



The Impact of Regional and International Human Rights Mechanisms on Trans Rights: **A Review**

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About GATE

GATE is an international advocacy organization working towards justice and equality for trans, gender diverse and intersex communities. Rooted in our movements, we work collaboratively with strategic partners at the global level to provide knowledge, resources and access to international institutions and processes. Our vision is a world free from human rights violations based on gender identity, gender expression and sex characteristics. Our strategy is to transform the landscape of global advocacy, knowledge creation and resource distribution through critical inclusion of trans, gender diverse and intersex movements at all levels of political, legal and socio-economic processes.

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ACRONYMS & ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AfCHPR	African Court on Human and Peoples' Rights
AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
AU	African Union, previously referred to as the Organization of African Unity (see OAU)
CARICOM	Caribbean Community
CAT	Committee against Torture
CCJ	Caribbean Court of Justice
CCPR	Human Rights Committee
CED	Committee on Enforced Disappearances
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CoE	Council of Europe
CRC	Committee on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities
CT	'Conversion Therapy'
ECHR	European Convention on Human Rights
ECSC	Eastern Caribbean Supreme Court
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Council
IACHR	Inter-American Commission on Human Rights
IACourtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICD-11	International Classification of Diseases 11th Revision
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IE SOGI	Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

LGBTI	Lesbian, Gay, Bisexual, Transgender, Queer, and Plus (representing other diverse sexual and gender identities)
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
NGO/s	Non-Governmental Organization/s
NHRIs	National Human Rights Institutions
OAU	Organization of African Unity, now referred to as the African Union (see AU)
OAS	Organization of American States
OAS GA	Organization of American States General Assembly
OECS	Organization of Eastern Caribbean States
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of Islamic Cooperation
PACE	Parliamentary Assembly of the Council of Europe
SDGs	Sustainable Development Goals
SOGI	Sexual Orientation and Gender Identity
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDG	United Nations Sustainable Development Group
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UPR	Universal Periodic Review
YP	Yogyakarta Principles
YP+10	Yogyakarta Principles plus 10

INTRODUCTION

“Trans rights are human rights” is a concept that should not be debatable and should be accepted by all. However, anti-gender actors have been working to undermine this concept by trying to separate trans rights from human rights. Anti-gender actors have been attempting to mobilize diverse anti-trans rights discourses, including religious and anti-gender narratives, and co-opting feminist principles to dehumanize and exclude trans people from the human rights discourse and fabricate public moral panic regarding progressive pro-trans policies.

Despite those attempts, trans rights have seen rapid positive developments in many countries across the globe, fueled by the resilience of local trans communities and activists together with their allies. Allyship is central to the advancement of trans rights globally; international and regional human rights mechanisms have proven to be strong allies when it comes to supporting global trans movements. As outlined in the following chapters, trans rights are not a new invention, but an extension of the various fundamental human rights protected by international and regional human rights mechanisms. In recent decades, those mechanisms have been working to affirm the concept that “trans rights are human rights” to counter growing discrimination and violence against trans people globally, by providing new interpretations and opinions that extend the protections and rights under different human rights treaties to include trans rights.

These interpretations and opinions are not welcomed by all, as some States still try to argue that trans rights are incompatible with the treaties they signed as they are not explicitly mentioned in the text of the treaties. However, currently, there is no disagreement among the experts on these mechanisms that trans people have equal rights to their cis counterparts under human rights treaties; including the right to non-discrimination, to be legally recognized, to health, to education, to the protection from violence, and more. National jurisdictions have also started to slowly implement these new interpretations and opinions as reflected in policy and legal reform, as well as judicial opinions from case law.

Thus, mindful of the central role international and regional human rights mechanisms have been playing in the advancement of trans rights globally, this report outlines how international and regional human rights mechanisms have been interacting with trans rights in recent years. The report aims to counter the anti-gender narratives regarding the concept of “trans rights are human rights”. To achieve this, the report clarifies how international and regional human rights standards apply to trans rights across different thematic areas, including education, health, rights of minors, anti-discrimination, decriminalization, and legal gender recognition. The report also examines how international and regional human rights mechanisms can influence national jurisdictions to implement more progressive pro-trans policies.

The report is designed to assist activists, policymakers, and other stakeholders in understanding how international and regional human rights standards can be an asset in their fight against anti-gender actors and their narratives. The report outlines the positive progress happening in international, regional, and national mechanisms for trans rights. The report relied on a comprehensive literature review and qualitative analysis of recent case law, human rights treaties, national laws, and other literature. GATE is grateful to the activists and legal experts who agreed to be interviewed, provided literature for review and provided their insights for the report.



CHAPTER I: THE INTERNATIONAL HUMAN RIGHTS SYSTEM

1. Introduction

The international system for the protection of human rights (the System), is the unique and complex web of bodies, agencies, and treaties introduced by the United Nations (UN) to monitor, protect and promote human rights globally.¹ The System has two types of human rights mentoring mechanisms: treaty-based, and charter-based. The System's origins can be traced back to 1948 when the Universal Declaration of Human Rights (UDHR) was adopted. Several human rights treaties were later added to form together with the UDHR the core of the treaty-based human rights mechanisms:

- [The International Convention on the Elimination of All Forms of Racial Discrimination](#) -ICERD- (1965);
- [The International Covenant on Economic, Social and Cultural Rights](#) -ICESCR- (1966);
- [The International Covenant on Civil and Political Rights](#) -ICCPR- (1966);
- [The Convention on the Elimination of All Forms of Discrimination against Women](#) -CEDAW- (1979);
- [The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) -CAT- (1984);
- [The Convention on the Rights of the Child](#) -CRC- (1989);
- [The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families](#) -CMW- (1990);

¹ "Human Rights Law Research Guide: International Human Rights System." Guides. Accessed September 13, 2022. <https://guides.ll.georgetown.edu/c.php?g=273364&p=1824722>.

- [The Convention on the Rights of Persons with Disabilities](#) -CRPD- (2006);
- [The International Convention for the Protection of All Persons from Enforced Disappearance](#) -CED- (2006).²

Each treaty has a committee of independent experts that works on assessing the progress of each State towards the implementation of a specific treaty. To achieve their goals, each committee receives periodic reports from State parties about the measures they have adopted to meet their obligations under each treaty, issues general comments to interpret provisions of a treaty concerning a thematic area, and six of the committees (Human Rights Committee (CCPR), Committee on the Elimination of Racial Discrimination (CERD), Committee against Torture (CAT), Committee on the Elimination of Discrimination against Women (CEDAW), Committee on the Rights of Persons with Disabilities (CRPD), and Committee on Enforced Disappearances (CED)) can receive an individual complaint from individuals who claim their rights have been violated by a State party. Those six committees can also initiate a country inquiry if they receive well-founded information and evidence that indicates that a serious, grave, or systematic violation is being committed by a State. States must have ratified the treaty for a committee to oversee its implementation in the State party. Moreover, the individual complaint mechanism and State inquiry mechanism requires further ratification of optional protocols which are accompanying some of the treaties like the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).³

Charter bodies are established under the UN charter and have a broad mandate to promote and monitor human rights in all Member States in the UN. Charter bodies consist of the Human Rights Council (HRC).⁴ Other bodies include the Office of the High Commissioner for Human Rights (OHCHR) which was created by General Assembly resolution 48/141 in 1993.⁵ The HRC is an inter-governmental agency consisting of 47 Member States elected by the UN's general assembly. Within the HRC several mechanisms are designed to achieve its goals:

- The Special Procedures of the Human Rights Council refers to groups of independent experts who are tasked with investigating and reporting on human rights issues. Those issues can have thematic or country-focus, such as the Independent Expert on sexual orientation and gender identity or the Special Rapporteur on the situation of human rights in the Syrian Arab Republic.
- The Universal Periodic Review (UPR) is a process where each UN member state is assessed for its human rights record periodically every 4.5 years. During the process, States under review submit a self-assessed report, a compilation report from UN mechanisms is compiled by OHCHR, and stakeholders such as Non-Governmental Organizations (NGOs) and National Human Rights Institutions (NHRIs) are invited to submit shadow reports. At the end of the review, States receive recommendations from their peers who are members of the HRC, and States under review can choose to accept or take note (effectively rejecting) those recommendations.

² The United Nations Human Rights Treaty System. New York: United Nations, 2012.

³ "What the Treaty Bodies Do." OHCHR. Accessed September 13, 2022. <https://www.ohchr.org/en/treaty-bodies/what-treaty-bodies-do>.

⁴ "Instruments & Mechanisms." OHCHR. Accessed January 1, 2023. <https://www.ohchr.org/en/instruments-and-mechanisms>.

⁵ "Mandate of UN Human Rights." OHCHR. Accessed January 1, 2023. <https://www.ohchr.org/en/about-us/mandate-un-human-rights>.

- The HRC Complaint Procedure - (*not to be confused with the treaty-based individual complaint procedure- established by resolution 5/1 of 18 June 2007*) is a claimant-oriented process, centered on confidentiality, in terms of which individuals, groups, or NGOs can submit a complaint against a State for its violations of one's human rights. It is the only human right mechanism that does not require ratification by States and monitors all human rights and fundamental freedoms within the UN human rights system.
- Commission of Inquiry and Fact-finding Missions are established by the HRC and are directed to conduct on-site investigations of serious violations of international humanitarian law and international human rights law and to promote accountability for each violation. Those missions are supported by OHCHR staff.⁶

The OHCHR was created through resolution 48/141 of the general assembly, the resolution also outlines the OHCHR's mandate to promote, enhance, and mentor the implementation of human rights in Member States. The OHCHR is part of the UN's executive arm, the secretariat, and it provides technical assistance including research and logistical support to facilitate the work of the HRC and treaty bodies. The OHCHR coordinates efforts among several agencies, States, bodies, and others to achieve its mandate.⁷

While these are the core bodies of the UN human rights system, other UN agencies can perform duties that enhance human rights globally. The International Labor Organization (ILO) has multiple treaties that ensure worker's rights and anti-discrimination in the workplace e.g., [Convention \(No.100\) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value](#) and [Convention \(No.111\) concerning Discrimination in Respect of Employment and Occupation](#). The United Nations General Assembly (UNGA) is the main policy making body of the UN and has been actively involved in the protection and promotion of human rights through engaging with the States and issuing resolutions to advance human rights globally. Other agencies within the UN that help support the Human Rights system include, but are not limited to, [United Nations Development Programme](#) (UNDP), [United Nations Sustainable Development Group](#) (UNDG), [United Nations High Commissioner for Refugees](#) (UNHCR), and [UN Women](#).

2. Gender Identity

2.1. General Comments and Individual Complaints

The UN and its mechanisms have been promoting the inclusion of trans and gender-diverse people's rights into the framework of the various treaties that govern the system. The application of international human rights in the UN System is guided by article 1 of the Universal Declaration of Human Rights (UDHR) which stipulates "*All human beings are born free and equal in dignity and rights.*" Meaning that at its core, the System is based on anti-discrimination, equality, and universality. This is reflected in the subsequent treaties, as most of them have open-ended provisions against discrimination which indicates that the rights and protections offered by a treaty can be extended to all humans, regardless of whether the grounds of discrimination are explicitly mentioned in the treaty

⁶ Human Rights Council. Geneva: UN, Human Rights Council, 2020. https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/HRC_booklet_EN.pdf

⁷ "Mandate of UN Human Rights." OHCHR. Accessed September 13, 2022. <https://www.ohchr.org/en/about-us/mandate-un-human-rights>.

or not.⁸ These rights include, but are not limited, to bodily autonomy, equality before law, protection from violence, and right to privacy.

For example, both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have provisions that ban discrimination based on “*race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or other status*”.⁹ There has been an evolution in the interpretation of treaties to include sexual orientation and gender identity (SOGI) under the clauses of “sex” and “other status.” This evolution can be seen across not only the international human rights system but also in national and regional judicial opinions as well. In 1994, The Human Rights Committee (CCPR) of the ICCPR in *Toonen v. Australia* declared that the state had failed to meet its obligation and was in violation of the human rights of the plaintiff through the continued existence of sodomy laws that criminalize same-sex relations among consenting adults.

The CCPR noted that such laws violate Article 17 (Right to Privacy), Article 2(1) (Anti-discrimination Clause), and Article 26 (Equality before the law).¹⁰ In 2009, the CCPR found Russia in violation of Article 21 (Freedom of Peaceful Assembly) for banning Moscow Gay Pride March in *Alekseev v Russian Federation*.¹¹ In 2012, the CCPR found Russia in violation of Article 19(2) (Freedom of Expression), in conjunction with Article 26, for imposing an administrative fine on an openly lesbian athlete for expressing positive views on the LGBTI community and her sexuality near a school in *Fedotova v Russian Federation*.¹²

In 2017, the CCPR ruled in *G v Australia* that Australia was in violation of Article 17 (Right to Privacy), as it acknowledged that the notion of privacy in the article encompasses gender identity of trans people. The CCPR held that requiring individuals to divorce prior to obtaining legal gender recognition is incompatible with Covenant guarantees, stating: “*by denying transgender persons who are married a birth certificate that correctly identifies their sex, in contrast to unmarried transgender and non-transgender persons, the government is failing to afford the author and similarly situated individuals’ equal protection under the law.*”¹³

In 2009, the Committee on Economic, Social, and Cultural Rights (CESCR) confirmed in its General Comment No. 20 that SOGI is a protected category under the treaty and any acts of discrimination based on SOGI are a violation of the treaty¹⁴. In 2016, the CESCR in General Comment No. 22 on sexual and reproductive health emphasized the prohibition of any acts of discrimination based on SOGI and went further, adding that States which allow the following practices are violating the treaty: the criminalization of same-gender consensual relations; so-called ‘conversation therapy’ that claims to cure LGBTI people; coercive medical practices that force trans people to undergo unnecessary

8 United Nations publication issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR). Geneva: Born Free and Equal Second edition: HR/PUB/12/06/Rev.1, 2019. https://www.ohchr.org/sites/default/files/Documents/Publications/Born_Free_and_Equal_WEB.pdf

9 See, International Covenant on Civil and Political Rights, art. 2(1) and International Covenant on Economic, Social and Cultural Rights, art. 2

10 *Toonen v. Australia*, Human Rights Committee, Communication No. 499/1992 (CCPR/C/50/D/499/1992)

11 *Alekseev v Russian Federation*, Human Rights Committee, Communication No. 1873/2009 (CCPR/C/109/D/1873/2009)

12 *Fedotova v Russian Federation*, Human Rights Committee, Communication No. 1932/2010 (CCPR/C/106/D/1932/2010)

13 *G v Australia*, Human Rights Committee, Communication No. 2172/2012 (CCPR/C/119/D/2172/2012)

14 UN Committee on Economic, Social and Cultural Rights (CESCR), 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.

hormonal or surgical treatment such as forced sterilization.¹⁵ The same year, in General Comment No 23, CESCR reaffirmed that discrimination in the workplace based on SOGI is prohibited under the treaty, and States have an obligation to ensure equal working opportunities for LGBTI people.¹⁶ In 2016, the Committee on the Rights of the Child (CRC) issued its General Comment No. 20, which interpreted the CRC to reflect its commitment to promote good practices for trans and gender-diverse people. The CRC emphasized “the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy.”¹⁷ The CRC added that during the process of determining the best interest of the child, one must take into account the child’s views, development and evolving capacity to understand and determine what is in their best interest.¹⁸ Thus, trans and gender-diverse people should have access to all information, psychological consultation, and any other services that may assist them in deciding on the best course of medical or non-medical treatment they may wish to undergo related to their gender identity without stigma or discrimination.¹⁹

The Committee against Torture (CAT) in its General Comment No. 2 and 3 extended the protection under the Convention to trans and gender-diverse people and found that the obligations of the state under the Convention are applicable to all people regardless of their gender identity or sexual orientation.²⁰ In 2018, the Committee on the Elimination of Discrimination against Women (CEDAW) found in its General Comment No.33 that trans and gender-diverse people face obstruction accessing justice because of criminalization, discrimination, and stigma.²¹

2.2. Committees Observations

Treaty body Committees periodically review Member States. Thus, Member States must submit periodic reports for the Committees to review their progress regarding the application of the treaties. The Committees then issue concluding observations, and it is often the case that some of those observations outline the reviewed country’s obligations towards trans and gender-diverse people. Those observations encompass the General Comments committees issued before and include improving or enacted anti-discrimination framework, decriminalization of gender identity and expression, equality before the law, providing gender-affirming health care, banning so-called ‘conversion therapy’ (CT) and eliminating all medical requirements to access legal gender recognition.²²

15 UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 22 (E/C.12/GC/22), 2016

16 UN Committee on Economic, Social and Cultural Rights (CESCR), 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; No. 22 (E/C.12/GC/22), 2016; No. 23 (E/C.12/GC/23), 2016.

17 Kara, Sheherezade. Gender is not an illness. How pathologizing trans people violates international human rights law. GATE. (2017)

18 Ibid

19 UN Committee on the Rights of the Child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20.

20 UN Committee against Torture, General Comment No. 2 (CAT/C/GC/2), 2008, para. 21 and General Comment No.3 (CAT/C/GC/3), 2012.

21 UN Committee on the Elimination of Discrimination Against Women, General Comment 33 on access to justice (CEDAW/C/GC/33), 2015.

