transgender people.

This report is premised on the belief that detailed assessments of relevant laws, regulations, court decisions and policies, including the context within which they have developed, provide a robust basis for strategic planning on how to overcome the barriers that transgender people face.

The report concludes that legal gender recognition has the potential to make a pivotal difference, precisely because it touches on so many parts of a transgender person’s life and related civil, political, economic, social and cultural rights. It calls for recognition that respecting and protecting the well-being and human rights of transgender people is necessary to achieve the Sustainable Development Goals (SDGs). The nine national assessments and this regional report are offered as resources for national dialogues that are required to address remaining challenges in this region. It is vital that transgender people are able to participate effectively in these processes and their diverse voices and perspectives are comprehensively taken into account.

# 1. Introduction

## 1.1 IMPORTANCE OF LEGAL GENDER RECOGNITION

Legal gender recognition is about a person's recognition and protection before the law and ability to navigate through areas of daily life. As this report demonstrates, transgender people's dignity, equality, privacy and security are severely compromised if their gender identity and expression is not recognized through legal and administrative processes. These processes include the possibility of changing name details and gender markers on identification documents and administrative records, such as birth certificates, identity cards, passports, ration cards, and educational and employment records.

On its own, legal gender recognition does not eliminate discrimination against transgender people. Nor does it always guarantee a transgender person the choice about whether or not to disclose that they are transgender, particularly for someone whose gender diversity is visible or whose personal history is widely known. What legal gender recognition does do is give transgender people the choice to no longer be legally defined by their sex assigned at birth, and legal protections based on their gender identity and expression. It is necessary, though not sufficient on its own, to address the discrimination and violence that transgender people face, including exclusion from school, vital health services, employment and housing, and from receiving access to social assistance and private banking or credit facilities. Legal gender recognition is strongly linked to and enforced through laws, regulations and policies that enable transgender people's gender identity and expression to be respected and protected in all areas of life and that provide remedies and redress if human rights violations occur.

Legal recognition of transgender people has been identified as a crucial step for achieving a number of Sustainable Development Goals including gender equality, ensuring healthy lives and fulfilling the commitment to "leave no one behind". It is essential to meet international human rights treaty obligations and regional policy commitments on respecting, protecting and fulfilling transgender people's human rights.<sup>2</sup>

Previous estimates suggest there are at least nine million transgender people in the Asia-Pacific region, though this is based on scattered, small-scale research that is largely limited to transgender women and third gender identities.<sup>3</sup> As this report and previous research shows, the vast majority of transgender people do not have access to legal gender recognition, either because no such provisions exist<sup>4</sup> or due to practical limitations in how court judgments or parliamentary decisions have been implemented.

Legal gender recognition is not limited to legislation or policies allowing transgender people to change their gender markers. It also includes inclusive definitions and constitutional, legislative and policy protections from discrimination that ensure transgender people are provided with equal protections and opportunities. Some progress in legal gender recognition and anti-discrimination protections for transgender people has been made in countries across the region. This report documents that progress and outstanding challenges across nine countries in Asia.

## 1.2 LEGAL AND POLICY REVIEW ACROSS NINE COUNTRIES IN ASIA

Given this context, the UNDP Bangkok Regional Hub provided a process and methodology to comprehensively assess laws, regulations and policies in relation to legal gender recognition in nine countries in Asia. UNDP

2 UNESCAP (2010). *Resolution 66/10: Regional call for action to achieve universal access to HIV prevention, treatment, care and support in Asia and the Pacific*, 19 May 2010; UNESCAP (2011). *Resolution 67/9: Asia-Pacific regional review of the progress achieved in realizing the Declaration of Commitment on HIV/AIDS and the Political Declaration on HIV/AIDS*, 25 May 2011; UNDP (2015). "Ending LGBTI discrimination is key to the SDGs", *Our Perspectives*, 29 September 2015.

3 Winter, S. (2012a). *Lost in Transition: Transgender People, Rights and HIV Vulnerability in the Asia-Pacific Region*. Bangkok: Asia Pacific Transgender Network (APTAN) & UNDP.

4 Winter, S. (2012b); HPP, APTN & UNDP (2015). Section 3.5.

Bangkok Regional Hub oversaw assessments in seven of those countries: Bangladesh, China, India, Nepal, Pakistan, the Philippines and Thailand. APTN conducted equivalent assessments in Indonesia and Malaysia.

The rationale behind this nine-country study was to demonstrate how laws and policies related to gender recognition can play a key role in upholding human rights and promoting transgender people's well-being in different legal, political and cultural settings. It also aimed to observe how provisions that are not consistent with human rights standards present barriers to transgender people's well-being. The project aimed to demonstrate that undertaking a detailed assessment of relevant legal, regulatory and policy provisions, and the context within which they have developed, benefits strategic planning on how to overcome the barriers that transgender people face.

The specific aims and objectives of this project were to:

- Undertake country-level research to assess existing information about relevant laws, policies and practice, and generate new information.
- Contribute to ongoing national processes and dialogues on legal gender recognition and human rights.
- Create participatory multi-stakeholder national processes where the voices and perspectives of transgender people were strongly and comprehensively taken into account.
- Build capacity among transgender activists and other national experts to initiate and carry out comprehensive legislative and policy processes in a multi-stakeholder context.
- Contribute to legal and policy changes in countries, that respect and protect transgender people's human rights.
- Provide knowledge transfer to other countries and regions through peer-reviewed publications.

This project has built on current national and regional activities and initiatives. Full details of the project's methodology are in Section 2.

This report uses examples to illustrate the barriers to gender recognition in this region, good practice, and some legal and policy solutions. It also provides an analysis of various ways that existing human rights guarantees can be evoked to protect transgender people. It illustrates and explains how, in the absence of comprehensive gender recognition laws or regulations, countries can use constitutional protections, jurisprudence or sectoral provisions (for example covering education and employment) as the basis for legal gender recognition.

Governments, national partners and stakeholders are encouraged to do further work to ensure transgender people are legally recognized and protected in all areas of life. It is hoped and envisaged that this report, and the Assessment Tool on which it is based, can be resources for that ongoing work.

Finally, the nine countries involved in this study do not exist within a vacuum. It is important to recognize other developments in the region that are not included within the scope of this report. Three examples are briefly summarized below: Hong Kong Special Administrative Region (SAR), China, Sri Lanka and Viet Nam.

In Hong Kong SAR, China, the government set up an Inter-departmental Working Group on Gender Recognition (IWG) in January 2014 to review international standards, provisions and case law, in order to make recommendations on possible legislation.<sup>5</sup> The IWG is also reviewing domestic provisions which may be affected by legal gender recognition and is drafting a public consultation paper.

In Sri Lanka, the Human Rights Commission of Sri Lanka (HRCSL) facilitated dialogue on legal gender recognition in response to a March 2015 complaint from a transgender person.<sup>6</sup> As a result, in 2016 the Ministry of Health issued a circular to health services and education institutions about issuing gender

5 Legislative Council Panel on Administration of Justice and Legal Services (Hong Kong) (2017). *2017 Policy Initiatives of the Department of Justice*, LC Paper No. CB (4)426/16-17(03), Section e, paragraphs 64–66, pp. 18–19.

6 Asia Pacific Forum of National Human Rights Institutions (APF) & UNDP (2016). *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions*, p. 59.

recognition certificates to transgender people.<sup>7</sup> The Registrar-General instructed all registrars to change sex and name details on birth certificates based on such gender recognition certificates.<sup>8</sup> The process remains a medicalized one, but with some degree of flexibility.<sup>9</sup>

In November 2015, the National Assembly of Viet Nam approved the legalization of gender-affirming surgeries and the introduction of the right to legal gender recognition, but only for transgender people who have undergone such surgery.<sup>10</sup> This was welcomed as a small, but significant step towards the recognition of transgender people's rights.<sup>11</sup> The policy considerations in this report, and the human rights standards upon which they are based, are equally relevant to these countries. It is hoped that they will inform the progressive realization of transgender people's human rights, including to legal gender recognition, across Asia.

## 1.3 STRUCTURE OF THIS REPORT

This regional report is divided into the following seven sections:

1. Introduction
2. Methodology
3. Defining gender identity, gender expression, and transgender populations in laws and policies
4. Recognition of the human rights of transgender people in laws and policies
5. Legal gender recognition (name change and guarantees, eligibility criteria, and procedural requirements for changing gender markers)
6. Gender recognition in various areas of life
7. Unjust use of criminal laws and punitive provisions
8. Accountability for progressing legal gender recognition
9. Ways forward

Each section starts with a brief overview of the human rights context, based on both the lived experiences of transgender people and applicable international human rights standards. The bulk of the material in each section analyses relevant national laws, court decisions, policies and practices across the region. Each section concludes by proposing human rights-based policy considerations directed at those responsible for setting enabling legal and policy frameworks in each of the countries reviewed.

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7 Ministry of Health (Sri Lanka) (2016). *General Circular No: 01-34/2016 on Issuing of Gender Recognition Certificate for Transgender Community* (16 June 2016).

8 The Registrar-General (Sri Lanka) (2016). *Circular No 06/2016* (28 June 2016).

9 A transgender person no longer has to submit written evidence of parental consent, or a surgeon's written verification of a clinical diagnosis and genital reconstruction surgery. Instead, a Consultant Psychiatrist authorizes a Gender Recognition Certificate. See: Gender Recognition Certificate, issued for the purpose of changing gender and name on Birth Certificates under Sections 27 and 52(1) of the Birth and Death Registration Ordinance included in Ministry of Health (Sri Lanka) (2016). *General Circular No: 01-34/2016*.

10 Through article 37 of the new Civil Code No. 91/2015/qh13 (24 November 2015) (Civil Code 2017) which replaced the Civil Code No. 33/2005/QH11 (14 June 2015) (Civil Code 2005). The new Civil Code 2017 came into effect on 1 January 2017. Details about the specific surgical steps transgender people required in order to gain legal gender recognition were due to be published in 2016, but were not available at the time this report was being finalized in May 2017.

11 Human Rights Watch (HRW) (2015b). *Vietnam: Positive Step for Transgender Rights*.

## 2. Methodology

### 2.1 LITERATURE REVIEW

A short literature review was undertaken at the start of the project and used to develop the Assessment Tool and to identify issues to be explored through each national assessment. It focused primarily on the nine countries being reviewed, while also providing an overview of good practices around the world, international human rights standards, and global and regional policies relevant to legal gender recognition.

### 2.2 ASSESSMENT TOOL

UNDP developed an Assessment Tool for this project. It provided a systematic way for country-based researchers to consider whether and to what extent current laws, policies, regulations and practices enable access to gender recognition in a way that meets human rights standards. The Assessment Tool was peer reviewed by regional and global partners working on legal gender recognition issues.<sup>12</sup>

The first consultation meeting in each country was used as an opportunity to identify any ways that the Assessment Tool needed to be adapted to the country-specific context. The Assessment Tool provided a structured process and methodology for collecting data on the issues covered in this report, so that country-based information could be cross-analysed systematically.

### 2.3 NATIONAL ASSESSMENTS IN NINE COUNTRIES

#### A. Selection of the nine countries

This project is a comprehensive review of provisions in nine countries in Asia including from Bangladesh, India, Nepal and Pakistan in South Asia, the Philippines and Thailand in Southeast Asia, and China in East Asia.

APTN had the opportunity to use the Assessment Tool as the basis for a desk review in Indonesia and a fuller study in Malaysia.

There was a deliberate decision to choose countries with different legal systems, political processes and cultural contexts, and from across Asia. This diversity illustrates how specific contexts influence the barriers and opportunities for legal gender recognition.

In the countries selected, there was often already progress in this area. Examples include Supreme Court and Cabinet decisions in South Asia, Thailand's Gender Equality Act, local anti-discrimination ordinances in the Philippines and the China government's inclusion of transgender people in its HIV policy. These were entry points for the more in-depth analysis conducted through this study.

#### B. National assessments

The process of doing a national assessment consisted of three phases. The initial phase involved introducing the study to a wide range of stakeholders to establish their interest in, and commitment to, the project. These stakeholders included transgender people and communities as the group whose rights are directly affected by legal gender recognition, as well as State actors who are responsible for creating laws and policies that impact on transgender people's well-being. In some countries, it was inappropriate or untimely for transgender

<sup>12</sup> The 18-page assessment tool is available from UNDP Bangkok Regional Hub as a resource that can be used in other countries: [http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic\\_governance/hiv\\_aids/legal-gender-recognition--a-multi-country-legal-and-policy-revie.html](http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/legal-gender-recognition--a-multi-country-legal-and-policy-revie.html).

communities to meet with government representatives to discuss these issues. In those countries, the project focused solely on working with civil society representatives.

The second phase was the assessment. It was conducted by national consultants in collaboration with transgender communities and, where appropriate, key stakeholders from government agencies and national human rights institutions (NHRIs). APTN's study in Indonesia is based on a desk review of current provisions and their implementation. There was no multi-stakeholder dialogue held in Indonesia due to security concerns. The laws, policies and court decisions identified in each country were collated in background papers, alongside analysis of how those provisions were implemented and their practical impact on transgender people's lives. These documents were used as the basis for this regional report. Most set out recommendations for addressing identified barriers to legal gender recognition. Those details have informed the policy considerations in this regional report. The aim is to publish these country-specific background papers either in full or as a summary of their key points.

In the third phase, typically a second multi-stakeholder or community/civil society dialogue was held with local transgender communities and relevant stakeholders. This was to verify the findings of the draft country report and identify potential recommendations or suggested actions. In Pakistan, a series of provincial community meetings were held to inform the community about the project and seek their input for the draft report. Due to time constraints, it was not possible to bring the community back together to review the draft report.

On average, the three phases were completed over an 8 to 12-month period, depending upon individual country circumstances.

### C. Assessment of political and legal systems

Each country assessment started with an analysis of the given country's legal and political system, including whether it is a common, civil or mixed law system, if customary and/or religious laws apply, and whether laws, regulations, court decisions and policies are adopted nationally/federally, or at the state or local level. That analysis has informed this regional report.

Assessing the types of political and legal systems was found to be crucial for examining the relevance and impact of the complex regulatory environments and the opportunities and challenges for reform. It helped in understanding the influence that court decisions, laws, regulations and policies currently, or could, have on transgender people's experience of their human rights in a specific cultural, historical, political and legal context. It also confirmed the understanding that a body of laws and policies is not static but constantly developing and changing, including in relation to legal gender recognition, as this report illustrates.

Assessing how federal and unitary systems work in a given context was also crucial to understand how laws and policies are applicable and impact upon transgender people's rights, including in relation to legal recognition. For example, in federal systems, like India,<sup>13</sup> central laws are usually applicable throughout the country, while state laws apply within the territory of the respective state. For this reason, whether and how human rights are incorporated into central laws on gender recognition has a great influence on the whole country. On the other hand, state-level laws can ensure speedier and more effective implementation. In unitary governance systems, such as the Philippines or Thailand, local governmental structures can only set policy in limited areas and the national government usually has the discretion to override any such policies. Local regulations or institutional policies can still have great relevance to legal gender recognition. In the absence of clear national-level legislation or policy, however, these regulations and policies may vary in content or form and are very dependent on the local councils' dynamics, composition, political culture and priorities on how they protect transgender people's human rights.

Assessing whether a country operates within a civil law, common law or mixed system was also found to be important in order to understand how these legal systems influence the applicability and impact of laws, court decisions and policies. In civil law systems such as in China, the Philippines and Thailand, for example, court rulings do not function as a 'law'. They are applicable to individual cases and are valid and binding for the individuals involved in that case (the parties) unless they are successfully appealed. In the Philippines, there

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13 *The Constitution of India*, art. 245.

are instances when lower courts in the provinces have allowed a change of name and/or gender marker for transgender people. Since these have not been challenged or appealed by anyone else, they are fully effective for the individual transgender person involved in each of those specific cases.<sup>14</sup> Where countries, such as Bangladesh, India and Pakistan, follow a common law system, the primary responsibility for interpreting the Constitution lies with the Supreme Court, which can also provide directions for elaborating laws and policies. In India, the Supreme Court interpreted the constitutional rights of transgender people in the National Legal Services Authority (NALSA) judgment, as is explained extensively in this report.<sup>15</sup>

Such an assessment has also shown how customary and religious laws can have a great influence, since they may be primary legal and regulatory sources for legal gender recognition provisions. For example, Malaysia recognizes religious law in all its 13 states and operates both civil courts<sup>16</sup> and religious courts (Syariah courts).<sup>17</sup> The civil courts are created by its constitution and federal law while the Syariah courts are created by state laws.<sup>18</sup> As Section 7.2A of this report notes, in Malaysia state-enacted Islamic laws criminalize gender expression by prohibiting so-called ‘cross-dressing’ or ‘female impersonation’.

Analysing a State’s commitment to international human rights obligations, including whether and how the State ratified and implemented international human rights treaties, has shown how international law can have a great relevance to understanding domestic legal and policy practices.<sup>19</sup>

## D. Sources of information

The project aimed to rely on primary legal and policy assessments to identify the actual provisions that set out the steps people are required to take to record or amend their names or gender markers. In many cases this has involved identifying the absence of any such provisions.

Sources of information about laws, regulations, court decisions and policies have included national Constitutions, Constitutional and Supreme or High Court decisions, the criminal law, the civil code, administrative laws, customary laws (e.g. Sharia laws),<sup>20</sup> health care laws, patients’ rights laws, child protection laws, and other relevant regulations or policies.

The country-specific assessments supplemented material about laws and policies, with key informant interviews about current practices and identified barriers. Primarily, this involved transgender people, lawyers or government officials. In some countries, particularly India, ‘Right to Information’ requests were used to obtain greater clarity about current provisions and processes.

Other sources of information about the implementation, application and impact of provisions included peer-reviewed articles published in journals, NGO reports, government reports, and academic reports.

## 2.4 REGIONAL REPORT

An initial background paper was prepared for a regional meeting held in Bangkok, Thailand on 22 and 23 November 2016. Participants included national consultants, APTN and other key transgender people who contributed to country reports, UNDP and other UN agencies, and the international consultants. The meeting provided feedback on common and diverse trends in laws, policies, jurisprudence and practice across the region, and clarified principles for assessing and proposing legislative and policy reforms in this region. Those contributions were incorporated into a first draft of this regional report.

14 UNDP (forthcoming). *Legal Gender Recognition in the Philippines: A Legal and Policy Review*.

15 *National Legal Services Authority (NALSA) v. Union of India* (2014) 5 SCC. 438 (NALSA Judgment).

16 The judiciary comprises the Federal Court (the highest court), the Court of Appeal and subordinate courts, including the Sessions court. Greenleaf G. (2014) *Asian data privacy laws: trade and human rights perspectives*, p. 319.

17 Syariah Law is the Malay spelling of the term Sharia Law.

18 *Dato’ Kadar Shah Tun Sulaiman v. Datin Fauziah Haron* (2008) 7 MLJ 779 at 785E.

19 This Office of the High Commissioner for Human Rights website provides an overview of ratification of the 18 core international human rights treaties by country: OHCHR, *Status of Ratification Interactive Dashboard*. Available at: <http://indicators.ohchr.org/>.

20 This is spelt as Sharia, Syariah or Shariah across the countries reviewed.

That first draft was circulated to the consultants, key stakeholders from trans communities and UNDP country partners in each country, and some regional and international experts on legal gender recognition including the project's regional partner, APTN. Over 40 people reviewed the draft report. They included transgender people from each country, regional and international transgender activists and experts, academics, lawyers and policy specialists (many of whom were writers of the national reports), and UN agencies.

## 2.5 LIMITATIONS OF THE STUDY AND CLARIFICATIONS

### A. Data limitations related to trans masculine and non-binary people

As previous research has shown, there is a significant lack of information about trans masculine people in this region.<sup>21</sup> It is only very recently that any laws or policies in this region specifically reference transgender men. In addition, the relative invisibility of trans masculine communities<sup>22</sup> and small number of activists meant considerable outreach was required to ensure they were represented in country-level technical experts' meetings. Trans masculine people were involved in all the country reviews, though in smaller numbers than trans women or those who identified as a third gender identity.

One of the key points highlighted throughout the Assessment Tool was to provide details about whether provisions and decisions applied to all transgender people or only to certain groups or identities. It specified the need to consider the relevance of provisions to culturally specific identities (including third gender identities), to transgender men, transgender women and those who identify as non-binary, those who class themselves as neither exclusively male nor female. Most country level consultants were unable to find published material or conduct interviews with people who identify as non-binary.<sup>23</sup> As a result, this report primarily contains material about trans feminine people, trans women, *hijras*, *khwaja siras*, *metis* and other third gender identities. It attempts to clarify whether or not general transgender policies apply to non-binary and trans masculine people too.

### B. Language limitations

The institutional knowledge and local language skills of the national consultants were critical for each of them to identify relevant court decisions, laws and policies and complete their country assessment.

The country reports were then written in English so that they could be incorporated into this regional report. The exceptions were China and Thailand where additional funding was obtained for the country reports to be written in the local working language as well, and then translated into English.

National technical meetings were conducted in a local working language. This included the national consultants' presentations of their draft reports back to the community, which took place during the second technical experts' meetings.

When it was not possible to have a second meeting in Pakistan, this meant the draft country report was only reviewed by people able to read a document written in English. Similarly, APTN was reliant on people who could read the Indonesian desk review, also written in English. APTN was able to find sufficient reviewers, and some informally translated the report in order to obtain feedback from other community members.

The regional report was written in English. Extensive comments were received including from the national consultants and some transgender people in each of the participating countries.

### C. Illustrative examples not comparisons

This project was designed to understand the complex interplay between laws, policies, administrative regulations and court decisions *within* each of the nine countries, and the opportunities and challenges this

21 HPP, APTN & UNDP (2015); Winter, S. (2012).

22 All transmen are trans masculine, but not all trans masculine individuals are comfortable regarding themselves as transmen. The terms 'trans masculine' and 'transgender men' have been used interchangeably in this report.

23 For example, UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*.

creates for legal gender recognition and transgender people's human rights. Examples are given as illustrations of themes across the region.

This report was *not* designed to make comparisons between specific laws or policies across the nine countries under review or to compare countries' overall performance in enabling legal gender recognition or protecting transgender people's human rights.<sup>24</sup> Its specific aim was to assess existing laws, policies and practice and generate new country-specific information that would contribute to ongoing national work on legal gender recognition, based on human rights.

## D. Period of the study

The data contained in this report is up-to-date and accurate up to April 2017, to the best knowledge of the authors. More recent developments in laws and policies are not captured.

## 2.6 RELEVANCE OF THIS PROJECT TO INTERSEX PEOPLE

This project has been designed to look at legal gender recognition for transgender people. The project did not proactively set out to collect data about laws, policies, regulations and court decisions that would enable intersex people<sup>25</sup> to amend their name, sex/gender, title or gender-specific identification number on official documents. However, any information relevant to intersex people that emerged during the country-based assessments was noted.

Intersex people's experiences of bodily diversity are strongly connected to their right to bodily integrity. There are some overlaps, but also many differences, between the experiences of intersex and transgender people. Yet, as Section 3.2 illustrates, terms and legal provisions across this region frequently conflate the experiences of both groups. These include third gender terms used in South Asia that assume a person's gender identity is based on innate biological differences to sex characteristics, particularly genitalia. As Section 8.2E describes, such perceptions have influenced definitions and eligibility criteria for affirmative action measures for transgender communities in South Asia.

Nor did the project look at the implementation or impact of such regulatory provisions on intersex people specifically. This is because such analysis requires a broader focus on the relationship between legal recognition and other human rights issues for intersex people. The country background papers provide some limited examples of how governments have responded differently to requests from intersex people to amend sex or gender details on identity documents compared to requests from transgender people who do not have an intersex variation. For example, in some parts of Asia, intersex people can amend sex details on birth certificates or other official documents when this option is not available to non-intersex transgender people.<sup>26</sup> Typically, this is not based on principles of self-determination but on the pressure to medically or surgically alter intersex people's bodies, because they are born with sex characteristics that do not fit typical, binary definitions of male or female bodies. Such involuntary procedures have been widely condemned by human rights bodies.<sup>27</sup> Typically, intersex people who have undergone such procedures are able to amend their gender

24 For legal mapping resources see Transgender Europe's international legal and social mapping project *Transrespect versus Transphobia Worldwide* and the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)'s *Trans Legal Mapping Report*. Both contain some information about gender recognition provisions, including in parts of Asia. ILGA: Chiam, Z., Duffy, S. & González Gil, M. (2016). *Trans Legal Mapping Report 2016: Recognition before the law*; TGEU: *Transrespect versus Transphobia Worldwide (TvT), Legal and Social Mapping*.

25 Intersex people are born with sex characteristics (for example, genitals, gonads or chromosome patterns) that do not fit typical binary notions of male or female bodies. Intersex is an umbrella term used to describe a wide range of natural bodily variations. In some cases, intersex traits are visible at birth while in others, they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all. According to experts, between 0.05 percent and 1.7 percent of the population is born with intersex traits – the upper estimate is similar to the number of red-haired people. OHCHR (2015) *Fact Sheet: Intersex*.

26 For example, the Indonesia and Malaysia country reports each contain an example of intersex men whose marriages were contested because their birth certificates listed them as female. In the Malaysian case, the Muslim marriage was annulled. In contrast, while the Indonesian man was initially detained on fraud charges, he was acquitted on medical evidence of his intersex variation. APTN (forthcoming) *Legal Gender Recognition in Indonesia: A Legal and Policy Briefing*.

27 For example, the UN Committee on the Elimination of Discrimination against Women (CEDAW) and the UN Committee on the Rights of the Child (CRC) (2014). *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 14 November 2014, CEDAW/C/

marker to match their medically assigned sex. Requiring all intersex people to undergo such procedures in order to gain legal recognition undermines their right to recognition before the law and to protection from medical abuses,<sup>28</sup> as well as their right to physical integrity, bodily integrity, autonomy and self-determination.<sup>29</sup>

It is hoped that data that have been collected in this legal gender recognition review will contribute to the development of future intersex-specific research, led by intersex people.

## 2.7 TERMS USED IN THIS REPORT

### A. Transgender and trans as umbrella terms

Three main factors were taken into account when deciding what umbrella term to use to describe people whose gender identity differs from their sex assigned at birth.

Firstly, the report acknowledges that every person has the right to use whichever term best describes their gender identity or expression.

For this report, this means that self-defined identity terms are respected whenever referring to specific individuals or communities. Often these will be local language terms. In Asia, there is a long history of culturally specific terms for diverse gender identities or expressions. These include *kathoey* (Thailand), *mak nyah* (Malaysia), *waria* (Indonesia), *hijra* (Bangladesh, India and Pakistan), *thirunangai* (India), *khwaja sira* (Pakistan), and *meti* (Nepal).<sup>30</sup> Typically, these terms describe people who were assigned a male sex at birth but whose gender identity or expression does not match this assigned sex. Each of the terms listed above from South Asia specifically describes a third gender identity.

