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Integrating Gender-Equity in CRVS Legal Review and Reform Processes

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Abstract

Introduction: Due to cultural, social, and religious traditions, discriminatory laws and practices, and registration services that are shaped around binary conceptions of gender – women, children, and individuals that identify as lesbian, gay, bisexual, transgender, and intersex (LGBTI) face unique challenges in registering vital events and obtaining identity documents in many low and middle-income countries.¹ Recognizing the long-term impacts resulting from a lack of birth registration and identity documents, the Global Health Advocacy Incubator (GHA) implements an inclusive, human rights-based approach to guide the civil registration and vital statistics (CRVS) legal review and reform work by incorporating international best practices for ensuring gender equity in national CRVS legal frameworks.

Methods: In 2021-2022, GHA added three new equity-themed chapters to the Legal and Regulatory Review Toolkit for CRVS (“toolkit”) focusing on Stillbirth Reporting and Registration, Inclusion of Women and Children, and Equal Access for LGBTI Individuals. Along with other chapters of the toolkit addressing different aspects of CRVS systems, these equity-themed chapters assist countries in ensuring that their civil registration systems are designed and governed by legal frameworks that protect everyone’s equal access to civil registration and identity services.

Results: Piloted in Thailand in 2021, the Stillbirth Reporting and Registration chapter led to a policy victory by informing stakeholders’ decision to make stillbirth reporting compulsory for all public and private hospitals as well as update the reporting forms to include stillbirth data. Implemented in Uganda in 2022, the Inclusion of Women and Children chapter of the toolkit helped identify the gaps in existing laws limiting women’s and children’s access to vital event registration services. The recommendations from this chapter’s analysis will inform law and policy reforms that can address the challenges faced by women and children in attempting to register births, deaths, stillbirths, marriages, divorces, and other vital events. In India, the Inclusion of Women and Children and Equal Access to LGBTI Individuals chapters are used to conduct a legal review that highlighted glaring gaps in the current practice in light of international best practices. Based on the legal review, recommendations are being developed to help inform the strategic approach toward a law reform process at national and state levels. The three equity-themed toolkit chapters are currently being

¹ Schwid A et al. Civil Registration, Vital Statistics, and Identity Management (CRVSID) Legal and Regulatory Review Toolkit. Chapter 8: Inclusion of Women & Children; Chapter 11: Equal Access for LGBTI Individuals. Available at: <https://advocacyincubator.org/wp-content/uploads/2022/03/CompleteToolkit.pdf>



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implemented in other countries supported by the Bloomberg Philanthropies Data for Health (D4H) initiative.

Conclusion: Over the last two years, GHAI integrated gender equity into CRVS legal review and reform initiatives by adding three equity-themed chapters to the legal review toolkit to help countries build inclusive CRVS systems in line with international human rights principles. By providing guidance for evaluating national legal frameworks against international best practices for stillbirth reporting and registration, and women’s, children’s, and LGBTI individuals' access to civil registration services, these toolkit chapters help countries fulfill their international human rights obligations and achieve universality in their civil registration services.

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Background

Over the last three years, the D4H Initiative’s focus on gender equity has largely increased across different arms and programmatic areas, including the CRVS legal review and reform work. With the addition of three new equity-themed chapters to the legal review toolkit – on Stillbirth Reporting and Registration; Inclusion of Women and Children; and Equal Access for LGBTI Individuals in 2021 and 2022 – CRVS legal reviews and resulting recommendations started to include sections devoted to (1) stillbirth reporting which is crucial for maternal and foetal health; (2) the unique challenges faced by women and children in accessing civil registration and identity documents that are essential to exercising basic rights, benefits and entitlements; and (3) the exclusion faced by LGBTI individuals from accessing CRVS services, which have traditionally been built around certain assumptions and biases toward cisgender heterosexual people and those who fit into binary sex and gender categories. The following paper provides an overview of country experiences implementing these chapters in CRVS legal reviews in Thailand, Uganda and India, illustrating the gaps identified and analyzing the recommendations made in each project.