22 See for example, Committee on the Elimination of Discrimination against Women, Concluding Observations on Kyrgyzstan (CEDAW/C/KGZ/CO/4), 2015; on Ecuador (CEDAW/C/EQU/CO/8-9), 2015; on Denmark (CEDAW/C/DNK/CO/8), 2015; on India (CEDAW/C/IND/CO/4-5), 2014; on Cameroon (CEDAW/C/CMR/CO/4-5), 2014. Also, Committee on the Rights of Persons with Disabilities, Concluding Observations on Canada (CRPD/C/CAN/CO/1), 2017, Lithuania (CRPD/C/LTU/CO/1), 2016. Also, Committee on Migrant Workers, Concluding Observations on Jamaica (CMW/C/JAM/CO/1), 2017, and Concluding Observations on Belize (CMW/C/BLZ/CO/1), 2014.

In 2014, CEDAW, in its concluding observation of Belgium, noted its concern regarding the lengthy and complicated process to obtain legal gender recognition and called for Belgium to reform its policies and laws to abolish medical requirements to access legal gender recognition.²³ In 2015, CEDAW found that Slovakia's requirement for trans women to undergo medical treatment to access legal gender recognition was a violation of their freedom to control their bodies as an extension to the right to health and bodily autonomy protected under the treaty.²⁴

In 2010, during Uganda's periodic review, CEDAW noted its concern regarding the ongoing criminalization of same-gender relations and gender expression and the discrimination trans and gender-diverse people face.²⁵ In 2017, CEDAW expressed its concern over the mistreatment trans and gender-diverse people may face while receiving medical care in Costa Rica and called for States to introduce sensitivity training for medical and psychological professionals to ensure such incidents do not reoccur.²⁶

In 2013, The CCPR noted its concern regarding the medical requirements for trans people to receive legal gender recognition in Ukraine and stressed that *"medical treatment should be provided in the best interests of the individual with [their] consent, should be limited to those medical procedures that are strictly necessary, and should be adapted to [their] own wishes, specific medical needs and situation."*²⁷ In 2011, the CCPR called on Kuwait to revoke laws that criminalize 'imitating the opposite gender' and are used to prosecute trans people, and to work towards the social destigmatization of homosexuality and to combat discriminatory acts targeting LGBTI people.²⁸

The CCPR also noted while reviewing Grenada, Uzbekistan, and Togo that the criminalization of same-gender relations and gender identity constitute a violation of an individual's rights to privacy and the anti-discrimination clause of the ICCPR.²⁹ In 2011, CESCR raised concern regarding the psychological treatment requirement to receive legal gender recognition and the classification of trans people as "people with mental illness" by Germany. The CESCR called for this requirement to be dropped and for the classification to be reformed.³⁰ In 2022, CESCR used for the first time the World Health Organization's International Classification of Diseases 11th Revision (ICD-11)³¹, when making recommendations to Mongolia regarding raising awareness around trans-related health issues and combating discrimination and violence faced by trans people in the country.³²

23 UN Committee on the Elimination of Discrimination against Women, Concluding Observations on Belgium (CEDAW/C/BEL/CO/7), 2014.

24 UN Committee on the Elimination of Discrimination against Women, Concluding Observations on Slovakia (CEDAW/C/SVK/CO/5-6), 2015.

25 UN Committee on the Elimination of Discrimination against Women, Concluding Observations on Uganda (CEDAW/C/UGA/CO/7), 2010.

26 UN Committee on the Elimination of Discrimination against Women, Concluding Observations on Costa Rica (CEDAW/C/CRI/CO/5-6), 2017.

27 UN Human Rights Committee, Concluding Observations on Ukraine (CCPR/C/UKR/CO/7), 2013.

28 UN Human Rights Committee, Concluding Observations on Kuwait (CCPR/C/KWT/CO/2), 2011.

29 UN Human Rights Committee, Concluding Observations on Grenada (CCPR/C/GRD/CO/1), 2009; on Uzbekistan (CCPR/C/UZB/CO/3), 2010; and on Togo (CCPR/C/TGO/CO/4), 2011.

30 UN Committee on Economic, Social and Cultural Rights, Concluding Observations on Germany (E/C.12/DEU/CO/5), 2011.

31 ICD-11 has redefined gender identity-related health, replacing outdated diagnostic categories like ICD-10's "transsexualism" and "gender identity disorder of children" with "gender incongruence of adolescence and adulthood" and "gender incongruence of childhood", respectively. Gender incongruence has been moved out of the "Mental and behavioral disorders" chapter and into the new "Conditions related to sexual health" chapter.

32 UN Committee on Economic, Social and Cultural Rights, Concluding Observations on Germany (E/C.12/MNG/CO/5), 2022.

2.3. Resolutions and Special and Special Procedures

The UNGA and HRC have issued resolutions to tackle regressive policies that limit the rights of trans and gender-diverse people globally. These resolutions reflect the commitment UN Bodies have towards SOGI rights and highlight the global need to address violations trans and gender diverse people endure by some Member States of the UN. Since 2002, the UNGA has made reference to sexual orientation as a specific protected category in its biennial resolutions on the extrajudicial, summary, and arbitrary executions, and it was only in 2012 that references to gender identity were also made.

In 2021, the UNGA adopted a resolution on “Strengthening the role of the United Nations in the promotion of democratization and enhancing periodic and genuine elections.” The resolution included an explicit reference to SOGI: *“Reaffirms the obligation of all States to take all appropriate measures to ensure that every citizen has the effective right and opportunity to participate in elections on an equal basis, and calls upon States to take measures to eliminate laws, regulations, and practices that discriminate, directly or indirectly, against citizens in their right to participate in public affairs, including based on race, color, ethnicity, national or social origin, sex, sexual orientation and gender identity, language, religion, political views or based on disability.”*³³

In 2011, the HRC adopted its first SOGI-specific resolution. In it, the HRC recalled the core elements of the UN human rights system: *“the universality, interdependence, indivisibility, and interrelatedness of human rights,”* and raised its concern over the increasing violence people face because of their sexual orientation and gender identity and requested from the OHCHR to conduct a study documenting laws that are limiting the rights of LGBTI people globally.³⁴ Following resolutions from the HRC reaffirmed its position on SOGI, focusing on the violence and discrimination of LGBTI people as an area of consensus among its members.³⁵

In 2016, the HRC passed resolution 32/2 to create the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI). The mandate was created as a direct reaction to the increased visibility of violations of international human rights law and standards towards LGBTI people and the increased violence and discrimination they face by state and non-state actors. The mandate was renewed twice in 2019 and 2022.

The IE SOGI issued various thematic reports to the HRC and the UNGA including “Legal recognition of gender identity and depathologization”, “Decriminalization and anti-discrimination legislation”, and “Conversion therapies practices”; Conducted country visits to Tunisia, USA, Ukraine, Mozambique, Georgia and Argentina; and issued urgent appeals and letters of allegation to States regarding violations of LGBTI people rights and violence and discrimination based on SOGI.³⁶

Other Special Procedures have been working to address issues faced by trans and gender-diverse people; for example, in 2015, the UN Special Rapporteur on the right to health noted, in their country visit report to Malaysia, the negative impact the criminalization of cross-dressing had on the live-

33 United Nations General Assembly. Seventy-sixth session. A/RES/76/176. 2022.

34 “Resolutions on Sexual Orientation, Gender Identity and Sex Characteristics.” OHCHR. Accessed September 13, 2022. <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/resolutions-sexual-orientation-gender-identity-and-sex-characteristics>.

35 Second dialogue

36 “The Struggle of Trans and Gender-Diverse Persons.” OHCHR. Accessed September 13, 2022. <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons>.

likelihood of trans and gender diverse people.³⁷ In 2017, the Special Rapporteur on the right to health stated that reducing trans identities to diseases aggravated stigma and discrimination. The UN Special Rapporteur on torture has recognized in various statements and reports that “members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations” and that compulsory sterilization and surgery is a violation of one’s bodily autonomy and integrity.³⁸

2.4. Sustainable Development Goals

The Sustainable Development Goals (SDGs) are a collective global effort to enact policies, laws, actions, and campaigns to eradicate poverty, promote economic empowerment, improve access to health and education, gender equality, and promote Justice and accountability.³⁹ The SDGs are a continuation of the previous global policy effort to eradicate hunger and poverty- the Millennium Development Goal (MDG). The SDGs were adopted by the UN General assembly in 2015, with the hopes to achieve them by 2030.⁴⁰

One of the important pillars of SDGs is the notion of “leave no one behind”, which aims to apply the goals of SDGs to all individuals. Although, like other international documents, the SDGs may not mention SOGI directly, it affirms that it is based on the non-discrimination principles existing in the UN human rights system. For example, target 10.2 states: “by 2030, empower and promote the social, economic and political inclusion of all, irrespective of age, sex...or other status.”⁴¹ The other status as discussed before has been interpreted by UN Human Rights Mechanisms to include gender identity. SDGs also acknowledge that some populations are at risk of being excluded from state policies which will result in the failure of the implementation of SDGs. Thus, SDGs reaffirm that States are mandated to erase social, economic, and governmental barriers that may impact the most marginalized and vulnerable and the furthest left behind.⁴²

Experts note that States should give special attention to the inclusion of trans and gender-diverse people who are often excluded from socio-economic policies and are marginalized because of their identity. For example, a 2015 survey in the USA found that “transgender individuals were two times more likely to live in poverty and three times more likely to be unemployed, resulting in negative psychosomatic factors, including anxiety, stress, shame, and humiliation.” Thus, failure to address the needs and rights of trans and gender-diverse people will lead to a direct failure of the implementation of SDGs in any country.⁴³ SDGs are reviewed annually, with stakeholder groups such as CSOs playing a crucial role in those reviews. The LGBTI Stakeholder Group, a global collection of different civil society groups working to advance the rights and achieve the highest development outcomes for LGBTI people, takes part in the annual review process.⁴⁴

37 Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, on a visit to Malaysia (A/HRC/29/33/Add.1), 2015.

38 Kara, S., and M. C. Grinspan. *Gender Is Not an Illness: How Pathologizing Trans People Violates International Human Rights Law*. Washington DC: Global Action for Trans Equality GATE, 2017.

39 Mills, E. (2015) ‘Leave No One Behind’: Gender, Sexuality and the Sustainable Development Goals, IDS Evidence Report 154, Brighton: IDS

40 United Nations (2015) Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development (A/RES/70/1)

41 <https://unstats.un.org/sdgs/metadata/?Text=&Goal=10&Target=10.2>

42 Mills, E. (2015) ‘Leave No One Behind’: Gender, Sexuality and the Sustainable Development Goals, IDS Evidence Report 154, Brighton: IDS

43 Scolaro, Brianna. “LGBTI and the Sustainable Development Goals: Fostering Economic Well-Being.” *LGBTQ Policy Journal*, June 24, 2020. <https://lgbtq.hkspublications.org/2020/06/24/lgbti-and-the-sustainable-development-goals-fostering-economic-well-being/>.

44 “LGBTI Stakeholder Group.” MGoS Coordination Mechanism, July 12, 2020. <https://mgoscoordinationmechanism.com/>

3. Challenges and Limitations

The political nature of the UN has had an impact on its human rights system. Implementation of core international human rights standards has been selective and depends on the geopolitical position of the state committing the violation. Countries can choose to ignore inquiries, recommendations or observations received by the System. For example in 2013, Israel boycotted a regular review by the HRC⁴⁵; and in 2018, the USA withdrew from the HRC and pulled funding for UN agencies, when its human rights record was subjected to criticism.⁴⁶ Countries with poor human rights records like Saudi Arabia and China have managed to join the HRC, mostly to protect their interests and interpretation of human rights.⁴⁷ The System was also criticized for relying too much on “the honor system”, where States can have a selective acceptance of the Human Rights Mechanisms, for example, in the UPR, States can choose to accept or take note (effectively reject) any human rights recommendation it receives.⁴⁸

The topic of SOGI rights has been the subject of intense debate among Member States every time it is brought up. Examining the votes on resolutions and other indicators, one can conclude that there are two vocal camps on SOGI, its proponents and opponents, while other States may opt to be neutral on the issue by staying vocally silent while either voting in support, against, or often abstaining. In 2008, The UN LGBTI Core Group was established to advance SOGI rights within the UN human rights system and beyond. Since 2008, the UN LGBTI Core Group has been a strong pro-SOGI voting bloc in the UNGA⁴⁹ On the other hand, Islamic countries under the guidance of the Organization of Islamic Cooperation (OIC), as well as countries from the African continent in the “African Group”, have formed a *de-facto* voting block together with other non-Islamic and non-African countries, to combat the spreading acceptance of SOGI rights. In 2014, the Resolution on Protection of the Family was passed without any reference to families outside the binary system. The resolution was passed by a coalition of countries who are trying to push a “traditional values” narrative in opposition to “SOGI rights.” These countries were made up almost exclusively of OIC Member States and African countries, with China, Bosnia, and El-Salvador as the only countries which were not members of either the regional group or political bloc.⁵⁰

SOGI rights are a continuation of older debate among Member States on the nature of human rights. Countries who oppose SOGI rights are quick to point out that the System was established during the era of late colonization and early independence for them. Thus, their voices were not echoed during the creation of the treaties governing the system and the interpretation of human rights under those treaties does not take into account the cultural, religious, and social differences among Member States. Moreover, the System is slammed by these countries for being “Western-centric” and as a form of neo-colonization, as the West is trying to impose their culture and standards regarding human rights upon them.⁵¹ This framing is debated, as non-Western States did take part in the creation of the United Nations and the subsequent treaties.

[mgos-list/lgbti-stakeholder-group/](#).

45 “Israel Boycotts UN Rights Council in Unprecedented Move.” BBC News. BBC, January 29, 2013. <https://www.bbc.com/news/world-middle-east-21249431>.

46 “US Halts Cooperation with UN on Potential Human Rights Violations.” The Guardian. Guardian News and Media, January 4, 2019. <https://www.theguardian.com/law/2019/jan/04/trump-administration-un-human-rights-violations>.

47 “US Quits ‘Biased’ UN Human Rights Council.” BBC News. BBC, June 20, 2018. <https://www.bbc.com/news/44537372>.

48 “Basic Facts about the UPR.” OHCHR. Accessed January 1, 2023. <https://www.ohchr.org/en/hr-bodies/upr/basic-facts>.

49 “Core Group History.” UN LGBTI CORE GROUP, December 27, 2022. <https://unlgbticoregroup.org/history/>.

50 Rosa Freedman Lecturer in Law, and Camilla R Barker. “UN Human Rights Council Keeps up Its Bad Form on LGBT Rights.” The Conversation, September 13, 2022. <https://theconversation.com/un-human-rights-council-keeps-up-its-bad-form-on-lgbt-rights-28676>.

51 Noralla, Nora. “The Forgotten Islamic Human Rights Document.” OpenGlobalRights, September 1, 2021. <https://www.openglobalrights.org/the-forgotten-islamic-human-rights-document/>.



CHAPTER II: REGIONAL HUMAN RIGHTS SYSTEMS

A. The Inter-American Human Rights System

1. Introduction

The Inter-American Human Rights System (the Inter-American System) was established by the Organization of American States (OAS) in 1948 with the adoption of the OAS Charter and the American Declaration of the Rights and Duties of Man, making it the oldest still active human rights system today.⁵² Since 1948, several treaties have been adopted to strengthen the System, including [the American Convention on Human Rights \(1969\)](#), [the Inter-American Convention to Prevent and Punish Torture \(1985\)](#), [Additional Protocol on Economic, Social and Cultural Rights \(Protocol of San Salvador, 1988\)](#), [Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women \(Convention Belém do Pará, 1994\)](#), and [Inter-American Convention Against All Forms of Discrimination and Intolerance \(2013\)](#). States can accept each treaty with separate signing and ratification for each.⁵³

⁵² "The Inter-American Human Rights System." Global Americans, April 15, 2016. <https://theglobalamericans.org/reports/the-inter-american-human-rights-system/>.

⁵³ "Oas :: IACHR :: What Is the IACHR?" OAS. Accessed September 9, 2022. <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp>.

The Inter-American System comprises two main principal bodies: the Inter-American Commission on Human Rights (IACHR), established in 1959, and the Inter-American Court of Human Rights, (IACourtHR), established in 1979.⁵⁴ The IACHR is composed of seven experts, elected by Member States of the OAS. The function of the IACHR is to promote, observe and analyze the human rights situation of Member States of the OAS.⁵⁵ The IACHR's mandate allows it to employ different methods to achieve its goals, those methods include publishing thematic reports and studies, holding thematic hearings on areas of concern, conducting in-country visits, issuing press statements, establishing thematic rapporteurs and, most importantly, receiving petitions.