This report notes that English language terms are also used within this region, particularly the term ‘trans man’, given the very limited number of traditional terms for trans masculine people across Asia. In some countries, the most common terms combine English and local words. For example, the use of the terms *transpinay* for transgender women and *transpinoy* for transgender men in the Philippines. While non-binary English language terms such as gender non-conforming or genderqueer are less common in Asia, these terms and identities are starting to emerge, particularly among trans youth.

Most terms used in China are new, influenced by Western terms used internationally. These include the term *bian xing ren* (变性人) to describe someone who has transitioned through medical interventions. Other new terms are *kua xing bie* (跨性别, transgender), *xiong di* (兄弟 for trans men, meaning ‘brothers’) and *jie mei* (姐妹, for trans women, meaning ‘sisters’).

Secondly, a regional report such as this also requires some common umbrella terms. This report follows the lead of the regional partner for this work, the Asia Pacific Transgender Network and uses the terms ‘transgender’ and ‘trans’ interchangeably, based on the following definition:

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GC/31-CRC/C/GC/18; UN Committee against Torture (CAT) (2016a). *Concluding Observations on the sixth periodic report of Austria*, 27 January 2015, CAT/C/AUT/CO/6, para. 45; CAT (2016b). *Concluding Observations on the fifth periodic report of China*, 3 February 2016, CAT/C/CHN/CO/5, para. 56; UN CAT (2016c). *Concluding Observations on the fifth periodic report of China with respect to Hong Kong, China*, 3 February 2016, CAT/C/CHN-HKG/CO/5, para. 29; UN Human Rights Council (UNHRC) (2016). UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 January 2016, A/HRC/31/57, para. 72(i); CRC (2015a). *Concluding observations on the combined fourth and fifth periodic reports of Chile* 30 October 2015, CRC/C/CHL/CO/4-5; CRC (2016a). *Concluding observations on the combined third and fourth periodic reports of Ireland*, 29 January 2016, CRC/C/IRL/CO/3-4, para. 40; CRC (2016b). *Concluding observations on the fifth periodic report of France*, 29 January 2016, CRC/C/FRA/CO/5, para 48.

28 International Commission of Jurists (ICJ) (2007). *Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity*, Principles 3 and 18.

29 For example, CRC (2015b). *Concluding observations on the combined second to fourth periodic reports of Switzerland*, 26 February 2015, CRC/C/CHE/CO/2-4; CRC (2015a), para. 49; CRC (2016a), para. 40; CAT (2016a), para. 45; CAT (2016b), para. 56; CAT (2016c), para. 29.

30 Many countries have multiple terms, often in different dialects or local languages. As noted below, people in each of these countries may also choose to use English language terms.

**Transgender** and **trans**: Persons who identify themselves in a different gender than that assigned to them at birth. They may express their identity differently to that expected of the gender role assigned to them at birth. Trans/transgender persons often identify themselves in ways that are locally, socially, culturally, religiously or spiritually defined.”<sup>31</sup>

Thirdly, while transgender is the umbrella term for this regional report, gender recognition laws and policies need to be grounded in local terms and concepts. Languages all over the world, including in this region, do not always use or distinguish between the terms sex, gender, gender identity and/or sexual identity. As Section 3 explains, court decisions, laws, policies and regulations often use these and other terms interchangeably, not necessarily reflecting the practices, needs and rights of transgender communities.<sup>32</sup> This needs to be taken into account when considering how to develop progressive legal gender recognition laws or policies.

## B. Other key terms

Other key terms were defined in the Assessment Tool that was used for collecting and analysing data in each of the nine countries, based on definitions from other regional reports.<sup>33</sup> Those that are most relevant for a reader of this report are listed below.

**Cisgender** describes people whose gender identity matches their assigned sex at birth. It is the opposite term, or antonym, to transgender.

**Gender identity** is a person’s internal sense of being a man, a woman, or third or other alternative gender, or combination of genders.

**Gender expression** is a person’s ways of communicating gender (for example, androgyny, masculinity and/or femininity) externally. This is done through physical appearance (including clothing, hair styles and the use of cosmetics), mannerisms, ways of speaking, and behavioural patterns when interacting with others.

**Gender marker** refers to how a person’s gender is recorded on official documents. Some examples in this region include Male (M), Female (F), indeterminate (X), and Other (O). As documents often use the words ‘sex’ and ‘gender’ interchangeably, sometimes this is referred to as changing ‘sex details’ rather than as changing one’s ‘gender marker’. Other gender-specific details may also be considered to be gender markers, for example a gendered name, title or registration number.

**Gender-affirming health services** encompass any of the biomedical, surgical or health interventions transgender people may undertake to align their physical body and their gender identity. This may include, for example, access to counselling support, hormone therapy, hair removal and a range of surgery.

**Intersex** is an umbrella term used to describe people born with sex characteristics (such as genitals, gonads or chromosome patterns) that do not fit typical binary notions of male or female bodies.

**Legal gender recognition** is the official recognition of a person’s gender identity, including gender marker(s) and name(s), in public registries and key documents. For transgender people, this includes the option of amending a gender marker or name so that it is no longer based on one’s sex assigned at birth. This may involve an administrative or legal process, and the changes made are legally recognized. Most forms of legal gender recognition involve a maximum of two or three options, such as recognizing transgender women as female, transgender men as male, and/or acknowledging a third gender identity.

31 World Health Organization Western Pacific Regional Office (WPRO) (2012). *Meeting Report of the Consultation on HIV, STI and other Health Needs of Transgender People in Asia and the Pacific, Manila, 11–13 September 2012*.

32 In some instances, direct quotes from court decisions may use language that is inappropriate or conceptually mistaken. Where using such a quote was unavoidable, a comment about the language has been inserted as a footnote.

33 For example, HPP, APTN & UNDP (2015); APF & UNDP (2016).

# 3. Defining gender identity, gender expression and transgender populations in laws and policies

## 3.1 HUMAN RIGHTS CONTEXT

How terms such as ‘gender’, ‘gender identity’, ‘gender expression’, ‘transgender’ or specific transgender identities are defined in laws or policies can strongly determine whether human rights protections apply to all transgender people or only to certain identities and expressions.

As Section 2.7 noted, there are traditional and/or contemporary terms for transgender people in all the countries covered by this report. The numerous local language terms typically describe people assigned a male sex at birth whose gender identity is third gender or female and/or whose gender expression is feminine. In some cases, terms denote specific cultural roles, including as performers in religious rituals.

In this region, the most commonly used terms in South Asia refer to third gender people, while in Southeast Asia transgender women, and terms describing their identity, are more visible. There are very few traditional terms referring to transgender men, and newly developed terms are less likely to be known by the wider population, including policymakers. This has ongoing impacts in terms of the invisibility of trans masculine people and their exclusion from legal and policy discussions. Until very recently, the term transgender was used in Asia to refer almost exclusively to people assigned a male sex at birth whose gender identity was either female or a third gender. As noted earlier, there is very limited mention of non-binary transgender people in Asia.

Third gender identities across South Asia have a complex history of being accorded social and official respect traditionally, followed by frequent classification as criminals under colonial laws, and more recently being encompassed under special measures or reservations for vulnerable groups. This is discussed in Section 8.2E on affirmative action.

These different histories of visibility influence how gender identity, gender expression and transgender populations themselves have been understood and defined in laws and policies.

While international human rights standards do not define gender identity and expression explicitly, human rights and political bodies increasingly use the following definition of gender identity from the Yogyakarta Principles<sup>34</sup> which encompasses a definition of gender expression:

“Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”<sup>35</sup>

As the Yogyakarta Principles state, “each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.” This affirms transgender people’s right to their own gender identity and gender expression.

34 UNHRC (2013). *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 1 February 2013, A/HRC/22/53; WHO, OHCHR, UN Women, UNAIDS, UNDP, UNFPA & UNICEF (2014). *Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement*; WHO (2015b). *Sexual health, human rights and the law*; UNHRC (2010). *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Addendum : Mission to India*, 27 April 2010, A/HRC/14/20/; UNHRC (2011). *Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41.

35 ICJ (2007), p. 6.

Frequently, laws, policies and practices fail to acknowledge or attempt to limit this human rights-based understanding of gender identity and expression, which is grounded in dignity and autonomy.

## 3.2 LAWS, COURT DECISIONS, POLICIES AND PRACTICES

### A. Broad definitions of transgender people in laws and policies

In most countries in this region, laws and court decisions do not define gender identity, gender expression or transgender people as a population group that enjoys recognition before the law.

There are a few exceptions. Notably, India's Supreme Court decision includes a highly expansive definition of the term transgender that encompasses anyone whose self-defined gender differs from that assigned to them at birth, citing the Yogyakarta Principles.<sup>36</sup> The NALSA judgment provides a space that allows individuals to identify as male, female or third gender regardless of the gender assigned to them at birth. This definition was reflected in a private member's Rights of Transgender Persons Bill that was passed by the Rajya Sabha (Upper House of Parliament) in April 2015.<sup>37</sup>

However, subsequently the Indian government introduced its own proposal for a Transgender Persons (Protection of Rights) Bill in 2016. Despite using the term 'transgender', and including 'trans-men' and 'trans-women' as listed examples, the proposed Bill's definition is premised on the assumption that transgender people are neither male or female or are a combination of both.<sup>38</sup> Thus, it excludes a transgender woman who identifies as female and a transgender man who identifies as male. This threatens to rollback the NALSA principle to a definition that is based only on the idea of a third 'transgender' identity.<sup>39</sup> The same definition was used in a draft bill introduced to the Pakistan Senate in January 2017 that had the same title as the Indian government's proposed Bill, and largely replicated its provisions.<sup>40</sup> At the time of writing, neither the Indian nor Pakistan Bills had been passed into law and a number of alternative state-level bills were being drafted across Pakistan.<sup>41</sup>

In Nepal, laws and policies use the broader term 'sexual and gender minorities' to cover lesbian, gay, bisexual, transgender and, in some cases, intersex people. In practice, discussions of gender identity are primarily framed around a third gender identity.<sup>42</sup> In the Philippines, local anti-discrimination ordinances prohibit discrimination against transgender people on the ground of gender identity. The most elaborative definition can be found in Quezon City's Gender Fair Ordinance and recognizes transgender people who identify as women, men, or as neither or both.<sup>43</sup> More details can be found in Section 4.2.

### B. Recognition of third gender identities in legal definitions

Bangladesh and India explicitly define transgender people in laws or policies using a range of local terms for third gender identities, and definitions have been proposed in a number of bills in Pakistan. This reflects the long-standing cultural role of *hijra* and *khwaja sira* in these countries, who were traditionally accorded great

36 ICJ (2007).

37 The Rights of Transgender Persons Bill, (India) (2014) Bill No. 49 of 2014 (passed by the Rajya Sabha on 24 April 2015). It is important to note that in order to become law the Bill must be passed by both Houses of Parliament, the Rajya Sabha (Upper House) and the Lok Sabha (Lower House) and then be assented to by the President. With the introduction of and focus on the government's own Transgender Persons (Protection of Rights) Bill 2016, consideration of the 2014 private member's bill has been shelved. Currently the law is pending in the Lok Sabha having been introduced on 26 February 2016.

38 The Transgender Persons (Protection of Rights) Bill (India) (2016) Bill No. 210 of 2016 (introduced to the Lok Sabha on 2 August 2016), section 2(i).

39 For more information on the relationship between the Rights of Transgender Persons Bill (2014) and the Transgender Persons (Protection of Rights) Bill (2016) as well as some primary concerns regarding the 2016 Bill, please see: ICJ (2016) "India: The Transgender Persons (Protection of Rights) Bill, 2016", *ICJ Briefing Paper*.

40 The Transgender Persons (Protection of Rights) Bill (Pakistan) (2017) (introduced to the Pakistan Senate on 9 January 2017) section 2(e).

41 As of July 2017.

42 Bochenek, M. and Knight, K. (2012). "Establishing a Third Gender Category in Nepal: Process and Prognosis", *Emory International Law Review*, 26, (1), pp. 11–41.

43 Rainbow Rights Project (2015b). *Sexual Orientation and Gender Identity: Access to Justice through Anti-Discrimination Ordinances. A Handbook on Selected Anti-Discrimination Ordinances on Sexual Orientation and Gender Identity Rights*.

social and official respect. Due to their perceived infertility or impotence, they were employed at various positions within the royal court as harem keepers and mediators between men and women.<sup>44</sup> These roles were based on assumptions that *hijra* and *khwaja sira* were born with what today might be referred to as an intersex variation, or had undergone a traditional castration ritual.<sup>45</sup> Those assumptions persist in definitions of third gender identities in some laws and policies today in these countries, or in their implementation.

Examples from Pakistan include the use of the term ‘eunuch’ in its 2009 Supreme Court decision and the following definition of *khwaja sira* in a 2012 private member’s Bill:

“a child or a person by whatever name, expression or terminology who is called or known who is eunuch, transvestite or any other person whose sex is not clear or well defined at the time of his birth or for the time being thereafter according to available medical information”.<sup>46</sup>

During the Pakistan Supreme Court discussions, three categories were proposed for the national identity card (CNIC): male, female and *khwaja sira*.<sup>47</sup> Subsequently the CNIC was updated with five categories: male, female, *khwaja sira (mard/male)*, *khwaja sira (aorat/female)* and *khunsa-e-mushkil* (indeterminate).<sup>48</sup> Any of these last three terms might be used by *khwaja sira* and/or by intersex people and are marked on the CNIC with an ‘X’. Given the absence of any traditional, cultural term for transgender men, none of those three options are likely to be used by trans men. Community consultations for this project confirm previous research that the terms are contentious, not well understood, and are being used inconsistently.<sup>49</sup> They do not include a clear option for transgender women who identify as female (rather than as *khwaja sira* or as intersex) or for people assigned a female sex at birth unless they identify as intersex.

The definition of transgender in both the Pakistan and India versions of the Transgender Persons (Protection of Rights) Bill, includes ‘persons with intersex variations’ under the definition of ‘transgender person’ and does not clarify the distinctions between innate intersex variations and a transgender person’s gender identity. The full definition in both proposed Bills reads:

(i) “transgender person” means a person who is—

(A) neither wholly female nor wholly male; or

(B) a combination of female or male; or

(C) neither female nor male;

and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.<sup>50</sup>

44 For example, Pamment, C. (2010). “Hijraism: Jostling for a Third Space in Pakistani Politics”, *The Drama Review*, 54 (2), pp. 29–50. While the terms ‘impotent’ and ‘infertile’ have different meanings, both are frequently used in academic and legal references to *hijras*. See also the footnote below.

45 For example, colonial authorities amended India’s Criminal Tribes Act in 1897 expressly to include ‘eunuchs’ as a notified group. A eunuch was “deemed to include all members of the male sex who admit themselves, or upon medical inspection clearly appear, to be impotent”. Criminal Tribes Act (India) (1971) No. 27 of 1871 (Repealed). Sharia law also recognizes three categories of intersex people: male, female, and indeterminate sex (*khunsa-e-mushkil*), based on whether an intersex person grows up to have ‘male’ secondary characteristics, female ones or those that are indeterminate.

46 The Protection and Welfare of Khawaja Saras Rights Bill (Pakistan) (2012) is a private member’s bill that has been pending in the National Assembly. In order to be enacted, the Bill must be passed by the National Assembly (Lower House) and the Senate (Upper House) and thereafter receive the assent of the President before it can become law. Note: It uses a different spelling of the term *khwaja sira*. For more information please see UNDP (2014). *Scan of Law and Policies Affecting Human Rights, Discrimination and Access to HIV and Health Services by Key Populations in Pakistan*. Bangkok, UNDP.

47 Redding, J. A. (2012). “From ‘She-Males’ to ‘Unix’: Transgender Rights and the Productive Paradoxes of Pakistani Policing”, in Daniela Berti and Devika Bordia, eds. (2015). *Regimes of Legality: Ethnography of Criminal Cases in South Asia*, pp. 258–89.

48 Redding, J. A. (2016). “Transgender Rights in Pakistan?: Global, Colonial, and Islamic Perspectives”, Saint Louis U. Unpublished Legal Studies Research Paper No. 2016–16, p. 2.

49 Khan, F.A. (2016). *Khwaja Sira: Culture, Identity Politics, and “Transgender” Activism in Pakistan* (Dissertation). Syracuse University, New York, p. 272.

50 Transgender Persons (Protection of Rights) Bill (India) (2016) and The Transgender Persons (Protection of Rights) Bill (Pakistan) (2017), section 2(e).

The need for greater clarity in this definition, based on a person's right to self-determination, is one of the many critiques of these Bills by civil society and human rights groups in both India and Pakistan.<sup>51</sup>

In Bangladesh, a November 2013 policy decision, approved by the Cabinet, recognized *hijras* as a separate, or 'third' gender. However, the term *hijra* was not defined in the Bangladesh Cabinet decision. A slightly earlier 2013 policy to improve the living standards of the *hijra* combined a medical definition of intersex people alongside "the principles taken by the Government, [that] *Hijra* are those who are known as *Hijra* and who do not feel any hesitation to be called as *Hijra*".<sup>52</sup> Those principles are a positive recognition of self-defined identity. However, they have not been implemented in practice or reflected in any human rights-based guidelines to support the recognition of *hijra* identity. Instead officials' bias and perceptions of *hijra* have reinforced a medicalized approach including forced 'medical examinations', based on the false assumption that these will verify someone's *hijra* identity.<sup>53</sup> Examples of such practices are described in Sections 5.2B and 8.2E, along with further analysis of how they violate human rights standards.

Pakistan's 2009 Supreme Court also specifically mentioned "medical tests based on hormones" in order to confirm someone was a "eunuch" or *khwaja sira*. The *khwaja sira* community protested this requirement and subsequently were able to obtain a third gender identity on their national identity card (CNIC) without a medical examination.

## C. Definitions of gender and/or sex

Definitions of gender and/or sex in laws, policies or regulations can impact on options for legal gender recognition. The key human rights concern is whether such terms recognize gender diversity and that a person's gender may change over time. This principle of inclusion applies whether a local language has a single term encompassing both sex and gender (for example in Nepali), or differentiates between the terms.

In Thailand, the 2015 Gender Equality Act defines 'gender discrimination', clarifying that it is not limited to men and women, but also applies to persons who have "a different appearance from his/her own sex by birth".<sup>54</sup> It has been proposed that the intentions document for the new Thai Constitution would also provide an inclusive definition for the Thai word *phet* (sex) encompassing "differences of individuals whose gender identity, gender and sexual diversity are different from their physical sex".<sup>55</sup> Such an approach was proposed but rejected in previous reviews of the Constitution.<sup>56</sup> In India, the Supreme Court's 2014 NALSA judgment also explicitly recognized that 'sex', a prohibited ground of discrimination in the Constitution, includes 'gender identity'.

In other countries in the region, courts are reluctant to provide broader definitions of sex or gender that recognize transgender people's gender identity and expression. In Malaysia, the Court of Appeal refused a transgender woman's appeal for legal gender recognition stating there was no medical evidence from local experts of "what was gender, what made a person male or female"; or whether gender-affirming surgery "changes a person's gender to warrant a change of the gender description".<sup>57</sup> Similarly, in a 2007 decision, the Supreme Court of the Philippines ruled that a person's sex was determined by the birth attendant at the time of birth, was "immutable" and therefore a transgender woman was not "included in the category female".<sup>58</sup>

In Thailand, the 1981 Supreme Court judgment that rejected a transgender woman's application for legal gender recognition referred to a dictionary definition of a 'woman' as "a person who is able to give birth".<sup>59</sup> This

51 The Transgender Persons (Protection of Rights) Bill (Pakistan) (2017) presentation by Blue Veins, TransAction and the Pukhtunkhwa Civil Society Network to the Senate Functional Committee on Human Rights, 7 March 2017; ICJ (2016); See also critiques from trans-led groups in India: Orinam (2016). "The Transgender Persons (Protection of Rights) Bill 2016" (Crowdsourced response from the trans and intersex communities), 5 August 2016.

52 Department of Social Services, Ministry of Social Welfare (Bangladesh) (2013). *Implementation Rules to Improve the Living Standards of Hijra Community*, p. 2.

53 HRW (2016a). "I Want To Live With My Head Held High" *Abuses in Bangladesh's Legal Recognition of Hijras*.

54 Gender Equality Act (Thailand) B.E. 2558 (2015), section 3; HRW (2015a) Thailand Gender Equality Act; UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

55 UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

56 Ibid.

57 *Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara* (2013) 4 CLJ 627, at 628, per Abdul Wahab Patail JCA

58 *Silverio v. Republic of the Philippines* (2007), G. R. No. 174689.

59 Supreme Court Judgment No. 157/2524 (Thailand) (1981). The text of the judgement reads "Gender of natural person which is

narrow definition has been questioned for excluding transgender women and many cisgender women from being recognized as women. However, as mentioned above and in more detail in Section 4.2, there has been significant progress since in defining sex (*phet*) in a more inclusive way, through gender equality provisions.

## 3.3 CONCLUSION AND POLICY CONSIDERATIONS

### Conclusion

How laws and policies define the word ‘transgender’ or local identity terms, including those for third gender identities, has a significant impact on whether and to what extent all transgender people’s universally protected human rights are recognized and protected under the law. Similarly, definitions of terms such as ‘sex’, ‘gender’, ‘gender identity’ and ‘gender expression’ can either recognize or limit the universal application of human rights. Examples from the nine countries reviewed show evidence of the use of all these terms. They also illustrate a worrying concern about the conflation of terms describing transgender people and intersex variations in ways that obscure the specific experiences and distinct human rights issues affecting each group.

### Policy considerations

- Ensure that definitions in laws and policies of terms such as ‘gender’, ‘gender identity’, ‘gender expression’, ‘transgender’ and specific transgender identities are inclusive of diverse genders, gender identities and expressions, and are based on self-determination.
- Educate lawmakers and policymakers to reflect these correct understandings.
- Avoid conflating transgender and intersex terms and definitions in laws, regulations and policies, and promote the use of human rights-based terms such as sex characteristics to describe the relevant prohibited ground of discrimination for intersex people.
- Develop confidential data collection methods that enable the diversity and size of transgender populations to be measured accurately in order to monitor and address barriers to the full realization of transgender people’s human rights.
- Share sound, expert data and knowledge with those making policy and communicate them in effective and powerful ways.

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recognized by law is based on sex at birth. According to the dictionary, woman is defined as a person who is able to give birth.”; UNDP (forthcoming) *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

# 4. Recognition of human rights of transgender people in laws and policies

## 4.1 HUMAN RIGHTS CONTEXT

Transgender people are often stigmatized and discriminated against, because their gender identity or gender expression does not match their sex assigned at birth, or because it does not match their identity documents, even after changing their gender markers.

These experiences include isolation and exclusion from families, schools, hospitals, churches, the formal workforce and mainstream economy. Transgender people are not accorded the same dignity, equality and respect as cisgender people and face high levels of gender-based violence. With few or any legal protections, they are pushed to the margins of society and experience persistent poverty, lack of housing, social exclusion and poor health outcomes.<sup>60</sup>

The provisions of international human rights law extend in full to all persons, including transgender people. The prohibition of discrimination on the basis of 'other status' includes other attributes such as gender identity and gender expression, whether or not they are specifically mentioned as prohibited grounds of discrimination.<sup>61</sup> Whether or not the protection of transgender people is mentioned explicitly in the text of a convention, treaty or a national constitution or law, States are required to take all measures to eliminate discrimination against transgender people in all aspects of their lives.

Some countries in the region specifically recognize the protection of transgender rights in their laws and constitution. In other countries, courts apply the overarching human rights principles set out in their constitutions or laws through jurisprudence. The report also provides examples of countries where explicit protection is applied through local or regional level laws and regulations.

In all countries reviewed, human rights are recognized in constitutions and laws in various forms. Hence, the human rights of transgender people are protected in each country for the very reason that human rights apply to all people, including transgender people.

## 4.2 LAWS, COURT DECISIONS, POLICIES AND PRACTICES

As already mentioned, in some countries constitutional rights protections for transgender people are being interpreted through court decisions. For example, the NALSA judgment in India recognizes that:

- The right to equality also applies to transgender persons.
- The right to freedom of speech and expression includes the right to expression of one's self-identified gender.
- Gender is a very important part of a person's identity and that recognition of self-defined gender identity is part of the fundamental right to dignity.

In Nepal, the Supreme Court in *Sunil Babu Pant and Others v. Nepal Government and Others* reviewed the equality principles of the then Interim Constitution of Nepal, 2063 (2007 AD).<sup>62</sup> It noted non-discrimination

60 HPP, APTN & UNDP (2015).

61 UN Committee on Economic, Social and Cultural Rights (CESCR) (2009). *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, art. 2, para 2; CEDAW (2010); CEDAW (2015a). *General Recommendation No.33 on women's access to justice*, 3 August 2015, CEDAW/C/GC/33; CRC (2013); APF, UNDP (2016), p. 130.

62 *Sunil Babu Pant and Others v. Nepal Government and Others* (Nepal) (2007), Writ No. 917 of 2064 BS (2007).

on the basis of sex was an enforceable right guaranteed to all citizens of Nepal, and “vested in the third gender people as human beings”.<sup>63</sup> In the subsequent 2015 Nepal Constitution, the right to equality is recognized in Article 18. It includes ‘other status’ as a ground of non-discrimination, which encompasses gender identity.<sup>64</sup> Article 18(3) includes a proviso to the right to equality, allowing for “special provisions by law for the protection, empowerment or advancement of people lagging behind socially and culturally” and specifically mentions “gender and sexual minorities”.<sup>65</sup>

Pakistan is also among the countries where transgender people’s rights gained specific protection through the Supreme Court. In 2009, the Pakistan Supreme Court requested provinces to submit detailed reports on the need to protect the rights and welfare of *hijra* in light of the discrimination, stigma and discrimination they suffered.<sup>66</sup> Progress has been slow. However, in November 2016 the Lahore High Court accepted a petition about the fundamental rights of transgender people, with media reports noting the Chief Justice’s observation that this was a matter of public importance as the state should do its best to secure the rights of the transgender community in the light of the Supreme Court’s earlier judgement.<sup>67</sup> In a January 2017 decision, the Chief Justice focused on directing authorities to register transgender people as third gender so they are counted as such in the March 2017 census.<sup>68</sup> Significantly, collecting data about the transgender population has the potential to highlight areas of life where they are marginalized and to inform policy decisions to address this disadvantage, including through special measures.