Implementing the Equity-Themed Chapters of the Toolkit: A Summary

Thailand was the first country to complete the Stillbirth Reporting and Registration chapter² in 2021 as part of the national CRVS system strengthening efforts. The findings from the review led to a policy decision that made stillbirth reporting compulsory for all public and private hospitals and enabled the release of an updated stillbirth reporting form in 2022.

In Uganda, the legal review project from 2022 helped identify the gaps in national laws and practices, and made recommendations to make necessary amendments to ensure alignment with international best practices for definitions of relevant terms in stillbirths, certification of cause of death for stillbirths, information collected during stillbirth reporting and the statistics produced based on stillbirth data. Uganda was also the first country to complete the Inclusion of Women and Children chapter of the toolkit³, which helped identify gaps in the laws limiting access to CRVS services for women and children who live independently on the street.

² Civil Registration, Vital Statistics and Identity Management (CRVSID) Legal and Regulatory Review Toolkit - Chapter 4: Stillbirth Reporting and Registration. Available at: <https://dfweawn6ylvgz.cloudfront.net/uploads/2022/01/Chapter4.pdf>

³ Civil Registration, Vital Statistics and Identity Management (CRVSID) Legal and Regulatory Review Toolkit – Chapter 8: Inclusion of Women and Children. Available at: <https://dfweawn6ylvgz.cloudfront.net/uploads/2022/02/Chapter8.pdf>

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In India, the implementation of the Equal Access to LGBTI Individuals chapter⁴ helped identify gaps in national laws and practices in defining terms such as ‘gender’ and ‘sexual orientation’, including a gender marker for the vital registration process, adopting gender-neutral terms in the laws and policies, removing medical intervention towards gender change, and granting the right to family to same-sex couples. Based on the outcomes of the review, recommendations were made for legal and policy reforms along with certain administrative measures, such as the establishment of an interagency CRVS coordination committee.

Analysis of Gender-Focused Legal Reviews and Recommendations

Stillbirth Reporting and Registration – Review of Laws in Thailand and Uganda

A review of the stillbirth reporting and registration in Thailand identified gaps in the laws and practices, and made recommendations to adopt clear definitions for the terms ‘Live Birth’, ‘Death’, ‘Foetal Death’, and ‘Stillbirth’ in the civil registration law in line with definitions provided by the World Health Organization (WHO) - A process that improves foetal death tracking by separately defining births and deaths (tracked by the Ministry of Interior) and foetal deaths and stillbirths that are tracked by the Ministry of Public Health. Tracking foetal deaths with gestational age of 22 weeks onwards has been recommended considering Thailand’s economic status, efficiency of the public health authorities, and the national goal for achieving 100% stillbirth reporting and documentation.⁵ The legal review report stipulated short-term, medium-term and long-term measures to guide stakeholders’ implementation of the detailed recommendations made for defining informants/reporters; time period for reporting; medical certification of foetal deaths; ICD coding and compilation of vital statistics; legal and statistical information collected during reporting; and issuance of foetal death certificates.⁶

Similarly, a review of the national laws and practices in Uganda identified challenges and made several recommendations for stillbirth reporting and registration. The Registration of Persons Act of Uganda and the implementing Regulations failed to define the terms “live birth”, “death”, “foetal

⁴ Civil Registration, Vital Statistics and Identity Management (CRVSID) Legal and Regulatory Review Toolkit – Chapter 11: Equal Access for LGBTI Individuals. Available at:

<https://dfweawn6ylvgz.cloudfront.net/uploads/2022/01/Chapter11.pdf>

⁵ Global Health Advocacy Incubator (GHA). Legal Recommendations Report: Stillbirth Reporting and Registration in Thailand, 2022, pp 42.

⁶ Id., pp 47-49.