Petitions can be filed against any state that has ratified any of the aforementioned treaties, most notably the American Convention on Human Rights (the American Convention). Currently, there are 24 active parties to the Convention, and under the procedure governed by the American Convention, any person, group of persons or a NGO on behalf of any of the former may submit a petition to the IACHR alleging violations of the rights enshrined in the treaties governing the Inter-American System.⁵⁶

Upon receipt of the petition, the IACHR requests clarifications from each party, can conduct its investigation, conduct an in-country visit or request further information from the petitioners. After receiving a petition, the IACHR proceeds to assess its admissibility based on the criteria set forth in Articles 46 and 47 of the American Convention, and follows the procedure outlined in Articles 30 and 36 of the Rules of Procedure of the IACHR. Of these criteria, the most crucial is the requirement that the petitioner exhaust all domestic remedies before submitting a petition. After determining admissibility, the IACHR decides on the merits of the petition and issues a merit report as stipulated in Articles 48 and 50 of the American Convention and Articles 37, 38,39, 43, and 44 of the Rules of Procedure of the IACHR. The IACHR issues recommendations in its merit report and conducts a follow-up procedure to ensure the implementation of those recommendations. The procedure can include working meetings or further hearings. The IACHR also allows for a friendly settlement to be reached among both parties and conducts a similar follow-up procedure for friendly settlements.⁵⁷

If States do not comply with the IACHR's recommendations, the IACHR may publish the case or refer it to the IACourtHR. The IACourtHR is based in San Jose, Costa Rica and is composed of seven judges, and convenes in four ordinary sessions annually. Extraordinary sessions take place in different Member States to help with the promotion of the Inter-American System. The IACourtHR has two jurisdictions; contentious jurisdiction and advisory jurisdiction. Currently, contentious jurisdiction is accepted only by 20 countries, whilst, advisory jurisdiction is mandatory for all state parties to the American Convention.⁵⁸

Contentious jurisdiction expands on the individual petition procedures of the IACHR. Decisions made by the IACourtHR are binding and final. If there is a violation, the IACourtHR awards repa-

54 "Inter-American Human Rights System." International Justice Resource Center, January 19, 2021. <https://ijrcenter.org/regional/inter-american-system/>.

55 "Oas :: IACHR :: What Is the IACHR?" OAS. Accessed September 9, 2022. <https://www.oas.org/en/IACHR/jsForm/?File=en/iachr/mandate/what.asp>.

56 Petition and Case System: Informational Brochure. Washington, D.C.: Organization of American States, 2010. <https://www.oas.org/en/iachr/docs/pdf/howto.pdf>

57 Ibid

58 "Annex to the ABC of Human Rights for Development Cooperation. the Inter ..." German Institute for Human Rights, June 2014. https://www.institut-fuer-menschenrechte.de/fileadmin/_migrated/tx_commerce/e-info-tool_the_abc_of_hr_for_dev_coop_the_interamerican_system.pdf.

rations. If the state fails to comply with the judgments, the IACourtHR can issue guidance for the States, conduct further hearings, and request observations from the IACHR. If the State continues to fail to comply, it can refer the case to the Organization of American States General Assembly (OAS GA). Under advisory jurisdiction, any OAS Member State or body can request an interpretation of any of the treaties that make up the Inter-American System. Moreover, Member States can request an advisory opinion on the compatibility of domestic norms with the instruments of the Inter-American System. Advisory opinions are not legally binding, but are considered an important mechanism of interpretation of different issues and can guide future IACourtHR judgments.⁵⁹

Provisional measures can be adapted by request of the IACHR and adopted by the IACourtHR, even when cases have not yet entered the jurisdiction of the IACourtHR. Those measures can be implemented in cases of extreme gravity, urgency, and the risk of irreparable harm. The procedure is meant to prevent irremediable harm to a person's right to life or personal integrity.⁶⁰

2. Gender Identity in the system

2.1. Case Law and Judicial Opinions

Development of SOGI rights in the Inter-American System has been taking place since the 1990s and accelerated in the past 20 years. The American Convention does not make direct reference to SOGI rights; however, over the years, the IACHR and IACourtHR have developed case law and thematic reports to extend the protections in the different treaties to LGBTI people.⁶¹ At the same time the IACHR and IACourtHR gave special attention to the issue of gender identity protection and recognized the unique challenges gender diverse and trans people face in order to realize their rights protected by the different treaties of the Inter-American System.⁶²

The first case examined by the IACourtHR regarding SOGI was the case of *Atala Riffo and Daughters v. Chile* in 2012. By denying same-gender couple custody of their children, the IACourtHR found Chile in violation of the plaintiff's rights to equality and non-discrimination, protection of privacy and dignity, rights of the family, the rights of the child, and judicial guarantees of due process.⁶³ The IACourtHR concluded that SOGI are protected under "any other social condition" and as such are considered to be protected categories under Article 1(1) of the American Convention. The IACourtHR stated in its holding: "*the Inter-American Court establishes that the sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by [S]tate authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.*"⁶⁴

59 Ibid

60 "Orders on Provisional Measures." Corteidh.or.cr. The Inter-American Court. Accessed September 9, 2022. https://www.corteidh.or.cr/medidas_provisionales.cfm?lang=en.

61 African Commission on Human and Peoples' Rights, Ending violence and other human rights violations based on sexual orientation and gender identity, 2016, available at: <https://www.refworld.org/docid/5707c8a04.html>

62 Report on Trans and Gender Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights. Inter-American Commission on Human Rights. Special Rapporteurship on Unit Economic, Social, Cultural and Environmental Rights., 2020. <http://www.oas.org/en/iachr/reports/pdfs/TransDESCA-en.pdf>

63 See I/A Court HR, Case of Karen Atala Riffo and daughters v. Chile. Merits, Reparations and Costs. Judgment of 24 February 2012. Series C No. 239. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf

64 Ibid Para 91

Following this case, several SOGI-related cases were reviewed by the IACourtHR. In 2016, in *Duque v. Colombia*, the IACourtHR found that denying same-gender couples' equal access to survivor pensions as their heterosexual counterparts is an act of discrimination.⁶⁵ In the same year, in *Flor Freire v. Ecuador*, the IACourtHR held that the dismissal of the plaintiff from the Ecuadorian army due to accusations of same-sex intimacy is discriminatory. In this case, the IACourtHR developed the protection of people who are perceived to be LGBTI, as the plaintiff denied that he was gay throughout the case.⁶⁶ Also, in the same year, the IACHR found in an admissibility report on a petition filed by Venezuelan activist, Tamara Hernández, that the States are obligated under the American Convention to provide trans people with an accessible and clear legal gender recognition mechanism.⁶⁷

In 2021, *Vicky Hernández et al. v. Honduras*, was a case regarding the death of a trans woman who was also a sex worker during a curfew imposed by Honduras in 2009. The IACourtHR concluded that Honduras was not only responsible for her death but also failed to properly investigate the incident. The IACourtHR concluded that the plaintiff's right to life, personal integrity, and her right to gender identity, as well as, her relatives' right to a life free of violence were violated. The IACourtHR also extended the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) to include trans women in a judicial precedent, as previous cases only had cis-gender women as plaintiffs.⁶⁸

In 2017, the IACourtHR issued the historic Advisory Opinion 24/17 (AO 24/17). The Opinion was requested by Costa Rica in 2016 to clarify current points under the American Convention:

(i) Whether states must "recognize and facilitate the name change of an individual in accordance with his or her gender identity";

(ii) Whether the lack of administrative procedures for name change in such circumstances could be considered contrary to the American Convention on Human Rights;

(iii) Whether the American Convention requires states to recognize all patrimonial rights that derive from a same-sex relationship; and

(iv) Whether there must be a specific mechanism to govern relationships between persons of the same sex for the state to recognize all the economic rights that derive from that relationship."⁶⁹

In its opinion, the IACourtHR concluded that gender identity is an essential and integral element of one's identity and linked the lack of recognition of one's gender identity by the state to limitations on trans people's rights such as enjoyment of life, human dignity, right to a name and freedom of torture. The IACourtHR found that providing trans individuals with accessible means to reflect their gender identity in official papers e.g., identifying photographs and gender markers is an extension

65 IACourtHR Case of *Duque v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 26, 2016. Series C No. 310.

66 IACourtHR, Case of *Flor Freire v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2016. Series C No. 315.

67 IACHR Report 66/16. Petition 824-12 Admissibility. Tamara Mariana Adrián Hernández. Venezuela. December 6, 2016, para 26

68 IACourtHR, INTER-AMERICAN COURT OF HUMAN RIGHTS VICKY HERNÁNDEZ ET AL. V. HONDURAS. Preliminary Objection, Merits, Reparations and Costs. JUDGMENT OF MARCH 26, 2021.

69 Contesse, Jorge. "The Inter-American Court of Human Rights' Advisory Opinion on Gender Identity and Same-Sex Marriage." ASIL, July 26, 2018. <https://www.asil.org/insights/volume/22/issue/9/inter-american-court-human-rights-advisory-opinion-gender-identity-and>.

of the non-discrimination clause in Article 1(1) of the American Convention. The IACourtHR stated in its concluded remarks:

“gender identity [is] the internal and individual experience of gender as each person feels it, which may or may not correspond to the sex assigned at birth... [S]ex, together with the socially constructed identities, attributes and roles that are ascribed to the biological differences regarding the sex assigned at birth, far from constituting objective and unchangeable characteristics of the civil status that individualizes a person – for these being a physical or biological fact – are merely characteristics that depend on the subjective appreciation of the person concerned, and are based on the construction of a self-perceived gender identity dependent on the free development of the personality, sexual self-determination, and the right to privacy. Consequently, those who decide to assume this self-perceived gender identity, are the holders of legally protected interests which cannot be subject to any restriction based merely on the fact that society as a whole does not share specific singular lifestyles, due to fears, stereotypes, and social and moral prejudices which have no reasonable basis.”⁷⁰

The IACourtHR added that the procedure to change one’s name to reflect their gender identity should be clear, accessible, free, quick, and confidential. The procedure should be based on self-identification and free consent of the person without requiring medical or psychological certificates or other documents, and without requiring unwarranted medical intervention such as surgical or hormonal intervention. The IACourtHR also held that the concept of family should be broadly defined to include same-gender families; those families should receive equal treatment to their heterosexual counterparts.⁷¹

2.2. Thematic Reports

In addition to this case-law framework, the IACHR has been engaging on SOGI rights on other fronts. In 2011, the IACHR created a special LGBTI unit to monitor the situation of SOGI rights in OAS Member States. Two years later the unit was transformed to what it is now the Rapporteurship on the Rights of LGBTI Persons. The IACHR has issued two thematic reports on SOGI: 1. Violence against lesbian, gay, bisexual, trans and intersex persons in the Americas in 2015 and 2. Report on Trans and Gender-Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights in 2020. In addition to those two SOGI-focused reports, SOGI was present in other general reports by the IACHR including Criminalization of Human Rights Defenders (2016), Legal Standards: Gender Equality and Women’s Rights (2015), and Access to Information, Violence against Women, and the Administration of Justice (2015).⁷²

The 2020 report focused solely on gender identity, reflecting the urgency of addressing the discrimination and violence trans and gender-diverse people endure. The report is the most recent of different actions by the IACHR to promote the rights of trans and gender-diverse people among OAS Member States. Apart from the case law, the IACHR has been actively issuing statements, press releases, country visits, and joint letters to address the issue.⁷³ Unlike other human rights systems,

70 “Inter-American Court of Human Rights Affirms Rights Related to Sexual Orientation, Gender Identity and Gender Expression.” ESCR, November 24, 2017. <https://www.eschr-net.org/caselaw/2018/advisory-opinion-gender-identity-equality-and-non-discrimination-same-sex-couples-2017>.

71 Ibid

72 Thematic Reports - OAS.Rapporteurship on the Rights of LGBTI Persons » Reports » Thematic Reports. Accessed September 9, 2022. <https://www.oas.org/en/iachr/lgtbi/reports/thematic.asp>.

73 “Statement on the Occasion of International Transgender Day of Visibility, the IACHR and a UN Expert Urge States to

the IACHR has acknowledged the diverse gender expressions of people as “it has indicated that the term “trans person” is the “umbrella term often used to describe the different variants of gender identity”. For the IACHR, gender identity can be binary (trans feminine and trans masculine), non-binary, genderqueer, indigenous identities such as *Muxhe* in South of Mexico, *Wigunduguid* identity from the Kuna indigenous people in Panama, and *Two-Spirit* man or woman in Canada and the US.⁷⁴

In the 2020 report, the IACHR presented an in-depth analysis of multi-layered intersectional areas of discrimination and violence trans and gender-diverse people face. The IACHR’s findings included the impact of the lack of access to gender-affirming health care on trans people in the region, as it concluded that most trans people are forced to undertake risky underground operations in the absence of official gender-affirming health care mechanisms which is a violation of their rights, specifically the right to health and enjoyment of life.⁷⁵

The IACHR also found that trans and gender-diverse people face structural barriers not experienced by others in practicing their rights and accessing housing, education, and employment. The IACHR also denounced provisions that include vague terminology such as “public morals” in some OAS members, that have a negative impact on the livelihoods of trans and gender-diverse people.⁷⁶ The IACHR called on countries to pass laws that will meet their obligations under the American System treaties and will address these issues, as well as, raise awareness among the general population on trans and gender-diverse people’s rights. The IACHR pointed out good examples by some OAS Member States who have been progressing on the issue in the right direction, most notably, Argentina and Uruguay.⁷⁷

2.3. Resolutions by the OAS General Assembly

The OAS has been a fundamental force of change towards the advancement of SOGI rights among its members. In 2018, the OAS GA issued its first SOGI-focused resolution, which was “concerned about acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity.” Following resolutions expanded on the first one and broadened it: in 2009, the OAS GA condemned the violence and discrimination LGBTI people face and called for States to investigate those acts; in 2010, the resolution expanded to call for “ways to combat discrimination of persons because of their sexual orientation and gender identity”; in 2012, the OAS GA asked the IACHR to conduct a study on laws that have a negative impact on the livelihoods of LGBTI people and to issue a guide for States on the decriminalization of same-sex relations.⁷⁸ The OAS GA also adapted two new treaties that for first time included SOGI as a ground for protection in its wording; the Inter-American Convention on Protecting of the Human Rights of Older Persons (2015) and the Inter-American Convention against All Forms of Discrimination and Intolerance (2013).⁷⁹

Guarantee the Full Exercise of the Human Rights of Transgender Persons.” OHCHR, March 29, 2018. <https://www.ohchr.org/en/statements/2018/03/statement-occasion-international-transgender-day-visibility-iachr-and-un-expert>.

74 Report on Trans and Gender Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights. Inter-American Commission on Human Rights. Special Rapporteurship on Unit Economic, Social, Cultural and Environmental Rights., 2020. <http://www.oas.org/en/iachr/reports/pdfs/TransDESCA-en.pdf>

75 Ibid

76 Report on Trans and Gender Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights. Inter-American Commission on Human Rights. Special Rapporteurship on Unit Economic, Social, Cultural and Environmental Rights., 2020. <http://www.oas.org/en/iachr/reports/pdfs/TransDESCA-en.pdf>

77 Ibid

78 “Joint Thematic Dialogue on Sexual Orientation, Gender Identity and Intersex Related Issues.” OHCHR, 2018. https://waps.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/ReportSecondTrilateralDialogue_InterAmericanAfricanExperts_EN.pdf.

79 “Joint Thematic Dialogue on Sexual Orientation, Gender Identity and Intersex Related Issues.” OHCHR, 2018.

3. Challenges and limitations

On different occasions, the IACHR has pointed out that the lack of data on violence and discrimination against trans and gender diverse people imposes a challenge on tracking, monitoring and improving the human rights of trans and gender-diverse people.⁸⁰ The IACHR urged States to provide trans and gender-diverse victims with an easy mechanism to report the acts of discrimination and violence they faced and to actively collect and analyze data in this regard.⁸¹

Colonial legacy plays a role in the limitation of SOGI rights in the region and causes a divide among OAS Member States. By examining countries that maintain laws that criminalize same-sex activities, for example, we find that almost all have a British colonial legacy, e.g. Antigua and Barbuda, Barbados, and Jamaica.⁸² On the other hand, countries with Spanish and Portuguese colonial legacy have been implementing progressive policies modeled after the Inter-American System recommendations for SOGI: Uruguay's Comprehensive Trans Persons Act of 2018; Argentina's Gender Identity Law of 2012; Order 7-2018 of the Supreme Tribunal of Elections, the State of Costa Rica, which allowed trans people access to legal gender recognition; Chile's Gender Identity Law of 2019. The IACHR is trying to mainstream progressive gender identity laws by highlighting the successes of these countries, while denouncing practices by other countries in the region that have a negative impact on SOGI rights⁸³.

Ratification of treaties is still an issue in the Inter-American System, as none of the 35 OAS members have ratified all human rights treaties in the Inter-American System. Moreover, the jurisdiction of the IACHR and IACourtHR are not accepted by many OAS countries including the US and Canada. This together with the colonial legacy have created a two-tier human rights system among OAS members, with one camp being active with the Inter-American System's bodies and another camp ignoring its existence.

https://waps.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/ReportSecondTrilateralDialogue_InterAmericanAfricanExperts_EN.pdf.

80 Report on Trans and Gender Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights. Inter-American Commission on Human Rights. Special Rapporteurship on Unit Economic, Social, Cultural and Environmental Rights., 2020. <http://www.oas.org/en/iachr/reports/pdfs/TransDESCA-en.pdf>

81 Ibid

82 "Joint Thematic Dialogue on Sexual Orientation, Gender Identity and Intersex Related Issues." OHCHR, 2018. https://waps.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/ReportSecondTrilateralDialogue_InterAmericanAfricanExperts_EN.pdf.