In other countries, anti-discrimination or equality protections may be guaranteed by legal provisions or through official interpretations of laws. In Thailand, as mentioned in Section 3.2C, the 2015 Gender Equality Act defines ‘gender discrimination’, clarifying that it is not limited to men and women, but also applies to people who have “a different appearance from his/her own sex by birth”.<sup>69</sup> It is currently the strongest legal instrument that is directly applicable to legal gender recognition in Thailand. However, it is yet to be seen how this law will be implemented and further interpreted to provide human rights protections for transgender people.

In 2014, the Law Commission of Bangladesh drafted an Anti-Discrimination Law detailing possible grounds of discrimination, including someone’s status as *hijra*. This was sent to the Ministry of Law as a proposal for enacting either a uniform anti-discrimination law covering all marginalized communities, or as the basis for enacting provisions focused on specific communities.<sup>70</sup> On 5 December 2016, the National Human Rights Commission of Bangladesh and Bandhu Social Welfare Society jointly organized a consultation meeting titled ‘Draft Anti-Discrimination Act and Way Forward’. It called for immediate enactment and implementation of the proposed legislation, including the launch of an awareness programme among those who would benefit from the provisions, including transgender people and other excluded minorities.<sup>71</sup>

In Indonesia, there is no explicit recognition of transgender people’s rights in laws; however, protective measures exist at the procedural or operational level. These include that transgender people are named specifically as a population group that can report human rights violations they experience to the National Human Rights Commission (*Komnas HAM*). Similarly, in 2010 the National Commission on Violence Against Women (*Komnas Perempuan*) also declared transgender women as women,<sup>72</sup> providing a mechanism for transgender women to file a complaint to *Komnas Perempuan* if their rights are violated.

In the Philippines, in the absence of comprehensive national anti-discrimination laws, some local anti-discrimination ordinances have explicitly included sexual orientation and gender identity among their

63 ICJ (2011). *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*, p. 61.

64 Blue Diamond Society (forthcoming). *Legal Gender Recognition in Nepal: A Legal and Policy Review*.

65 *Constitution of Nepal* (Nepal), 2015 (2072.6.3), 20 September 2015, art. 18(3); Blue Diamond Society (forthcoming). *Legal Gender Recognition in Nepal: A Legal and Policy Review*.

66 *Khaki v Rawalpindi* (Pakistan), Constitutional Petition no. 43 of 2009, Supreme Court of Pakistan. Summary available at ICJ, *Khaki v. Rawalpindi, Supreme Court of Pakistan (12 December 2009)*, available at: <http://www.icj.org/sogicasebook/khaki-v-rawalpindi-supreme-court-of-pakistan-12-december-2009/> (accessed 12 March 2017).

67 “Transgender’s rights: Lahore High Court moved”, *The Times of Islamabad*, 30 November 2016.

68 “Lahore High Court verdict on Transgender rights”, *The Times of Islamabad*, 9 January 2017.

69 Section 3 of the Gender Equality Act (Thailand) B.E. 2558 (2015); UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

70 Bandhu Social Welfare Society (forthcoming). *Legal Gender Recognition in Bangladesh: A Legal and Policy Review*.

71 See: Bandhu Social Welfare Society (2017). *Consultation Meeting on Anti Discriminatory Law*. (Online), 27 February 2017.

72 UNDP & USAID (2014a). *Being LGBT in Asia: Indonesia Country Report*, Bangkok.

protected grounds. Only individuals in that local area can use such regulations to claim redress against discrimination, and only once Implementing Rules and Regulations have been passed. As of June 2017, only Quezon City has Implementing Rules and Regulations, so it is the only place where a local ordinance recognizing gender identity discrimination can be used by transgender people in response to discrimination.

In China, there are both national and sub-national laws prohibiting discrimination on the broader basis of gender. In principle, these should encompass transgender people too. However, there is no explicit legal, jurisprudential or policy interpretation clarifying that transgender people are protected from discrimination based on their gender identity or gender expression.

Even in countries where there are guarantees of legal gender recognition, there is typically limited information available about the extent to which a person will be legally recognized in their self-defined gender identity. This raises ongoing questions about the extent to which transgender people are equally recognized and protected under laws.

In countries that have introduced a third gender marker, this includes clarifying the resulting legal rights and responsibilities. In Pakistan, the focus on changing registration documents arose partly in response to questions about whether *khwaja sira* would have the same inheritance rights as men, or the lesser inheritance rights of women. Legal and policy debates about fully recognizing the human rights of transgender people have the potential to question the gender bias of such provisions.

Another example is when laws on sexual and domestic violence are narrowly defined as offences committed against a woman, understanding a ‘woman’ in narrowly defined terms. Another example is when rape provisions narrowly define rape as penile penetration of a vagina. Such legal definitions of violence and rape often exclude transgender people from enjoying protection and receiving remedies on an equal basis. Frequently, it is unclear whether transgender people can seek redress under such rape or sexual violence laws, as it often depends on the person’s gender marker on an official identification document and/or their physical anatomy.

For example, in China, rape is defined as violence or coercion against a woman.<sup>73</sup> If a man is raped, courts only have the option of administering punishment under the crime of “intentional bodily harm”. It is unclear how the law applies to a transgender person, including whether it is based on the gender marker on a person’s official identification (ID) card.<sup>74</sup> In a recent positive step, molestation laws have been extended to cover the use of violence or coercion to force or molest “any person”.<sup>75</sup>

## 4.3 CONCLUSION AND POLICY CONSIDERATIONS

### Conclusion

According to human rights principles, international, constitutional and national human rights law protections should apply to transgender people. Depending on the political and legal system of the given country, explicit human rights protections for transgender people can be provided through the constitution or official interpretation of its provisions, and/or through national laws, local regulations or Supreme Court or other precedent-setting court decisions.

### Policy considerations

- Ensure that transgender people are protected under human rights and anti-discrimination provisions of the constitution and relevant laws, including that gender, gender identity and gender expression should be understood as prohibited grounds for discrimination.

<sup>73</sup> Criminal Law of the People’s Republic of China (China) (1997), art. 236.

<sup>74</sup> UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*.

<sup>75</sup> Criminal Law of the People’s Republic of China” (1997), Amendment IX to art. 237 passed on 29 August 2015, at the 16<sup>th</sup> Session of the 12<sup>th</sup> National People’s Congress Standing Committee, that came into effect on 1 November 2015.

- Audit existing and proposed laws, regulations and policies, including those that make distinctions based on a person's sex or gender, to ensure that they do not discriminate against transgender people, but provide respect and protection for their human rights.
- Provide protections and remedies for transgender people under violence, domestic violence, sexual violence and rape laws, regardless of their gender identity, gender expression, legal gender marker or surgical status.

# 5. Legal gender recognition

## 5.1 HUMAN RIGHTS CONTEXT

### A. The significance of legal gender recognition

In most of the countries covered by this review, the vast majority of transgender people cannot obtain any official identification documents that reflect their gender identity. Instead, their listed title, name, sex and/or gender is based on the individual's sex assigned at birth. In some countries, the numbering system for official documents is also categorized in this way.

In many instances, a transgender person cannot amend the gender marker on identification documents. In other circumstances, while it may be a legal possibility, either the eligibility criteria and/or the steps required to make an application exclude most transgender people. As the next section shows, sometimes such exclusion directly contradicts legal protections granted by Supreme Courts in this region.

A transgender person's ability to live in dignity, equality and security is severely compromised without the option of legal gender recognition. The discrimination and exclusion they face is exacerbated when they are required to use an identity document that does not match their gender identity or gender expression. This discrimination may involve threats to a transgender person's safety, or mean they are marginalized when trying to participate in virtually any area of life. This includes exclusion from school, vital health services, employment, housing, or from receiving access to social assistance or to private banking, credit or mortgage facilities. It affects many daily activities, such as entering a shopping mall or collecting a parcel from the post office, where identification documents are increasingly required.

Often, identity verification is required at times when people are particularly vulnerable, including when faced with a medical emergency, in natural disasters, or when they are homeless or are crossing borders. Transgender people have been denied access to gender-segregated services or support in each of these circumstances, including because they did not have official identity documents that match their gender identity and/or gender expression.<sup>76</sup> Legal gender recognition is a vital component of the legal protection that transgender people require in order to enjoy the full realization of their human rights.

### B. Human rights standards

The rights to recognition before the law, self-determination, autonomy and privacy are set out in binding international human rights treaties including conventions that have been very widely ratified by countries in Asia.<sup>77</sup> The Yogyakarta Principles, published in 2007, summarize the extent to which international human rights standards had been applied to issues relating to gender identity or sexual orientation at that time.<sup>78</sup> Principle 3 focuses on the right to recognition before the law, noting that "every person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom". It addresses the impact that eligibility or procedural requirements have on undermining transgender people's right to recognition before the law, stating that no one should be forced to undergo medical procedures, including surgeries, sterilization or hormonal therapy, as a requirement for legal gender recognition. In addition, it notes that "no status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity."

76 HPP, APTN & UNDP (2015), pp. 62–63.

77 Universal Declaration of Human Rights (UDHR) (1948), art. 6; International Covenant on Civil and Political Rights (ICCPR) (1966a), art. 16; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979), art.15; and Convention on the Rights of Persons with Disabilities (CRPD) (2007), art 12. In addition, Article 8 of the Convention on the Rights of the Child (CRC) (1989) requires states to "respect the right of the child to preserve his or her identity."

78 ICJ (2007). There are proposals to update the Yogyakarta Principles in 2017 to reflect these developments, including how gender identity and expression should be understood across human rights more broadly.

In the subsequent 10 years, laws and court decisions in relation to legal gender recognition have greatly progressed and underpin developing jurisprudence on this issue, including by UN human rights mechanisms. Treaty monitoring bodies have repeatedly recommended the revision of gender recognition laws to comply with the rights to non-discrimination, privacy, autonomy, physical and psychological integrity, and equal protection before the law.<sup>79</sup> This has included recommendations that legal gender recognition procedures should not require transgender people to conform to stereotypical ideas of masculine or feminine appearance or behaviour.<sup>80</sup> Specifically recommended is the removal of restrictive or abusive requirements such as the need for a psychiatric assessment,<sup>81</sup> hormonal treatment, surgeries and/or sterilization,<sup>82,83</sup> or dissolution of a marriage or civil partnership.<sup>84</sup> Statements and reports from multiple UN agencies have reiterated these concerns.<sup>85</sup> Treaty monitoring bodies have also called for legal gender recognition procedures that are “expeditious, transparent and accessible”,<sup>86</sup> inclusive of transgender children,<sup>87</sup> and have been developed through effective consultation with transgender people and organizations.<sup>88</sup>

In country visits and reports, including within this region, Special Rapporteurs have increasingly spoken out against the multiple human rights challenges that transgender people face because legal gender recognition does not exist<sup>89</sup> or is constrained. The United Nations Special Rapporteur against Torture, for example, has recommended that all States outlaw forced or coerced sterilization in all circumstances and provide special protection to marginalized groups, including transgender people.<sup>90</sup>

The evolution of human rights standards on the application of the rights to bodily and mental integrity, autonomy and self-determination to gender identity, gender expression or sex characteristics is well reflected in the “The Yogyakarta Principles+ 10” published in 2017. It also acknowledges national legal, policy and practice developments that guarantee and protect the rights of everyone, including all children, to bodily and mental integrity, autonomy and self-determination; including in relation to legal gender recognition.<sup>91</sup>

Such national legal, jurisprudential and policy practices in different parts of the world has reinforced that abusive requirements for legal gender recognition, such as sterilization and forced divorce, violate a person’s human dignity including the right to private life, which encompasses a person’s self-determined gender identity.<sup>92</sup>

79 Human Rights (HR) Committee (2017). *Concluding observations on the third periodic report of Serbia*, 10 April 2017, CCPR/C/SRB/CO/3, para 13; CEDAW (2017). *Concluding Observations on the combined seventh and eighth periodic reports of Germany*, 9 March 2017, CEDAW/C/DEU/CO/7-8, para 46; HR Committee (2016a). *Concluding Observations on the second periodic report of Kazakhstan*, 9 August 2016, CCPR/C/KAZ/CO/2, para 10; HR Committee (2016b). *Concluding Observations of the fourth report of Slovakia*, 22 November 2016, CCPR/C/SVK/CO/4, para 15; CAT (2016c), para 29; CEDAW (2015b). *Concluding observations on the combined fifth and sixth periodic reports of Slovakia*, 25 November 2015, CEDAW/C/SVK/CO/5-6, para 37.

80 CEDAW (2014a). *Concluding Observations on the seventh periodic report of Finland*, 10 March 2014, CEDAW/C/FIN/CO/7, para 29.

81 CEDAW (2014b). *Concluding Observations on the seventh periodic review of Belgium*, 14 November 2014, CEDAW/C/BEL/CO/7, para 45.

82 CEDAW (2016). *Concluding observations on the combined fourth and fifth periodic reports of Switzerland*, 25 November 2016, CEDAW/C/CHE/CO/4-5, para 39; HR Committee (2016b), para 14; HR Committee (2015). *Concluding Observations on the fourth periodic report of the Republic of Korea*, 3 December 2015, CCPR/C/KOR/CO/4, para 14; CESCR (2016). *Concluding observations on the fifth periodic report of Costa Rica*, 21 October 2016, E/C.12/CRI/CO/5, para 20; CAT (2016c), para 29; CEDAW (2015b), para 37. CESCR (2014). *Concluding observations on the second periodic report of Lithuania*, 24 June 2014, E/C.12/LTU/CO/2, para 8; CEDAW (2014a), para 29; CEDAW (2014b), para 45.

83 In April 2017, the European Court of Human Rights ruled that requiring transgender people to undergo sterilization, in order to have their gender recognized, violated the right to respect for private life. *Affaire A.P., Garçon et Nicot v. France (79885/12, 52471/13 and 52596/13)*, 6 April 2017.

84 HR Committee (2014). *Concluding observations on the fourth periodic report of Ireland*, 19 August 2014, CCPR/C/IRL/CO/4, para 7.

85 WHO, OHCHR, UN Women, UNAIDS, UNDP, UNFPA & UNICEF (2014); WHO (2015b); UNHRC (2015a). *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23.

86 CEDAW (2015c). *Concluding Observations on the fourth periodic report of Kyrgyzstan*, 11 March 2015, CEDAW/C/KGZ/CO/4, para 34; CEDAW (2014b), para 45.

87 CRC (2015a), para 35.

88 HR Committee (2014), para 7.

89 For example, in his May 2015 report, the Special Rapporteur on the right to health, Dainius Pūras, recommended that Malaysia “legally recognize the gender identity of transgender people”. UNHRC (2015b). *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Addendum: Visit to Malaysia (19 November–2 December 2014)*, 1 May 2015, A/HRC/29/33/Add.1.

90 UNHRC (2013), paras 78 and 88.

91 Yogyakarta Principles plus 10 (YP+10). Available at: <http://www.ypinaction.org/yogyakarta-principles-10/>. Update to the original Yogyakarta Principles to take onboard new developments in international law with respect to sexual orientation, gender identity, gender expression and sex characteristics, published in 2017.

92 BVerfG, (Federal Constitutional Court of Germany), 1 BvR 3295/07 (11 January 2011); BVerfG, (Federal Constitutional Court of

Outside this region, Argentina and Malta are widely recognized as two countries that have introduced gender recognition laws that are based on international human rights standards and place gender recognition within the context of transgender people’s human rights more broadly.<sup>93</sup> Both countries affirm the right of transgender people to self-determination and deliberately do not restrict eligibility for gender recognition on discriminatory or abusive grounds. They explicitly ensure that legal gender recognition is not dependent on any form of medical diagnosis or gender-affirming health interventions, such as surgeries or hormonal treatment. In both Argentina and Malta, there are no age or other restrictions on who can access the provisions and there are additional protections for children. Laws in both countries have a broad focus on transgender people’s human rights and the application of gender recognition to other areas of life. Both countries have addressed transgender people’s rights to health, privacy, and protection from discrimination.

## C. Pathologization

International, regional and national trans civil society groups, health professional organizations and international human rights bodies have strongly advocated that gender diversity should not be pathologized (considered to be a sign of illness) and that trans health needs should no longer be defined by a mental health diagnosis (de-psychopathologization).<sup>94</sup> All these entities have called on the World Health Organization (WHO) to no longer classify ‘gender identity disorder’ as a mental health disorder, and to provide an alternative solution for accessing gender-affirming health services.<sup>95</sup> WHO is in the process of revising the *International Classification of Diseases and Related Health Problems* (ICD). Current proposals of the WHO Secretariat include that codes relating to transgender people’s gender identity and expression be removed from the ICD chapter on ‘Mental and Behavioural Disorders’ and new codes, entitled ‘gender incongruence’ be placed in a newly recommended chapter on ‘Conditions Related to Sexual Health’. These recommended revisions aim to recognize gender identity and expression as a matter of self-determination, and transgender people’s decision-making autonomy in regard to gender-affirming health care. They also acknowledge the need for available, accessible, affordable, and quality transgender health services.<sup>96</sup> In addition, UN and other international human rights experts and transgender civil society are calling for the complete removal of gender diversity in childhood-related diagnostic categories from the classification of diseases.<sup>97</sup> Final decisions about the revision of ICD 11 are expected to be made by WHO’s World Health Assembly in 2018.<sup>98</sup>

In this region, the Psychological Association of the Philippines has spoken out in support of “global initiatives to remove the stigma of mental illness” that has long been associated with transgender and LGB people. Its statement notes that “anti-LGBT prejudice and discrimination tend to be based on a rhetoric of moral condemnation and are fuelled by ignorance or unfounded beliefs associating these gender expressions and sexual orientations with psychopathology or maladjustment.”<sup>99</sup>

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Germany), 1 BvL 10/05, (27 May 2008); VfGH (Constitutional Court Austria) V 4/06-, (8 June 2006); WHO, OHCHR, UN-Women, UNAIDS, UNDE, UNFPA & UNICEF (2014).

- 93 Ley 26.743: *Derecho a la identidad de género* (Argentina) (Law No. 26.743: Gender Identity Law); Gender Identity, Gender Expression and Sex Characteristics Act (Malta) (2015); Transgender Europe (2015). “Malta Adopts Ground-breaking Trans and Intersex Law” (Press Release), 1 April 2015.
- 94 World Professional Association for Transgender Health (WPATH) De-psychopathologisation statement, 26 May 2010; Global Action for Trans\* Equality (GATE), Depathologization, 5 April 2017; Stop Trans Pathologization International Campaign, *Manifesto*, available at: <http://www.stp2012.info/old/en/manifesto>; APTN (2016). *Understanding the ICD: Its History, Organization, and Engaging Asia and the Pacific in the Revision Process*. APTN discussion paper, 22 October 2016.
- 95 Council of Europe: Parliamentary Assembly (2015). *Resolution 2048: Discrimination Against Transgender People in Europe*; European Parliament (2015). *Report on the situation of fundamental rights in the European Union (2013–2014)*; Pan American Health Organization (PAHO), HPP (2015); APTN & UNDP Programme (2015); GATE (2013). *Critique and alternative proposal to the “Gender Incongruence of Childhood” Category in ICD-11*. Position developed by the GATE Civil Society Expert Working Group, Buenos Aires; Spanish Network for Depathologization of Trans Identities (2010). *Best Practices Guide to Trans Health Care in the National Health System*.
- 96 WHO (2015a). *ICD-11 Beta Version*; Drescher J., Cohen-Kettenis P. and Winter, S. (2012). ‘Minding the body: Situating gender identity diagnoses in the ICD-11’, *Int. Rev. Psychiatry*, 24 (6), pp. 568–571.
- 97 OHCHR (2017). ‘Embrace diversity and protect trans and gender diverse children and adolescents’ OHCHR Media Statement for International Day Against Homophobia, Transphobia, and Biphobia, 17 May 2017; GATE (2013).
- 98 WHO (2015a).
- 99 Psychological Association of the Philippines (PAP) (2011). *Statement of the Psychological Association of the Philippines on Non-Discrimination Based on Sexual Orientation, Gender Identity and Expression*, Policy Statement.

Pathologizing gender diversity results in, and often justifies, stigma and discrimination against transgender people.<sup>100</sup> It has wider practical impacts on transgender people's human rights. When gender identity or expression is pathologized, States frequently deny transgender people the right to make informed decisions about their own bodies if those decisions have not been endorsed by health professionals.<sup>101</sup> This includes making legal gender recognition contingent on medical evidence of either a pathologizing diagnosis and/or of gender-affirming health interventions.

This report illustrates how pathologization influences gender recognition provisions in the nine countries reviewed. It contends that transgender people's access to legal gender recognition should be based on international human rights standards, with no pathologizing requirements. Similarly, access to gender-affirming health services should be based on evidence of medical necessity, not on judgements that gender diversity is inherently a sign of mental illness.

## 5.2 LAWS, COURT DECISIONS, POLICIES AND PRACTICES

This section summarizes whether and to what extent the nine countries reviewed:

- Enable transgender people to change their names (Section A)
- Enable transgender people to change their gender markers (Section B)
- Impose restrictive or abusive eligibility requirements for changing a gender marker (Section C)
- Have administrative processes that limit access to changing gender markers (Section D).

Given the primary focus of this study is on legal gender recognition, more extensive examples are given in this section than in other parts of the report.

### A. Changing name details

While name changes are technically possible in seven of the nine countries reviewed, in practice it can be very difficult for transgender people to get a name approved if it does not match their sex assigned at birth.

#### Name change is technically possible but may not be so in practice

In India, formal name changes require that the applicant advertises this name change in a daily local leading newspaper. The guidelines themselves do not restrict people from choosing a gender-specific name that does not match their sex assigned at birth.<sup>102</sup> However, a documented example in the India country report describes an official refusing to accept a transgender woman's female name for that reason.

In Thailand, there is a general right to choose and change one's name; however, it only has legal status once the name is registered.<sup>103</sup> While this is a purely administrative process, the registrar has some discretion. Community consultations undertaken for the Thailand country report indicated that transgender people commonly face problems when they try to change their name to match their gender identity. Reportedly, registrars often deny such requests based on a principle in their operational manual that requires a person's name to indicate whether the individual's gender is male or female.<sup>104</sup> Typically, this provision is interpreted as requiring a person's gender to be based on their sex assigned at birth.

100 WPATH (2010).

101 GATE (2017). "What does pathologization mean?" in *Intersex Issues in the International Classification of Diseases: Introductory Guide* (draft).

102 Department of Publications (India), *Guidelines for Change of Name for Adult (Major)*. An earlier procedure required the submission of an affidavit attested by a Magistrate or Notary, while now a self-attested document is sufficient. Printing charges for publication of change of name are INR 850 in the most recent notification, which can go up to INR 1100 in certain specified instances.

103 Person Name Act (Thailand) B.E. 2505 (1962).

104 The Person Name Determination Principle" in the Operational Manual of the Department of Provincial Administration, Ministry of Interior; UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

In Indonesia, while it is very difficult for transgender people to change their gender markers, it is easier to change name details. A transgender person applies to the court for a name change,<sup>105</sup> and that document is then taken to the Civil Registry office to have that name changed on their Indonesian ID card.<sup>106</sup> There are no legal requirements that a person's name or gender expression in a photo ID must match their gender marker. The main barrier is that a Family Card is required for a court application to change one's name.<sup>107</sup> Transgender people who are estranged from their family are unlikely to have access to their original Family Card. It is possible for a transgender person to obtain a new Family Card in their own right. However, this requires supporting documents proving that the applicant is living and working in the area where the application is made. Transgender people working in the informal economy, including sex workers, are unlikely to be able to obtain such documentation.<sup>108</sup>

The law in China enables a transgender person to change their personal name.<sup>109</sup> The provision does prohibit "false representation of personal names". Implementing regulations on the changing of names also did not specifically prohibit the changing of gendered personal names.<sup>110</sup> However, changing personal names in practice requires extensive documentation, including approvals from one's family and work unit, and ultimately relies on the discretion of the local household registration office where a transgender person was born or legally resides. There are several documented cases in which individuals' applications for changing a personal name have been denied on very minor grounds, and the courts have largely affirmed the discretion of the household registration authorities in doing so. This suggests that, in practice, transgender people would face many practical barriers in pursuing a name change.

In Pakistan, it is theoretically possible for transgender people to change their name, using the generic, administrative process set out on the National Database and Registration Authority (NADRA) website.<sup>111</sup> However, the requirements are not widely understood among the transgender community and no such examples were shared in community consultations with transgender people or *khwaja siras* undertaken for this study. It is also unclear if a gendered name that did not match someone's sex assigned at birth would be accepted and the implications of having such a name. For some *khwaja siras* and transgender women, there may also be concerns that changing to a female name may have negative implications for inheritance entitlements that are based on a person's gender. Some previously identified barriers (such as the requirement to place an advertisement of a name change in a local newspaper) appear to have been removed.<sup>112</sup>

In Bangladesh, a court order is required for anyone to change their name. There is no legal provision either allowing or prohibiting transgender people from amending their name and taking on a gender-specific name that does not match their sex assigned at birth. A transgender person could theoretically bring a petition to the court requesting such a change.<sup>113</sup> However, according to legal advice obtained by a transgender man in Bangladesh, it is very unlikely that the court would approve such an application in practice.<sup>114</sup> At least one component of a person's legal name is gender-specific and changing this would require explaining why such a change was necessary. The only official information about amending a name on the National ID card refers to name change after a marriage.<sup>115</sup> In recent years, when a *hijra* attempted to change her name (and subsequently her gender marker) on educational documents, authorities required a physical examination and chromosome test and rejected the application based on that evidence.<sup>116</sup>

105 Law No. 23 of 2006 on Population Administration (Indonesia), 29 December 2006, Article 52.

106 Presidential Decree on Requirements and Procedures for Registration of Population and Civil Registration (Indonesia), No. 25 Year 2008, art. 97, para 2.

107 The Family Card contains data on the structure, size and relationships within a family, including identifying the heads of the household who are responsible for reporting to the village any births, deaths or other changes to these household details.

108 Information supplied by Mario Prajna Pratama, Chairperson, People Like Us Satu Hati and Ricky Gunawan, Director of the Community Legal Aid Institute (LBH Masyarakat) in Indonesia, March 2017.

109 General Principles of the Civil Law of the People's Republic of China (China) (1986), art. 99.

110 Regulations of the People's Republic of China on Household Registration (China) (1958), art. 18.

111 National Database and Registration Authority (Pakistan) *Modify your ID Card*, available at: <http://id.nadra.gov.pk/modify-id/>; ILGA: Chiam, Z. & Duffy, S. (2016), p. 20.

112 See: "NADRA makes NIC making process extremely easy", *Dunya News*, 20 November 2015.

113 ILGA: Chiam, Z. & Duffy, S. (2016), p. 15.

114 Email correspondence with Aahil Hossain Neer, a trans man from Bangladesh, February and March 2017.

115 See: "Regarding the National Identity Card Correction", *Election Commission Bangladesh*, (Online) (Bengali only, no English translation available). Available at: <https://services.nidw.gov.bd/faq> (accessed 31 May 2017).