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death” and “stillbirth”.⁷ Although the terms “live birth” and “stillbirth” are defined under the Uganda Maternal and Perinatal Death Surveillance and Response Guidelines (MPDSR), they are not aligned with best practices and risk undercounting infant deaths (live birth followed by death within the first year) for infants born before 28 weeks gestation as well as undercounting stillbirths in national statistics. Hence, it was recommended that MPDSR Guidelines should be amended to 1) define “death” and “foetal death”; 2) amend the definition of live birth to remove mention of gestational age and weight, and 3) use the criteria recommended by WHO for national surveillance of stillbirths – at least 22 weeks’ gestation, 500 grams and 25 cm.⁸ Regarding certification of cause of death for stillbirths, although the WHO-recommended MCCD form is embedded in the existing (new) form for all perinatal deaths, the practice is inconsistent. Hence, it was recommended that the form is filled out for all perinatal deaths to allow for the reporting of immediate, antecedent and underlying causes of death, as well as coding using ICD-PM.

Many of the United Nations (UN) high-priority data points are collected during stillbirth reporting in Uganda. However, a few UN high priority topics are missing, including cause of death, foetal deaths to mother during entire lifetime, date of last previous live birth, and date of marriage and inclusion of these topics in the reporting process was recommended.⁹ Although the health sector in Uganda is responsible for generating summary (aggregate) data on stillbirths, neither the health sector nor the Uganda Bureau of Statistics generate stillbirth tabulation tables as recommended by the UN. Since the Uganda civil registration agency does not currently register foetal deaths (and the health sector collects information on all deaths), a recommendation was made to either keep this information within the health sector for tabulation of vital statistics or for the health sector to send anonymized information to the statistics bureau for tabulation of vital statistics.¹⁰

Inclusion of Women and Children: A Review of CRVS Legal Frameworks in Uganda

In Uganda, where there is a requirement to involve the head of the civil registration agency for births that are not registered immediately, the process for registering births could be complicated for children that are abandoned, working or living on the streets, or who otherwise have little or no connection to their parents.¹¹ To ensure the registration of births of children in these situations, a recommendation was made for the law to be reformed to empower the civil registration agency to set up and implement programs or procedures to facilitate the birth registration of children who live

⁷ Global Health Advocacy Incubator (GHA). Legal Review of the Civil Registration, Vital Statistics and Identity Management System of Uganda. August 2022, pp 77-94.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Global Health Advocacy Incubator (GHA). Legal Review of the Civil Registration, Vital Statistics and Identity Management System of Uganda. August 2022, pp 160-170.

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independently on the street. To further improve access to registration services, a recommendation was made for the civil registration agency to implement a provision under existing Regulations by developing guidelines to designate assistants to Registration Officers to facilitate the registration process.¹²

Moreover, it was identified in the legal review process that the civil registration agency does not implement mobile registration of identity cards and offices are only open during typical business hours. Because women serve as the primary caregivers in many places throughout Uganda, especially in the rural areas, and those with young children have limited free time during the working weeks, recommendations were made for the civil registration agency to (1) develop guidelines to facilitate registrations for women and (2) be authorized to implement mobile registration for identity cards, regulate registration hours, and hire female staff, as needed.¹³

Equal Access to LGBTI Individuals – A legal Review in India

In India, legal status to the third gender was granted as recent as in 2014 by the Supreme Court of India. Registration laws – birth, death and marriage – predate the grant of legal recognition. A legal review in India identified the need to update the existing laws to align with the national jurisprudence on gender and international practices on CRVS to make the laws inclusive and non-discriminatory.

India has historically faced challenges with regard to sex and gender equity. To begin with, India suffers from deep-rooted patriarchal societal norms and since 1991 every subsequent census has shown an alarming decline in the child sex ratio of the country.¹⁴ The term Sex is used in various contexts within the legal framework in India, such as a prohibited ground for discrimination in the constitution¹⁵, in banning sex selection diagnostic methods¹⁶, a marker under the Registration of Birth and Death Act¹⁷, Adoption Regulation¹⁸ and in the context of sex reassignment surgery under the Transgender Persons Act¹⁹. However, the term remains undefined, failing to distinguish it from gender.