83 Report on Trans and Gender Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights. Inter-American Commission on Human Rights. Special Rapporteurship on Unit Economic, Social, Cultural and Environmental Rights., 2020. <http://www.oas.org/en/iachr/reports/pdfs/TransDESCA-en.pdf>



B. The African Human Rights System

1. Introduction

The African Human Rights System (The African System) is considered to be the youngest among the regional judicial or quasi-judicial bodies. The system was established in 1981 when the African Charter on Human and Peoples' Rights was approved by members of the Organization of African Unity (OAU), now called the African Union (AU).⁸⁴ The system evolved and today it includes different subsidiary treaties and protocols such as [the African Charter on the Rights and Welfare of the Child \(ACRWC\)](#) passed in 1999 and Protocol to [the African Charter on Human and Peoples' Rights on the Rights of Women in Africa](#) (Maputo Protocol) passed in 2003.⁸⁵

The African System also includes various supervisory bodies, most notably, the African Commission on Human and Peoples' Rights (ACHPR) established in 1987, and the African Court on Human and Peoples' Rights (AfCHPR) established in 2006. The ACHPR is considered the core body of the African system, as every country that ratified the Charter acknowledges its jurisdiction over the implementation of the Charter, unlike the African Court (AfCHPR), where additional ratification is needed to acknowledge its jurisdiction.⁸⁶

84 "African Human Rights System." International Justice Resource Center, December 10, 2021. <https://ijrcenter.org/regional/african/>.

85 "OAU/AU Treaties, Conventions, Protocols & Charters." OAU/AU Treaties, Conventions, Protocols & Charters | African Union. Accessed September 1, 2022. <https://au.int/en/treaties/1164>.

86 A Guide to the African Human Rights System: Celebrating 30 Years since the Entry into Force of the African Charter

Currently, all countries on the continent have ratified the African Charter, with the exception of Morocco. Thus, the ACHPR has jurisdiction over the implementation of the Charter in almost all countries in Africa.⁸⁷ The ACHPR consists of 11 members elected by the African Union (AU) assembly and nominated by AU members. Article 45 of the Charter establishes the mandate of the ACHPR as:

“• Promotion of human and peoples’ rights The Commission carries out sensitization, public mobilization and information dissemination through seminars, symposia, conferences and missions.

• Protection of human and peoples’ rights The Commission ensures protection of human and peoples’ rights through its communication procedure, friendly settlement of disputes, state reporting (including consideration of NGOs’ shadow reports), urgent appeals and other activities of special rapporteurs and working groups and missions.

• Interpretation of the Charter the Commission is mandated to interpret the provisions of the Charter upon a request by a state party, organs of the AU or individuals. No organ of the AU has referred any case of interpretation of the Charter to the Commission. However, a handful of NGOs have approached the Commission for interpretation of the various articles of the Charter. The Commission has also adopted many resolutions expounding upon the provisions of the Charter.”⁸⁸

The African Charter establishes different methods the ACHPR can engage with state and non-state actors to ensure the implementation of the Charter. The ACHPR accepts complaints or, as it is officially called, “communications”. The ACHPR can receive communications from a state against another state in what is called “inter-state complaints” or by an individual or NGO against a state in what is called “individual complaints”.⁸⁹ The admissibility criteria are established by article 56 of the African Charter:

“Before any communication is declared admissible by the Commission, it must comply with all the following requirements:

- Communications must indicate their author(s)*
- Communication must be compatible with the AU Constitutive Act and the African Charter*
- Communication must not be written in disparaging or insulting language*
- Communication must not be based exclusively on a media report*
- Domestic remedies must have been exhausted unless the domestic procedure has been unduly prolonged*
- Communication must be submitted within a reasonable time after exhausting local remedies*
- The issues raised in the communication must not have been settled under other UN or AU procedures”⁹⁰*

The ACHPR also receives periodic reports from Member States to evaluate their progress in the implementation of the African Charter. The ACHPR engages with human rights defenders (HRDs) and

on Human and Peoples’ Rights, 1986-2016. Pretoria, South Africa: Pretoria University Law Press PULP, 2016. <https://www.corteidh.or.cr/tablas/31712.pdf>

87 Ibid

88 “African Commission on Human and Peoples’ Rights.” African Commission on Human and Peoples’ Rights Mandate of the commission. Accessed September 1, 2022. <https://www.achpr.org/mandateofthecommission>.

89 “African Human Rights System.” International Justice Resource Center, December 10, 2021. <https://ijrcenter.org/regional/african/>

90 African Charter on Human and Peoples’ Rights. Banjul, The Gambia: Secretariat of the African Commission on Human and Peoples’ Rights, 1981 <https://www.achpr.org/legalinstruments/detail?id=49>

non-governmental organizations (NGOs). In addition to submitting individual complaints, NGOs can be granted observer status, submit shadow reports, assist the ACHPR with popularizing concluding observations and monitor States' compliance with the African Charter.⁹¹

Article 46 of the African Charter allows the ACHPR to employ any appropriate method of investigation in carrying out its responsibilities. Thus, over the years, the ACHPR created what is known as "the special mechanisms" to assist it with fulfilling its duties.⁹² Those mechanisms comprise special rapporteurs and working groups and committees. Current special mechanisms include:

- [Committee on the Protection of the Rights of People Living with HIV \(PLHIV\) and Those at Risk, Vulnerable to and Affected by HIV](#)
- [Special Rapporteur on Human Rights Defenders](#)
- [Special Rapporteur on Rights of Women](#)
- [Working Group on Economic, Social, and Cultural Rights](#)⁹³

Article 45 of the African Charter stipulates that the ACHPR may issue resolutions, guidelines, and general comments to assist with the interpretation of the African Charter. The resolutions, guidelines, and general comments are not legally binding to Member States, however, they can guide future complaints received by the ACHPR.⁹⁴

2. Gender Identity in the system

Like other human rights treaties, the African Charter is silent on sexual orientation and gender identity (SOGI). However, not explicitly using those terms does not mean that the rights protected in the African Charter cannot be extended to people with diverse SOGI, as those are fundamental human rights to be enjoyed by all without discrimination.⁹⁵ The rights protected in the African Charter include, but are not limited to, Article 5: Prohibition of Torture and Cruel, Inhuman and Degrading Treatment, Article 16: Right to Health, Article 17: Right to Education, Article 19: Right of All Peoples to Equality and Rights, and Article 22: Right to Economic, Social and Cultural Development.⁹⁶

All those rights are to be read with Article 2 of the African Charter, which is a general anti-discrimination provision stipulating that "all the rights in the African Charter are to be enjoyed without discrimination of any kind."⁹⁷ Article 2 also stipulates that all individuals are "entitled to the rights under the African Charter 'without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.'"⁹⁸

91 "African Commission on Human and Peoples' Rights." African Commission on Human and Peoples' Rights Network. Accessed September 1, 2022. <http://www.achpr.org/network/>.

92 A Guide to the African Human Rights System: Celebrating 30 Years since the Entry into Force of the African Charter on Human and Peoples' Rights, 1986-2016. Pretoria, South Africa: Pretoria University Law Press PULP, 2016. <https://www.corteidh.or.cr/tablas/31712.pdf>

93 Ibid

94 Ibid

95 da Luz Scherf, Erick & Zanatta, Maria. (2021). Health care access by transgender persons in South Africa: gender-based discrimination, human rights violations, and the role of the African human rights system. 10.13140/RG.2.2.22896.58880/1.

96 African Charter on Human and Peoples' Rights. Banjul, The Gambia: Secretariat of the African Commission on Human and Peoples' Rights, 1981 <https://www.achpr.org/legalinstruments/detail?id=49>

97 Ibid

98 Ibid

The choice of wording in the African Charter also indicates that the African Charter shall provide protections to all Africans without discrimination, for example, “every individual” is mentioned in 12 provisions of the African Charter. Moreover, using phrases like “such as” and “or other status” indicates that grounds for non-discrimination are not exhaustive.⁹⁹ Moreover, in the Maputo Protocol, the scope of protection is extended to all women in Africa; the protocol used the word “gender” instead of sex” in defining whom it considers a woman; “persons of the female gender.”

The ACHPR has already interpreted the African Charter following that logic, for example, in *Purohit and Another v The Gambia (2001)*, the ACHPR extended the rights to people with disability, especially people with mental health issues.¹⁰⁰ While in *the Social and Economic Rights Action Centre (SERAC) v. Nigeria (2001)*, the ACHPR established that individuals have the right to shelter and food despite those rights not being explicitly enumerated in the African Charter.¹⁰¹

Articles 9, 10, and 11 of the African Charter protect freedom of assembly and expression, the ACHPR interpreted those articles in its “Declaration of Principles on Freedom of Expression in Africa” and found that the States must “promote diversity” of ideas and beliefs and also to protect the interests of “vulnerable or marginalized groups” in promoting their ideas.¹⁰²

In 2014, the ACHPR issued its most comprehensive resolution on SOGI rights. In Resolution 275, the ACHPR interprets the entirety of the African Charter in conjunction with the non-discrimination clause in Article 2. In the resolution, the ACHPR denounced acts of violence based on SOGI including: extrajudicial killing, corrective rape, arbitrary arrest, extortion, and physical assault¹⁰³, and finds that those acts violate article 3 (equal protection of the law); article 4 (respect of life and the integrity of the person); and article 5 (prohibition of torture and other cruel, inhuman and degrading treatment or punishment) of the African Charter.¹⁰⁴ The ACHPR also called on the States to ensure a safe environment for SOGI human rights defenders working on these issues, as well as noting that States have an obligation under the African Charter to combat those acts whether it is happening by state or non-state actors.¹⁰⁵

The ACHPR also contextualized the resolution when it used the following wording “the basis of their real or imputed Sexual Orientation or Gender Identity.” Since in Africa, a lot of LGBTI are not out with their identities, it was important to add the word “imputed” to include violence against those who may not be out or are yet to identify as LGBTI due to the social stigma, violence or discrimination that they may face. This is crucial in the African context, as one can face violence and discrimination because of their perceived sexual orientation or gender identity even if they do not identify as such, as gender stereotypes and sexist beliefs often play a role in this violence and discrimination.

99 African Commission on Human and Peoples’ Rights, Ending violence and other human rights violations based on sexual orientation and gender identity, 2016, available at: <https://www.refworld.org/docid/5707c8a04.html>

100 Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII

101 Communication 155/96

102 <http://hrlibrary.umn.edu/achpr/expressionfreedomdec.html>

103 Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples’ Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia. <http://hrlibrary.umn.edu/achpr/expressionfreedomdec.html>

104 African Commission on Human and Peoples’ Rights, Ending violence and other human rights violations based on sexual orientation and gender identity, 2016, available at: <https://www.refworld.org/docid/5707c8a04.html>

105 Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, adopted at the 55th Ordinary Session of the African Commission on Human and Peoples’ Rights in Luanda, Angola, 28 April - 12 May 2014. <https://www.achpr.org/sessions/resolutions?id=322>

3. Challenges and Limitations

Extending protections under the African Charter for trans and gender-diverse people is still limited. Sources of those limitations can be split into two: specific and general. General limitations facing gender identity are similar to other human rights issues and are often caused by political and administrative issues, such as: States not submitting their reports for review, as all Member States have at least one delayed report; lack of implementation of the ACHPR's resolutions, guidelines, recommendations, or findings; the politicization of the ACHPR, as AU political organs have on occasions worked to undermine the ACHPR independence.¹⁰⁶

Specific issues that are unique to the issue of gender identity include: the lack of complaints submitted to the ACHPR for review; lack of clear direct interpretation of gender identity as a specific protected category; the focus of the ACHPR's work can be more on sexual orientation with gender identity being an afterthought; and debate among key stakeholders of the concept of trans and gender-diverse people rights being a foreign one and "Un-African".

Article 27(2) provides that limitations of rights by States shall be evaluated by the ACHPR on a case-by-case basis. The preamble provides that "the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights."¹⁰⁷ There has been strong debate among AU Member States on the "African-ness" of SOGI rights, as officials like to label LGBTI people as a western product and Un-African.¹⁰⁸ Morality is mentioned in Article 12 and 27(2) as a ground to restricting rights, due to the vague definition of morality, it can be used as a ground to restrict SOGI rights, citing the will of the moral majority.

The ACHPR is yet to receive any communications on SOGI rights to examine those arguments for limitations. However, in other non-SOGI communications, the ACHPR found that limitations on rights cannot take place solely from popular will, even when it is reelected by a legislative assembly. In *Legal Resources Foundation v Zambia* (2001) the ACHPR stated in its holding: "*Justification ... cannot be derived solely from popular will, as this cannot be used to limit the responsibilities of states parties in terms of the Charter.*"¹⁰⁹

The case of granting observer status to the Collation of African Lesbians (CAL) reflects the limitation of rights that LGBTI people can face. In 2010, CAL applied to be granted an observer status with the ACHPR. The ACHPR refused CAL's application, citing "*i) CAL's objectives were not consonant with the AU Constitutive Act and African Charter; and (ii) the Charter does not explicitly recognize the rights to non-discrimination on sexual orientation or gender identity, or the rights of LGBTI persons.*" In 2015, CAL reapplied and in a positive sign of change of attitude towards SOGI rights, the ACHPR granted CAL an observer status.¹¹⁰

106 Atrakouti, Amal. "Why Are African Countries Undermining the Rights Bodies They Created?" CIVICUS Global Alliance, May 24, 2021. <https://www.civicus.org/index.php/media-resources/op-eds/5086-why-are-african-countries-undermining-the-rights-bodies-they-created>.

107 African Charter on Human and Peoples' Rights. Banjul, The Gambia: Secretariat of the African Commission on Human and Peoples' Rights, 1981 <https://www.achpr.org/legalinstruments/detail?id=49>

108 McAllister, John. "Tswanarising Global Gayness: The 'unAfrican' Argument, Western Gay Media Imagery, Local Responses and Gay Culture in Botswana." *Culture, Health & Sexuality* 15 (2013): S88–101. <http://www.jstor.org/stable/23524931>.

109 African Commission on Human and Peoples' Rights, Ending violence and other human rights violations based on sexual orientation and gender identity, 2016, available at: <https://www.refworld.org/docid/5707c8a04.html>

110 Ibid

However, this decision was met with outrage by AU's political organs. The ACHPR legally reports to the AU Assembly of the Head of States and Governments (the AU Assembly), as it is established within the political system of the AU. Some or most Head of States in Africa are notorious for their anti-SOGI stands, with some being supporters of the notion of the Un-“Africanness” of SOGI rights and LGBTI people being a danger to morality in society.¹¹¹ Thus, it should not come as a surprise that the AU Assembly has taken offense to the ACHPR granting observer status to CAL. In 2015, the executive council of the AU Assembly stated the following:

“Request[ed] the African Commission to ‘take into account the fundamental African values, identity, and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values’; and to ‘review its criteria for granting Observer Status to NGOs’ and to ‘withdraw the observer status granted to the Organization called CAL, in line with those African Values.’”¹¹²

Following this backlash, the ACHPR was asked to clarify the criteria it uses to grant observer status. Finally, in 2018, the ACHPR bowed to political pressure and revoked CAL's observer status in an act that undermined the independence of the ACHPR and reflected the limitation of the ACHPR's work on SOGI rights within the greater political system of the AU.¹¹³

Every two years, States are required to submit reports on the progress of the implementation of the African Charter. NGOs are also invited to submit a shadow report to assist the ACHPR with its assessment of the state's report. On different occasions, ACHPR Commissioners directed questions to States regarding the treatment of people of diverse sexual orientations but none was directed regarding the status of gender-diverse people. In 2001, the ACHPR asked Namibia about the treatment of lesbian and gay people in the country, and in 2005, the ACHPR asked about the possibility of same-sex marriage in South Africa.¹¹⁴

In its general comments on articles 14 (1) (E) and (D), the ACHPR interprets the Maputo Protocol within the anti-discrimination clause to include women with diverse sexual orientations, however, it does not mention feminine trans identities as a specific category of protection under the protocol.¹¹⁵ In 2010, the ACHPR established the Committee on the Protection of the Rights of People Living with HIV and Those at Risk, Vulnerable to and Affected by HIV, mandated to *“integrate agender perspective and give special attention to persons belonging to vulnerable groups, including women, children, sex workers, migrants, men having sex with men, intravenous drugs users and prisoners”*. In 2006, during the Special Summit of the African Union on HIV/AIDS, the AU established a common understanding and position on HIV and identified “men who have sex with men” as a vulnerable group.¹¹⁶ Despite various research identifying trans people as a key population for HIV risk globally and on

111 Schäfer Rita, and Eva Range. *The Political Use of Homophobia Human Rights and Persecution of LGBTI Activists in Africa*. Berlin: Frierich-Ebert-Stiftung, Africa Department, 2014.

112 EXECUTIVE COUNCIL Twenty-Seventh Ordinary Session 7 – 12 June 2015 Johannesburg, SOUTH AFRICA. https://au.int/sites/default/files/decisions/31762-ex_cl_dec_873_-_898_xxvii_e.pdf

113 Ijrc. “African Commission Bows to Political Pressure, Withdraws NGO's Observer Status.” International Justice Resource Center, February 10, 2020. <https://ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/>.