116 National Human Rights Commission of Bangladesh (JAMAKON) (2015). *A Manual for Gender and Sexual Minorities*, p. 5. This publication mentions JAMAKON's initial involvement after this *hijra* lodged a discrimination complaint. Additional updated

## Policy to change name is forthcoming

In Nepal, it has only been possible to amend a gender marker, not a name, on a Citizenship Certificate (see Section 4.3B below). On 23 January 2017, the Supreme Court directed the Nepal government to develop a policy enabling transgender people to change their name.<sup>117</sup>

## No ability to change to a gendered name that matches one's gender identity

There are no official options – a legal gender recognition law, policy or regulation – for transgender people in the Philippines to change name details on official documents.

In Malaysia up until 1996, it was possible to change both name and gender marker on National Identity Cards (ICs).<sup>118</sup> When that option was no longer available, there was an interim period when a transgender woman could add a female name to an IC, as long as the original male name was retained. That partial name change policy is no longer in practice, and there is no transparent provision enabling a transgender person to change name details.<sup>119</sup>

## No ability to change one's name title to match one's gender identity

In Thailand, the use of gender-specific name titles is legally mandatory and enforced. Thailand currently has no law enabling transgender people to change their name title (Mr, Mrs or Ms) on official documentation. Name title options are classified into two categories, for women and men, based on sex assigned at birth and appear on all official documentation.<sup>120</sup> This means, for example, even if a transgender woman can obtain a female name on her identification documents, her name title will be listed as 'Mr'. A transgender man will have the name title 'Miss' or 'Mrs'. All name titles are gendered, with no non-binary options, such as Mx.

Proposed amendments to name title laws in 2007 included enabling transgender people to be able to amend their name titles, if they had a diagnosis of Gender Identity Disorder and had undergone gender-affirming surgeries. That proposal did not progress further and the Persons' Name Title Act excludes mention of transgender people.<sup>121</sup>

## B. Guarantees of legal gender recognition

Assessing whether legal gender recognition exists in a specific country is not simply about identifying if there is a gender recognition law. Instead, it requires a more comprehensive analysis of the content of a variety of laws, court decisions, administrative orders, policies, the relationships between them and how they are implemented in practice. It is also necessary to clarify whether the identity documents used most frequently in a given country by transgender people to navigate daily interactions can be amended to reflect a person's self-defined gender identity, and if changing that gender marker enables other documents to be issued with those details.

The rest of this subsection focuses on whether and to what extent there are legal or policy avenues for transgender people to amend gender markers on official identification documents in the nine countries reviewed.

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information was provided in emails to the authors by Aahil Hossain Neer, February 2017.

117 This 23 January 2017 decision was in response to a writ petition filed in 2013 by Sunil Babu Pant, Anik Ranamagar and others, *Sunil Babu Pant and others v Nepal Government and others* (2013). At the time of writing this report, the full written text of the Supreme Court order has yet to be issued.

118 HRW (2014). *"I'm scared to be a woman" Human rights abuses against transgender people in Malaysia*.

119 APTN & SEED (2017). *Gender Recognition in Malaysia: A Legal and Policy Review in the Context of Human Rights*.

120 Act on the Use of Person Name B.E. 2484 (1941) and the Person Name Act B.E. 2505 (1962), Child Title Act B.E. 2464 (1921), Female Title Act B.E. 2551 (2008); Civil Registration Act B.E. 2534 (1991).

121 It is possible for some intersex people to change their registered name title and gender marker. This requires evidence that the intersex variation was recognized at birth and the person has had surgery to 'normalize' their genitals to conform to their identified gender. UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

## Court or Government decisions guarantee the right to legal gender recognition

In *NALSA v. Union of India*, the Indian Supreme Court upheld the right of transgender individuals to identify as either male, female or third gender.<sup>122</sup> It is the only country reviewed where transgender people have the right to choose to be legally recognized as any one of the genders that their country officially recognizes. The Indian Supreme Court accepted self-identification as the principle that would govern gender recognition, with no additional eligibility requirements, such as gender-affirming surgeries or hormone therapy. However, as Sections 5.2C and 5.2D note, there are some eligibility criteria, implementation delays and inconsistencies across documents and agencies, which limit the guarantee to self-identification set out in the *NALSA* judgment.

The India country report details the eligibility criteria for obtaining or amending various identification documents so that the gender marker matches a transgender person's gender identity (as either male, female or as a third gender identity).<sup>123</sup> A third gender option can be chosen on Aadhar cards,<sup>124</sup> ration cards<sup>125</sup> and voter IDs,<sup>126</sup> with no additional eligibility criteria. This option is not available on PAN cards<sup>127</sup> or birth certificates. Technically, Aadhar cards, voter IDs and PAN cards can be corrected, though it is unclear what documentation is sufficient for these to be changed from female to male, or vice versa. Transgender people consulted in the technical experts' meetings in India described that it was more difficult to amend a first document, or if an Aadhar card had already been issued in a person's sex assigned at birth. Documents supplied by a trans man showed that his request to change his gender marker was refused because it would not match existing sex details held by the Income Tax Department.<sup>128</sup>

In India, all applications to amend sex details on a passport (to male, female, or transgender) require proof of gender-affirming surgeries.<sup>129</sup> This is also the case if an agency requires the gender marker change to be notified publicly in the Gazette of India. These barriers are explained in more detail in Section 5.2C.

In 2007, Nepal was the first country in the region where a Supreme Court decision (*Sunil Babu Pant and Others v. Nepal Government and Others*) recognized a third gender identity, based solely on an individual's self-determination. This third gender category was reflected in voter rolls in 2010,<sup>130</sup> immigration forms, and the 2011 federal census,<sup>131</sup> and added to Nepal's Citizenship Certificate (*nagarikta*) in 2013.<sup>132</sup> Nepal's Public Service Commission added 'Other' as a third gender option on application forms for civil service examinations. In 2015, the first fiscal year when this option was available, up to 651 transgender people applied using 'Other' as their gender marker, comprising 0.11 percent of all applicants.<sup>133</sup>

The Nepal Supreme Court decision clearly stated that the sole criterion for being legally recognized as third gender on documents and in government registers was an individual's "self-feeling", citing international human rights standards.<sup>134</sup> There are no requirements for medical diagnosis or treatment, or any third-party verification before a transgender person can amend their title and gender marker. Subsequently, in the case

122 *NALSA v. Union of India* (2014) 5 SCC. 438.

123 UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*, Appendix A.

124 The Unique Identification Authority of India collects biometric and demographic data of residents, registers them in a centralized database and issues a 12-digit unique identity number called Aadhar to each resident.

125 Ration cards are used to purchase subsidized food items like wheat, rice, sugar and kerosene from public distribution shops or 'ration shops'. They are an important subsistence tool for the poor, provide proof of identity and a link with government databases that use the ration cards to establish identity, eligibility and entitlement. The rules governing the Public Distribution System are currently undergoing reform and all new applications and requests for changes to existing ration cards are presently suspended.

126 Electors Photo Identity Card (EPIC), commonly referred to as voters ID. Election Commission of India (2006) *A Guide for the Voters*.

127 PAN, or permanent account number, is a unique 10-digit alphanumeric identity allotted to each taxpayer by the Income Tax Department under the supervision of the Central Board of Direct Taxes. It also serves as proof of identity. PAN is mandatory for financial transactions. The card does not feature gender-specific details beyond a name. See also: 'Tax Identity', *Money Today* (Online), June 2013.

128 UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*.

129 Instructions available at: Passport Seva, Consular, Passport & Visa Division, Ministry of External Affairs (India), *Instructions for filling of Passport Application form and supplementary form*, Case No. (II) 7, p. 10.

130 See: The Carter Center (2012). *The Carter Center's Information Sessions on the Election Commission of Nepal's Voter Registration with Photograph Program*.

131 See: Knight, Kyle, "What we can learn from Nepal's Inclusion of 'Third Gender' on its 2011 Census", *New Republic*, 18 July 2011.

132 See: Knight, Kyle, "Dividing by Three: Nepal Recognizes a Third Gender", *World Policy Blog*, 1 February 2012.

133 Shrestha, Prithvi Man, "LGBTIs in civil service: 651 transgender people apply for PSC exam", *Kathmandu Post*, 11 February 2017.

134 *Sunil Babu Pant and Others v. Nepal Government and Others* (2007), Writ No. 917 of 2064 BS (2007).

*Dilu Dibuja v. the Ministry of Foreign Affairs*, the Supreme Court ordered that a transgender person be given a passport that matched their citizenship certificate. The passport regulation was changed in August 2015, adding a third gender marker using the category “O”. In the 2015 Constitution of Nepal, Article 12 guarantees the right to a citizenship certificate that reflects a person’s third gender identity.

In Bangladesh, a November 2013 Cabinet decision recognized the right to gender recognition for those who identify as a third gender.<sup>135</sup> It was meant to enable the option of stating *hijra* as a third gender on official documents, such as birth certificates, passports and National Identity Cards. Three years later, in November 2016, there has been no explicit addition of a *hijra* category in passports, birth certificates, voter registration forms or the national ID card. There is a third gender option, ‘other’, on passports. There are implementation difficulties as the passport policy asks new applicants to submit a birth certificate or national ID card to verify information on the passport application form. Yet, as Section 5.2C shows, it is very difficult for a transgender person to change details on those documents.

In 2009, a petition was filed in the Pakistan Supreme Court alleging the infringement of the fundamental rights of *khwaja siras*.<sup>136</sup> The issue of gender recognition was not brought up directly but the petition asked the Court to understand the issues facing *khwaja siras*. In its judgment, the Supreme Court called on the government to begin to register *khwaja siras* in all jurisdictions, so that they may be entitled to their due inheritance from their families. Registration means that the National Database and Registration Authority must provide a third option for *khwaja siras* on the national identity card (CNIC) and the Election Authority must include them in the voter lists. Initially, the Court required a medical test to determine the validity of a person’s claim to be *khwaja sira*. The community protested this requirement and subsequently CNICs could be changed without a medical exam.

On 9 January 2017, a draft Transgender Persons (Protection of Rights) Bill 2017 was introduced to the Pakistan Senate, and referred to the relevant standing committees of the House.<sup>137</sup> As noted in Section 3.2, it shares the same title, definition and almost identical provisions as the heavily critiqued 2016 Bill in India. The Pakistan proposal combined gender recognition, anti-discrimination and welfare provisions, with criminalization of begging. Similarly, while it mentioned the right to self-perceived gender, the Bill introduced a District Screening Committee comprised of a medical professional and one community representative who would assess applications.

China provides a clear process for transgender people to change gender markers on official identity documents from male to female or vice versa. However, as outlined below in Section 5.2C, eligibility criteria place very significant limitations on access to legal gender recognition, including by requiring proof of gender-affirming surgeries. There are eligibility criteria at two levels: firstly those mandated in order to undergo gender-affirming surgeries, and then additional steps required to amend one’s gender marker. Once someone’s sex details have been changed, the citizen identification number (that also identifies if someone is male or is female) will be updated and reissued with this amendment.<sup>138</sup> There are no options in China to select a gender marker other than female or male for those who identify as non-binary or as a third gender identity.

## No laws but possibility of courts allowing individual applications

Most countries in this study have no gender recognition laws or policies. However, this does not prevent courts from considering individual applications under other provisions. In Indonesia the law is silent, but a district court may allow a “change of sex” under population administration provisions for registering “other important events”. That court decision can be submitted as evidence to change sex details on an identification card and birth certificate.<sup>139</sup> There are no clear legal requirements for when a judge should grant or not grant the ruling

135 In November 2013, a policy decision of the Bangladesh Government officially recognized *hijras* as a separate or third gender. This was approved in the Government’s Cabinet Meeting presided over by the Prime Minister of Bangladesh; Ministry of Social Welfare (Bangladesh), Gazette, No. sokom/work-1sha/Hijra-15/2013-40 (26 January 2014).

136 *Khaki v. Rawalpindi Pakistan*, Constitutional Petition no. 43 of 2009, Supreme Court of Pakistan. The petition itself used the terminology ‘eunuchs’ and ‘Shemales’.

137 The Transgender Persons (Protection of Rights) Bill (Pakistan) (2017), introduced to the Pakistan Senate on 9 January 2017 (Pending).

138 State Bureau of Quality and Technical Supervision (China) (1999) ‘National Standards for Citizen Identification Numbers’ (GB 11643-1999).

139 *Law No. 23 of 2006 on Population Administration* (Indonesia), 29 December 2006, art 56, para (1).

on change of sex. However, as Section 5.2C shows, the court frequently asks for expert medical evidence of gender-affirming surgeries.

In Pakistan, the two High Court decisions discussed in Section 5.2C, were the result of individual applications by transgender people wishing to undergo gender-affirming surgeries.

### No guarantee and limited potential for legal challenges

In some countries, the law is ambiguous and there are contradictory decisions or guidance about what the law allows or forbids. For example, in Malaysia there is no general law allowing or prohibiting legal gender recognition. There are, however, two religious edicts, or *fatwa*, against Muslim transgender people either undergoing gender-affirmation surgeries (1989) or amending the gender marker on their identification card (2005). As Section 6 notes, although these *fatwas* have never been referred to in the secular case law relating to gender recognition, they have a significant impact on practice.

In addition, the precedent-setting 2013 Court of Appeal decision *Kristie Chan v. (National Registration Department Director-General)* rejected a gender recognition application by a transgender woman who had undergone gender-affirming surgeries overseas. The Justice of the Court of Appeal dismissed the appeal on the ground that there was no medical evidence from Malaysian experts on whether gender-affirming surgery “changes a person’s gender”.<sup>140</sup> However, as noted in Section 5.2C below, there have been some differing lower-level court decisions.

In some other countries where there are no gender recognition laws or policies, courts have also ruled that it is not possible for them to grant gender recognition.

For example, in the Philippines, a 2007 Supreme Court judgment ruled against a transgender woman who had undergone gender-affirming surgeries and wished to change her first name and gender marker on her birth certificate. The Court ruled that provisions allowing correction of errors in birth certificates did not apply for transgender women, as the applicant’s “sex” on the birth certificate was based “correctly” on the sex recorded at birth.<sup>141</sup> This judgment defined the terms ‘male’ and ‘female’ narrowly, based on a person’s ability to produce spermatozoa and ova respectively, concluding that an everyday understanding of the terms did not include people who have undergone gender-affirming surgeries.<sup>142</sup>

Similarly, Thailand has no law or policy enabling transgender people to change their title, sex or gender on official documents. The legal precedent is a 1981 Supreme Court decision that confirmed the ‘gender’ of a person, as recognized by law, is based on the person’s sex assigned at birth. It cited the dictionary definition of a woman as someone who is able to give birth, in dismissing an application by a transgender woman to be recognized as female.<sup>143</sup> In 2016, Thailand introduced a draft Gender Recognition Act that would allow legal gender recognition for transgender people. However, as the draft contains numerous restrictive eligibility criteria, further consultations with transgender civil society are recommended.<sup>144</sup>

## C. Eligibility criteria for legal gender recognition

Even in countries where legal gender recognition is possible, there are eligibility criteria set out in laws, policies, regulations or court decisions or imposed through administrative practices that exclude many transgender people. In contrast to international human rights standards and good practice, laws, policies, or court decisions governing gender recognition in Asia frequently enforce abusive eligibility requirements. The main restrictions in the countries reviewed involve making legal gender recognition contingent on gender-affirming medical interventions and a mental health diagnosis, requiring family approval and that applicants are unmarried (and if they are already married, requiring proof of divorce). As Section 5.1 noted, these requirements undermine rights to privacy, autonomy and self-determination.<sup>145</sup>

140 *Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara* (2013) 4 CLJ 627, at 628, per Abdul Wahab Patail JCA.

141 *Silverio v. Republic of the Philippines* (22 October 2007) G.R. No. 174689.

142 The judgment used the term ‘sex reassignment’.

143 Supreme Court Judgment No. 157/2524 (Thailand) (1981).

144 UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

145 For example: WHO, OHCHR, UN-Women, UNAIDS, UNDP, UNFPA & UNICEF (2014); WHO (2015b); UNHRC (2015a). See Section 5.1 for more details.

## Mental health diagnosis and/or gender-affirming surgeries

In some countries in this region, access to gender recognition is possible if a transgender person has had gender-affirming surgeries and/or a mental health diagnosis. This medical evidence has swayed the opinions of judges in two July 2016 lower-level court decisions in Malaysia and Pakistan.

Despite the 2013 Court of Appeal decision in Malaysia rejecting a transgender woman's attempt to change the gender marker on her Malaysian national identification card,<sup>146</sup> in July 2016 lower-level High Court cases allowed a transgender woman and a transgender man to do so, after showing evidence of gender-affirming surgeries.<sup>147</sup> In the latter case, the judge argued that requiring chromosomal proof of a person's gender identity was archaic and unjust, and that the Court of Appeal in *Kristie Chan* did not unequivocally endorse such a requirement as part of Malaysian jurisprudence. In his opinion, the judge stated "to insist on the chromosomal requirement is to ask for the impossible and I think nothing can be more unjust than that".<sup>148</sup> However, in January 2017, the Court of Appeal overturned this ruling. It allowed the National Registration Department's appeal, which had focused on the need for chromosomal evidence of the trans man's sex.<sup>149</sup>

In Pakistan, the Supreme Court decision enabling third gender recognition does not enable transgender women to be recognized as female or transgender men to be recognized as male. There are, however, two precedents from the Lahore and Islamabad High Courts where transgender people approached the courts for permission to be treated for Gender Identity Disorder (GID) by allowing them to proceed with gender-affirming surgery. In both the cases, the courts granted permission for the treatment which then enabled the individuals to change their gender marker on legal documents and obtain the requested surgeries.<sup>150</sup>

In Indonesia, there are no laws, regulations or binding court decisions that can confirm whether or not transgender people have to undertake gender-affirming medical steps in order to change their gender markers. Expert witness or testimony is not legally required as part of the petition to the court. However, in practice it is common that judges summon or ask for expert testimony, because it is recognized as 'legal evidence' in the Indonesian legal system. This is also based on the persuasive, but not binding, precedent in the 1973 Vivian Rubianti case where a transgender woman was able to obtain a change to her gender marker after gender-affirming surgeries.<sup>151</sup>

In China, both a psychiatric diagnosis<sup>152</sup> and gender-affirming surgeries<sup>153</sup> are required before transgender people can alter sex details on their household registration. Such a diagnosis will only be given to someone who is exclusively heterosexual, for example a transgender woman who is attracted only to men.<sup>154</sup> Additional eligibility barriers at this first stage are that someone can only get approval for gender-affirming surgeries by verifying they have no prior criminal record, that family have been notified,<sup>155</sup> and that they are unmarried and over the age of 20.<sup>156</sup> These criteria may not always be uniformly enforced. In order to amend 'sex' details, a

146 *Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara* (2013) 4 CLJ 627, at 628, per Abdul Wahab Patail JCA.

147 *Re JG, JG v. Pengarah Jabatan Pendaftaran Negara* (2006) 1 MLJ 90 HC, at 95, per James Foong J; High Court in *Tan Pooi Yee v. Ketua Pengarah Jabatan Pendaftaran Negara* (2016) 8 CLJ 427 HC, per Nanta Balan J HC.

148 *Tan Pooi Yee v. Ketua Pengarah Jabatan Pendaftaran Negara* (2016) 8 CLJ 427 HC, at Para 64, per S Nanta Balan J.

149 Jalil, M.A. "NRD wins appeal bid to stop transgender from changing IC details", *Malay Mail Online*, 5 January 2017; "Uphold Right to Identity for Transgender Persons" (Media Release), *Justice for Sisters*, 11 January 2017.

150 UNDP (forthcoming). *Legal Gender Recognition in Pakistan: An internal background paper*.

151 UNDP, USAID (2014a), p. 6.

152 A diagnosis of "transsexualism", is classified as a type of "gender identity disorder" under the Chinese Medical Association (2001) Chinese Classification of Mental Disorders (CCMD-3).

153 Ministry of Public Security (China) (2008). "Reply to Questions Concerning the Alteration of Assigned Sex on Household Registration for Citizens following Sex Change", MPSA Ordinance No. 478 (2008); and the Ministry of Public Security (China) (2002). "Reply to Questions Concerning the Alteration of Assigned Sex on Household Registration for Citizens following Sex Change Surgery", MPSA Ordinance No. 131 (2002).

154 The Chinese Classification of Mental Disorders (CCMD-3) defines exclusive heterosexuality as sexual attraction to others whose sex matches the transgender person's sex assigned at birth.

155 The China country report details how, in practice, this requirement can operate as a requirement to show proof of familial consent, UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*.

156 Sex Reassignment Procedural Management Standards (2017), which were issued under National Health and Family Planning Commission General Office Order No. 7 (2017). See: UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*, Appendix E.

transgender person must then produce the gender determination certificate from a hospital verifying gender-affirming surgery.<sup>157</sup>

In India, passport rules<sup>158</sup> and official practice requires transgender people to provide medical evidence of gender-affirming surgeries in order to change their gender marker on a passport. This applies whether the transgender person is applying to change a passport from male to female, or vice versa, or to have a passport issued with the gender marker listed as transgender.

In addition, in order to amend gender markers on other documents, frequently a transgender person will be required to submit a public notification through the Gazette of India.<sup>159</sup> The Gazette has a pro forma for publication of such a notice that was released after the NALSA judgment.<sup>160</sup> It contradicts the judgment's self-identification principle, by requiring the applicant to declare they have had gender-affirming surgeries and the name of the supervisory doctor for those procedures.

In several other countries where a third gender is recognized, the issue of medical evidence has emerged in the context of confirming a person's eligibility for affirmative action measures, as detailed in Section 8.2E.

### Family or other third person notification or approval

In some countries in this region, family or other third parties must be notified before transgender adults can change their gender markers or undergo gender-affirming surgeries. Ministry of Health regulations in China require written proof that the patient's family and work unit have been notified, before gender-affirming surgeries can take place, for any transgender person over the age of 20. The transgender person must also supply their household registration book, which may need to be retrieved from their hometown or family.<sup>161</sup> Close kin must be informed and provide a signature signing off on the procedure. If the transgender person's parents are deceased, other kin must be notified instead. If written proof of such notification is not provided, technically the procedure should not go forward, thus preventing access to legal gender recognition. While individual surgeons may be more flexible, there is also anecdotal evidence of increasing pressure on surgeons from parents who do not want their adult children to have gender-affirming surgeries. After surgery, when a transgender person applies to amend the sex details on the household registration, approval is again required from a work unit or educational institution.<sup>162</sup>

In Nepal, it is difficult to obtain or amend a citizenship certificate if the applicant is estranged from family as the process requires the Citizenship Certificate of a parent or guardian. In addition, at least one parent or guardian must be present before the Chief District Officer to obtain the Citizenship Certificate. It is necessary to be identified as 'Other' on a Citizenship Certificate in order to make those changes to a passport or other identity documents, including a voter card.<sup>163</sup>

In Indonesia, while family approval or representation is not a legal eligibility requirement to make a court application, in practice this may become a procedural requirement. This is explained in Section 5.3D.

### Marital status

The relationship between legal gender recognition and marriage is discussed in more depth in Section 6.2D of this report. As outlined there, one argument made against legal gender recognition has been that it raises the possibility that someone's heterosexual marriage would then become a marriage between two women or two men. Therefore, where gender recognition is possible, there may be an additional requirement that people must be unmarried (or divorced) in order to change their gender markers. In China, for example, it is only possible to

157 Ministry of Public Security (China) (2008); Ministry of Public Security (China) (2002).

158 Schedule III, Passport Rules, 1980, pp. 102, 104–105. Instructions available at: <http://www.passportindia.gov.in/AppOnlineProject/pdf/ApplicationformInstructionBooklet-V3.0.pdf> or under required documents for reissuing a passport with change of sex: <http://passportindia.gov.in/AppOnlineProject/docAdvisor/selectCaseReissue>.

159 For example, one documented example submitted during consultations for the India country report was from a transgender man who was asked to provide a Gazette Notification in order to obtain a male voter ID.

160 Department of Publications (India), *Specimen Pro forma regarding Change of Sex*.

161 Ministry of Public Security (China) (2008); Ministry of Public Security (China) (2002).

162 Ibid.

163 Blue Diamond Society (forthcoming). *Legal Gender Recognition in Nepal: A Legal and Policy Review*.

amend a gender marker after having gender-affirming surgeries, and one of the Ministry of Health's eligibility requirements for such procedures is that a person is unmarried.<sup>164</sup>

Marital status has been part of legal gender recognition debates in other countries reviewed, particularly due to a widespread perception that a person's gender is fixed as their sex assigned at birth. For example, if wider society perceives a transgender woman as a man, then legal gender recognition would enable her to marry a man and create what is perceived to be a same-sex marriage. Therefore, any revision to gender recognition laws is framed within local debates against same-sex marriage. In contrast, as Section 6.2D notes, Nepal is currently considering "same-sex marriage" provisions that reportedly would be inclusive of third gender identities.

### Other eligibility requirements – age and no criminal record

Of the nine countries reviewed, China's legal provisions are the most detailed and therefore explicitly outline the limitations on access to gender recognition. As already noted, the Ministry of Health directive in China also requires that someone must be over 20 years of age, and have no criminal record in order to access gender-affirming surgeries and therefore legal gender recognition.

In some parts of Asia, children and young people do not have identification documents in their own name. For example, Nepali citizens do not get citizenship documents until the age of 16. For this reason, 16 is the minimum age for obtaining a third gender citizenship document in Nepal.

Good practice internationally includes ensuring that it is possible for a child's name and gender marker to be changed to reflect their gender identity or expression. Both the Argentinean and Maltese laws are based on human rights standards. Applications to change a child's or young person's details are made by their legal guardian and the child or young person must give their explicit agreement. Laws in both countries are framed around the Convention on the Rights of the Child, including that the child's best interests and evolving capacities must be taken into account.<sup>165</sup>

## D. Procedural requirements for legal gender recognition

Processes for how transgender people can change a gender marker and whether and how these challenges limit transgender people's access to legal gender recognition may vary country by country.

### Inconsistency between identity documents

In many countries, there are different laws or policies depending on which ID documents someone is trying to change, and whether a name, title or gender marker is being amended. Usually there is no single procedure or overarching principles that could provide guidance for a consistent approach for legal gender recognition.

In some countries, fundamental principles may be enshrined; however, the implementation of these principles on legal gender recognition are done in an inconsistent manner. In India there are significant inconsistencies in processes for amending a gender marker on passports, *Aadhaar*, PAN and ration cards, voter identification and birth certificates.<sup>166</sup> Typically, obtaining the first identification card is the hardest as each application form requires a supporting document to verify the applicant's identity.