UN Globe define sex as classification of a person as having female, male and/or intersex sex characteristics assigned at birth and gender as socially constructed roles, behaviours, activities and

¹² Ibid.

¹³ Ibid.

¹⁴ Synthesis of Research on Gender Biased Sex Selection (2001-2012), United Nations Children’s Fund 2014, pp 10

¹⁵ The Constitution of India 1950

¹⁶ Pre-Conception & Pre-Natal Diagnostic Techniques Act 1994

¹⁷ Model Registration of Births and Death (RBD) Rules 1999 (Forms appended to the Rules)

¹⁸ Adoption Regulation 2017 (Forms appended to the Regulation)

¹⁹ The Transgender Persons (Protection of Rights) Act 2019

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attributes that a given society considers appropriate for individuals based on the sex they were assigned at birth²⁰. This discourse emerged as a legal discussion in India in 2014 when the Supreme Court granted legal recognition to transgenders and third genders²¹. The Court held that gender identity is one of the most fundamental aspects of life. In 2017, while establishing the Right to Privacy as an integral part of the Right to life in India, the Supreme Court upheld the decisional autonomy in the matters of gender identity and sexual orientation.²² Finally, in 2018, the Supreme Court decriminalised homosexuality²³, earlier a criminal offence under the Indian Penal Code²⁴. The Supreme Court relied on definitions of gender identity and sexual orientation from various sources, more particularly from Yogyakarta Principles²⁵.

Against the backdrop of the jurisprudence on the issue of gender identity and sexual orientation and best international practices, seven broad issues were identified in the legal review. Firstly, subsequent to the legal recognition of third gender by the Supreme Court in 2014, the Registrar General of India directed the inclusion of transgender, along with male and female, against the sex markers for registration of birth and death. Although at the time of registration of births, the sex marker is recorded on the basis of the sex assigned at birth, the registers and vital event certificates do not record or recognise the self-determined gender.

Secondly, the matters on gender identity are largely governed by The Transgender Persons (Protection of Rights) Act 2019 and accompanying The Transgender Persons (Protection of Rights) Rules 2020. The Transgender Act governs the determination of the identity of transgenders and the change of gender and identity – from male to female or from female to male – pursuant to medical intervention. In that regard, the Transgender Act falls short to encapsulate other gender identities such as gay, lesbian, bisexual, etc. Although it defines intersex variation, it further fails to encapsulate that the varying characteristics may be apparent at birth or emerge later in life, often at puberty and that intersex people can have any sexual orientation and gender identity.

Thirdly, the Transgender Act mandates certification by the District Magistrate for identity as transgender. It also mandates gender-affirming medical intervention and certification by the District Magistrate for change in identity and gender, from male to female and female to male. Only upon the certification, allows a person to change gender and identity on all government-issued documents,

²⁰ UN GLOBE Resources/Training: International Organization for Migration, Full Glossary of Terms to describe sexual orientation, gender identity, gender expression and sex characteristics, updated November 2020

²¹ NALSA v Union of India (2014) 5 SCC 438

²² KS Puttuswamy v Union of India (2017) 10 SCC 1

²³ Navtej Singh Johar v Union of India (2018) 10 SCC 1

²⁴ Indian Penal Code, S377

²⁵ Yogyakarta Principles, Introduction to the Yogyakarta Principles, pp 6

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leaving it up to the person to make applications to each issuing authority separately. The process of change in government-issued documents upon certification and application to each issuing authority can be burdensome and dehumanizing for the person towards change in gender and identity based on medical certification.

Fourthly, while the Transgender Act mandates a time frame of 15 days for issuing authorities to change gender and identity on receiving a complete application, it does not provide any offense or penalty for refusal of the same. Moreover, separate legislations that govern all government-issued documents²⁶ predate the Transgender Act and have not been amended to include this provision. In such a scenario, even the penalty for a general offense in violation of the law does not apply to the refusal of change in identity.