114 African Commission on Human and Peoples' Rights, *Ending violence and other human rights violations based on sexual orientation and gender identity*, 2016, available at: <https://www.refworld.org/docid/5707c8a04.html>

115 General Comments on Article 14 (1) (d) and (E) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Banjul, The Gambia: African Commission on Human and Peoples' Rights, 2013. https://www.achpr.org/public/Document/file/English/achpr_instr_general_comments_art_14_rights_women_2012_eng.pdf

116 African Commission on Human and Peoples' Rights, *Ending violence and other human rights violations based on sexual orientation and gender identity*, 2016, available at: <https://www.refworld.org/docid/5707c8a04.html>

the African continent, trans people are yet to be identified by the AU or the ACHPR as a vulnerable group in relation to HIV risk.¹¹⁷

The ACHPR is yet to examine transgender identities on their merit in relation to the African Charter. This is due to the lack of trans-specific complaints submitted to the ACHPR . Several obstacles and challenges may explain this absence, most notably, the criteria of admissibility of a complaint. Under article 56, *“Domestic remedies must have been exhausted unless the domestic procedure has been unduly prolonged”*. This forces applicants to engage in a lengthy, expensive, and mentally demanding litigation process nationally, before they can submit a complaint with the ACHPR . Other criteria stating that *“Communications must indicate their author(s) even if they requested anonymity”* can deter individuals from submitting a complaint, out of fear of being outed or being targeted for reprisal due to their involvement with the complaint.¹¹⁸ Other issues that can explain the lack of transgender-related complaints are the technical knowledge needed to submit such complaints, the expenses related to the complaint, the lengthy process of examining a complaint and the mental distress an individual may have to go through during the process.

117 Jobson GA, Theron LB, Kaggwa JK, Kim HJ. Transgender in Africa: invisible, inaccessible, or ignored? SAHARA J. 2012;9(3):160-3. doi: 10.1080/17290376.2012.743829. PMID: 23237071.
118 <https://www.corteidh.or.cr/tablas/R21582.pdf>



C. The European Human Rights System

1. Introduction

The European Human Rights System (European System) can be divided into two: one under the framework of the Council of Europe (CoE); and the other under the framework of the European Union (EU). In this section, we will focus on the CoE, as it is more prominent on the European continent.¹¹⁹

The CoE was founded in 1949 in the aftermath of World War II. It currently has 46 members (Russia's membership was suspended after the invasion of Ukraine in 2022), and of the 46 members, 27 are members of the EU. In 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR), was adopted by the CoE. Ratifying the ECHR was a condition to accepting members into the CoE, thus, all members of the CoE have ratified the ECHR.¹²⁰ Other treaties were added to complement the ECHR including:

- [European Social Charter](#) (1961)
- [Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment](#) (1987)
- [Convention on Action against Trafficking in Human Beings](#) (2005)

119 Guides De Recherche · Research Guides: Human Rights: European Human Rights System. European Human Rights System - Human Rights - Guides de recherche · Research guides at University of Ottawa. Accessed September 16, 2022. <https://uottawa.libguides.com/c.php?g=265233&p=1773746>.

120 "About the Council of Europe." Council of Europe Office in Yerevan. Accessed September 16, 2022. <https://www.coe.int/en/web/yerevan/the-coe/about-coe>.

The core of the CoE is the European Court of Human Rights (ECtHR). Founded in 1959, the ECtHR is tasked with interpretation and monitoring of the enforcement of the ECHR. The ECtHR has 47 judges, one per member state and elected by the Parliamentary Assembly of the Council of Europe. The ECtHR is structured into five sections, each has four chambers with seven judges each. The Court has a grand chamber which operates as the supreme judicial body of the ECtHR and is composed of 17 judges.¹²¹

The ECtHR has two jurisdictions: continuous and advisory. Continuous is defined by Art. 34 of Protocol No. 11 to the ECHR and gives the ECtHR jurisdiction to receive and review individual applications: *“The Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.”*¹²² The ECtHR’s judgments on applications are final and legally binding. Advisory jurisdiction gives the ECtHR the ability to issue advisory opinions on abstract questions regarding the interpretation of the ECHR. While those opinions are not legally binding, they can provide a guide to countries when implementing the ECHR.¹²³

The admissibility criteria for applications include 1. the exhaustion of all domestic remedies, 2. applications must be submitted within six months after a final verdict received from domestic courts, and 3. if the application is compatible with the provisions of the ECHR or the Protocols thereto. Admissibility is considered a big hurdle, as a substantial majority of the applications submitted to the ECtHR are deemed inadmissible for failing to meet one condition or more.¹²⁴

If the application meets the admissibility criteria, it will be referred to one of the ECtHR’s five sections to be examined on its merits. Before issuing a judgment on merit, the ECtHR can attempt to facilitate a friendly settlement between both parties, and if no friendly settlement is reached, a chamber will review the application and issue a judgment. There is a three-month period before the chamber’s judgment on merit becomes final, during which, the parties of the applications may request for the judgment to be reviewed by the grand chamber. The ECtHR can issue an interim measurement for exceptional cases, where the applicant may face harm or danger while the application is reviewed by the ECtHR.¹²⁵

Apart from the ECtHR, there are other mechanisms established by the CoE to monitor and promote human rights among its members. The European Commission against Racism and Intolerance (ECRI), is a mentoring body specialized in issues related to xenophobia, racism, and SOGI-related discrimination, among others. The European Commissioner on Human Rights cooperates with other human rights offices in regional and international bodies, e.g. UN and OSCE, to issue thematic reports and conduct in-country visits. The Commissioner’s office works on raising awareness regarding human rights, spreading human rights education, and identifying legal gaps in the human rights implementation of each country of the CoE. The Committee for the Prevention of Torture

121 Annex to the ABC of Human Rights for Development Cooperation European Human Rights System. Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, December 2013. https://www.institut-fuer-menschenrechte.de/fileadmin/_migrated/tx_commerce/e-info-tool_the_abc_of_hr_for_dev_coop_the_european_system.pdf.

122 The European Convention on Human Rights. Strasbourg: Council of Europe, Directorate of Information, 1968.

123 “European Court of Human Rights.” International Justice Resource Center, November 1, 2021. <https://ijrcenter.org/european-court-of-human-rights>.

124 Thavard, Blaga. “The Admissibility Hurdle.” *Verfassungsblog*, May 27, 2021. <https://verfassungsblog.de/the-admissibility-hurdle/>.

125 “European Court of Human Rights.” International Justice Resource Center, November 1, 2021. <https://ijrcenter.org/european-court-of-human-rights>.

and Inhuman or Degrading Treatment or Punishment (CPT) and the European Committee of Social Rights (ECSR) are tasked with monitoring the implementation and violations of the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the European Social Charter respectively.¹²⁶

2. Gender identity in the system

2.1. European Court of Human Rights (ECtHR) Case Law

The CoE has been engaging positively in the promotion and protection of the rights of trans and gender-diverse people. The ECtHR has had the opportunity to develop one of the most comprehensive bodies of case law on the issue of gender identity. Since the 1980s, the ECtHR has examined key issues for trans and gender-diverse people: legal gender recognition, the right to marry, equality before the law, transgender parenthood, and the right to access health care.

→ Legal Gender Recognition

In *B v France* (1992), the ECtHR held for the first time that a violation occurred against a trans person under Article 8 (Right to Respect for Private and Family life) of the ECHR. The ECtHR found France's refusal to amend the official documents to reflect a trans person's true identity as a violation, as it put in the application, "in a daily situation which was not compatible with the respect due to her private life."¹²⁷ In *Goodwin v United Kingdom* (2002), the ECtHR issued a landmark judgment, affirming that trans people have a general entitlement to legal gender recognition. The ECtHR held that the UK violated Article 8 and Article 12 (Right to Marry) by refusing to grant the applicant legal gender recognition which led to social and legal difficulties in her daily life, including accessing early pension benefits for women. The ECtHR implemented its fair balance doctrine and determined that it is now in favor of the applicant and not the state, as "*the clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.*"¹²⁸

The medical requirements to receive legal gender recognition were examined in more recent cases. In *P, Garc, on, and Nicot v. France* (2017), the applicants complained about the two main conditions French law required for individuals to receive legal gender recognition: proof of 'syndrome of transsexuality' and the 'irreversibility of the transformation of the bodily appearance' to the 'opposite' sex. The ECtHR found that forcing transpeople to undergo surgical or hormonal sterilization is a violation of the right to physical and moral integrity under Article 8 of the ECHR.¹²⁹ The ECtHR also concluded in its assessment that the state did not strike a fair balance here and "*stressed the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8*" and that the right to gender identity and personal development is a fundamental aspect of the right to respect for private life. This finding leads it to conclude that the respondent State had only a narrow margin of appreciation in the present case."¹³⁰

126 "Tarlton Law Library: Human Rights Protection: The European System." The European System - Human Rights Protection - Tarlton Law Library at Tarlton Law Library. Accessed September 16, 2022. <https://tarlton.law.utexas.edu/c.php?g=457708&p=3128757>.

127 *B v France*, Merits, App No 13343/87, A/232-C, (ECtHR 25th March 1992)

128 *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002)

129 *A.P., Garc, on, Nicot v France* App no 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017)

130 *Ibid*, para 123

In *X and Y v. Romania* (2021), the Romanian Courts refused to grant legal gender recognition to two trans men as they had not undergone gender affirming surgery. The ECtHR cited that the ECtHR allowed Member States to have such requirements for legal gender recognition. The ECtHR built on its previous “impossible dilemma” doctrine found in *P., Garc, on, and Nicot v. France* (2017), and found that requiring trans people to undergo gender affirming surgery against their will is a violation of Article 8. The ECtHR noted that the legal gender recognition process should be “*quick, transparent and accessible.*” When implementing its fair balance doctrine, the court found that society has no interest in forcing trans people to undergo the surgery and noted that the surgery condition has been increasingly abolished among the CoE Member States.¹³¹

→ Access to Gender-Affirming Health Care

In *L. v. Lithuania* (2007), the ECtHR held that the failure of Lithuanian authorities to provide access to gender affirming surgery (note that the Court uses “sex reassignment surgery” terminology instead) is a violation of Article 8. The ECtHR noted that there is a legislative gap, as Lithuanian law requires trans people to undergo the surgery to receive legal gender recognition. By not providing mechanisms to access the surgery, trans people are left in great distress due to the uncertainty and inability to access the surgery.¹³²

In *Van Kück v. Germany* (2003), the applicant complained about the unfairness of the German Court System in dealing with her complaint against a private insurance company that refused to reimburse her for her sex reassignment surgery. The German Courts dismissed her claim arguing that she had deliberately caused her condition. The ECtHR held that Germany had violated Articles 8 and Article 6 § 1 (Right to a Fair Hearing), and stressed that *gender identity is one of the most intimate private-life matters of a person.*” Adding that the decision to transition should never be viewed as arbitrary.¹³³

A similar judgment was given in *Schlumpf v. Switzerland* (2009). In this case the applicant was denied reimbursement by her insurance for her surgery as she had failed to observe a two-year waiting period and the Swiss Courts upheld the insurance’s decision. The ECtHR concluded that there has been a violation of Article 8 as the Courts failed to consider that the two years waiting period is excessive, especially for the applicant, as she was aged 67.¹³⁴

→ Trans Parenthood

In *A.M. and Others v. Russia* (2021), the applicant was denied her parental rights by Russian Courts after an expert report stated that due to her “disorder”, any contact she has with her children will be harmful to their mental welfare. The ECtHR held that denying a trans person their parental rights solely based on their identity is a violation of both Article 8 and 14. The ECtHR stated in its judgment that “*All the expert reports had also lacked any indication of how the information about the applicant’s gender transition represented a risk to her children’s psychological health and development or any indication of how that risk could have been mitigated.*” The ECtHR emphasized that gender identity is a protected category under Article 14 stating: “*It was clear from the domestic decisions and the judicial proceedings that the influence of the applicant’s gender identity on the assessment of her*

131 *X and Y v. Romania* applications nos. 2145/16 and 20607/16 (ECtHR, 19 June 2021)

132 *L. v. Lithuania* App no 27527/03 (ECtHR, 11 September 2007).

133 *Van Kück v. Germany* No. 35968 (ECtHR, 12 June 2003).

134 *Schlumpf v. Switzerland* App No. 29002/06 (ECtHR, 5 June 2009).

*claim had been a decisive factor leading to the decision to restrict her contact with her children. The applicant had therefore been treated differently from other parents who also sought contact with their estranged children, but whose gender identity matched their sex assigned at birth.*¹³⁵

The terminology of protections under Article 14 was expanded once again in *Identoba and Others v Georgia (2015)*, stating “the Court reiterates that the prohibition of discrimination under Article 14 of the Convention duly covers questions related to sexual orientation and gender identity.” The ECtHR found Georgia violated the ECHR by failing to stop the homophobic and transphobic attack on a civil society demonstration marking the International Day against homophobia and Transphobia.¹³⁶

2.2. Resolutions, Recommendations and Thematic Reports

In 2009, the European Commissioner on Human Rights issued a first-of-its-kind report examining the challenges and barriers trans people face when trying to enjoy their ECHR-protected human rights. In its report “Human Rights and Gender”, the Commissioner called on the States to implement international human rights standards without discrimination based on gender identity and to enact policies that can combat such discrimination.¹³⁷ Building on that report, the Committee of Ministers of the Council of Europe - the Council of Europe’s decision-making body - issued recommendation CM/Rec (2010)5 to combat discrimination based on SOGI. The recommendation called on Member States to “ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity... to ensure respect for the human rights of transgender persons and to promote tolerance towards them”. The recommendation emphasized the need to implement policies that will combat hate speech and ensure access to education, and health for trans people.¹³⁸ In 2014, the Council of Europe Sexual Orientation and Gender Identity Unit was established, which derives its mandate from the recommendation and works with States to strengthen their anti-discrimination frameworks through cooperative training and providing technical assistance.¹³⁹

The Parliamentary Assembly of the Council of Europe (PACE) has 324 representations from the 47 Member States of CoE and works to monitor, investigate, and promote human rights among its members. PACE has been active in advancing trans and gender-diverse people’s rights through resolutions. In 2010, PACE adopted Resolution 1728 on “[Discrimination based on sexual orientation and gender identity](#)”; Resolution 2021 in 2013 on “[Tackling discrimination on the grounds of sexual orientation and gender identity](#)”; Resolution 2048 in 2015 on “[Discrimination against transgender people in Europe](#)”; Resolution 2230 in 2018 on “[Persecution of LGBTI people in the Chechen Republic \(Russian Federation\)](#)”; and Resolution 2418 in 2022 on “[Alleged violations of the rights of LGBTI people in the Southern Caucasus.](#)”

In these resolutions, PACE reaffirmed the rights and protections trans and gender-diverse people enjoy under the ECHR, called on countries to enact effective anti-discrimination policies, provide clear and accessible legal gender recognition mechanisms, respect ECtHR judgments, and address violence against trans and gender-diverse people in specific regions.¹⁴⁰

135 A.M. and Others v. Russia App. 47220/19 (6.7.2021 ECtHR)

136 *Identoba and Others v Georgia* App no 73235/12 (ECtHR 14 April 2015)

137 Human Rights and Gender Identity. Strasbourg: Council of Europe, 2008. <https://rm.coe.int/16806da753>

138 Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010)

139 “Homepage.” Sexual Orientation and Gender Identity. Accessed September 16, 2022. <https://www.coe.int/en/web/sogi>.

140 den, Brink M van, and P. Dunne. Trans and Intersex Equality Rights in Europe - A Comparative Analysis. Utrecht: Universiteit

3. Challenges and Limitations

The ECtHR has been slow to adopt judgments that would advance the rights of trans and gender-diverse people. The right to access legal gender recognition was only affirmed in 2002 in *Goodwin v. the UK*, a whole 16 years after the first trans case was examined by ECtHR in 1986 in *Rees v. the United Kingdom*¹⁴¹, where the ECtHR failed to acknowledge the right to access legal gender recognition for trans people. Striking down abusive medical requirements to receive legal gender recognition only happened in the past five years in *P., Garc, on, and Nicot v. France (2017)* and *X and Y v. Romania (2021)*. Apart from striking down the requirements of sterilization, and forced gender-affirming surgery, the ECtHR still allows a wide margin of appreciation for States to decide on other medical requirements to receive legal gender recognition such as psychological diagnosis. Thus, the ECtHR is still failing to provide trans and gender-diverse people with the right to self-determination and is still complicit in allowing the ongoing pathologizing of transgender identities by Member States.¹⁴²

In *Hämäläinen v. Finland (2014)*, the applicant complained of being forced to divorce her wife or to convert into a civil partnership as a condition of obtaining legal gender recognition, as Finnish law did not allow marriage equality. The ECtHR found no violation of Articles 8 and 14, despite acknowledging that the applicants are being treated differently than their cisgender counterparts whose preferred gender is acknowledged without needing to divorce.¹⁴³ The ECtHR reasoned that the difference between civil partnerships and marriages in Finnish law is too minor and that States enjoy a wide margin of appreciation on the issue of same-sex marriage. Thus, the ECtHR failed here to protect the transgender applicant from forced divorce as a pre-condition to receiving legal gender recognition.¹⁴⁴

CoE has failed to establish unity on the issue of gender identity. The issue is still polarizing among the Member States, with some moving in more progressive directions like introducing self-identification laws in Belgium (2017), Denmark (2014), Ireland (2015), Luxembourg (2018), Malta (2015), Norway (2016) and Portugal (2018).¹⁴⁵ Others, like Hungary, Russia, Poland, Bosnia, Serbia and Turkey, have been moving in a different direction, backtracking on previous gender identity laws and introducing new legal frameworks that restrict the rights of trans and gender-diverse people.¹⁴⁶ The rise of the anti-gender movement in Europe also proposed a challenge to CoE's ability to harmonize gender identity laws among its Members' States. The CoE together with other European bodies' abilities to challenge anti-rights movements is at the test now with the continuous regressing of the rights of trans and gender-diverse people in Europe.¹⁴⁷

van Utrecht, 2018. https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf

141 CASE OF REES v. THE UNITED KINGDOM. (Application no. 9532/81)

142 Schoentjes, Sarah, and Pieter Cannoot. "X And Y v. Romania: The 'Impossible Dilemma' Reasoning Applied to Gender Affirming Surgery as a Requirement for Gender Recognition." *Strasbourg Observers*, February 25, 2021. <https://strasbourgoobservers.com/2021/02/25/x-and-y-v-romania-the-impossible-dilemma-reasoning-applied-to-gender-affirming-surgery-as-a-requirement-for-gender-recognition/>.