In Bangladesh, while there is a separate third option ('Other') for *hijras* in the passport form, a *hijra* is required to submit a birth certificate or national ID card to verify this information. Neither of those documents includes a third gender option and therefore both will record a *hijra* as 'male'. This has raised concerns about whether applications for an 'Other' passport will be declined.

There are also countries such as Pakistan where introducing the right to amend one identification document (by creating an X option on the national identity card (CNIC)), is not matched with provisions that enable other documents to be amended.<sup>167</sup>

164 Ministry of Public Security (China) (2008); Ministry of Public Security (China) (2002).

165 Argentinean Gender Identity and Health Comprehensive Care for Transgender People Act (Decree No. 773/12, of Gender Identity Act No. 26.743), art. 5.; Articles 3 and 7(2) of Malta's Gender Identity, Gender Expression and Sex Characteristics (2015).

166 UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*, Appendix A.

167 Khan, F.A. (2016), p. 274.

## Only issuing new documents, not amending existing documents

The third gender category was added to Nepal's Citizenship Certificate (*nagarikta*) in 2013 but only those applying for their first Citizenship Certificate were able to request a third gender marker. It has not been possible to amend an existing male or female Citizenship Certificate.<sup>168</sup> This excludes transgender people who already had a Citizenship Certificate before the third gender category was introduced or whose gender identity changes after obtaining a Citizenship Certificate. In 2015, a transgender woman from the western part of Nepal filed a petition against 75 Central district offices demanding that those who already had a male or a female citizenship ID should also be eligible to apply for a third gender ID, and to change their name.<sup>169</sup> On 23 January 2017, the Supreme Court directed the Nepal government to develop policies addressing both these issues.<sup>170</sup>

## Administrative processes require medical transition

Frequently, wider social perceptions about transgender people and their human rights affect the procedural steps that transgender people are required to take when applying for gender recognition. This is most clearly seen in the impact of false assumptions that all transgender people wish to, and are able to, undergo a medical transition, and that their gender identity requires taking such steps. This can result in medical requirements being imposed as *de facto* eligibility requirements through administrative processes or practices.

In India, one of the requirements for changing name or gender marker across documents is to publish a gazette notification.<sup>171</sup> After the NALSA judgment, the Gazette released a standard form requiring transgender people to declare that they have changed their gender “after a successful sex reassignment surgery”. They must also supply the details of the supervising doctor. This pro forma was released by the Government after the NALSA judgment, flouting the judgment's self-identification principle. Application of this gazette requirement is inconsistent. While it is a crucial prerequisite for changing identity documents in Delhi and Hyderabad, in Bangalore a newspaper notification, notarized affidavit and a copy of the NALSA judgment have been sufficient in some cases.

In Pakistan, the National Database and Registration Authority (NADRA) had initially required medical checks to determine a *khwaja sira's* hormone levels and “true sex”. That requirement was overturned by the Chief Justice after *khwaja sira* groups argued it was a defective method of measuring their identity and was discriminatory that they were the only group required to undergo such tests.<sup>172</sup>

In Nepal, while citizenship and passport options for transgender people are limited to a third gender option (marked by an “O”), the civil society organization Blue Diamond Society has shared anecdotal information of at least one transgender woman who was able to obtain female identity documents. One similar example has been provided about a transgender man. In both instances, the decisions were made at a ministry level, rather than by local administrative officials and the applicants were required to provide some medical evidence. Medical verification is not required to obtain third gender citizenship certificates.<sup>173</sup>

## Family identification documents are required

In Indonesia, if someone wants to change their sex on their Indonesian National Identity Card (KTP) or birth certificate, they must first apply to the court for a ‘change of sex’. There are no clear legal requirements for when a judge should or should not recognize a change of sex. The lack of guidance is likely to result in limited knowledge about and inconsistent application of this provision. In practice, the court may ask family members to attend to give evidence. This court decision is then submitted, along with the transgender person's national

168 UNDP & USAID (2014b). *Being LGBT in Asia: The Nepal Country report*. Bangkok.

169 Information supplied by Manisha Dhakal, Blue Diamond Society, September 2015. At that time, the hearing was still ongoing.

170 This 23 January 2017 decision was in response to a writ petition filed in 2013 by Sunil Babu Pant, Anik Ranamagar and others, *Sunil Babu Pant and Others v. Nepal Government and Others* (2013). At the time of writing, the full written text of the Supreme Court Order had yet to be issued.

171 These are authorized legal documents published by the Department of Publication and printed by the Government of India printing presses regularly, and uploaded to the E-Gazette website. See: Directorate of Printing, *The Gazette of India*, available at: <http://www.egazette.nic.in>.

172 Khan, F.A. (2016), p. 271.

173 Email communications with Manisha Dhakal, Executive Director of Blue Diamond Society, 23 September 2015 and 30 December 2016.

ID card and their Family Card, in their application to amend their sex details. The latter document is typically held by a senior family member who may refuse to provide it for this purpose.

## 5.3 CONCLUSION AND POLICY CONSIDERATIONS

### Conclusion

In most of the countries reviewed, transgender people struggle to amend their names to match their gender identity or expression. While name-change provisions exist, most are silent on how they apply to transgender people. In a context where significant stigma prevails against transgender people, prejudice, ignorance or misinformation can easily translate into discriminatory practices. These include the imposition of barriers that have a disproportionately negative impact on transgender people.

In parts of this region, there has been some significant progress in guaranteeing the right to legal gender recognition, particularly through Supreme Court decisions in India and Nepal. Both these Supreme Court decisions are based on human rights and also cite the Yogyakarta Principles. All four countries in South Asia, Bangladesh, India, Nepal and Pakistan, have Supreme Court judgments or Cabinet decisions recognizing a third gender on specific documents; however, in many of these countries implementation measures have been inconsistent. India is the only South Asian country whose Supreme Court decision affirms transgender people's rights to identify as male, female or a third gender identity. However, eligibility criteria are still imposed in certain instances through administrative practices. This includes requiring evidence of gender-affirming surgeries in order to amend details on a passport.<sup>174</sup> Nepal's commitment to third gender recognition is embedded in the Constitution, and is gradually been rolled out across a range of government documents. It remains, however, focused solely on a third gender identity, with no options for transgender women to be recognized as female or transgender men to be recognized as male.<sup>175</sup>

None of the four countries reviewed in Southeast Asia provide a clear pathway for changing gender markers. Malaysia has a Court of Appeal decision that prohibits such changes, and there are no legal or policy avenues available in the Philippines or Thailand. In Indonesia, the one available option available is attempting to use a generic administrative provision for registering "other important events".

China has laws and policies setting out a clearer process for amending name and gender markers on documents. However, these set heavy and restrictive eligibility criteria, as outlined in detail above.

### Policy considerations

- Guarantee the right to legal gender recognition through laws, policies or regulations, based on self-determination.
- Ensure that the right to legal gender recognition is not undermined through eligibility criteria that violate human rights including, but not limited to, criteria that discriminate on any grounds including marital or family status, age, or criminal record or that require a mental health diagnosis, medical treatment, or family or community approval.
- Ensure rights-based procedures for legal gender recognition that are accessible, non-discriminatory, consistent across various documents, apply to both new and existing documents, and respect transgender people's dignity and privacy.
- If identity verification processes are required, ensure these are based on human rights standards and do not discriminate or impose eligibility requirements for legal gender recognition.

<sup>174</sup> Schedule III, Passport Rules, 1980, pp. 102, 104–105.

<sup>175</sup> Blue Diamond Society (forthcoming). *Legal Gender Recognition in Nepal: A Legal and Policy Review*.

# 6. Gender recognition in various areas of life

## 6.1 HUMAN RIGHTS CONTEXT

Legal gender recognition can be a pivotal factor affecting whether transgender people have equal access to education, employment and marriage, and can lead a life with dignity, free from stigma and discrimination. Lack of legal gender recognition can negatively impact on transgender people's ability to stay at school and graduate, and gain and keep a job, resulting in economic and social exclusion. Without legal gender recognition, it is harder for transgender people to access general and transition-related health services, and to exercise rights under sex-differentiated laws, often including those related to marriage, protection from violence, and search and detention policies.

According to the principle of universality and indivisibility of human rights, human rights should be applied to all people, including transgender people. Human rights standards recognize transgender people's human rights in various areas of life. These either derive directly from the principles of non-discrimination, autonomy or privacy or are guaranteed through specific provisions related to, for example, the right to education, health and security. In various ways, all of these human rights are recognized in the constitutions and laws of all countries represented in this report. Human rights standards increasingly recognize that transgender people's ability to have their gender legally recognized is strongly related to the exercise of these human rights in various areas of life including in relation to work, education and health services.<sup>176</sup> For example, the Committee on Economic, Social and Cultural Rights has noted that the absence of legal gender recognition "is a barrier to transgender persons having effective access to work, education and health services" as required under Article 2 of the International Covenant on Economic, Social and Cultural Rights.<sup>177</sup>

## 6.2 LAWS, COURT DECISIONS, POLICIES AND PRACTICES

Transgender people's ability to change their name and gender marker and have these changes recognized in various parts of their life depends on an array of laws, regulations, policies and court decisions, those that are specifically about gender recognition, and those sectoral provisions that govern particular areas of life, such as education and employment. These have a great influence on how legal gender recognition manifests in a transgender person's daily life.

In some countries, laws or court decisions set out how gender recognition should be applied in specific sectors, based on human rights standards. For example, in India, the NALSA judgment calls for the effective application of the judgment in relation to education and employment, and in other areas of life.<sup>178</sup>

In other countries in this region, there are some progressive sectoral laws and policies, or judgments that can create an enabling environment for gender recognition for transgender people in relation to education, employment, marriage or health care.

This regional report considers the five main areas of life where relevant laws or policies were identified in the nine countries under review. These are education, employment, access to health services, marriage, and issues for transgender people in places of detention.

<sup>176</sup> UNHRC (2011); WHO (2015b).

<sup>177</sup> CESCR (2016), para 20.

<sup>178</sup> *NALSA v. Union of India* (2014) 5 SCC. 438.

## A. Education

The lack of legal gender recognition in education systems can manifest in many ways. When transgender students are required to register using the name and gender marker given to them at birth, this has multiple, negative implications for their right to education. In many countries in the world, including in these nine countries, transgender children, youth and adults are often not able to attend, graduate from or fully participate in educational life because of their gender identity or expression. Many are excluded from school or disciplined because of their gender identity or expression. This includes, for example, gender conversion therapies designed to enforce gender conformity and sex role stereotypes.<sup>179</sup> Those who remain at school are typically forced to wear a uniform, participate in sex-segregated activities such as sport, or use facilities such as bathrooms and changing rooms based on their sex assigned at birth. This creates an institutional environment that discriminates against trans and gender-diverse children, youth and adults, and deprives them of the lifelong benefits of education, including improved employment and health outcomes.

### Gender markers on educational documents

In most countries in the region there are no clear, consistent, rights-based regulations that would enable transgender people to navigate administrative processes in a way that respects their self-defined gender identity. Most countries have no policies allowing a gender marker change on education documents, and some explicitly forbid it.

For example, in China, educational institutions usually do not have the authority to alter the gender markers of transgender people on academic certificates and diplomas. This applies even in cases when the transgender person has medically transitioned and subsequently changed other official identification documents.<sup>180</sup> This causes considerable problems in the workplace, where there have been documented instances of employers refusing to accept the educational credentials of transgender people whose gender marker on diplomas or certificates no longer match the gender marker on official documents.<sup>181</sup>

It has been documented in all nine countries that access to education is obstructed if a transgender student does not have identification documents or the student's gender expression does not match the details on that document. As already discussed in Section 5, transgender children and young people thrown out of their homes do not have access to their birth certificates and other essential documents that are necessary for registering in education facilities. For example, in Pakistan without these initial documents, transgender children and youth, especially those raised largely in *khwaja sira* communities, cannot be admitted to public schools and have minimal chance of getting any education.<sup>182</sup>

In India, the Aadhar Card has been introduced as an identification document, primarily as the basis for delivering welfare services.<sup>183</sup> Although concerns have been raised that the card can serve as a surveillance tool, hence violate privacy, there has been high demand for it as an identity document.<sup>184</sup> The Aadhar Card allows people to choose the option of male, female or transgender. However, there is limited information about whether or how it can be used as an identification document, including whether or how gender markers can be changed on educational or other documents using this card.

### Regulation of gender expression through school uniform policies

In the nine countries covered by this report, there is a lack of guidance or directives on how uniform policies should respect and protect the rights of transgender students. In many countries in the region, school uniforms are compulsory at all levels of the education system, and students are forced to wear the uniform that

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179 For example, a 2012 Malaysia UN shadow CEDAW report described conversion camps and a federal policy, published through a student handbook, that categorized 'gender confusion' as a serious offence. Women's Aid Organization (2012). *CEDAW & Malaysia: Malaysian Non-Governmental Organisations' Alternative Report*, p. 77; UNESCO (2015), p. 35.

180 UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*.

181 Ibid.

182 UNDP (2017). *Legal Gender Recognition in Pakistan: An internal background paper*.

183 Please see: Unique Identification Authority of India, *About Aadhaar*, available at: <https://uidai.gov.in/your-aadhaar/about-aadhaar.html>. This is also discussed in Section 5.

184 The following article highlights surveillance and privacy concerns: Arun, Chinmayi, "Privacy is a fundamental right", *The Hindu*, 18 March 2016.

matches their sex assigned at birth. In some countries, some educational systems or individual institutions have made positive changes to policies..

In the Philippines, the 2008 Order of the Department of Education in the Philippines stated that the wearing of a school uniform shall not be required in public schools.<sup>185</sup> The effective implementation of such a policy could be particularly beneficial for transgender and gender-diverse students and is reinforced by another order that “a student’s attire should not become a cause for discrimination”.<sup>186</sup> However, despite this progress, most schools in the Philippines continue to require the wearing of gender-specific uniforms.<sup>187</sup>

In Thailand, the National Social Welfare Promotion Commission Regulation 2012 states that there should be increased opportunity in education for persons of diverse genders and sexualities and that gender diversity should be promoted.<sup>188</sup> Its influence can be seen in some secondary schools allowing students to choose their uniform, based on the principle that the student’s well-being is more important than norms about gender and clothing.<sup>189</sup> Another institutional interpretation of this regulation is Bangkok University issuing dress guidelines for students under the categories ‘boy’, ‘girl’, ‘tomboy’ and ‘ladyboy’.<sup>190</sup> Some schools and universities have also introduced single cubicle toilets that can be used by any students, regardless of their sex or gender identity.<sup>191</sup>

In addition, compulsory uniform policies have been successfully challenged by transgender students in a few institutions, including Mahidol University. As a result of a case pursued by transgender women, the University President’s meeting passed a resolution stating that transgender women wishing to wear the female uniform during the graduation ceremony are required to submit certain documents, including a medical certificate confirming a diagnosis of Gender Identity Disorder.<sup>192</sup> This policy has been implemented since the 2014 academic year. While there is now a mechanism for transgender women to apply to wear the formal uniform in accordance with their gender identity, there remains no information on whether this process is open equally to transgender men. With the passage of the Gender Equality Act B.E. 2558 (2015), Mahidol University voluntary intends to revise their rules and regulation to ensure that they are in line with the Act.<sup>193</sup>

Transgender people in Thailand have noted outstanding concerns that this aspect of students’ freedom of expression relies on medical certification of a mental health diagnosis. In a recent case, an intersex trans woman took a different approach when she appealed against the dress code policy at the University of Phayao. Rather than producing medical evidence of a mental health diagnosis, she appealed successfully on the ground that the Gender Equality Act protected her gender expression. As a result, in February 2017 she was allowed to use a female photo on all her university documents, and graduate wearing long hair and a female graduation gown. This student could not change her name title, from Mr to Ms, because that falls under the jurisdiction of a different law. As of the date of the decision, 10 more students at her university have come forward with their own requests;<sup>194</sup> however, there are reportedly still thousands of transgender students facing similar problems around the country. Although there is no nationwide policy about how university dress codes apply to transgender people, there is hope within the transgender community that such a policy could be adopted, based on a similar human rights-based approach.<sup>195</sup>

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185 Department of Education (the Philippines), ‘Student Uniforms Not Required in Public Elementary and Secondary Schools’ DO 45, s. 2008.

186 Department Order (D) 46, s. 2008. It focuses, in particular, on discrimination against students belonging to a lower socioeconomic status. Available at: <http://www.deped.gov.ph/orders/do-46-s-2008>.

187 UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*; HRW (2017). “Just Let Us Be”: *Discrimination against LGBT students in the Philippines*.

188 UNESCO (2015), p. 35.

189 Ibid.

190 Please note that these terms are not considered derogatory within Thai culture.

191 UNESCO (2015).

192 UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

193 Ibid.

194 Mahavongtrakul, M. ‘Uniform Justice’, *Bangkok Post Lifestyle*, 6 February 2017; UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

195 UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

## Anti-bullying and anti-violence regulations

Trans children and youth face numerous barriers to completing their education due to discrimination and bullying based on their gender expression and identity. Examples include dropping out of school due to severe bullying,<sup>196</sup> the imposition of strict dress codes,<sup>197</sup> compulsory attendance at camps for boys who are perceived to be effeminate,<sup>198</sup> and corporal punishment, such as whipping, for so-called ‘gender confusion’.<sup>199</sup>

Whether and what measures governments take in order to combat bullying and violence in education facilities varies country by country. In the Philippines, the government enacted various regulations to combat violence and discrimination against transgender youth in education facilities. This includes the Anti-Bullying Act (2013) that prohibits any act that humiliates or excludes a person on the basis of perceived or actual sexual orientation and gender identity.<sup>200</sup> However, in the year following the Act, only 38 percent of schools submitted child protection or anti-bullying policies. This low rate was attributed to poor awareness of what the Act required, combined with weak monitoring by the Department of Education. The Department’s releases on reported incidents of bullying are not disaggregated on the basis of sexual orientation or gender identity.<sup>201</sup> It has issued a further memorandum to clarify the data that schools are required to submit and is working to build the sector’s capacity to implement the policy.<sup>202</sup>

Another critique of the law was that it only addresses bullying between and among students and not perpetrated by school personnel. In cases where the bullying is committed by a principal, teacher or other school personnel, a complaint could be filed administratively under the Department of Education’s Child Protection Policy, citing the Anti-Child Abuse Act.<sup>203</sup> Such cases can cover instances of physical or psychological injury, or cruelty on the basis of the child’s gender identity. The effective use of the Anti-Child Abuse Act to protect gender non-conforming children, however, depends largely on judicial understanding of gender expression and gender identity. This understanding was not demonstrated in the July 2016 case of *People v Penonia* in Cagayan De Oro City, since the trial court agreed with a principal’s actions in punishing a child’s gender expression, ruling that this did not amount to child abuse.<sup>204</sup>

Other countries do not call specifically for the elimination of gender-based bullying but have general anti-discrimination policies that apply to all students. One such example is the Education Law of the People’s Republic of China (2015) that ensures all citizens’ the right and obligation to receive education without discrimination. However, there are no provisions prohibiting the bullying of transgender students in schools. Further, educational materials continue to lack accurate information on gender identity and sexual orientation. These gaps can have a disproportionate impact on LGBTI students given the high levels of discrimination and bullying they face, and the effects on their school attendance and well-being.<sup>205</sup> In response to these concerns, civil society actors submitted an Open Government Information (OGI) request to the Ministry of Education about the content of such textbooks and materials. Since the Ministry did not respond, these actors subsequently challenged the government at court for failing to meet its obligations under relevant OGI laws. While the court of first instance rejected this lawsuit, stating that the plaintiff lacked an interest in the substance of the suit, civil society groups appealed that decision and as of February 2017, were awaiting the decision of a higher court.<sup>206</sup>

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196 APTN & SEED (2017). *Legal Gender Recognition in Malaysia: A Legal and Policy Review in the Context of Human Rights*.

197 Ibid.

198 Women’s Aid Organisation (2012), p. 77.

199 APTN & SEED (2017). *Legal Gender Recognition in Malaysia: A Legal and Policy Review in the Context of Human Rights*.

200 RA 10627 (*Anti-Bullying Act of 2013*) *Implementing Rules and Regulations* (the Philippines). The Act defines the: nature of bullying behaviour and prohibited acts; prevention and intervention programmes, including procedures to handle incidents of bullying; duties and responsibilities within educational communities; training and development; requirements for monitoring; and sanctions for non-compliance.

201 Human Rights Watch interview with Eric Manalastas, assistant professor of psychology, University of the Philippines, Manila, 13 November 2016 cited in HRW (2017). “*Just Let Us Be*” *Discrimination against LGBT students in the Philippines*.

202 UNESCO (2015).

203 Department of Education’s Order No. 40 on Child Protection Policy (the Philippines) (2012).

204 *People v. Penonia*, FC Criminal Case No: R 2013-066, Regional Trial Court of Misamis Oriental, 10th Judicial Branch 22, Cagayan De Oro City (12 April 2016).

205 “19-year-old boy successfully completes sex change after four harrowing episodes: Before changing sex, within three months the boy attempted suicide four times”, *Modern Living Newspaper*, 6 January 2006; UNDP (forthcoming). *Legal Gender Recognition in the Philippines: A Legal and Policy Review*.

206 Cited in UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*.

## B. Employment

Lack of clear human rights-based regulations and policies in relation to legal gender recognition result in limited opportunities for employment and in workplace discrimination. In some countries non-discrimination and/or employment laws and policies have been successfully used to protect transgender people from discrimination at the workplace. Some governments introduced affirmative action for trans people; however, implementation and eligibility criteria for benefits remain a challenge. More details can be found in Section 8.2E.

### Equal employment opportunities

In many countries in the region, the mandate of the government to provide equal employment opportunities is clear; however, transgender people encounter hardships in accessing work opportunities because of discrimination during hiring processes.<sup>207</sup> The problem often lies in the disparity between employees' identification documents or school records and their gender expression, which often leads to discrimination when applying for jobs.

In the Philippines, the Civil Service Commission issued its 'Guidelines in the Processing, Verifying, and Handling of the Applications for Civil Service Examinations of LGBT Applicants'. This was after an individual complaint from a transgender woman who was barred from sitting for the Civil Service entrance examination because of a discrepancy between her gender expression and the male name on her identification document.<sup>208</sup> These guidelines require transgender and gender-diverse people to submit an authenticated copy of their birth certificate to verify their identity. While these guidelines are well-intentioned, this additional procedural requirement potentially disadvantages transgender people. For example, transgender people could be turned away from the exam because they are not carrying their birth certificates. In addition, frontline services are often not familiar with these guidelines or any other policies protecting transgender people from discrimination.<sup>209</sup>

### Non-discrimination regulations and policies at the workplace

As already noted, in countries where legal gender recognition is protected by the law, or through Court decisions, such as in India and Nepal, specific provisions or directives have been developed against workplace discrimination, although their implementation remains a challenge.<sup>210</sup>

Even in the absence of clear human rights-based laws and policies on legal gender recognition, many countries have comprehensive legal provisions prohibiting discrimination at the workplace that shall apply to transgender people, even if most of these policies do not mention gender identity and expression explicitly. For example, in China, equal employment regulations that could potentially prohibit discrimination against transgender people are scattered across various laws and regulations. Some of them use the term 'gender', while others state that job information shall not contain any discriminatory content, or severely forbid harassment at the workplace. These could be applied to transgender people as well. However, greater clarity is needed about how protective regulations are being officially interpreted, including how the term 'gender' is being defined and applied. Judgments have also demonstrated a lack of clarity in interpreting such regulations, resulting in ambiguity in their effect.<sup>211</sup>

Similarly, while several laws and policies in the Philippines provide protection against workplace discrimination and harassment,<sup>212</sup> it is not clear how they are applied to transgender people. At the same time, specific

207 Society of Transsexual Women of the Philippines (2010). *The human rights situation of transgender people in the Philippines Submission of the Society of Transsexual Women of the Philippines (STRAP) to the 13th Session of the United Nations Human Rights Council Universal Periodic Review*.

208 "Civil Service Commission (CSC) memorandum on LGBT applicants", *Rainbow Blog Philippines*.

209 Interview with the Civil Service Commission, Quezon City, 14 June 2016, conducted for the Philippines country report. UNDP (forthcoming). *Legal Gender Recognition in the Philippines: A Legal and Policy Review*.

210 See University Grants Commission (India) (2015). *Annual Report 2014–15*; Government of Kerala (2015). *State Policy for Transgenders in Kerala, 2015* (approved 22 September 2015); Office of the Council of Ministers (Nepal), Human Rights Action Plan, 2014/15 to 2018/19, pp. 48, 59.

211 UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*.

212 For example: Department of Labour and Employment (the Philippines), *Labor Codes of the Philippines*, available at: [http://www.dole.gov.ph/labor\\_codes](http://www.dole.gov.ph/labor_codes); The Labor Code, PD 442 (1974), art 3.

protections for trans people are lacking in these laws and policies. There are lower-level regulations that prohibit workplace discrimination on the basis of gender identity (and sexual orientation), though it seems unclear how they are being implemented.<sup>213</sup>

### Uniform policies at the workplace

As in the education sector, workplace uniform policies can be discriminatory or have a discriminatory effect on transgender people. These policies are usually not consistently applied, or their application is widely dependent on the culture of leniency in each agency.<sup>214</sup>

Good practices exist in the region. In the Philippines, some workplaces allow women with a more masculine gender expression and transgender men to wear male-issued uniforms. Some of these decisions were in response to written requests to be allowed to wear the uniform of choice.<sup>215</sup> However, without clear anti-discrimination protections, it is likely that many transgender people would be reluctant to make such requests fearing employment discrimination. In other countries, such as Malaysia, where so-called ‘cross-dressing’ or ‘female impersonation’ is a crime and there are strict regulations about how women should dress, pursuing flexible uniform policies on the basis of gender expression remains very challenging. This is discussed further in Section 7.2.

Workplace attire plays a central role in an ongoing high-profile case in China. In this instance, a trans man alleged that he was dismissed from his position after only a few days on the job for wearing male attire, which did not conform with the female gender markers on his identification documents. The employer considered the employee’s attire was hurting the company’s image. While as of April 2017 the court has yet to issue its final decision, for the first time in Chinese history, the court accepted testimony from an expert witness on discrimination against trans individuals in the workplace. This has raised hopes that the court might substantively comment on the issue of trans discrimination in its final judgment.<sup>216</sup>

## C. Health services

Transgender people in this region are frequently unable to change their gender markers on official documents unless they have received transition-related medical care of some kind. However, gender-affirming health services are often not available or accessible for transgender people.