Fifthly, the current practice in India also does not align with the best practice that demands that the identity documents do not carry, or at least provide to opt-out, from mentioning gender markers from the document. Unique Identification Card (Aadhaar) and Passport carry the gender marker male, female, and transgender. The markers also do not align with the global practice of the International Civil Aviation Organisation (ICAO) to carry the marker for the third gender as 'X'.

Sixthly, birth, marriage, adoption, and surrogacy laws in India are largely influenced by the fact that India does not legally recognize a marriage or a civil union between couples of the same sex. The terms used for parents on the birth register and birth certificate are 'father' and 'mother'²⁷ and not gender-neutral, such as parents. The terms used under marriage laws²⁸ are 'bride', 'bridegroom', 'husband', and 'wife'. Amendment of birth registration in case of adoption²⁹ is upon an adoption order from the Court. The local Registrar issues a birth certificate with the particulars of the adoptive parent(s) based on the order of the Court. It is to be noted that adoption, while allowing single persons to adopt, divides categories of adoptive parents as male and female applicants. Surrogacy³⁰, however, is permitted only to married couples and therefore, allows intended parents to be only a man and a woman. Performa of the birth certificate remains the same in this case.

Lastly, no information was available on an interagency CRVSID coordinating committee or other coordination mechanisms in India. India, through Joint Registrar General, is a member of the Regional

²⁶ The Registration of Births and Deaths Act 1969; The Passport Act 1967; Aadhaar Act (Targeted Delivery of Financials and Other Subsidies, Benefits and Schemes) 2016

²⁷ Model Registration of Birth and Death Rules 1999, Form 1, 2, 5

²⁸ The Hindu Marriage Act 1955; The Parsi Marriage and Divorce Act 1936; The Indian Christian Marriage Act 1872; The Special Marriage Act 1954

²⁹ Adoption Regulation 2017

³⁰ The Surrogacy (Regulation) Act 2021; The Assisted Reproductive Technology Act 2021

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Steering Group (RSG) for CRVS, serviced by the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). The Transgender Act, however, establishes a National Council for Transgender Persons to advise the Government on the formulation of policies, programmes, legislations and projects; to monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of transgender persons; to review and coordinate activities of government departments and other organisations related to the matter of transgender persons and redress grievances of transgender persons.

To address these challenges, a series of recommendations were made for policy and legal reform along with administrative measures. It was recommended that: the scope of the Transgender Act is amended to include other genders such as gay, lesbian, bisexual, etc. and define key legal terms such as gender identity and sexual orientation. It was highly recommended that the change in gender and identity does not mandate medical gender-affirming procedures and certification and must be a self-affirming process. A single identity registrar must be appointed and entrusted to change gender and identity in all government-issued documents, with a well-defined penalty for the failure to do so. It was recommended that India, through legislative procedure, grants legal recognition to right to family to same-sex couples and align the birth, marriage, adoption and surrogacy laws to the legal recognition in terms of eligibility and terminology. Lastly, the Government of India must set up an interagency CRVSID coordinating committee according to the recommendation by United Nations, Principles and Recommendations for a Vital Statistics System. In an alternate, the Government of India may extend the scope of the Council to include reformation of terminology and to address issues of gender identity in CRVS.

Conclusion

Countries benefit from evaluating their laws and practices against the international best practices for CRVS as the process guides them in introducing appropriate changes to stillbirth reporting and registration processes, as well as making civil registration services accessible to all individuals within their territories. The D4H Initiative supports the completion of ongoing legal reviews implementing the equity-themed chapters of the legal review toolkit and the realization of legal reforms based on the findings and recommendations made in the law review process. In the broader context of equity, other aspects of CRVS will be explored within the Initiative to further provide guidance to countries on how to address challenges faced by vulnerable groups, including refugees and people with disability, in accessing civil registration services.