

# ESTABLISHING A NEW ERA BEYOND SECTION 365 OF SRI LANKAN PENAL CODE: A COMPARATIVE ANALYSIS ON GENDER IDENTITY AND MARRIAGE EQUALITY FOR TRANSGENDER PEOPLE IN THE LEGAL CONTEXT OF SRI LANKA AND THE UNITED KINGDOM

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## Abstract

This paper aims to establish marriage equality for transgender people beyond mere equality and non-discrimination in the legal context of Sri Lanka. This study further adopts the qualitative research method to examine the lack of legal gender recognition, constitutional lacuna, and outdated criminal law for affording marriage equality for transgender people in Sri Lanka. Thus, in light of the progressive developments in the jurisdiction of the United Kingdom, this research crucially aims to make suggestions to enhance the domestic legal regime also by recognising the legal rights of transgender persons to marry. Accordingly, the enactment of specific legislation on recognising the gender identity of transgender people and their 'right to marry and find a family' is identified as the viable solution to affirm the equality and recognition of transgender people in Sri Lankan society.

**Keywords:** *Gender identity, Human rights, Marriage equality, Sri Lanka, Transgender people*

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## **Introduction**

The word ‘transgender’ creates humiliation in the minds of Sri Lankans as our society consistently recognises only two sexes as male and female. A transgender individual is a person whose gender identity and gender expression do not conform to his or her gender which is assigned at birth. They have been identified as a deserted group even within the lesbian, gay, bisexual, transgender, and intersex (LGBTI) community. Therefore, in the current context, the transgender rights movements are entering a new era of claiming marriage equality. That means the right to marry and the right to find a family.

In this regard, this research discusses the problem of marriage equality for transgender people in Sri Lanka by exploring the inadequacy of the available laws in terms of both domestic and international obligations. Eventually, in light of the jurisdiction of the United Kingdom, this study makes suggestions to enhance the domestic legal regime by recognising the legal right that a transgender person should have to marry.

## **Material and Methods**

The methodology adopted for this research is a purely qualitative research method. It is supported by primary and secondary sources of law related to the topic, such as statutes, international legal instruments, judicial decisions, academic writings, and e-sources.

## **Results and Discussion**

The right to marry is one of the most fundamental rights of every human being that should be protected by law. In Sri Lankan context, the Constitution guarantees equality and non-discrimination under Article 12. It states “no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, and place of birth or any one of such grounds”. However, this Article does not interpret equality and non-discrimination based on sexual orientation and gender identity. This non-recognition often deprives the rights of transgender people affecting almost all aspects of their daily lives. The Ministry of Health, Nutrition, and Indigenous Medicine issued a circular in 2016 aiming to fill this constitutional lacuna by establishing a process to issue the ‘Gender Recognition Certificate’. But that does not provide strong legal protection for transgender people since that is merely an administrative process and not a law passed by the legislature. Similarly, Sri Lankan marriage law has been limited only to two binary sexes and does not provide protection for people with different gender identities.

Moreover, the Penal Code of Sri Lanka, 1883 passed during British rule criminalises a wide range of sexual offences under Section 365. It identifies unnatural offences as “carnal intercourse against the order of nature with any man, woman, or animal”. Furthermore, section 365A criminalises “any act of gross indecency” with another person. These provisions can be widely applied to sexual acts and romantic affection between two individuals of the same sex respectively. On the other hand, Section 399 identifies another criminal offence as “cheat by personation”. That has been often used to arrest transgender people based on the assumption that they have the malicious intention of cheating others by taking measures to reveal or hide their gender identity which is different from the sex assigned to them at birth. Moreover, the Vagrants Ordinance No. 4 of 1841 targets transgender persons making them more vulnerable to abuses.

Since there is no unalterable international human rights treaty that specifically protects the rights of transgender persons, the explicit provisions in the existing international legal instrument can be applied to protect the rights of transgender people. The right to marry is secured under Article 23 of the International Covenant on Civil and Political Rights (ICCPR). It recognises the “right of men and women of marriageable age to marry and to found a family”. However, this Article should not be regarded as one that excludes other ways of finding a family. Thus, on the one hand, international law aims to promote equality and eliminate discrimination and on the other hand, it is voiceless as far as marriage equality for sexual minorities like transgender people is considered. Therefore, ‘Yogyakarta Principles’ was drafted in 2007 as non-binding international legal guidelines to afford better protection for people with different sexual orientations. Accordingly, Principle 24 of Yogyakarta Principles identifies a right that goes beyond the right to marriage: “everyone has the right to found a family, including through access to adoption or assisted procreation (including donor insemination) regardless of sexual orientation or gender identity”.

Consequently, in the current context, the United Kingdom has made some progressive initiatives to affirm transgender persons' marriage equality. Thus, the Gender Recognition Act, 2004 of the United Kingdom permits transgender people to apply to the Gender Recognition Panel to have a Gender Recognition Certificate. That also permits the holder to be recognised for all legal purposes including marriage. Similarly, the marriage rights of British transgender people are positively affected by the Marriage (Same Sex Couples) Act 2013. Thus, in order to ensure whether provisions of law related to transgender rights are implemented in practice, the UK Government, under the Equality Act 2010 has enacted ~~the~~ Section 7 to prohibit discrimination based on “gender

reassignment” as the “protected characteristic”. All in all, this can be regarded as a huge step forward in protecting the rights of transgender people.

### **Conclusion and Recommendations**

Every person should have a “right to marry and found a family”. But, as discussed in the section above, the existing legal framework of Sri Lanka does not guarantee the right of transgender persons to marry and to find a family. Amendments or replacements to the existing constitutional provisions and criminal law are not viable solutions to ensure the protection of the complex legal issues faced by transgender persons. Therefore, the necessity of enacting specific legislation on recognising their gender identity, and the right to marry and find a family through adoption or assisted procreation are identified as the constitutional provisions along with this, newly enacted legislation on the matters of transgender people will hopefully reaffirm their right to equality and recognition in Sri Lankan society.

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