Whether or not surgery or hormonal treatment are considered eligibility criteria for legal gender recognition, transgender people may need a variety of health services during their lifetime. They may require transition-related health services, but also the same range of health services as others, such as primary care, contraception, gynaecological or urinary health services or other specialized care. Developing transgender health-related laws and policies, establishing necessary health services, and creating standards of care and training for providers are prerequisites for providing quality health services for transgender people, based on their rights and needs.<sup>217</sup>

A human rights analysis of eligibility criteria for legal gender recognition, including of the requirement for surgery and/or sterilization, is discussed in Section 5.2C.<sup>218</sup> This section of the report focuses on laws and policies about accessing health care that are closely connected to legal gender recognition.

### Availability and eligibility criteria for receiving gender-affirming health services

There is significant diversity in the availability of gender-affirming health services across the nine countries involved in this study. For examples, access to hormones is typically unregulated and varies from widely

213 Examples of ordinances with ambivalence in relation to pre-employment discrimination include the Gender Fair Ordinance of Quezon city and that of Dagupan City. Rainbow Rights Philippines (2015).

214 Based on interviews conducted for the Philippines country report, two examples of workplaces where gendered dress codes are applied flexibly are the Philippine’s Commission on Women and the Department of Social Welfare and Development.

215 Interview conducted for the Philippines country report with the Civil Service Commission, Quezon City, Manila, 14 June 2016.

216 UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*; See also: Guoxiu, W. (2017). “Transgender Man Demands Workplace Justice, Social Equality”, CCTV.Com, 15 March 2017.

217 WHO (2015b); Coleman E., Bockting W., Botzer M. et al. (2012). “Standards of care for the health of transsexual, transgender, and gender-nonconforming people, version 7”. *Int J Transgenderism*, 13(4), pp. 165–232.

218 HPP, APTN & UNDP (2015).

available through pharmacies to very limited availability through informal, underground supplies. Gender-affirming surgery is typically not publicly funded in the countries reviewed.

In countries in the region where gender-affirming health services are regulated, eligibility criteria are set out in laws, policies and standards of care. Some of the most regulated criteria exist in China. While these are not always strictly enforced, any flexibility is solely at the discretion of an individual health professional. Anecdotal evidence received from transgender people interviewed for this research indicates that greater visibility of transgender people may negatively impact on that flexibility. This is partly due to pressure from parents, who are technically required to be notified if their child requests gender-affirming health services. This requirement applies equally to transgender adults and some health professionals are now requiring notarized, written evidence that a parent has been notified.

The high level of regulation in China is set out in technical standards issued initially by the Ministry of Health in 2009 and then updated by the National Health and Family Planning Commission in February 2017. These serve as a regulatory directive for gender-affirming surgeries.<sup>219</sup> As noted in Section 5.2C, such surgeries are also part of the eligibility criteria for legal gender recognition. Details of the main eligibility criteria are listed there, including the need for a diagnosis of “transsexualism” that will only be given to someone who is exclusively heterosexual. In addition, there are clinical criteria. A transgender person must show proof that “the desire to change sex has existed, and been persistent, for over five years with no history of hesitation in pursuing this desire” and they “must have received psychological and/or psychiatric therapy for over a year, without effect”. The written request from the transgender person seeking gender-affirming surgery must also be verified by a notary.<sup>220</sup>

These requirements are not only contradictory to human rights standards but they also make access to gender-affirming surgeries, and hence legal gender recognition, very difficult. It has been documented that hospitals in China often reject requests for surgeries because a transgender person could not fulfil all criteria.<sup>221</sup> There is also some anecdotal evidence of transgender people committing self-harm, including trying to remove parts of their sexual organs, when they were refused permission to undergo gender-affirming surgeries.<sup>222</sup>

In India, some state-level laws and government policies require medical interventions as a prerequisite for legal gender recognition. This is against the principle of self-determination set out in the NALSA judgment. It also ignores the reality that, even for those people wishing to medically transition, such services are largely unavailable and inaccessible. In general, very few government hospitals provide gender-affirming health services for transgender people.<sup>223</sup> Even in the state of Tamil Nadu, where India’s first transgender welfare board was formed, free surgery is provided currently in only one or two government hospitals in Chennai (the capital of the State), on an irregular basis.<sup>224</sup> Almost all of these surgeries are provided only for transgender women, not transgender men. Diagnosis of gender dysphoria or gender identity disorder is often a prerequisite for undergoing surgery in these hospitals.<sup>225</sup>

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219 Sex Reassignment Procedural Management Standards, (2017), which were issued under National Health and Family Planning Commission General Office Order No. 7 (2017), “Announcement from the National Health and Family Planning Commission General Office Concerning 15 ‘Restricted Clinical Application’ Medical Treatment Technical Management Standards and Quality Control Targets, Including Blood Generating Stem Cell Transplant Technical Management Standards” (2017 Version). Appendix E of the China country report compares these February 2017 standards and the 2009 “Sex Reassignment Surgery Technical Management Standards (Provisional)” that they replace.

220 Full details of the Sex Reassignment Procedural Management Standards (2017), which were issued under National Health and Family Planning Commission General Office Order No. 7 (2017), can be found in UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*, Appendix E.

221 Wenjing, Y. “Client in ‘Nanjing’s first transsexual case’ receives compensation of CNY 50,000,” *Jiangnan Times*, 17 May 2005. UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*.

222 For example: “Changing sex to avoid becoming one of the guys: Choosing not to commit suicide for the sake of his father,” *Southern Metropolis Daily*, 3 April 2007.

223 Singh, Y., Aher, A., Shaikh, S., Mehta, S., Robertson, J. & Chakrapani, V. (2014). “Gender Transition Services for Hijras and Other Male-to-Female Transgender People in India: Availability and Barriers to Access and Use”, *International Journal of Transgenderism*, 15(1), pp. 1–15.

224 UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*.

225 UNDP (2012). *Legal Recognition of Gender Identity of Transgender People in India: Current Situation and Potential Options* (Policy Brief).

## Availability of qualified health providers

In countries where gender-affirming surgeries or hormonal treatment are conditions for legal gender recognition, there may not be sufficient qualified health professionals able to provide such services. This issue is exacerbated if qualification requirements are overly restrictive, based on criteria other than required competencies. For example, China's technical standards for gender-affirming surgeries require, among other criteria, that surgeons should hold a professional position of deputy director of the department or above; have at least 10 years of clinical experience in plastic surgery; and have independently completed at least 10 genital reconstruction surgeries.<sup>226</sup> While some of these requirements may be reasonable for specific procedures, others related to seniority of position may not be justifiable on the grounds of professional or medical necessity.

## Building health care professionals' competency to work with diverse trans populations

In many countries, there is limited or no understanding by health care professionals that some transgender people may not wish to undergo gender-affirming surgeries or may wish to have some forms of medical intervention but not others. This has wider implications for the types of gender-affirming health services provided in a country, due to the misinterpretation of transgender people's diverse health needs and arbitrary decisions about what is to be provided.<sup>227</sup>

## Affordability of services

In most countries in Asia, the majority of gender-affirming health services are not covered by public hospitals or by either public or private health insurance systems, even where such services are legal requirements for gender recognition. Typically, transgender people are required to pay for their own medical consultations, clinical visits, laboratory testing, hormone therapy and/or surgeries. The exceptions are Hong Kong SAR, China and some targeted state-level services in India.<sup>228</sup>

## Discrimination in health care settings

Despite legal guarantees against discrimination in many constitutions and laws across Asia, access to health care remains difficult for transgender people because health care providers are often judgemental, dismissive or abusive towards them. This includes refusing to provide access to gender-segregated hospital wards, when a transgender person's legal sex on hospital records does not match their gender identity or expression.<sup>229</sup> The May 2016 Pakistani case of Alisha, reported extensively internationally,<sup>230</sup> illustrates the fatal impact of discrimination in emergency health care settings. Alisha, a *khwaja sira* sex worker, was shot multiple times and then brought to Lady Reading Hospital in Peshawar, where she faced immense discrimination. Staff refused to place her in either the male or the female ward. When she finally received treatment, it was too late, and she died of her injuries. This was not an isolated incident and the *khwaja sira* community has come out strongly to voice their concerns to the government over this kind of discrimination and negligence they face in medical establishments.<sup>231</sup> As a result, the province of Khyber Pakhtunkhwa, where Peshawar is located, has since committed to ensure access to health facilities and services for transgender people there.<sup>232</sup> A subcommittee

226 Surgeons specializing in genital reconstruction for transgender men are required to have independently completed five such surgeries. Full details of the Sex Reassignment Procedural Management Standards (2017), which were issued under National Health and Family Planning Commission General Office Order No. 7 (2017), can be found in UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*, Appendix E.

227 As communicated by transgender people and health care providers during focus group discussions during the development of this report, as well as other national and regional consultations organized by UNDP.

228 UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*; HPP, APTN & UNDP (2015), p. 52.

229 Chakrapani, V. & Velayudham, J. (2008). 'Whether ICD-10/DSM-IV diagnostic guidelines and WPATH treatment guidelines on 'Gender Identity Disorders' (GID) are relevant to India?: Discussion on the need for 'India-specific' guidelines for GID.' *8th Annual National Conference of Indian Psychiatrists Society*, Kolkata; UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*; UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*.

230 For example, Akbar, A. "Transgender Alisha succumbs to wounds at Peshawar hospital", *Dawn*, 25 May 2016; Marzhal, M. "Transgender activist dies after being 'denied treatment' for gun wounds in Pakistan hospital", *The Telegraph*, 25 May 2017; Bearak, M. "Pakistan transgender activist dies after being shot six times and then being denied treatment", *The Washington Post*, 25 May 2016.

231 HRW (2016b). *Pakistan: Attacks on Transgender people surge*; and Knight, K (2016). "When Being Counted Can lead to Being Protected: Pakistan's Transgender and Intersex Activists" (Online Commentary), *HRW*, 6 November 2016.

232 Directorate of Social Welfare, Special Education and Women Empowerment, Government of Khyber Pakhtunkhwa (2017). *Meeting*

has been set up to formulate a mechanism for the 'Sehat Insaf Card' to be issued to transgender people, and to include transgender people in programmes for HIV, AIDS and other ancillary conditions. The Committee has also proposed that separate wards, of at least six to eight beds, are established for transgender people in two main hospitals in Peshawar, Hayatabad Medical Complex and significantly, Lady Reading Hospital where Alisha was denied treatment.<sup>233</sup>

### Absence of rights-based medical standards

Most countries in the region have not adopted health standards that recognize transgender people's needs and rights. When health professionals lack information and there are no national rights-based guidelines, this restricts health care providers' ability to provide quality services.<sup>234</sup> In some countries, this includes lack of clear policies and guidelines against the practice of conversion therapy for transgender children and adults. Such therapies have been found to be unethical, unscientific and ineffective and, in some instances, tantamount to torture. International and regional health professional bodies recommend that such therapies should be banned.<sup>235</sup>

## D. Marriage

Marriage equality for transgender people involves a range of interrelated issues. This report focuses primarily on those that are linked to legal gender recognition, and the impact that a person's gender marker has on their ability to marry or stay married. In the countries reviewed, marriage is legally defined narrowly as a union between a man and a woman. As explained in more detail below, the case law and policy debates in this region have focused on whether, and in what circumstances, transgender people's gender identity will be recognized so they are eligible to enter a heterosexual marriage. This report also describes gender recognition provisions that require transgender people to be unmarried, so that amending a gender marker does not create a same-sex marriage.

There is a dearth of information available about the legal status of other potential relationship scenarios for transgender people who are not heterosexual. For example, if a married transgender man transitions, and remains in his relationship with a cisgender male partner, in what circumstances does his relationship remain legally recognized and protected? Similarly, if a transgender woman was married to a cisgender woman and stays in that relationship, does the relationship remain valid if her gender marker does not change? Does it depend on the specific identity document that is amended? If someone's gender marker is third gender, who are they able to marry? Can transgender people marry each other, and does it matter whether they identify as male, female, non-binary or as a third gender identity?

Transgender people experience the same range of sexual attraction, orientation and behaviour as the cisgender population. Ongoing debates about marriage equality will need to acknowledge that diversity and include the questions asked above. Full relationship equality would recognize transgender people's relationships, whatever the sex, gender identity or gender expression of each partner.

### Marriage laws limited to unions between a man and a woman

Over the past decades, the application of the principles of equality, non-discrimination, privacy and human dignity to same-sex relationships have been applied by international and national courts in various parts of the world, including in relation to transgender people.<sup>236</sup> All the countries in this study, however, define marriage

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*Minutes: Third Meeting of the sub-committee regarding to chalking out modalities of provision of INSAF cards and other health facilities to transgender community, 15 April 2017.*

233 In 2016, Khyber Pakhtunkhwa launched the 'Sehat Insaf Card' which aims to provide free medical treatment to 1.8 million households in the province. Each card may cover up to eight people in a household. The details of how the Insaf cards will be issued to transgender people are still being formulated, though the subcommittee has agreed that the card will be issued to a group of up to eight transgender people and are also exploring how the card can be issued to transgender people with families. "Sehat Insaf Card Launches", *Dawn*, 1 September 2016; Directorate of Social Welfare, Special Education and Women Empowerment (Pakistan) (2017).

234 Chakrapani, V. & Velayudham, J. (2008).

235 UNHRC (2015a).

236 *Halpern v. Canada (Attorney General)* (2003) O.J No. 2268, Court of Appeal for Ontario (10 June 2003); *Barbeau v. British Columbia (Attorney General)* (2003) BCCA 406, Court of Appeal for British Columbia (8 July 2003); *Minister of Home Affairs and Another v. Fourie and Another* (CCT 60/04) (2005) ZACC 19 (1 December 2005); *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015), Supreme Court of the United States (26 June 2015).

as a relationship between a man and a woman, and none recognize same-sex marriage, civil unions or civil partnerships. Therefore, there is an explicit link between a person's legal sex or gender marker and who they can legally marry. This includes both whether a person is legally recognized as male or female, for the purpose of marriage, and how such marriage laws apply to those who are recognized as a third gender.

In China, married people are barred from changing their gender marker, because this would create a same-sex marriage. However, if unmarried people have gender-affirming surgeries and amend their gender markers, they are recognized as that gender for the purpose of marriage. So, a transgender woman who has a female gender marker can marry a man, and a transgender man with a male gender marker can marry a woman. Those marriages cannot be challenged on the basis on the person's gender identity.<sup>237</sup>

The narrow definition of marriage in laws is reinforced by some Supreme Court decisions in the region. The 2007 Philippines Supreme Court decision, *Silverio v Republic of the Philippines*, ruled against a transgender woman being able to change her first name and gender marker on her birth certificate, even after gender-affirming surgeries.<sup>238</sup> The Court viewed the transgender woman as male, based on her sex assigned at birth. Therefore, it argued that allowing this transgender woman to change her name and gender marker, in order to marry her male fiancé, would alter established laws on marriage and family relations.

In 2013, the Thai government worked with civil society to draft a civil partnership bill for same-sex couples that was introduced to a Parliamentary Committee. Since then, progress has stalled, partly because the term 'same-sex' did not explicitly include transgender people's civil partnerships. The bill also did not address the issue of eligibility to be adoptive parents. Subsequently, civil society organizations have been working with the Law Reform Commission of Thailand to redraft a gender-neutral civil partnership bill.<sup>239</sup> A revised draft Civil Partnership Act is due to be presented to the Cabinet for consideration in the second half of 2017.

In India, the NALSA judgment specifically noted the "binary notions of gender ... in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations". It concluded that non-recognition of *hijras'* identity in various laws "denied them equal protection of law and they face wide-spread discrimination".<sup>240</sup> Although the judgment made this observation and later gave the government six months to implement its directions, no order has been passed in this regard. It remains an aspirational legal principle which has yet to be grounded in the legislative framework.<sup>241</sup>

The 2007 Nepal Supreme Court case, *Sunil Babu Pant and Others v Nepal Government and Others*, focused on sexual and gender minorities generally, and recommended actions on both same-sex marriage and recognition of third gender identities. Nepal's Same Sex Marriage Committee was established and submitted its report to the Office of the Prime Minister and Council of Ministers (OPMC) in 2014.

The report of the Committee identified different Chapters of the Civil Code 1963 for amendment.<sup>242</sup> It recommended legalization based on the right to equality, clarifying that marriage laws should apply equally, irrespective of a person's gender identity, including when a gender marker has been amended.<sup>243</sup> The OPMC has vested responsibility for implementing the Same Sex Marriage Committee's report with the Ministry of Women, Children and Social Welfare. It has established a Committee involving government agencies and civil society, tasked to study the laws and policies related to marriage and divorce, and to produce a concept note specifying how much work is required to draft a same-sex marriage law in Nepal.<sup>244</sup> In December 2016, the Nepal's Immigration Office issued a dependent's visa to a Nepalese lesbian and her female partner who were married in California. This is the first decision officially recognizing a same-sex relationship. Subsequently, civil

237 UNDP (forthcoming). *Legal Gender Recognition in China: A Legal and Policy Review*.

238 *Silverio v Republic of the Philippines* (2007), G.R. No. 174689.

239 UNDP & USAID (2014c). *Being LGBT in Asia: Thailand Country Report*, Bangkok, pp. 23–24.

240 *NALSA v. Union of India*, 3 (2014) 5 S.C.C. 438, para 75, 112. The specific term used in this part of the judgment was *Hijras/Transgenders*.

241 UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*.

242 These included the Chapters on Marriage, Divorce and Adoption and amendments to eighteen laws including the Marriage Registration Act (Nepal), 2028 BS (1971) and the Birth, Death and Other Personal Incident (Registration) Act (Nepal) 2033 BS (1976).

243 Nepal's Same Sex Marriage Study Committee (2014), *Same Sex Marriage Study Report*, Nepal.

244 Information supplied by Blue Diamond Society in February 2017. At that time, the Committee had met once.

society has demanded that this decision should be reflected in an equal marriage law that applies for all LGBTI people.<sup>245</sup>

In Pakistan, there was widespread media reporting in 2016 of a statement issued by a group of clerics, citing a *fatwa* that recognized *khwaja sira* marriages in certain circumstances. While this statement has no legal weight, and focuses on biological differences, excluding many *khwaja sira* and other transgender people, media reports suggest it was considered a positive sign.<sup>246</sup>

### **Penalties when a transgender person's relationship is legally considered to be a same-sex relationship**

Several country reports documented prosecutions of transgender people because their relationship was legally perceived to be a same-sex relationship and homosexuality is forbidden under the relevant national laws. The Ardhany Institute in Indonesia has documented 11 cases since 2011 in which transgender people have been convicted of fraud and other charges for amending their gender markers on some documents without meeting the legal requirement to undergo gender-affirming surgeries. Typically, these transgender people, mostly transgender men, had tried to change their gender marker to male so they could marry their female partners.<sup>247</sup>

In Pakistan, a legal case brought to the Lahore High Court illustrates the unresolved issue of transgender people's right to marry and their vulnerability to discrimination beyond the jeopardization of their marriage rights. A trans man (Shumaile Raj) had legally married his wife (Shahzina). The couple petitioned the Lahore High Court for protection from the wife's family, who were harassing the couple and not accepting the marriage.<sup>248</sup> The wife's family responded that the trans man was a woman and therefore the couple were not legally married. Based on that allegation, the High Court judge directed the trans man to have a medical examination to determine his gender. The doctors determined that the trans man was a woman, and the judge charged the couple with perjury and sent them to separate women's jails.<sup>249</sup> They subsequently appealed this decision in the Supreme Court, were released on bail, applied for and were accepted and resettled as refugees overseas.<sup>250</sup>

In many parts of this region, transgender men do not have the option of medically transitioning. Typically, they will be unable to obtain identity documents containing a male gender marker. Therefore, even if they identify as transgender, many are likely to be perceived as female and face discrimination for stepping outside gender-based norms. If they have a relationship with a woman, it is likely to be perceived to be an illegal same-sex relationship. In Bangladesh, for example, there have been several cases where two people assigned female at birth have married in secret, then been arrested, convicted and jailed under a charge of 'unsocial activities' when the relationship was discovered. The police evidence included medical tests to determine whether the masculine-appearing partner was male or female.<sup>251</sup>

### **Divorce requirement before undergoing gender-affirming surgeries**

In some countries in the region, gender-affirming surgeries are a requirement before a gender marker can be changed and regulations restrict access to such surgeries to people who are unmarried. This is the case in China where such regulations have resulted in transgender women being rejected as candidates for gender-affirming surgeries if they are currently married. This legal practice was successfully challenged by the Intermediate People's Court of Nanjing City, which ruled that the fact that same-sex marriage is not protected is not a valid excuse for preventing a married person from undergoing gender-affirming surgery. The court argued that the law regulates behaviours, not the consequences of those behaviours and that while the law does not prohibit a certain behaviour, its legality should not be negated simply because the consequences of that behaviour are

245 Email correspondence from Manisha Dhakal, Executive Director of Blue Diamond Society, 30 December 2016.

246 "Pakistan's transgender community cautiously welcomes marriage fatwa", *BBC News*, 28 June 2016.

247 Feder, J.L., "The Hidden History of Same-Sex Marriage in Asia", *BuzzFeed*, 28 October 2013; UNDP & USAID (2014a).

248 *Shumaile Raj v. State (2007)* Lahore High Court.

249 "Pakistan: Transgender husband and his wife separated and imprisoned" (2007) *Outright Action*, 1 June 2007.

250 UNDP (2017). *Legal Gender Recognition in Pakistan: An internal background paper*.

251 Deb, A. (2009). "An Analysis of Homosexuality in Bangladesh", *LGBTI Bangladesh*, 28 March 2009.

illegal. The Court argued that changing sex is a matter of “lawful disposal” of a person’s own body, and is not part of spousal rights.<sup>252</sup>

This report was unable to identify any case law related to how these regulations impact on transgender men or non-binary people. However, the case above presents a promising precedent for possible changes in legal practice on this issue that would have wider implications for other transgender people.

## E. Places of detention

Being in detention places transgender people at risk of specific forms of discrimination, stigma and violence. In particular, transgender people who have not been able to change their gender marker on their official identification documents are typically placed in male or female prisons or detention facilities based on their sex assigned at birth, without regard to their gender identity or expression. The process of being detained, whether in the criminal system, immigration detention centres or in mental health facilities, places transgender people at particular risk of human rights violations. These include violence, discrimination, rape and torture, and inhuman and degrading treatment, including through the use of humiliating and invasive body searches.<sup>253</sup>

The documented cases of such violations in this region focus primarily on transgender women in male detention facilities.<sup>254</sup> There is anecdotal evidence of transgender men held in places of detention, but no description or analysis of the specific issues they face, including whether they are at greater risk of being segregated from other prisoners if held in female detention centres.

There is a large body of international human rights standards relevant to people in detention generally, that also applies to transgender people.<sup>255</sup> These standards refer to decisions about placement and treatment in prison and access to medical care and to conjugal visits on an equal basis to other prisoners. They include the principle of equal treatment that requires positive action to be taken to eliminate any form of discrimination or risks faced by vulnerable groups, including transgender people.<sup>256</sup> Specific examples are also spelt out in Principle 9 of the Yogyakarta Principles, including the need for independent monitoring of detention facilities and training for those working in places of detention about relevant international human rights standards.<sup>257</sup>

Many of the general human rights standards in relation to detention and prison treatment are guaranteed in constitutional protections, laws and regulations within countries in this region.<sup>258</sup> However, it remains unclear whether and to what extent they are applied to the needs and rights of transgender people specifically.

### Searches by police and detention officers

The Special Rapporteur on Torture has called on State Parties to the Convention Against Torture to guarantee all transgender detainees the choice of being searched by male or female officers as well as to take individuals’ gender identity and choice into account prior to placement and provide opportunities to appeal placement decisions.<sup>259</sup>

Country-specific laws and policies can be mindful about ensuring the privacy and dignity of transgender people when they are searched during arrest or detention. However, the application of such policies is usually based on binary and fixed understandings of gender, determined by a person’s sex assigned at birth. Such policies

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252 Reproduced in Xiaofei Guo and Jingshu Zhu, “LGBTI Rights and Legal Reform: A Comparative Approach; Silent Changes: Transsexuals’ Right to Marry in China’s Mainland and Hong Kong,” *Frontiers of Law in China*, 11 (3) (September 2016).

253 UNHRC (2016), paras 34–36.

254 Information received from Mr. Prem Bahadur Thapa, Legal Advisor of Blue Diamond Society, August 2016 for the Nepal country report; HRW (2014).

255 For example, UDHR, articles 2, 9 and 12; ICCPR, articles 2, 9, 10 and 17, CAT, United Nations (1955). *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955 and General Assembly (1988) *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution/adopted by the General Assembly*, 9 December 1988, A/RES/43/175.

256 United Nations Office of Drugs and Crime (UNODC) (2009). *Handbook on Prisoners with special needs: Criminal Justice Handbook Series*.

257 ICJ (2007), pp 16–17.

258 For example, Section 28 of the *Constitution of Thailand* (Thailand), B.E. 2560 (2017) prescribes that any arrest, detention, searching of an individual shall not be permitted, unless there is a ground specified by law. The same section also states that torture, brutal act or punishment by cruel or inhumane means is prohibited.

259 UNHRC (2016), paras 34–36.

fail to recognize the needs and experience of transgender people whose gender identity differs from their sex assigned at birth, nor do they consider their vulnerability to violence.

In Thailand, for example, the Criminal Procedure Code states that a person should be searched by a person of the same gender. However, the Royal Thai Police do not have a formal policy about searching transgender people. Gender is interpreted as a person's sex assigned at birth. Therefore, typically transgender women would be searched by male officers and transgender men by female officers.<sup>260</sup> In practice, the Royal Thai Police provides its officers some discretion about who searches transgender prisoners. In the absence of a formal policy, this flexibility does not guarantee the right for transgender people in detention to choose whether they are searched by a male or a female officer.<sup>261</sup>

## Separation of women and men in detention

The United Nations Standard Minimum Rules for the Treatment of Prisoners states that women deprived of their liberty should be held in accommodation which is physically separate from that of male prisoners in order to protect them against sexual harassment and abuse.<sup>262</sup> This standard minimum rule is reflected in prison regulations across the region.<sup>263</sup> Since very few transgender people are able to gain legal gender recognition in this region, this means decisions about the detention of transgender people are typically based on sex assigned at birth. Documented examples include the detention of transgender women in male prisons in Malaysia,<sup>264</sup> the Philippines,<sup>265</sup> and Thailand<sup>266</sup> and of trans men in women's prisons in Indonesia,<sup>267</sup> Pakistan,<sup>268</sup> and Thailand.<sup>269</sup>

For example, the Philippines country report indicated that transgender women in male prisons are detained separately from cisgender men, but only when there is space available. With prison overcrowding as a major issue in the Philippines, this is rare. This means transgender women are detained with male prisoners. There is some anecdotal evidence of wardens who separate transgender women and gay male prisoners from other prisoners at night, to reduce sexual and physical abuse directed at these prisoners.<sup>270</sup> It has been emphasized that such protective measures should not involve any greater restriction on a transgender person's rights than is experienced by other prisoners.<sup>271</sup>

Police regulations in Thailand provide some discretion for the police to place transgender people in separate detention rooms.<sup>272</sup> However, consultations with the transgender community in Thailand indicate that they have had little knowledge of this option. There are no similar regulations for prisons in Thailand and prison officials have no equivalent discretionary power to create transgender-only detention rooms within a prison. In addition to the absence of clear regulations, insufficient space or resourcing to enable transgender women to be kept separate from male prisoners is a problem.<sup>273</sup>

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260 Section 85 of Criminal Procedure Code B.E. 2559 (2016). Frequently, there is less discussion about the impacts on transgender men of policies that treat them as though they are women, based on their sex assigned at birth. These are equally as dehumanizing as policies that treat transgender women as though they were men.