143 Case of *Hämäläinen v. Finland* App. No. 37359/09 (July 16, 2014 ECtHR)

144 den, Brink M van, and P. Dunne. *Trans and Intersex Equality Rights in Europe - A Comparative Analysis*. Utrecht: Universiteit van Utrecht, 2018. https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf

145 Legal Gender Recognition in the EU – European Commission (2020) – P. 9 : <https://op.europa.eu/en/publication-detail/-/publication/7341d588-ddd8-11ea-adf7-01aa75ed71a1/language-en>

146 Wesolowsky, Tony. "The Worrying Regression of LGBT Rights in Eastern Europe." *RadioFreeEurope/RadioLiberty*. Radio Free Europe / Radio Liberty, December 23, 2021. <https://www.rferl.org/a/lgbt-rights-eastern-europe-backsliding/31622890.html>.

147 Beo. "No to Gender - Yes to What Exactly? Insights into the European Anti-Gender Movement." *GenPORT*. GenPORT, December 13, 2021. <https://www.genderportal.eu/resources/no-gender-yes-what-exactly-insights-european-anti-gender-movement>.



CHAPTER III: OTHER INTERPRETATIONS AND SUB-REGIONAL SYSTEMS

1. The Eastern Caribbean Supreme Court & the Caribbean Court of Justice

The Eastern Caribbean Supreme Court (ECSC), founded in 1967, is the supreme judicial body in the Organization of Eastern Caribbean States (OECS) and has jurisdiction over six countries: Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and three British Overseas Territories (Anguilla, British Virgin Islands, and Montserrat). The ECSC consists of two divisions: the Court of Appeal and the High Court of Justice¹⁴⁸

The ECSC has been instrumental in challenging colonial-era buggery laws which not only criminalize queer people in the Eastern Caribbean, but further increased social stigma, discrimination, and marginalization of queer people. In *Orden David et al v The Attorney General of Antigua and Barbuda (2022)*¹⁴⁹, and *Jamal Jeffers et al v The Attorney General of St. Christopher And Nevis (2022)*¹⁵⁰, the ECSC's High Courts are responsible for each country moved to strike down buggery laws. The ECSC reasoned that those laws violate the rights to privacy, dignity, equality before the law, freedom of expression, and protection from discrimination based on sex for LGBTI people. The ECSC's judgments

148 "Brief History of the Court." Eastern Caribbean Supreme Court, September 20, 2017. <https://www.eccourts.org/brief-history-of-the-court/>.

149 *Orden David et al v The Attorney General of Antigua And Barbuda Claim*, No. ANUHCV2021/0042, 5th of July 2022, THE EASTERN CARIBBEAN SUPREME COURT IN THE HIGH COURT OF JUSTICE ANTIGUA AND BARBUDA. <https://www.eccourts.org/orden-david-et-al-v-the-attorney-general-of-antigua-and-barbuda/>

150 *Jamal Jeffers et al v The Attorney General of St. Christopher And Nevis*, Claim No.: SKBHC 2021/0013, 29th of August 2022, EASTERN CARIBBEAN SUPREME COURT FEDERATION OF SAINT CHRISTOPHER AND NEVISSAINT CHRISTOPHER AND CIRCUIT. <https://www.eccourts.org/jamal-jeffers-et-al-v-the-attorney-general-of-st-christopher-and-nevis/>

were based on international and regional standards such as rulings from ECtHR, Inter-American Court, United Nations Human Rights Mechanisms, and the Caribbean Court of Justice (CCJ).¹⁵¹

The Caribbean Court of Justice (CCJ) is the judicial body of the Caribbean Community (CARICOM), it was founded in 2001 and is based in Trinidad and Tobago. Currently, the CCJ has jurisdiction over Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St Kitts and Nevis, St Vincent and the Grenadines, Suriname, and Trinidad and Tobago.¹⁵² The CCJ has jurisdiction to settle disputes among CARICOM Member States and is the final Court of Appeals for civil and criminal matters for Barbados, Belize, and Guyana. The CCJ cannot receive individual complaints, except in its capacity as the final Court of Appeal in civil and criminal matters, for the countries who accepted this jurisdiction.¹⁵³

In *Quincy McEwan, Seon Clarke, Joseph Fraser, Seyon Persaud, and the Society Against Sexual Orientation Discrimination (SASOD) v The Attorney General of Guyana (2018)*¹⁵⁴, the CCJ examined how Guyana's law that criminalizes cross-dressing has negatively impacted the livelihood of trans people in the country and restricted their rights. In 2009, the law was used to arrest and convict several trans women for the offense of being a "man" appearing in "female attire" in public for an "improper purpose." The CCJ ruled that the law violates fundamental rights to equality, freedom of expression, and non-discrimination. The CCJ also found that the vagueness of the law, especially in the term "improper purpose" is unconstitutional. The CCJ declared the law unconstitutional and stated: "[it] is a law that belonged to a different time. It criminalized the expression of sexual orientation and gender identification at a time when State intrusion of that nature was the norm, and human rights were, at best, a developing intellectual concept." In 2021, Guyana's Parliament voted to remove the law, officially complying with the CCJ's judgment.¹⁵⁵

2. The ASEAN Intergovernmental Commission on Human Rights

The ASEAN Intergovernmental Commission on Human Rights (AICHR) is the human rights body of the Association of Southeast Asian Nations (ASEAN), which is an intergovernmental agency in Southeast Asia and is composed of ten Member States: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.¹⁵⁶ The AICHR Was founded in 2009, making it the youngest regional human rights body globally. The AICHR is composed of ten members, each representing one state. In 2012, the ASEAN Human Rights Declaration (the Declaration) was adopted as a first step towards the establishment of a regional human rights system for the ASEAN States.¹⁵⁷

151 "Antigua & Barbuda High Court Strikes down 'Buggery' and 'Indecency' Laws Imposed by British during Colonial Period." Human Dignity Trust, July 6, 2022. <https://www.humandignitytrust.org/news/antigua-barbuda-high-court-strikes-down-buggery-and-indecency-laws-imposed-by-british-during-colonial-period/>.

152 "Caribbean Court of Justice (CCJ)." CARICOM, January 24, 2022. <https://caricom.org/institutions/caribbean-court-of-justice-ccj/>.

153 "Caribbean Court of Justice." International Justice Resource Center, September 5, 2012. <https://ijrcenter.org/regional-communities/caribbean-court-of-justice/>.

154 Quincy McEwan, Seon Clarke, Joseph Fraser, Seyon Persaud, and the Society Against Sexual Orientation Discrimination (SASOD) v The Attorney General of Guyana, CCJ Appeal No. GYCV2017/015, 13th of Nov 2018, The Caribbean Court of Justice (CCJ)

155 "Guyana Lawmakers Abolish Law against Cross-Dressing." AP NEWS. Associated Press, August 11, 2021. <https://apnews.com/article/caribbean-guyana-0058f8fa096133ff42d3fb2ecd2f0316>.

156 "History." ASEAN. Accessed September 19, 2022. <https://asean.org/about-asean>.

157 "About AICHR." AICHR, August 12, 2020. <https://aichr.org/about-aichr-2/>.

Since the establishment of AICHR, the agency has faced a lot of criticism regarding its lack of meaningful work to advance human rights in the region. The terms of reference governing the work of the agency were described as weak, as it turned the AICHR into a consultative body incapable of tackling human rights violations through effective mechanisms like individual complaints. The AICHR is yet to evolve into an effective regional human rights agency like its counterparts in Africa, Europe and the Americas. Thus, only the future will tell if the agency will be capable of evolving from a consultative body to a monitoring and enforcing one.¹⁵⁸

Despite being adopted in 2012, the Declaration is silent on the issue of SOGI. Several civil society actors called on the AICHR to make an explicit reference to SOGI during the drafting process, however, the AICHR opted to keep them out. Representatives from Singapore, Malaysia, and Brunei directly rejected any mention of SOGI during the drafting process.¹⁵⁹ The wording of the Declaration is also problematic as it contains several limitations on the exercising of rights and protections under the Declaration. For example, Article 6 stipulates: “The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals.”¹⁶⁰ While Article 7 stipulates: that “the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.” Article 8 provides for limitations of human rights for national security, public order, and public morality.¹⁶¹ All those limitations made the Declaration lose its purpose which is the realization of human rights for all in the region. Those limitations can impact trans and gender-diverse people in countries claiming that public morals or socio-religious context opposes such identities.¹⁶²

3. Yogyakarta Principles

In 2006, the Yogyakarta Principles (YP) were authored, reviewed, and approved by a group of leading experts, human rights activists, academics, UN human rights professionals, and judges. The principles aim to provide a clear interpretation of the application of international human rights law and SOGI rights. In 2017, additional principles were added to supplement the original ones creating the Yogyakarta Principles plus 10 (YP+10). These principles are legally non-binding and work as a guidance for countries, inter-governmental bodies, activists and judicial bodies. They reaffirm the concept of universality in human rights and emphasize that international human rights standards apply to all people regardless of their sexual orientation, gender identity, gender expression or sex characteristics. The principles cover the right to education, health, employment, non-discrimination, equality, freedom of expression, access to justice, access to legal gender recognition, and immigration and refugee protection.¹⁶³

158 “Asia.” International Justice Resource Center, October 7, 2021. <https://ijrcenter.org/regional/asia/>.

159 “Fridae 20120914 SOGI Excluded from Draft ASEAN Human Rights Declaration,” September 14, 2012. https://queeramnesty.ch/docs/Fridae_20120914_SOGI_excluded_from_draft_ASEAN_human_rights_declaration.pdf.

160 “ASEAN Human Rights Declaration.” ASEAN, November 19, 2012. <https://asean.org/asean-human-rights-declaration>.

161 Ibid

162 Kmills. “On the Exclusion of Sexual Orientation Gender Identity (SOGI) Non-Discrimination in the ASEAN Human Rights Declaration.” OutRight Action International, September 12, 2012. <https://outrightinternational.org/press-room/press-releases/exclusion-sexual-orientation-gender-identity-sogi>.

163 “The Yogyakarta Principles – How International Human Rights Protect LGBTI PEOPLE.” TGEU, January 31, 2018. <https://tgeu.org/yogyakarta-principles/>.

The principles also promote the (de)pathologizing of transgender identities, as stated in principle 3: *“Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. 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. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization, or hormonal therapy, as a requirement for legal recognition of their gender identity.”*¹⁶⁴

The principles have been key to several progressive developments towards SOGI rights globally. The Indian Supreme Court held that YP and other international human rights standards related to SOGI should be applied as national law.¹⁶⁵ The Brazilian Supreme Federal Court cited the YP in its judgment legalizing same-sex civil unions.¹⁶⁶ Regional bodies like the European Union (EU) and OAS have been citing YP in their resolutions, recommendations, and thematic reports regarding the application of human rights and SOGI.¹⁶⁷

164 See, Principle 3 - <https://yogyakartaprinciples.org/principle-3/>

165 “India: Application of Yogyakarta Principles under National Law a Major Step for Transgender Rights.” ISHR, April 17, 2014. <http://archived2021.ishr.ch/news/india-application-yogyakarta-principles-under-national-law-major-step-transgender-rights>.

166 STF, ADPF 132, j. 5/5/2011. <https://portal.stf.jus.br/processos/detalhe.asp?incidente=2598238>

167 “Gender Identity.” Migration and Home Affairs. Accessed September 19, 2022. https://home-affairs.ec.europa.eu/pages/glossary/gender-identity_en.



CHAPTER IV: PROGRESS IN NATIONAL JURISDICTIONS

1. Introduction

While international and regional human rights mechanisms have seen rapid advances in interpreting treaties to include trans rights, national law and human rights mechanisms have been slow to adapt those new interpretations. Despite this slow implementation and the rise of anti-gender narratives, national trans activists and their allies have managed to mobilize not only international and regional human rights treaties but also national constitutions and human rights laws to advance the rights of trans people in their countries. In this section, we will briefly examine legal and policy reform that helped advance trans rights globally across different thematic areas that represent areas of concern for trans people globally. The examples provided reflect the global change of attitude towards trans rights influenced directly or indirectly by the pro-trans interpretations from regional and international human rights mechanisms.

Aware of the different realities of trans contexts around the globe, we aimed to provide examples that encompass the diverse cultural, social, religious, and legal settings that exist on our planet. While those examples offer a sign of progress for trans rights, they are still not perfect, and more work will need to be done in the future to ensure that trans rights are genuinely viewed in theory and practice as human rights worldwide. However, it is still vital to acknowledge these examples as a significant first step towards the complete realization of trans rights globally.

This section aims to introduce community members, activists, policy and lawmakers, and other stakeholders interested in advancing trans rights in their contexts with a recap of how different na-

tional jurisdictions have been positively interacting with the issue of trans rights. To provide an overview of how international and regional human rights mechanisms can influence national jurists and lawmakers to enact positive change for the trans community. In addition, it encourages cross-jurisdiction exchange on the issue by providing examples of how different jurisdictions interpreted national law and constitution to reflect their international obligations towards trans people positively.

2. Legal Gender Recognition

The right to receive legal gender recognition is a fundamental human right for trans people. As examined in the first chapter, international and regional human rights mechanisms have been working to enforce this right in Member States. The implementation of this right differs from one jurisdiction to another, with some countries adopting an accessible and easy legal gender mechanism, and others requiring a more complicated judicial process for it.¹⁶⁸ However, generally, there has been positive advances toward securing the right to legal gender recognition for trans people fueled by the positive opinions coming from international and regional human right mechanisms on the matter.¹⁶⁹

Recently, several countries have started to implement legal gender recognition policies that are based on the right to self-identify; this right enables trans people to receive legal gender recognition without needing medical documentation and is part of a greater effort to de-pathologize the legal gender recognition process.¹⁷⁰ In 2012, Argentina became the first country to adopt a legal gender recognition law based on the right to self-identify.¹⁷¹ Other countries that implemented similar policies include Belgium, Canada, Malta, Peru and Chile.¹⁷²

In 2014, India's Supreme Court examined the right to legal gender recognition in *NALSA v. Union of India*. The Court investigated whether people who fall outside the binary conception of gender (male/female) should be legally acknowledged.¹⁷³ In its judgment, the Court did not only acknowledge the right of non-binary people to legal gender recognition but also discussed at length the right of every individual to be legally acknowledged according to their self-determined gender identity. The Court upheld the right to self-identify for all individuals and declared that the traditional Hijra community can be classified as a third gender. The Court relied on international human rights standards as they apply and uphold trans rights to reach its judgment. In the judgment, the Court cited international instruments such as the YP, the ICCPR, and the UDHR.¹⁷⁴

In 2018, Brazil's Supreme Court affirmed the right to self-identify for trans people in *Direct Unconstitutionality Lawsuit 4275 Brazil*¹⁷⁵; when it ruled that trans people should be allowed to receive legal gender recognition through a simple administrative process without requiring any medical

168 ILGA World: Zhan Chiam, Sandra Duffy, Matilda González Gil, Lara Goodwin, and Nigel Timothy Mpemba Patel, *Trans Legal Mapping Report 2019: Recognition before the law* (Geneva: ILGA World, 2020). https://ilga.org/downloads/ILGA_World_Trans_Legal_Mapping_Report_2019_EN.pdf

169 *ibid*

170 Grinspan, Mauro Cabral. "Self-Identification Is Not a Matter of Belief." GATE, October 1, 2022. <https://gate.ngo/self-identification-is-not-a-matter-of-belief/>.

171 Gender self-identification is the concept that a person's legal sex or gender should be determined by their gender identity without any medical requirements, such as via statutory declaration: https://en.wikipedia.org/wiki/Gender_self-identification

172 "Countries That Allow Transgender People Easy Status Change." France 24. France 24, June 29, 2021. <https://www.france24.com/en/live-news/20210629-countries-that-allow-transgender-people-easy-status-change>.

173 "National Legal Services Authority (NALSA) vs. Union of India - South Asian Translaw Database - Third Gender." South Asian Translaw Database, July 22, 2020. <https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity/>.