261 Interview Apicha Thawornsiri, a Superintendent of Case Inspection Sub-division 3, Criminal Affairs Division, on 25 February 2016. UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

262 United Nations (1955), Section 8(a); UNODC (2008). *Handbook for prison managers and policymakers on Women and Imprisonment: Criminal Justice Handbook Series*, p. 34.

263 For example, Malaysia's Prisons Regulations 2000, Regulation 5(1); Thailand's Regulation of Department of Corrections on the treatment of detained person: Detention and Administration Procedure No. 24, B.E. 2549 (2006).

264 HRW (2014).

265 UNDP (forthcoming). *Legal Gender Recognition in the Philippines: A Legal and Policy Review*.

266 UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

267 APTN (forthcoming). *Legal Gender Recognition in Indonesia: A Legal and Policy Briefing*. In addition, when Alterina Hofan, an intersex man, was reported to the police for fraud and forgery of identity, he was detained in Pondok Bambu Detention Center, a female prison. This is because his sex was considered to be female, until the Supreme Court declared that he was not guilty of the fraud and confirmed that he was male.

268 See: "Pakistan: Transgender husband and his wife separated and imprisoned", *Outright Action*, 1 June 2007. This trans man was imprisoned for fraudulent identity despite have lived as a man for 15 years and having undergone gender-affirming surgeries

269 Information from Thailand consultations, based on site visits to two of Thailand's prisons in Chonburi Province in late 2016.

270 Source: focus groups conducted between domestic and multinational company representatives in 2015 that produced the Rainbow Rights Project (2015a). *Diversity in the Workplace: A Handbook on Building LGBT-Inclusive Workplaces in the Philippines*. Quezon City.

271 ICJ (2007), Principle 9D, p. 16; UNODC (2009), p. 115.

272 Police Procedure Code Concerning the Case: Regulation No 139 B.E. 2545 (2002) (Thailand).

273 Interview with Kerdchoke Kasemwongjit, specialist on the dispute settlement and promotion of Rights and Liberties Protection Department, Office of Promotion of Rights and Liberties Protection Department, 22 January 2016; UNDP (forthcoming). *Legal*

Thailand's prison policies for 'sexual minorities', including transgender people, are under review.<sup>274</sup> In June 2016, Thailand's Ministry of Justice indicated that it intends, in the short term, to develop and issue guidelines on the protection of the rights of transgender people in prison.<sup>275</sup> It is important that such guidelines encompass all transgender people, whatever their gender identity or expression, and whether or not they have had gender-affirming medical interventions.

Of the countries covered by this regional report, China has the clearest, albeit restrictive, provisions enabling transgender people to amend their gender marker. Theoretically, a transgender woman in China who has amended her gender marker would be placed in a women's prison. However, limited employment opportunities for transgender people in China mean that many, particularly transgender women, are criminalized for being sex workers.<sup>276</sup> Having a criminal record excludes them from being eligible for gender-affirming surgeries, and without such surgeries they are not allowed to amend their gender marker. This vicious cycle means it is very unlikely that transgender women in detention will have a female gender marker on their Chinese identification document. As a result, they will be housed in a men's prisons, forced to cut their hair, and be treated as male – with all the risks that such a setting may entail.

### Gender-affirming surgery and other criteria for proper placement

In some countries prison practices depend on whether a prisoner has undergone gender-affirming surgeries. In Thailand, some prisons allow a transgender woman who has had gender-affirming surgeries to retain long hair and have some degree of separation from male inmates. In contrast, a transgender woman who has not had gender-affirming surgeries is likely to have her head shaved and be housed with male prisoners. She is also likely to be prohibited from starting or continuing medically necessary hormonal therapy while in detention.<sup>277</sup> This is despite requirements that all prisoners should undergo a full health screening on entry to prison and that they should receive medical care equivalent to that in the community.<sup>278</sup>

Malaysia's Penal Code stipulates that male and female prisoners shall be detained separately.<sup>279</sup> As Section 4 noted, it is very rare for Malaysian transgender women to have a female gender marker on identification documents. Yet, in November 2016 the Home Ministry was reported as stating that transgender women are held in women's prisons, separate from other female inmates.<sup>280</sup> This written answer was supplied in response to a question from a politician about whether the Prisons Department had plans to place transgender women in separate prisons from men for safety reasons. The response contradicts previous documented examples of transgender women held in male prisons.<sup>281</sup> Further clarification is required about whether it is a new policy, who it applies to and how it is monitored and enforced.

## 6.3 CONCLUSION AND POLICY CONSIDERATIONS

### Conclusion

Ensuring equal opportunities for accessing education, employment, health services and safety in all areas of life requires strong laws and policies that address the needs and rights of transgender people without

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*Gender Recognition in Thailand: A Legal and Policy Review.*

274 Kang, D. "Thailand separates LGBT inmates, considers segregated prison", *The Denver Post*, 30 January 2017.

275 Second experts' meeting held in Thailand during consultation on the Thailand country report, 15 June 2016. UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review.*

276 Asia Catalyst (2015). "My Life is too Dark to see the Light". *A survey of the Living Conditions of Transgender Female Sex Workers in Beijing and Shanghai.*

277 Kang, D (2017); and consultations with transgender women conducted for the Thailand country report: UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review.*

278 UNODC (2009). p. 116; General Assembly (1990). *Basic Principles for the Treatment of Prisoners*: resolution/adopted by the General Assembly, 28 March 1991, A/RES/45/111, art 9. The principles adopted and proclaimed by this UN General Assembly resolution include that "Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation".

279 For example, Malaysia's Prisons Regulations 2000, Regulation 5(1); Thailand's Regulation of Department of Corrections on the treatment of detained persons: Detention and Administration Procedure No. 24; APTN & SEED (2017). *Legal Gender Recognition in Malaysia: A Legal and Policy Review in the Context of Human Rights.*

280 Anand, R. "Special cells for transgenders at women's prisons' Parliament told". *Malay Mail Online*, 24 November 2016.

281 HRW (2014).

discrimination and guarantee transgender people's right to legal gender recognition. The existence or absence of gender recognition in sectoral regulations and policies highly influences whether and how transgender people's rights are being respected, protected and fulfilled.

When such provisions guarantee gender recognition, and protect transgender people from discrimination based on their gender identity or gender expression, they can contribute to transgender people's quality of life and well-being.

## Policy considerations

### Education

- Develop rights-based regulations and policies allowing transgender people to amend their gender marker on education records, based on self-determination and with no other eligibility requirements, and obtain new education documents with the appropriate gender marker.
- Audit policies in schools and other educational institutions, including uniform and registration policies, so they are inclusive of students of all gender identities and expressions, and transgender and gender-diverse students can participate fully in all educational activities.
- Document the vulnerability of transgender students to bullying and violence due to their gender identity or expression, and develop clear anti-bullying and anti-violence regulations and policies covering the actions of students and staff, focused on effective prevention, support and complaints mechanisms.

### Employment

- Develop equal employment opportunity laws, regulations and policies that extend fully to transgender people, including through the provision of affirmative action.
- Ensure that anti-discrimination laws, regulations and policies fully encompass and address pre-employment and workplace discrimination that transgender people experience based on their gender identity or expression.
- Ensure workplace policies enable transgender people to participate fully at work, including through choice of appropriate name, title and gender marker on employment records, a workplace dress code that matches their gender identity and/or expression, and access to safe bathroom facilities.

### Health services

- Ensure that health care policies, ethical standards and standards of care focus on eliminating discrimination and violence against transgender people in health care settings, including when these are linked to a discrepancy between transgender people's gender markers on medical records and their gender identity or expression.
- Ensure that access to gender-affirming health services is based on informed consent and choice and without restrictive or abusive eligibility criteria including those that discriminate on the basis of age or marital status, require a mental health diagnosis or authorization from a third person, or that exclude those with a criminal record.
- Adapt or develop national clinical guidelines for gender-affirming health services for local contexts, in response to the needs of specific trans populations, reflecting international human rights standards and building on international guidance from WPATH and WHO, and regional guidance including the Asia Pacific Trans Health Blueprint.<sup>282</sup>
- Build the capacity and capability of health professionals to provide general and gender-affirming health care services to transgender people, including by integrating technical skills and cultural competency

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282 HPP, APTN & UNDP (2015).

into medical education and in-service training for health care professionals, and focusing on required competencies rather than length of service, seniority or position.

- Monitor and publicly critique the practice of ‘conversion’ or ‘reparative’ therapies (which aim to change a person’s gender identity, gender expression or sexual orientation), highlighting that such treatment is not evidence-based and is longer considered ethical.
- Make gender-affirming health services affordable for transgender people, including through public health care systems, and public and private health insurance schemes that do not discriminate based on a person’s gender identity or expression.

## **Marriage**

- Ensure that laws and regulations provide marriage equality to transgender people on an equal basis.
- Ensure that existing laws and regulations governing the institution of civil marriage are clarified and extended to encompass third gender and transgender people on an equal basis.
- Enable a gender marker change achieved through any official administrative process to be used as a primary identity document in marriage applications.

## **Places of detention**

- Ensure that human rights standards relevant to people in detention apply in practice for all detainees without discrimination, including those who are transgender.
- Develop rights-based national policies about transgender people in detention (including in relation to placement, safety, name and gender marker on records, search processes, and access to rehabilitation and health care), that recognize transgender people’s gender identity and expression, irrespective of whether they have had gender-affirming surgeries, and that provide opportunities for transgender people to participate meaningfully in decisions about their detention.
- Ensure access to and continuity of health care services, including transition-related health services, without discrimination and at a level equivalent to that available outside of the places of detention.
- Establish independent monitoring mechanisms of detention facilities and provide training for those working in prisons about transgender people’s human rights.

# 7. Unjust use of criminal laws and punitive provisions

## 7.1 HUMAN RIGHTS CONTEXT

Human rights bodies increasingly recognize that criminal laws that condemn and punish various forms of gender expression and identity are discriminatory and infringe on human rights. These infringements ultimately undermine the inherent dignity of persons upon which the international human rights framework is based.<sup>283</sup> Human rights bodies have explicitly called for the decriminalization of gender expression, established that such criminal laws breach the rights to privacy and non-discrimination and welcomed their repeal. In addition, countries in various parts of the world have recognized that the criminal persecution of people on the basis of their gender expression or gender identity may be grounds for seeking asylum.<sup>284</sup>

Criminalization of gender expression reinforces stigma and discrimination in many areas of transgender people's lives, including in relation to education, work and accessing health services.<sup>285</sup> Due to fear of stigma and prosecution and increased vulnerability to violence, including from the police, transgender people often do not seek services when they are in need. Health care professionals may refuse to treat transgender people, or respond with hostility when compelled to. Such attitudes from health care providers make transgender people reluctant to share personal and medical information, jeopardizing their overall health and their access to appropriate health care.<sup>286</sup> Transgender people are also often reluctant to seek protection against violence, and to seek remedies and redress when their rights are violated, due to mistrust in and discriminatory treatment by law enforcement officials and the judiciary.<sup>287</sup>

## 7.2 LAWS, COURT DECISIONS, POLICIES AND PRACTICES

This section investigates whether, how and for what reasons criminal laws are being used to penalize transgender people's gender expression. In some instances, this involves direct criminalization. However, other forms of criminalization disproportionately target or impact on transgender people. These include criminalization of consensual sexual acts (such as sex work and same-sex behaviour) and criminalization of other activities connected to the marginalization of transgender people, such as begging.

### A. 'Cross-dressing' and 'impersonation'

Unjust use of criminal laws includes when transgender people's gender expression is criminalized through 'cross-dressing' or 'impersonation' provisions. For example, in Malaysia all 13 states and Federal Territories have enacted Islamic Syariah laws and regulations that criminalize transgender women's gender expression.<sup>288</sup> These regulations contain provisions that prohibit 'posing as a woman', 'cross-dressing' or 'cross-dressing for

283 UNHRC (2010); Council of Europe: Parliamentary Assembly (1981a). *Resolution 756: Discrimination against Homosexuals*, 1 October 1981; Council of Europe: Parliamentary Assembly (1981b). *Resolution 924: Discrimination against Homosexuals*, 1 October 1981; CESCR (2000). *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, para 18; CESCR (2009) para. 32; CEDAW (2010), para 13; *Caso Atala Riffo y Niñas v. Chile (Atala Riffo and Daughters v Chile)*, Inter-American Court of Human Rights, Case 12.502, Rep. No. 139/09.

284 UNHRC (2010).

285 UNHRC (2010).

286 WHO (2015b).

287 UNHRC (2010).

288 Syariah is the preferred spelling in Malaysia. There are 14 sets of state-enacted Islamic laws; one for each state and one for the Federal Territories.

immoral purposes’.<sup>289</sup> In addition, five states criminalize transgender men’s gender expression under ‘male impersonation’ provisions.

Such laws negate the existence of transgender people by criminalizing gender expression that does not match a person’s sex assigned at birth. Such use of criminal laws upholds fixed, binary concepts of gender based on moral or religious beliefs about strict gender roles for women and men that are determined by a person’s sex assigned at birth. Freedom of expression, including gender expression, is a universal human right, whether or not it is reflected in a specific country’s laws.<sup>290</sup>

## B. Immorality, public indecency, public nuisance vagrancy and loitering laws

In some countries, laws or regulations on ‘immoral’ or ‘indecent’ behaviours are applied in ways that penalize transgender people’s gender expression. This use of such regulations is often based on the view that it is unacceptable for transgender women to wear clothes that conflict with religious or cultural norms.

In the Philippines, for example, the provision of the Penal Code on “offence against decency or good customs by any highly scandalous conduct” is used to justify the arrest and detention of transgender women in public spaces, though the cases are rarely prosecuted.<sup>291</sup> Furthermore, transgender women are often arrested at entertainment venues under Penal Code provisions that prohibit “indecent or immoral plays, scenes, acts or shows” including those that are “contrary to law, public order, morals, and good customs”.<sup>292</sup>

Public indecency or vagrancy laws, such as the Minor Offences Act in Malaysia, are also often used to target transgender people in public places,<sup>293</sup> even though such laws do not directly criminalize gender identity or expression.<sup>294</sup>

In India, public nuisance laws tend to be widely used against *hijras* and transgender women. In the Indian Penal Code, both the offence set out in Section 268 and the punishment (in Section 290) are vague and broad, leaving them open to abuse. They effectively allow someone to be arrested for causing “annoyance to the public”. Similar examples can be found in several state-level police acts, such as the Meghalaya Police Act.<sup>295</sup>

## C. Criminalization of homosexuality

Another way in which stigma and discrimination is perpetuated against transgender people is the unjust use of criminal laws in relation to homosexuality that are often used to specifically target transgender people.<sup>296</sup>

Criminal morality and obscenity laws are frequently used by law enforcement officials as a form of harassment and abuse, with charges seldom laid that would be subject to scrutiny through judicial processes. This unjust application of the law often falls disproportionately on transgender women, who are often considered to be ‘men who have sex with men’ by law enforcement officials, whose behaviour is therefore deemed to be criminal according to current laws.<sup>297</sup> For example, Section 377 of the Penal Code in India (and in other countries with British colonial anti-sodomy laws such as Bangladesh, Malaysia and Pakistan) criminalizes “carnal intercourse

289 Syariah Criminal Offences (Malacca) Enactment (1991), Section 72: Posing as a Woman; Syariah Criminal Offences (Selangor) Enactment (1995), Section 30: Male person posing as a woman; Syariah Criminal (Negeri Sembilan) Enactment (1992) Section 66: Posing as a Woman.

290 *NALSA v. Union of India*, 3 (2014) 5 S.C.C. 438; APE, UNDP (2016), p. 88.

291 UNDP (forthcoming). *Legal Gender Recognition in the Philippines: A Legal and Policy Review*. In the April 2016 technical experts’ meeting held in Manila, participants described transgender women from Cebu being rounded up for “behaving contrary to public morals” when they approached bar customers. They were not arrested but their details were registered in the police database.

292 Revised Penal Code (the Philippines) (Act No. 3815 of December 8, 1930), Book 2, art. 201.

293 Minor Offences Act 1955 (Malaysia) (Act 336), section 21.

294 HRW (2014), p. 18.

295 The Meghalaya Police Act, 2010 (Act No. 7 of 2011) cited in ICJ (2017) “*Unnatural Offences*” – *Obstacles to Justice in India Based on Sexual Orientation and Gender Identity*, p. 22.

296 In *Suresh Kumar Koushal v. Naz Foundation* (2013), that reversed the Delhi High Court decision *Naz Foundation v. Government of NCT Delhi* (2009).

297 People’s Union for Civil Liberties (2003). *Human Rights Violations Against the Transgender Community: A PUCL Report. A study of Kothi and Hijra Sex Workers in Bangalore*.

against the order of nature”.<sup>298</sup> This is directly used against transgender women, particularly *hijras*, based on the false perception that they are men.

There is limited information in the region about how anti-sodomy laws apply to, or are used against, transgender men. Transgender men who have sex with men and/or who are gay are likely to be vulnerable under such provisions, even if their gender marker is female. As discussed later in this section, transgender men in relationships with women are also vulnerable to harassment and charges of fraud, particularly from a partner’s family. Laws criminalizing real or purported engagement in consensual sexual relations, whatever the gender identity or expression and/or sexual orientation of the persons concerned, contravene international human rights law and standards.

Section 377 of the Penal Code in India has also been interpreted through lower-level regulations in a way that creates false criminal stereotypes about transgender people based on their gender identity or expression. For example, under the guiding note of the Karnataka Police Act 1963, the police commissioner had a power to suppress or control “undesirable activities” of “eunuchs”. This enables the Police Commissioner to include their names within a register of those who are reasonably suspected of kidnapping or emasculating boys as well as those suspected of committing unnatural offences or any other offences. The named individuals could then be prohibited from doing any activities stated in the order. These provisions directly discriminated against the *hijra* community who, as Section 3.2B notes, are frequently referred to as “eunuchs”. These provisions not only promoted false stereotypes about *hijras* but also questioned their caregiving function for children and deemed them dangerous to society.<sup>299</sup> As a result of successful public interest litigation filed by the Karnataka Sexual Minorities Forum, the Karnataka government removed the word ‘eunuch’ from Section 36A of the Karnataka Police Act.<sup>300</sup>

## D. Criminalization of sex work

Another punitive measure with severe negative impacts on transgender people’s lives is the criminalization of sex work, or the use of anti-trafficking laws for policing sex work. This includes when provisions criminalize sex workers, clients or other people engaging in sex work, such as brothel owners or those supplying rooms to rent for activities related to sex work. For example, in India transgender people who engage in sex work are directly targeted through rampant misuse of the Immoral Trafficking (Prevention) Act of 1986. While the objective of this Act is to criminalize institutional structures that result in trafficking, it ends up primarily targeting visible sex workers and enables the police to arrest and intimidate the transgender sex-worker population.<sup>301</sup>

In Indonesia, sex work is penalized under some sub-national laws. For example, the Jakarta Provincial Regulation regarding Public Order prohibits involvement in “commercial sex work”.<sup>302</sup> This Regulation specifically notes that transgender people are often sex workers.<sup>303</sup> In practice, many transgender sex workers are arrested by the Public Order Agency (*Satuan Polisi Pamong Praja/Satpol PP*) and brought to a social rehabilitation center. After receiving vocational skills for a number of days, they are often released. Involvement in commercial sex work is punishable with incarceration (*kurungan*) for a minimum of 20 days and maximum of 90 days or fines.<sup>304</sup>

In Thailand, the Prevention and Suppression of Prostitution Act is often used to target transgender women.<sup>305</sup> As transgender women are overrepresented among female sex workers and highly visible, it is assumed that all transgender women are sex workers and as a result, the use of this Act disproportionately and unjustly affects transgender women, especially in the form of harassment.<sup>306</sup><http://orinam.net/human-rights-violations-tg-karnataka-ondede-report/>

298 Section 377, Indian Penal Code (1860) Act No. 45 of Year 1860.

299 UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*.

300 *Karnataka Sexual Minorities Forum v. State of Karnataka & Ors*, Writ Petition No. 1397 of 2015 (GM-Police) PIL, High Court of Karnataka, 6 February 2017. See also: “In High Court – Govt agrees to remove ‘eunuch’ from Police Act”, *The Times of India*, 13 January 2016 and “Govt to HC: word ‘eunuch’ removed from Police Act”, *Deccan Herald*, 7 February 2017.

301 UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*.

302 Jakarta Provincial Regulation Number 8 of 2007 regarding General Order, Article 42.

303 *Ibid.* Explanatory Note of Article 42.

304 *Ibid.* Article 61 paragraph (2).

305 Prevention and Suppression of Prostitution Act (Thailand) B.E. 2539 (1996).

306 UNDP (forthcoming). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

In China as well, a high number of transgender women are sex workers. As sex work is illegal, this places them at high risk for arrest and harassment by police. Generally, sex work is punished by administrative sanctions issued by police, such as fines and short-term detention. While in custody, transgender women engaged in sex work have widely reported mistreatment because of their gender identity. The police repeatedly and systematically target transgender women in their intermittent campaigns on sex work, resulting in repeated arrests, fines and concomitant harassment.<sup>307</sup>

## E. Laws against begging

Transgender people face many barriers trying to access the formal work force, as noted in Section 6.2B. For many, sex work and begging are among the only available options. This means laws against begging have a greater proportional impact against transgender people, particularly *hijras*, *khwaja siras*, *waria* and other transgender women.

In India, 20 states have enacted their own anti-beggary legislation.<sup>308</sup> The provisions and their implementation are not uniform. Even the national government advocates a rehabilitative rather than punitive approach towards begging.<sup>309</sup> Anecdotal evidence, however, shows that *hijras* are often arbitrarily arrested while going about their daily chores, aided in part by the very broad legal definition of a beggar as anyone “having no visible means of subsistence” who is caught “in any public place.”<sup>310</sup> For example, in November 2014 over 150 were arrested under the Karnataka Prohibition of Beggary Act 1975.<sup>311</sup>

In Indonesia, in some regions, such as in the Yogyakarta region, regional regulations that prohibit any activities interpreted as begging have been used to arrest transgender women by the Public Order Agency (*Satuan Polisi Pamong Praja/Satpol PP*).<sup>312</sup> Transgender women have been documented as arrested while street singing and then brought to a social rehabilitation centre, Camp Assessment, and held there between one and six months without trial or prosecution. They were pressured to change their name, behaviour and gender expression to be more masculine, as a condition before being released. One documented case in March 2015 involved a deaf trans woman who was pressured in this way by the Camp’s administrator. During the process, she was not accompanied by a sign language interpreter. In October 2016, a civil society organization visited the camp with the National Human Rights Institution, *Komnas HAM* to record what was occurring.<sup>313</sup>

## F. Falsification of documents

As noted elsewhere in this report, due to the prohibition of and other difficulties in amending gender markers legally in this region, trans people may try to get fraudulent identity documents so they can navigate their daily lives based on their self-defined gender identity or expression. This practice may be necessary to protect their health and well-being yet because of it, trans people have been prosecuted for fraud, ‘falsification of documents’ and other charges for using such documents, including when trying to obtain a marriage certificate (see Section 6.2D).

307 Asia Catalyst (2015).

308 Examples of laws that criminalize begging include: The Bombay Prevention of Begging Act, 1959 (Delhi Extension); The Telangana Prevention of Begging Act, 1977; The Andhra Pradesh Prevention of Begging Act, 1977; The Maharashtra Prevention of Begging Act, 1959; The Goa, Daman and Diu Prevention of Begging Act, 1972; The Gujarat Prevention of Begging Act, 1959; and The Tamil Nadu Prevention of Begging Act, 1945. Cited in ICJ (2017), p. 22.

309 Ministry of Social Justice and Empowerment website: *Social Defence: About the Division*, available at: <http://socialjustice.nic.in/UserView/index?mid=47564> (accessed 3 May 2017). <http://orinam.net/human-rights-violations-tg-karnataka-ondede-report/>

310 UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*.

311 Ondede (2014). *A Report on Human Rights Violations against Transgenders in Karnataka*, ICJ (2017), p. 21.

312 Bylaw/Regional Regulation No. 1 Year 2014, Regarding the Handling of Homeless and Beggars, article 9(2)(d), prohibits any activities interpreted as begging, including “begging with tools”.

313 APTN (forthcoming). *Legal Gender Recognition in Indonesia: A Legal and Policy Briefing*.

## 7.3 CONCLUSION AND POLICY CONSIDERATIONS

### Conclusion

Although the criminalization of gender expression has been condemned by human rights bodies, many countries in the region criminalize transgender people's gender expression, either by directly criminalizing 'cross-dressing' or by using the morality provisions of the penal code. Criminalization of sex work, beggary or same-sex sexual activity also makes transgender people a target for arbitrary arrest, harassment, coercion and the deprivation of liberty. Human rights bodies explicitly call for the decriminalization of gender expression, have established that such criminal laws are in breach of rights to privacy and non-discrimination, and have welcomed their repeal.<sup>314</sup> It is yet to be seen whether and how States are willing to implement these human rights standards in relation to decriminalizing gender expression and protecting transgender people from discrimination.

### Policy considerations

- Audit criminal laws and punitive sanctions of other laws to eliminate various forms of penalization of gender identity or expression, including criminalization of 'cross-dressing', 'prohibitions of posing as a woman or man', 'wearing women's clothing', 'female impersonation' and 'male impersonation'.
- Audit and prevent the application of indecency and immorality penal provisions against transgender people's gender expression.
- Investigate, recognize and address the severe negative impact of criminalizing sex work, same-sex sexual activity and beggary.
- Cease the harassment, arrest and prosecution of transgender people based on the often-false profiling of them as sex workers simply because of their gender identity and expression.