174 SUPREME COURT OF INDIA. AIR 2014 SC 1863

175 Ação Direta de Inconstitucionalidade 4275. 01/03/2018. <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=749297200>

documentation or judicial intervention. In its judgment, the Court cited the 24th Advisory Opinion of the Inter-American Court of Human Rights as well as the European Court of Human Rights opinion in *Y.Y. vs. Turkey*. The Court also used the wording “transgender” allowing its decision to impact individuals who also present outside the binary trans identities.¹⁷⁶

Other jurisdictions need to be faster in adopting the right to self-identify. However, they have seen a positive change in allowing binary trans people access to legal gender recognition through judicial procedures. Those jurisdictions are still developing their trans rights; thus, recognition is still limited to those who wish to identify within the binary two sexes, male and female, while non-binary identities are yet to be included in their legal gender mechanisms.

In 2015, Lebanon’s Beirut Civil Court of Appeals allowed legal gender recognition for a trans man in case No. 1123/2015.¹⁷⁷ The Court overruled a lower Court’s judgment which denied the plaintiff legal gender recognition due to the absence of laws/regulations allowing such a process in Lebanon. The Court of Appeals examined the issue at length, citing how the issue of gender identity is being examined at a global level in Europe and Latin America.¹⁷⁸

In its judgment, the Beirut Civil Court of Appeals found that not granting legal gender recognition to the plaintiff undermines multiple rights including the right to privacy, and emphasized the right of trans people to access gender-affirming health care to reflect their desired gender identity. To reach its judgment, the Court cited the European Court of Human Rights cases on trans rights: *Goodwin v UK (2002)* and *B v France (1992)*. The Court also mentioned that in the absence of national law, the Court shall issue its judgment to align itself with Lebanon’s obligations under international human rights treaties such as the ICCPR.¹⁷⁹

In 2018, a Tunisian Court issued a similar judgment, declaring that individuals who are diagnosed with “gender identity disorder” should be allowed to receive legal gender recognition from the state.¹⁸⁰ Tunisia also has an absence of laws regulating legal gender recognition for trans people; thus, the Court in its judgment cited the ECtHR’s positions on the matter as well as the European Court of Human Rights *Goodwin v UK (2002)*. Also, just like the Lebanese Court, the Tunisian Court declared that in the absence of national law, it shall issue a judgment within the lines of international human rights mechanisms such as ICCPR and UDHR.¹⁸¹

In 2017, Botswana’s High Court granted a trans man legal gender recognition in *ND v. Attorney General of Botswana and others*.¹⁸² The Court found that denying trans individuals the right to legal gender recognition undermines their right to privacy, equal protection, freedom from degrading and

176 Fico, About Bernardo. “Brazil’s Landmark Decision on Transgender Persons’ Official Documents.” OHRH, April 27, 2018. <https://ohrh.law.ox.ac.uk/brazils-landmark-decision-on-transgender-persons-official-documents/>.

177 03/09/2015 خیرامب رهاص 1123/2015 مقر عطف: تنوري سبب في نهة الازان تيسالان عطفه

178 Noralla, Nora. “Confused Judiciary & Transgender Rights: Inside the MENA Region’s Case Law on Legal Gender Recognition.” Manara Magazine, March 17, 2022. <https://manaramagazine.org/2022/03/confused-judiciary-transgender-rights-inside-the-mena-regions-case-law-on-legal-gender-recognition/>.

179 “لناح ريغت يف برفلنا قح بارتحا: هيح يف اىحق عطف يف سزجل ريغت.” Legal Agenda, January 11, 2016. <https://legal-agenda.com/%D8%AA%D8%BA%D9%8A%D9%8A%D8%B1-%D8%A7%D9%84%D8%AC%D9%86%D8%B3-%D9%81%D9%8A-%D8%AD%D9%83%D9%85-%D9%82%D8%B6%D8%A7%D8%A6%D9%8A-%D8%AC%D8%AF%D9%8A%D8%AF-%D8%A7%D8%AD%D8%AA%D8%B1%D8%A7%D9%85-%D8%AD%D9%82/>.

180 09/07/2018 خیرامب رهاص عطف 12304 مقر فيحق سز ونب في اىا سبالا عطفه ل

181 Noralla, Nora. “Tough Territory for Transgender People in the Middle East and North Africa.” Human Rights Watch, April 8, 2022. <https://www.hrw.org/news/2022/04/08/tough-territory-transgender-people-middle-east-and-north-africa>.

182 High Court of Botswana. MAHGB-000449-15- 29 Sept 2017.

inhuman treatment, freedom of expression, and protection from discrimination. The Court declared that Botswana's Constitution should be interpreted as a living instrument to reflect the cultural and social changes that happened from the time it was written. Finally, the Court noted that the government did not provide a legitimate justification for why it denied the plaintiff legal gender recognition.¹⁸³

3. Rights of Trans Minors

Policy and law regarding the protection of the human rights of trans minors and youth is still developing in many jurisdictions. Trans minors and youth still face limitations in practicing their human rights, such as access to health, education and legal gender recognition due to their identity. Those limitations are happening, despite international and regional human rights mechanisms stipulating several protections for trans minors to ensure their full enjoyment of human rights protected under different treaties.

Not providing legal gender recognition mechanisms based on self determination is a violation of children's rights under the CRC's Article 3 (The best interests of the child are a primary consideration), Article 5 (The need to respect the growing capacity of a child to make decisions about their life), and Article 12 (Children's views are to be listened to and given due weight, in accordance with the age and maturity of the child).¹⁸⁴

When it comes to accessing gender-affirming health care, there is no agreement on the best policy to follow when providing it to trans minors. However, as stipulated in the CRC general comment 20, it is important to take into consideration the agency and autonomy of the child and their ability to process information and to provide informed consent, when introducing any policies governing the issue.¹⁸⁵

Trans minors are still denied access to legal gender recognition in many jurisdictions; this makes trans minors more vulnerable to discrimination, mental distress, and bullying in the educational system for example.¹⁸⁶

The right to education is a fundamental human right protected by international and regional human rights mechanisms; this includes the right to a safe and equal environment for minors to receive their education. Article 19 of the CRC calls on state parties to protect minors from all forms of violence in an educational setting, while Article 28 calls on the States Parties to take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity.¹⁸⁷

183 "High Court of Botswana Protects Transgender Man's Right to Have Identity Document Reflect His Gender Identity." ESCR, September 29, 2017. <https://www.escr-net.org/caselaw/2019/nd-v-attorney-general-botswana-and-others>.

184 "Without Legal Recognition, Trans Children Face Discrimination and Abuse." Open Society Foundations, November 19, 2015. <https://www.opensocietyfoundations.org/publications/trans-children-and-youth>.

185 Trans Rights are Human Rights: Dismantling misconceptions about gender, gender identity, and the human rights of trans people Prepared by GATE, ILGA-Europe, and TGEU, July 2021

186 Turna, J.L., King, D., Carswell, J.M., Keuroghlian, A.S. (2020). Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation. *Pediatrics*. DOI: <https://doi.org/10.1542/peds.2019-1725>

187 "Violence against Children in Education Settings in South Asia." UNICEF South Asia, January 1, 2016. <https://www.unicef.org/rosa/reports/violence-against-children-education-settings-south-asia>.

3.1. Gender-affirming health care

While in a growing number of jurisdictions, access to puberty blockers for minors diagnosed with gender dysphoria is medically and judicially accepted, there is a growing debate about access to other gender-affirming health care, such as hormonal replacement therapy and surgery.¹⁸⁸ Even jurisdictions that allow puberty blockers for minors with ease have been seeing a growing number of criticism and attack by anti-gender actors who want to undermine access to all gender-affirming health care for minors.¹⁸⁹

Minors in jurisdictions such as the United Kingdom (UK) and Australia can consent to their medical treatment without parental involvement if they are found to be “Gillick competent.” Coined in 1985, Gillick competence describes a series of tests done by medical professionals to determine the maturity of minors and their ability to provide informed consent for their medical treatments.¹⁹⁰ Gradually, policies were relaxed to allow trans minors to access gender affirming health care if found to satisfy Gillick competence tests.¹⁹¹

The Australian family courts in two cases in 2017¹⁹² and 2018¹⁹³, declared that judicial approval is not needed for trans minors to access stages 2 and 3 of gender-affirming health care if they are Gillick competent and diagnosed with gender dysphoria. In Australia, gender-affirming health care is divided into three stages: stage 1: puberty blockers; stage 2: hormonal replacement therapy; stage 3: surgical interventions.¹⁹⁴ The two rulings stipulated another third condition to allow trans youth access to gender-affirming health care without seeking judicial approval if there is a lack of controversy regarding the treatment (e.g., disagreement between the parents or doctors about the treatment).¹⁹⁵

In practice, this third condition undermines the rationale behind declaring a minor Gillick competent and restricts trans minors’ access to gender-affirming health care if one of the parents does not consent to it. The third condition forces trans minors to undergo a lengthy, complicated and unnecessary judicial process, which can cause unwarranted mental distress to trans minors.¹⁹⁶ In 2020, a trans minor was blocked from accessing gender-affirming health after one of the parents refused to consent to the treatments. Due to this third condition, the trans minor had to file for judicial approval to receive the treatment they seek. The Family Court did allow the minor to proceed with the treatment despite the parent’s disapproval.¹⁹⁷ The Court found that it is in the best interest for the child to proceed with stage 2 gender-affirming treatment, as they are Gillick competent. The parent did not provide compelling evidence as to why the Court should ignore doctors’ recommendations and the child’s wish.

188 “Rollbacks in Access to Trans-Specific Healthcare in Europe and Central Asia.” Transgender Europe, December 7, 2020. <https://tgeu.org/rollbacks-in-access-to-trans-specific-healthcare-in-europe-and-central-asia/>.

189 “Prohibiting Gender-Affirming Medical Care for Youth.” Williams Institute, March 23, 2022. <https://williamsinstitute.law.ucla.edu/publications/bans-trans-youth-health-care/>.

190 GenderGP. “Gillick Competency and Body Autonomy for Transgender Youth.” GenderGP Transgender Services, February 27, 2022. <https://www.gendergp.com/gillick-competency-and-body-autonomy-of-transgender-youth/>.

191 Ibid

192 Re Kelvin [2017] Fam CA 78. 30 November 2017

193 Re: Matthew [2018] FamCA 161. 16 March 2018.

194 “The Royal Children’s Hospital Melbourne.” The Royal Children’s Hospital Melbourne. Accessed January 3, 2023. https://www.rch.org.au/kidsinfo/fact_sheets/Gender_dysphoria.

195 Jowett, Steph, Georgina Dimopoulos, and Fiona Kelly. 2022. Reforming the Law on Consent to Medical Treatment for Trans Youth: A Renewed Call for Legislative Intervention. *Laws* 11: 56. <https://doi.org/10.3390/laws11040056>

196 Ibid

197 Re: Imogen (No. 6) [2020] FamCA 761. 10 September 2020

In England, Gillick competence with trans minors was challenged in the 2020 case *Bell v Tavistock Clinic*. The High Court agreed with the plaintiff that children under the age of 16 are not capable of understanding the long-term impact of such hormonal treatment¹⁹⁸, stating

*“There will be enormous difficulties in a child under 16 understanding and weighing up this information and deciding whether to consent to the use of puberty-blocking medication. It is highly unlikely that a child aged 13 or under would be competent to give consent to the administration of puberty blockers. It is doubtful that a child aged 14 or 15 could understand and weigh the long-term risks and consequences of the administration of puberty blockers.”*¹⁹⁹

The Court also stipulated that minors over the age of 16 can only receive treatment after applying for and receiving judicial approval. Tavistock appealed citing that the judgment violates national law, case law, and the European Convention on Human Rights (ECHR). In 2021, the Court of Appeal overruled the High Court’s judgment citing the medical nature of the matter which does not require judicial intervention.²⁰⁰ The Court of Appeal endorsed Tavistock’s guidance on declaring trans minors Gillick competent stating:

*“We should not finish this judgment without recognizing the difficulties and complexities associated with the question of whether children are competent to consent to the prescription of puberty blockers and cross-sex hormones. They raise all the deep issues identified in Gillick, and more. Clinicians will inevitably take great care before recommending treatment to a child and be astute to ensure that the consent obtained from both child and parents is properly informed by the advantages and disadvantages of the proposed course of treatment and in the light of evolving research and understanding of the implications and long-term consequences of such treatment.”*²⁰¹

In April 2022, the plaintiff’s attempt to challenge this judgment in the Supreme Court of the United Kingdom failed, as the Supreme Court stated, “it did not raise an arguable point of law.”. Thus, the case is fully dismissed and the law allows Tavistock to allow minors access to gender-affirming health care if they are Gillick competent without needing further parental or judicial consent.

However, despite this judicial victory, the case has negatively impacted access to gender-affirming health care for trans minors, as Tavistock had to suspend operations while the legal battle was going on. Its impact will have to be evaluated in the upcoming years. The Tavistock clinic will be closed and replaced with two regional centers connected to children’s hospitals, one in London and one in the Northwest.²⁰²

198 Sarela AI. *Bell v Tavistock: Rethinking informed decision-making as the practical device of consent for medical treatment*. *Clinical Ethics*. 2022;17(3):241-247. doi:10.1177/14777509211070499

199 *Bell & Anor v The Tavistock And Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin). 01 December 2020. Para 151

200 Fudakowski, Katie. “Bell v Tavistock Update.” *Transgender issues in the Court of Appeal*. Farrer & Co, September 27, 2021. <https://www.farrer.co.uk/news-and-insights/transgender-issues-in-the-court-of-appeal-bell-v-tavistock-update/>.

201 *Bell v Tavistock And Portman NHS Foundation Trust* [2021] EWCA Civ 1363. Para 92.

202 Pritilata, Maysa. “Survey Reveals Devastating Impact of Trans Healthcare Ruling.” *openDemocracy*, December 9, 2022. <https://www.opendemocracy.net/en/5050/mermaids-report-tavistock-keira-bell-mental-health-trans-hormones/>.

3.2. Legal Gender Recognition

In recent years, some countries sought to remove age restrictions on accessing legal gender recognition, a move that is aligned with international human rights law. Despite being in the minority, those countries provide an example of good practices for others to follow.²⁰³ The Argentina gender-identity law of 2012 cites the CRC and does not have any age requirement and children's legal guardians can apply for legal gender recognition on behalf of their children.²⁰⁴ In 2013, a six-year-old, trans female who was assigned male at birth successfully changed her gender in official documents to reflect her gender identity. However, in this case the child needed to have parental consent, which luckily, she had.²⁰⁵ Other countries such as Malta and Luxembourg have similar laws that allow children's legal guardians to submit a request for legal gender recognition on their behalf.²⁰⁶

Other countries have set an arbitrary age requirement to access legal gender recognition for minors. In Belgium and Ireland, the age requirement is set at 16 with parental consent. While in the Netherlands, children age 16 can apply for the process without parental consent only if they have a gender dysphoria diagnosis.²⁰⁷ Inversely, requiring judicial procedure and medicalization to receive legal gender recognition de facto excludes minors from accessing the mechanism, even when the law allows it; this is the case in Australia and New Zealand, where age restrictions on changing one's sex in official documents do not exist but have medical requirements to do so.²⁰⁸ In Germany and Switzerland, the complication, length, and cost of the judicial process to receive legal gender recognition deters minors from applying for it, despite being legally allowed to with parental consent.²⁰⁹

3.3. Inclusive Educational Policy:

Trans minors are faced with multiple challenges when trying to enjoy their right to education. Those challenges include and are not limited to gendered school activities, gendered uniforms, access to bathrooms, and transphobic bullying. Most countries do implement zero bullying and discrimination policies in school; however, these policies might not cover issues of concern for trans minors. Thus, some countries seek to create trans-specific protection policies.

In India, trans students are recognized as a disadvantaged group in educational policy. The government has been slowly enacting policies to allow trans students a safe environment in education. The 2019 Transgender Persons (Protection of Rights) Act requires educational entities to provide inclusive education for trans people. In 2020, the government approved the national education policy, which discusses providing "equitable quality education" to girls and trans students.²¹⁰

203 Ibid

204 Schvartzman, Luna. "Being Young and Trans in Argentina." Shado Magazine, May 10, 2021. <https://shado-mag.com/act/being-young-and-trans-in-argentina/>.

205 BRYDUM, SUNNIVIE. "Trans Six-Year-Old Is Argentina's Youngest to Amend Gender on Birth Certificate." ADVOCATE. Advocate.com, September 28, 2013. <https://www.advocate.com/politics/transgender/2013/09/28/trans-six-year-old-argentinasyoungest-amend-gender-birth>.

206 TGEU, Köhler, R. Legal Gender Recognition and the Best Interest of the Child. 2018. <https://tgeu.org/wp-content/uploads/2018/11/tgeu-policy-brief-legalgender-recognition-for-children-2018.pdf>

207 Ibid

208 "Without Legal Recognition, Trans Children Face Discrimination and Abuse." Open Society Foundations, November 19, 2015. <https://www.opensocietyfoundations.org/publications/trans-children-and-youth>.