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<sup>314</sup> Council of Europe: Parliamentary Assembly (1981a). *Resolution 756: Discrimination against Homosexuals*, 1 October 1981; Council of Europe: Parliamentary Assembly (1981b). *Resolution 924: Discrimination against Homosexuals*, 1 October 1981; CESCR (2000); CESCR (2009), para. 32; CEDAW (2010), para. 13; *Caso Atala Riffo y Niñas vs. Chile (Atala Riffo and Daughters v Chile)*, Inter-American Court of Human Rights, Case 12.502, Rep. No. 139/09, para. 95.

# 8. Accountability for advancing legal gender recognition

## 8.1 HUMAN RIGHTS CONTEXT

As this review of the nine countries in the region shows, the lived reality of transgender people depends in part on what measures the State, including the government, parliament, judiciary and independent National Human Rights Institutions (NHRIs), puts in place to realize human rights-based legal gender recognition. It also depends on whether responsible stakeholders are identified as accountable for specific actions.

States have an obligation to respect, protect and fulfil human rights. Respect for transgender people's human rights encompasses the obligation to refrain from doing actions that violate those human rights. These include States not criminalizing gender expression, or putting abusive eligibility criteria in place for legal gender recognition. States also have positive obligations to protect people's human rights (for example, against discriminatory practices), and also to fulfil them, by putting all necessary legislative, budgetary and other measures in place.

Whether and how transgender people are consulted throughout these processes, and the transparency of those processes, are key determinants of rights-based State accountability.

## 8.2 LAWS, COURT DECISIONS, POLICIES AND PRACTICES

In countries where there are specific laws, policies or regulatory provisions that are directly applicable to legal gender recognition, some include comprehensive provisions for implementation, for example the Gender Equality Act in Thailand. In other countries, the highest court decisions call for implementation, particularly the adoption of a law, budgetary allocations or affirmative action. One example is the NALSA judgment that applies across all states in India.<sup>315</sup>

### A. Progressive realization

The principle of progressive realization recognizes that no State may be in a position to immediately and completely fulfil all rights. Hence, duty bearers have a wide margin of flexibility about how they implement legal gender recognition and other measures to progress transgender people's human rights. However, steps need to be concrete and targeted as clearly as possible towards meeting a State's human rights obligations, to the maximum level of its available resources. It also means that no retrogressive or backward measures are taken, and reversing agreed upon decisions and commitments is not permissible under any circumstances, whether intentional or non-intentional.<sup>316</sup>

While many countries in the region are making some level of progress towards the realization of transgender people's human rights, in some countries retrogressive measures have been introduced. These provide great challenges for transgender people, resulting in severe human rights violations. For example, historically, the University of Malaya Hospital in Malaysia provided gender-affirming surgeries for transgender women, and the National Registry Department then allowed these transgender women to amend the gender marker on their identity cards. The university hospital ceased these services after the National Fatwa Council issued a *fatwa* against such surgeries, and gender-affirmation surgery was declared as *haram* (forbidden).<sup>317</sup> Few or no

315 *NALSA v. Union of India*, 3 (2014) 5 S.C.C. 438.

316 General Assembly (1966b). *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; CESCR (2000).

317 HPP, APTN & UNDP (2015), p. 53.

hospitals have performed the surgeries since the 1982 fatwa and as a result, there is no longer this option for amending gender markers.<sup>318</sup>

According to human rights principles, progressive realization does not exempt States from dealing with human rights violations that have immediate effect. This places a responsibility on States to protect transgender people from violence or direct discrimination, including by ensuring that access to gender-affirming health services, legal gender recognition, or affirmative action are not dependent upon coercive eligibility criteria.<sup>319</sup>

## B. Human rights-based implementation

In various instances, laws, policies, or court decisions are based on human rights but the implementation measures may violate them. For example, the NALSA judgment in India set out very clear principles for implementation in the context of autonomy and self-determination. The Indian government, especially local governments in some states, made great effort to initiate the implementation of the judgment. Yet coercive eligibility criteria for legal gender recognition and for affirmative action in several instances have been introduced, that are contradictory to human rights standards, and to the principles of the NALSA judgment itself.

## C. Duty bearers

Human rights recognition and effective implementation requires the clear identification of duty bearers, those who are mandated as responsible for upholding international and domestic human rights standards. It may be a particular state institution or multiple duty bearers that are responsible for the implementation of legal gender recognition-related laws and policies. Coordination among various state agencies is crucial for effective implementation and meaningful recognition of transgender people's human rights.

For example, under the provisions of Thailand's Gender Equality Act, discrimination complaints can be lodged with a new Committee on Consideration of Unfair Gender Discrimination.<sup>320</sup> However, the Act has broad content and definitions that are open to wide interpretation, and enforcement responsibilities that rest with many different committees. In addition, each committee has only a three-year term which is likely to be a problem for continuity which could affect the effective implementation and enforcement of the Act's provisions. In such circumstances, regular sensitization training and guidelines for new Committee members might be needed to ensure clear and consistent protection of transgender people's rights.

While States are the principal duty bearers to implement human rights within a given country, other organizations have statutory responsibilities. For example, NHRIs have a mandate to monitor the human rights situation in their country and a specific role in undertaking on-site inspection of places where the risk of human rights violations is high.<sup>321</sup> This can include focusing on the measures taken to address the vulnerability of transgender people in prison. Visits by Nepal's NHRI identified that there were no separate cells allocated in prison for transgender people.<sup>322</sup> During its 2014 monitoring in the Selangor state, the Human Rights Commission of Malaysia (SUHAKAM) was informed that transgender people would be placed together in a separate cell, apart from other inmates.<sup>323</sup>

## D. Participation

Under international human rights law, States have an obligation to ensure active, informed participation of individuals in decision-making that affects them. Participation of affected populations in all stages of

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318 HRW (2014).

319 CESCR (2000).

320 Until that Committee is established, the Ministry of Social Development and Human Security has taken interim responsibility for informing complainants and respondents that any actions of unfair gender discrimination are unlawful and can be adjudicated under the Gender Equality Act.

321 APF, APT & OHCHR (2010). *Preventing Torture: An Operational Guide for National Human Rights Institutions*, p. 8.

322 National Human Rights Commission of Nepal (2012). *Report to the Regional National Human Rights Institutions Project on Inclusion, The Right to Health and Sexual Orientation and Gender Identity*, Presented at the National Partnership Dialogue, 5 October 2012.

323 APF, UNDP (2016), p. 175.

decision-making and the implementation of policies and programmes has been recognized as a precondition of sustainable development. There is strong evidence demonstrating an association between the participation of affected populations and positive impacts on their well-being. This shows that when affected populations take part in programme and policy development, their needs and human rights are better addressed.

Participation might range from communities coming together to plan strategies to address local priorities, to the active involvement of individuals, communities or community-based organizations in the design, implementation, management or evaluation of programmes related to gender recognition and transgender people's human rights. Power differentials based on literacy, language, social status or other factors often determine who is involved in such processes.

According to the nine national assessments and reports, it is rare for transgender people to have the opportunity for meaningful and comprehensive participation in policy development and law reforms that affect their daily lives. Where such participation occurs, it is likely to be limited to more visible transgender populations. Involving transgender people in local-level programmes and planning, in addition to national-level discussions, enables a greater degree of community participation.

## E. Affirmative action and special measures

### Affirmative action and special measures in practice

In South Asia, Supreme Court or Cabinet decisions have called for or reiterated the need for affirmative action to protect transgender people's rights in specific areas of their lives. In Nepal, these have also been adopted in the 2015 Constitution. Article 18(3) recognizes the need to have positive discrimination for the protection, empowerment and development of specific groups, including gender and sexual minorities. Such affirmative action is also set out in Article 42, which guarantees the right to social justice through employment in state structures.<sup>324</sup>

In Bangladesh, affirmative action was introduced for *hijra* communities in 2012 prior to the November 2013 Cabinet decision. The Department of Social Welfare introduced a small pilot programme in seven districts offering monthly stipends for *hijras* to study or start their own business, and job-readiness trainings. This was extended and by 2015–16 encompassed all 64 districts and added educational scholarships and allowances for older *hijras*. In December 2014, the Ministry of Social Welfare also invited *hijras* to apply for government employment.<sup>325</sup>

In Pakistan, the Supreme Court judgment called on the government to register *khwaja siras* and ensure that the Social Welfare Department opened up income-support programmes and educational and employment opportunities to the community, including establishing a 2 percent job quota for *khwaja siras* in government departments.<sup>326</sup> As a result, a few *khwaja siras* were hired by the provincial Sindh government in Karachi,<sup>327</sup> by NADRA, and in a government university's canteen.<sup>328</sup>

In India, after the NALSA judgment, the national and state governments were asked to formulate various social welfare schemes for the transgender community and to treat the community as a socially and economically backward class within the meaning of the Constitution. The Ministry of Labour and Employment, for example, directed states to provide vocational training to transgender individuals. Beyond the Ministries, other statutory authorities have taken steps towards implementation. This included the University Grants Commission directing educational institutions to put in place transgender-friendly measures, ranging

324 *Constitution of Nepal* (Nepal), 2015 (2072.6.3), 20 September 2015. Blue Diamond Society (forthcoming). *Legal Gender Recognition in Nepal: A Legal and Policy Review*.

325 Department of Social Services, Ministry of Social Welfare (Bangladesh) (2016). *Development program for improving the living standard of Hijra community* (online). Hawlader, Abdur Rajjak "The Living Standard Development Program for the Hijra Community," Department for Social Welfare, February 17, 2016. Cited in HRW (2016a), appendix 2.

326 These directives were contained in provisional judgements as well as the final judgement. See *Khaki v. Rawalpindi Pakistan* (2009). The English language version of the judgment uses the term eunuch throughout the 2009 and subsequent 2011 hearings (misspelt as Unix in the 2009 decisions). As discussed in Section 3.2, this raises some questions about how broadly the judgment applies.

327 "Sindh Government Gives Jobs to Three Transgender (*Khwaja Sira*)", *Daily Motion*, 30 January 2014.

328 UNDP (2017). *Legal Gender Recognition in Pakistan: An internal background paper*.

from scholarship schemes to infrastructural changes.<sup>329</sup> The National Commission for Backward Classes recommended the inclusion of transgender persons within the “other backward classes” category in May 2014.<sup>330</sup> Several states, such as Karnataka and Kerala, also issued state policies for transgender people aimed at implementing the judgment.<sup>331</sup>

State-level courts have also specifically noted that eligibility for affirmative action measures extends to transgender people. For example, the Allahabad High Court recognized the State’s affirmative obligation to provide access to food security to transgender people by acknowledging them as heads of household who are entitled to ration cards issued under the Food Security Act. In doing so, the Court affirmed transgender people’s fundamental right to live with dignity and their right of access to all facilities for the development of the personality, including to education and employment.<sup>332</sup>

While these measures flow directly from the NALSA judgment and have the potential to allow for access to a range of affirmative action policies, it must be noted that implementation measures have been uneven.<sup>333</sup>

## Implementation challenges

The affirmative action measures outlined above demonstrate the potential power of coupling gender recognition with measures to reduce poverty and social exclusion. However, as the discussion below illustrates, there are also pitfalls if recognition is not based on human rights standards.

In India, the mandate to implement the NALSA judgment has been split across a range of Ministries.<sup>334</sup> In 2015, a Bill was passed by the Rajya Sabha (the Upper House of Parliament) that called for a comprehensive rights framework for transgender people, including in relation to education, employment and social security and health.<sup>335</sup> It proposed vocational training and self-employment schemes for transgender people and would prohibit employment discrimination against them. However, proposals in the Indian government’s subsequent Transgender Persons (Protection of Rights) Bill, 2016 would effectively limit access to affirmative action measures to those who identify as a third gender identity. These proposals would add a bureaucratic, autonomy-negating medicalized procedure for recognizing and certifying transgender identity, which would prevent or delay access to employment benefits and affirmative action for many other transgender men and women.<sup>336</sup> As of April 2017, there was no comprehensive policy that provides direction on how affirmative action shall be implemented in India.

The consequences and implementation of the Pakistan Supreme Court judgment have been complex. On the one hand, the government began to register *khwaja siras* in accordance with the court order. When government officials came through their neighbourhoods to conduct the census and registration, however, *khwaja siras* would leave. Abuses from state agencies such as the police have led to a deep-seated mistrust among the *khwaja sira* community and few allowed themselves to be identified.<sup>337</sup>

There is a similar lack of clarity in other countries in the region, on how affirmative action measures are being implemented for transgender people. Discussions with transgender groups in various countries indicate a perception that implementation is haphazard and does not comprehensively cover all transgender communities requiring such provisions.<sup>338</sup>

329 See University Grants Commission (India) (2015). *Annual Report 2014–15*.

330 “Backward Commission Recommends Transgenders for Reservation”, *The Indian Express*, 13 May 2015. In UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*. As noted in a media release, the Ministry of Social Justice and Empowerment requested further clarification from both the National Commission and the Supreme Court: Ministry of Social Justice (India), “Proposal for Inclusion of Transgenders in OBC (Media Release)”, *Press Information Bureau*, 17 March 2015.

331 Government of Karnataka (2014). *State Policy for Transgenders in Karnataka, 2014 (draft)*; Department of Social Justice, Government of Kerala (2015). *State Policy for Transgenders in Kerala, 2015* (approved 22 September 2015).

332 *Ashish Kumar Misra v. Bharat Sarkar*, Allahabad High Court, Misc. Bench. No. 2993 of 2015, 15 April 2015.

333 UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*.

334 *NALSA v. Union of India*, 3 (2014) 5 S.C.C. 438.

335 The Rights of Transgender Persons Bill, (India) (2014) Bill No. 49 of 2014 (passed by the Rajya Sabha on 24 April 2015). The usual practice is for the government to respond to a private members’ bill, based on how it is received when introduced in Parliament. In this case, the Government produced their own, substantially different, draft law.

336 UNDP (forthcoming). *Legal Gender Recognition in India: A Legal and Policy Review*.

337 UNDP (forthcoming). *Legal Gender Recognition in Pakistan: An internal background paper*.

338 Bandhu Social Welfare Society (forthcoming). *Legal Gender Recognition in Bangladesh: A Legal and Policy Review*.

## Coercive eligibility requirements

In Pakistan, those that did register for the census levelled several critiques of the government's implementation of the Supreme Court order including towards compulsory medical checks that were initially required. These had been mentioned in the Supreme Court decision and were based on the erroneous assumption that hormone levels would verify someone's *khwaja sira* status and "true sex".<sup>339</sup> These medical checks were removed as eligibility criteria after protests from *khwaja sira*.

In Bangladesh, there have been significant concerns raised that coercive eligibility requirements were imposed on *hijras* applying for government jobs allocated to the *hijra* community. *Hijra* applicants reported numerous human rights violations during initial interviews or when they attended follow-up 'medical examinations' from June 2015 onwards. These included being harassed, asked inappropriate questions about their gender identity and sexuality, requested to undress in front of other patients, and forced to do so if they questioned the instruction. The *hijra* job applicants reported that during the so-called 'examinations', non-medical hospital staff such as custodians touched their genitals. Some described medical pressure to take male hormones, or being required to return multiple times for additional examinations, including 'ultrasounds'. They were ridiculed, and derided as "men fraudulently pretending to be *hijra*".

Following these abuses at the hospital, their photographs and addresses were released to online and print media, sparking increased harassment from the public. These *hijras* faced ostracism, including from their own communities because they were blamed for the media's negative portrayals of *hijras* generally. Applying for government positions resulted in greater economic hardship as they were forbidden from working and living in their *hijra* communities, and former sex work clients or those who gave them money for begging avoided them following this exposure.<sup>340</sup>

These events took place a year after the Bangladesh Cabinet announced it recognized the *hijra* community as "a *hijra* sex".<sup>341</sup> However, the government had not developed rights-based procedures for recognizing *hijras* on official documents. This left *hijras* open to abuse and human rights violations when asserting their rights. Hospital staff and others interpreted eligibility criteria for these *hijra* positions based on their personal biases and widely held misconceptions of what it means to be *hijra*.<sup>342</sup> This was further exacerbated after a January 2015 memorandum from the Ministry of Health requested that "necessary steps are taken to identify authentic *hijras* by conducting a thorough medical check-up".<sup>343</sup>

## Community verification processes

Another controversial aspect of some affirmative action programmes in this region is the use of a community verification process to determine a transgender person's eligibility for special measures. Such a process delegates authority to a designated group of transgender people to verify who belongs to the community and is therefore eligible for affirmative action. Sometimes these community verification processes are also applied to broader decisions including eligibility for legal gender recognition or how to define transgender populations in population surveys.

Difficulties arise when community verification processes attempt to limit who can be legally recognized as transgender. One recent example includes community lobbying in Pakistan to ensure that only those *khwaja sira* "who are transgender by birth" are counted in the Census, and that *khwaja sira* who have undergone castration are explicitly excluded.<sup>344</sup>

There have been heated debates about community verification of eligibility for affirmative action measures. In some countries reviewed, including Bangladesh, India and Pakistan, the concern was raised whether enabling

339 UNDP (2017). *Legal Gender Recognition in Pakistan: An internal background paper*. Focus group discussions conducted as part of the research for this study; Khan, F.A. (2016), p. 271.

340 HRW (2016a).

341 On January 26, 2014, the Bangladesh cabinet announced its November decision in its gazette: "The Government of Bangladesh has recognized the Hijra community of Bangladesh as a Hijra sex."; Ministry of Social Welfare, *Bangladesh Gazette*, No. sokom/work-1sha/Hijra-15/2013-40 (26 January 2014).

342 HRW (2016a).

343 HRW (2016a), appendix 1.

344 Wasif, Sehrish, "Eligibility Rules: Census Should List 'True Transgender Person'", *The Express Tribune*, 19 February 2017.

transgender people to more easily amend their name and gender markers through such a process, with no medical evidence required, would impact on the number of people trying to access affirmative action allocated to transgender people. Specifically, could cisgender people fraudulently identify as transgender in order to access these opportunities?

While this concern may or may not be valid, making the right to legal gender recognition reliant on third party verification limits the rights to privacy, autonomy and self-determination that by their very nature should not be constrained by any form of community verification process.

Affirmative action or special measures are designed to address inequalities. If community advisory roles or screening committees are established in relation to affirmative action provisions, these too should be bound by human rights standards. This would require a clear mandate, transparent selection processes, and consistent verification processes and criteria. Selected community members would have a responsibility to not discriminate and to recognize and respect all gender identities and expressions without prejudice. This includes refraining from making decisions based on any predetermined ideas that there is only one type of ‘true’ transgender person.

It is the responsibility of the States to consult widely to ensure any affirmative action proposals, including those that involve some form of community verification, are applied equally to all transgender communities, without discrimination.

## F. Remedies and redress

Under international human rights law and many constitutions, a core obligation of States is to provide effective remedies for human rights abuses, regardless of whether the perpetrator is the State or a private individual or organization (that is, a non-State actor).

Remedies and redress requires a human rights-based judicial process and access to legal services (legal aid and pro bono services, as well as sensitized private legal practitioners). However, in many countries lawyers and the judiciary have very limited and outdated understandings of gender identity and expression and the needs and rights of transgender people.

The assurance of effective remedies also assumes the availability of quasi-judicial complaints mechanisms, which are rarely and sporadically available in the countries under review. In some countries, such as Indonesia, Nepal and the Philippines, the NHRI has set up a specific focal point for sexual orientation and gender identity issues. In Nepal, this role was established in 2005 and led to a community internship role within the National Human Rights Commission of Nepal since 2012.<sup>345</sup> In Bangladesh, *hijras* are one of the listed groups in a thematic committee focused on human rights issues faced by excluded minorities. The committee’s role includes monitoring and reporting, contributing to policy dialogues, and providing feedback on draft laws and strategic guidance to the National Human Rights Commission of Bangladesh (JAMAKON).<sup>346</sup>

In the Philippines, gender focal points were appointed across government agencies. The Philippines’ Commission on Human Rights, in its role as Gender Ombud, expanded its mandate to take on gender-based complaints under the Magna Carta of Women to include cases based on sexual orientation, gender identity or gender expression. The effectiveness of such focal points for transgender people will depend largely on officials’ understanding of human rights issues that transgender people face and the extent to which that knowledge is mainstreamed across the institution beyond individual staff or positions.

345 UNDP & IDLO (2013); APF, UNDP & APCOM (2015).

346 APF & UNDP (2016), p. 167.

## 8.3 CONCLUSION AND POLICY CONSIDERATIONS

### Conclusion

This review of nine countries has identified the complex relationship between laws, policies, regulations and court decisions and their implementation that impact on legal gender recognition and the human rights of transgender people. The country reports have demonstrated that there are many possible avenues for progressing gender recognition in effective ways, and that international human rights standards provide a strong principled basis for developing and assessing progressive laws, policies and practices. However, in certain instances, even when positive legal provisions exist, implementation measures including administrative practices or unjustified eligibility criteria for affirmative action can impose abusive requirements that amount to human rights violations.

The country reports have documented the growing diversity and visibility of transgender people and the need for their effective participation in decisions that affect every aspect of their lives, and for meaningful access to remedies and redress when human rights violations occur.

It is vital that such provisions encompass the full diversity of gender identity and expression in this region, including transgender people who identify as women or as men, as third gender and other long-established cultural identities including *kathoeay*, *hijra*, *thirunangai*, *meti*, *waria*, *mak nyah* and *khwaja sira*, and emerging non-binary identities.

### Policy considerations

- Develop comprehensive plans and strategies on how to implement human rights-based laws and policies on legal gender recognition, including clear timeframes, and monitoring and evaluation processes.
- Commit and allocate adequate human and financial resources for effective implementation.
- Ensure that duty bearers are appointed, with clearly assigned roles and responsibilities for the development and implementation of laws and policies, and effective mechanisms are set in place for monitoring progress.
- Ensure meaningful participation of transgender people from planning through to implementation, enabling representation from a diverse range of transgender people including those who identify as a third gender or non-binary, transgender women who identify as female, transgender men who identify as male, and vulnerable groups.
- Train duty bearers (including law enforcement officers, judges and government officials), NHRIs and civil society organizations on how anti-discrimination protections and other human rights standards apply to transgender people, and more generally on issues of sexual orientation, gender identity and expression; sexuality; and transgender rights.
- Consider introducing affirmative action or special measures to address the marginalization of transgender people, ensuring that any eligibility criteria do not impose norms that exclude or discriminate against certain transgender populations or result in other forms of human rights violations.
- Introduce effective remedies and redress mechanisms that comprehensively address the needs and rights of transgender people and provide them equal opportunities for accessing justice without discrimination. Ensure these mechanisms are adequately resourced.

## 9. Ways forward

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This report illustrates many opportunities and levers for progressing legal gender recognition and transgender people's human rights. Successful action in this region has frequently been based on the fundamental recognition of the dignity of transgender people, and the right to be free from discrimination based on gender identity or gender expression. In some countries, there is also a broader recognition of the status of transgender people within a culture or community. This is seen most clearly in the longstanding history of third gender identities across Asia, particularly but not exclusively in South Asia, manifested through Supreme Court and constitutional decisions and elaborated in laws and policies that reflect rights-based gender recognition for transgender people.

Across the region, visibility is growing of the diversity of gender identities, including transgender men and non-binary gender identities, and trans women in countries where third gender identities have historically been more visible. Universal human rights standards apply equally to all people, and prohibit discrimination based on gender identity or gender expression. This is a strong basis for ensuring that laws, policies and regulations provide protection to all transgender people, whatever term they use to describe their gender identity or expression.

The pathologization of gender diversity, the perception of it as an illness, is a relatively recent phenomenon, and post-dates the cultural acceptance of gender diversity across many parts of this region. However, pathologization underpinned many of the first wave of gender recognition laws internationally that required gender-affirming surgeries, sterilization, forced divorce, and other eligibility criteria that violate human rights. Such provisions have been challenged and overturned by several Constitutional Courts and are increasingly condemned by human rights bodies.

While many individual health professionals have played important roles in providing general and gender-affirming health services to trans people, the pathologization of gender diversity has contributed to stigma and discrimination against transgender communities. The strong statements by professional public health and human rights bodies in support of depathologization and legal gender recognition signal progress. So too does the increasing collaboration between transgender organizations and health care providers to address barriers to transgender people's health and human rights. This includes the work that the Asia Pacific Transgender Network is coordinating with health care providers and trans communities to implement the Asia Pacific Trans Health Blueprint and the Transgender Implementation Tool (TRANSIT) in this region.<sup>347</sup>

As the examples in this report show, progressive steps in the countries reviewed combine both targeted affirmative action and mainstreaming, including through broadening gender equality provisions to encompass gender identity and expression.

There are challenges in the region, including those highlighted in the previous chapter on accountability. Progress within countries and across this region, as in others, has often been uneven and slow. And frequently even progressive legal frameworks have not translated into progress and protection for transgender people in their daily lives. Some countries reviewed continue to criminalize gender expression.

Legal gender recognition has the potential to make a pivotal difference, precisely because it touches on so many parts of a transgender person's life and related rights – civil, political, economic, social and cultural. The well-being, inclusion and human rights of transgender people are jeopardized when States fail to enable legal gender recognition, or make it conditional on requirements such as compulsory gender-affirming surgery or sterilization. If the Sustainable Development Goals are to be reached, then it is essential to address the absence of comprehensive and inclusive human rights protections for transgender people. The core principle of the SDGs is to leave no one behind. Transgender people represent some of the most marginalized people in the

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347 HPP, APTN & UNDP (2015); UNDP, IRGT: A Global Network of Transgender Women and HIV, UNFPA, UCSF Center of Excellence for Transgender Health, Johns Hopkins Bloomberg School of Public Health, WHO, UNAIDS & USAID (2016). *Implementing comprehensive HIV and STI programmes with transgender people: practical guidance for collaborative interventions*.

Asia-Pacific region, and as such must be included in development priorities in order to achieve sustainable development.

It is hoped that this detailed assessment of relevant legal, regulatory and policy provisions, and the context within which they have developed, benefits strategic planning on how to overcome the barriers that transgender people face in each of the countries reviewed. As this report has shown, the input of transgender people has enabled an accurate depiction of whether and how laws, policies, regulations and court decisions make a real difference in transgender people's lives. The country reports, many of which contain detailed policy considerations focused on specific local provisions, are a resource for ongoing national dialogues. It is vital that transgender people are able to participate effectively in these processes and their diverse voices and perspectives are comprehensively taken into account.

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### **Legislation**

*Bộ Luật Dân Sự* (Civil Code of Vietnam), No. 33/2005/QH11 (14 June 2005).

*Bộ Luật Dân Sự* (Civil Code of Vietnam), No. 91/2015/QH13 (24 November 2015), effective from 1 January 2017.





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