209 TGEU, Köhler, R. Legal Gender Recognition and the Best Interest of the Child. 2018. <https://tgeu.org/wp-content/uploads/2018/11/tgeu-policy-brief-legalgender-recognition-for-children-2018.pdf>

210 Sharma, Chanchal. "Challenges of Transgender Children in Schools." Leagle Samiksha, September 2, 2022. <https://leaglesamiksha.com/2022/08/26/challenges-of-transgender-children-in-schools/>.

The Philippines has been taking steps to ensure its policies and laws promote inclusive education for trans minors. In 2012, the Philippines Department of Education issued an anti-bullying policy that included bullying based on one being a member of the LGBTI community.²¹¹ In 2013, this policy was made into law, when congress approved the anti-bullying act. In 2017, the Philippines Department of Education issued a new policy to make schools more gender-responsive to combat discrimination based on gender identity and sexual orientation. The policy stipulates educational professionals should receive gender-responsive training, and integrate gender, sexuality, and human rights into teacher training programs and school curricula.²¹² In 2022, the head of the Philippines Department of Education announced that under the 2017 policy, students can attend their graduation ceremony wearing clothes reflecting their gender identity and not sex assigned at birth.²¹³

In 2015, Malta became the first European to introduce a comprehensive education policy focusing specifically on trans, gender variants, and intersex children. The policy provides a practical guideline on the proper methods to register trans students, access gender-specific activities and areas, use a preferred name and pronouns of trans students, and tackle transphobic bullying.²¹⁴ In 2013, California became the first state in the USA to introduce a law protecting trans students in school; the School Success and Opportunity Act extends the anti-discrimination clauses to include sexual orientation and gender identity and allows trans students to access facilities, activities, and areas based on their gender identity and not sex assigned at birth; which includes accessing sports activities and bathrooms.²¹⁵

In 2021, The US Department of Education also issued guidance affirming that trans minors are protected under Title IX, a federal anti-discrimination in schools act.²¹⁶ The Title provides that “no person shall “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity” receiving federal assistance “on the basis of sex.”²¹⁷ The USA Department of Education interpreted “sex” to include sexual orientation and gender identity.²¹⁸

In 2016, Colombia’s Constitutional Court issued a landmark judgment declaring that banning trans students from accessing education due to their gender expression is unconstitutional. The case was brought up by a trans student who was denied access to educational services due to their refusal to wear a female uniform as it conflicts with their gender identity.²¹⁹ The Court found that the National Service of Education (SENA) violated the student’s right to free personal development and education by denying him to wear a uniform that aligns with their gender identity. In its judgment, the Court cited the General Comment No 13 of the United Nations Committee on Economic, Social,

211 Thoreson, Ryan. “The Philippines Affirmed Equal Rights in Schools – Now It Should Protect Them.” Human Rights Watch, July 19, 2017. <https://www.hrw.org/news/2017/07/19/philippines-affirmed-equal-rights-schools-now-it-should-protect-them>.

212 Ibid

213 Bautista, Jane. “LGBTQIA+ Students Gain Some Ground via DepEd Memo.” INQUIRER.net, June 30, 2022. <https://newsinfo.inquirer.net/1619275/lgbtqia-students-gain-some-ground-via-deped-memo>.

214 “Respect for All: What Does This Mean for Malta’s Trans, Gender Variant and Intersex Students?” SchoolEducationGateway, July 3, 2017. <https://www.schooleducationgateway.eu/en/pub/viewpoints/experts/respect-for-all-what-does-thi.htm>.

215 McBride, Sarah. “California’s New Protections for Transgender Students.” Center for American Progress, August 23, 2013. <https://www.americanprogress.org/article/californias-new-protections-for-transgender-students/>.

216 “U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity.” U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity | U.S. Department of Education, June 16, 2021. <https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity>.

217 20 U.S.C. § 1681(a).

218 Ibid

219 Corte Constitucional [C.C.] [Constitutional Court], Sala Quinta de Revisión, julio 11, 2016, Sentencia T363/16, M.P: Gloria Stella Ortiz Delgado, Expediente T-5.442.396, (Colom.).

and Cultural Rights which emphasizes that all public services must comply with the guarantees of accessibility, adaptability, and acceptability.²²⁰

In 2020, Brazil's Supreme Court moved to strike down two laws prohibiting educational policies and school activities from having references to gender identity, sexual orientation, or gender ideology.²²¹ The two laws were passed in Novo Gama, Goiás in 2015²²² and in Foz do Iguaçu, Paraná state in 2018.²²³ The Court found that enacting such laws violates the Constitutional rights of LGBTI students including the right to equality, freedom of expression, and non-discrimination. The Court also found that "the municipal legislatures neglected their duty to promote politics of inclusion and equality, which can prevent prejudice and violence against LGBT people," according to Human Rights Watch.²²⁴

4. Protection from abusive practices and discrimination

4.1. Decriminalization and protection from ill-treatment in detention:

In some jurisdictions, trans identities are still criminalized to this day. Apart from laws that impact LGBTI people generally, such as sodomy laws, some jurisdictions have laws that are specifically used to target trans people, such as laws around cross-dressing and imitating the opposite sex. Moreover, trans people often face ill-treatment amounting to torture while in custody due to their gender identity.²²⁵ In recent years, there have been several legal challenges and reformation to laws impacting trans people; as mentioned in the first chapter, Guyana's parliament eliminated cross-dressing as a crime after a successful judicial intervention.

In Samoa, gender identity is understood within its pre-colonial Polynesian cultural and traditional legacy. In Samoan culture, two genders often existed outside the binary, *fa'afafines* and *fa'afatamas*.²²⁶ Those two terms literally translate to "in a manner of a woman" and "in a manner of a man" respectively. Despite the existence of those indigenous trans identities, Samoa had laws criminalizing "female impersonation" up until 2013, when the government accepted recommendations to remove this criminalization from the Law Reform Commission which was established to review and update the criminal laws of the country.²²⁷

In 2022, Kuwait's Supreme Constitutional Court repealed article 198 of the Penal Code which was used to prosecute trans people²²⁸, especially trans women, for imitating the opposite sex. The Court reasoned its judgment on the fact that the wording used in article 198 is vague and not objective,

220 "Judgment T-363/16 (Colombia)." Right to Education Initiative. Accessed November 14, 2022. <https://www.right-to-education.org/resource/judgment-t-36316-colombia>.

221 González Cabrera, Cristian. Supreme Court Strikes Down Bigotry in Brazil's Schools. Human Rights Watch, May 19, 2020. <https://www.hrw.org/news/2020/05/19/supreme-court-strikes-down-bigotry-brazils-schools>.

222 Lei 1.516/2015. 30/06/2015

223 EMENDA A LEI ORGÂNICA MUNICIPAL Nº 47, DE 3 DE MAIO DE 2018.

224 González Cabrera, Cristian. Supreme Court Strikes Down Bigotry in Brazil's Schools. Human Rights Watch, May 19, 2020. <https://www.hrw.org/news/2020/05/19/supreme-court-strikes-down-bigotry-brazils-schools>.

225 "Map of Countries That Criminalize LGBT People." Human Dignity Trust. Accessed November 14, 2022. <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>.

226 "Beyond Gender: Indigenous Perspectives, Fa'afafine and Fa'afatama." 2022. Natural History Museum. Accessed October 10. <https://nhm.org/stories/beyond-gender-indigenous-perspectives-faafafine-and-faafatama>.

227 Dickson, Anna, Eleanor Gadd, John Curtis, and Timothy Robinson. "LGBT+ Rights and Issues in Pacific Islands- Research Briefings Publications - House of Commons Library." Research Briefings Publications - House of Commons Library, March 21, 2022. <https://commonslibrary.parliament.uk/research-briefings/cbp-9502/>.

228 ريابى 16 ذي الحجة 1443هـ (5) وقريوعه. تي وطل اب فيروستس هل اة هجج هل 2022

which gives law enforcement agencies unconstitutional powers to interpret the law as they see fit. The Court also found that the lack of objectivity violates the conditional right of personal freedom.²²⁹

In 2019, Bulawayo High Court in Zimbabwe delivered a judgment reaffirming the Constitutional rights of trans people in the country.²³⁰ The case was brought up by a trans woman who was wrongfully detained by the police. During her detention, she was subjected to abuse because of her gender identity, including being forced to strip down by police agents and being forced to undergo a “gender verification” process in medical facilities. She was later charged with “entering a female toilet”, which was later dropped and she was cleared of any wrongdoing. The plaintiff then filed a claim for damages for the abuse she endured at the hand of police officials.²³¹

The Bulawayo High Court cited Indian case *Navtej Singh Johar & Ors v Union of India* and found that the police violated the plaintiff’s Constitution rights stating that: *“To my mind, this is one example of the kind of inhuman and degrading treatment spoken to by sections 50, 51 and 53 of the Constitution of the Republic of Zimbabwe. It was insensitive and cruel for the officers to have done this to the plaintiff.”*²³²

The Court recognized that the plaintiff’s gender identity was the reason behind the ill-treatment she endured stating that: *“For three days, the plaintiff, in this case, was not only deprived of her liberty but was subjected to forced anatomical examination in the crudest and naked manner by adventurous members of the police force. As if that was not enough, she was then subjected to further invasive examination by two doctors at two different medical institutions – all because of her transgender status, something that she did not invite upon herself.”*²³³ Finally, the Court affirmed that trans people are equal citizens of the Country and should be treated accordingly.

In 2019, South Africa’s Equality Court issued a judgment allowing trans people to express their gender identity even when incarcerated.²³⁴ The case was brought up by a trans woman who was denied the right to express her gender identity while in detention. The Court found that the plaintiff’s right to the personal development of gender identity and freedom of expression was violated.²³⁵ The Court held that the plaintiff faced unjustified discrimination that violates both the right to equality and section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act.²³⁶ To reach its judgment, the Court cited the international obligations of South Africa towards trans and incarcerated people. In the judgment, the Court cited the General Comment 20 of the UN Committee on Economic, Social and Cultural Rights (CESCR), the General Assembly Resolution 45/111 regarding the rights of prisoners, and the YP.²³⁷

229 “Kuwait: Constitutional Court Rules Provision Criminalizing ‘Imitating the Opposite Sex’ Unconstitutional.” The Library of Congress. Accessed November 14, 2022. <https://www.loc.gov/item/global-legal-monitor/2022-02-28/kuwait-constitutional-court-rules-provision-criminalizing-imitating-the-opposite-sex-unconstitutional>

230 *Nathanson v Mteliso & Ors*. (HB 176 of 2019, HC 1873 of 2014) [2019] ZWBHC 135 (14 November 2019)

231 <https://africanlii.org/article/20191128/zim-judge-gives-stunning-human-rights-decision-transgender-case>

232 *Nathanson v Mteliso & Ors*. (HB 176 of 2019, HC 1873 of 2014) [2019] ZWBHC 135 (14 November 2019). Para 93

233 *Ibid*, para 117

234 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019)

235 “Victory for Jade September and the Transgender Community.” Lawyers for Human Rights, September 23, 2019. <https://www.lhr.org.za/lhr-news/victory-for-jade-september-and-the-transgender-community/>.

236 *Ibid*

237 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019). Para 91, 92 and 95.

4.2. Right to assembly and protection from discrimination

Globally, trans people are still vulnerable to discrimination due to their identities. This discrimination can be in housing, employment, education, and other aspects of daily life.²³⁸ Discrimination can also impact trans people's right to organize to advocate for their rights, as in some countries, groups advocating for trans rights are banned from registering.²³⁹ Denying trans rights groups from organizing and operating solely due to their work area is an act of identity-based discrimination, as those groups face limitations not experienced by other civil society rights groups. Realizing the need to tackle trans-specific discrimination, regional and international human rights bodies have been working in the past years to issue guidelines and advisory opinions for countries to follow to end trans-specific discrimination.

In recent years, several countries have codified anti-discrimination clauses based on gender identity. In the UK, the term "gender reassignment discrimination" is used in the Equality Act 2010 to prohibit discrimination against trans people in different settings.²⁴⁰ The protections included in the act do not require any medical proof of being trans.²⁴¹ However, the terms used in the act, such as "gender reassignment" and "transsexual" have been criticized for being too vague on defining who is protected under the act or not.²⁴² In 2013, Germany passed the General Equal Treatment Act to prohibit discrimination based on "gender" in employment, housing and education.²⁴³ In 2017, Bill C-16 was passed in Canada as part of a larger effort to end discrimination against the trans community. The bill added the term gender identity to three pre-existing anti-discrimination frameworks: the Canadian Human Rights Act, and The Criminal Code in two sections, one dealing with the definition of hate crimes and one relating to the sentencing of hate crimes.²⁴⁴

In 2019, following a strike of positive judicial interventions, India passed The Transgender Persons (Protection of Rights) Act. The act defines transgender as "*a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities a skinner, hijra, a ravani and jogta.*"²⁴⁵

The acts prohibit discrimination against trans people in health care, education, employment, and any government or private establishment. The act also stipulates that the government will work to promote the full inclusion and participation of transgender persons in society through cultural and social programs. The act also stipulates accessible and easy legal gender recognition for trans people and the creation of the National Council for Transgender persons (NCT) to advise the central government on best practices and policies to implement to advance the rights of trans people.²⁴⁶

238 "The Struggle of Trans and Gender-Diverse Persons." OHCHR. Accessed November 14, 2022. <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons>.

239 Ibid

240 "Gender Reassignment Discrimination." Gender reassignment discrimination | Equality and Human Rights Commission. Accessed November 14, 2022. <https://www.equalityhumanrights.com/en/advice-and-guidance/gender-reassignment-discrimination>.

241 Ibid

242 Ayling, Lisa, and Lutfur Ali. "Sexual Orientation and Gender Identity Discrimination at Work: Factsheets." CIPD, February 11, 2021. <https://www.cipd.co.uk/knowledge/fundamentals/emp-law/sexual-orientation-discrimination/factsheet>.

243 "Gender and Gender Identity." Antidiskriminierungsstelle. Accessed November 14, 2022. <https://www.antidiskriminierungsstelle.de/EN/about-discrimination/grounds-for-discrimination/gender-and-gender-identity/gender-and-gender-identity-node.html>.

244 Dragicevic, Nina. "Canada's Gender Identity Rights Bill C-16 Explained." CBCnews. CBC/Radio Canada. Accessed November 14, 2022. <https://www.cbc.ca/cbcdocspov/features/canadas-gender-identity-rights-bill-c-16-explained>.

245 THE TRANSGENDERPERSONS (PROTECTION OF RIGHTS) ACT, 2019, Chapter I. <https://www.indiacode.nic.in/bitstream/123456789/13091/1/a2019-40.pdf>

246 "The Transgender Persons (Protection of Rights) Bill, 2019." PRS Legislative Research, July 14, 2019. <https://prsindia>.

While the Act is a progressive step toward the complete realization of trans rights in India, it still has its shortcomings. Trans activists have criticized the Act for requiring trans people to officially register with the government as a “transgender person” if they wish to receive papers reflecting that they are trans.²⁴⁷ Moreover, the law still requires those who want to identify with the binary two sexes, male and female, to submit proof of undergoing gender-affirming surgery to be granted legal gender recognition as male or female. These requirements add a layer of unnecessary bureaucratic hurdles for trans people and contradict the landmark Supreme Court ruling in *NALSA v. Union of India*, which promoted the right to self-identify for trans people without administrative barriers.²⁴⁸

In 2012, Pakistan’s Supreme Court finally recognized the rights of trans people in *Khaki v Rawalpindi*, in this case, the Court ruled that trans people have equal rights and protections under the Constitution and recognized the historical marginalization of Pakistan’s indigenous trans community “Khwaja Sira.”²⁴⁹ In 2018, Pakistan codified the Supreme Court ruling and issued the Transgender Persons (Protection of Rights) Act. The act defines transgender people as “*intersex persons (khusra), persons assigned male at birth who have undergone sex-reassignment surgeries (“eunuchs”), and Khwaja Sira. It also includes transgender men, transgender women, and any persons whose gender identity or gender expression differs from the gender assigned at birth.*”²⁵⁰

The act ensures that the fundamental rights of the Pakistani Constitution are applied to trans people and prohibits discrimination in housing, education, employment, and health care, and acknowledges the harassment trans people can face inside and outside their houses due to their gender identity.²⁵¹ However, both the Pakistani and Indian acts have made a similar mistake which is placing “intersex” people under the transgender umbrella, which can undermine intersex rights in those two countries. In 2020, the U.S Supreme Court ruled that gender identity and sexual orientation are protected categories under Title VII of the Civil Rights Act.²⁵² The Case was brought by three LGBTI people who were fired due to their sexual orientation or gender identity.²⁵³ The Court joined many jurisdictions in the interpretation of the word “sex” under the Civil Rights Act and concluded that “sex” should be interpreted to include gender identity and sexual orientation. Justice Gorsuch wrote the majority opinion and stated: “*It is impossible to discriminate against a person for being homosexual or transgender without discriminating ... based on sex.*”²⁵⁴

In 2020, a Beijing Intermediate Court in China issued a ruling regarding the illegal termination of a trans woman from her work due to her transition.²⁵⁵ The company argued that the plaintiff was terminated because of her repeated absence from work, however, the plaintiff provided evidence that the company has repeatedly refused to grant her sick leave to recover from her sex reassignment

org/billtrack/the-transgender-persons-protection-of-rights-bill-2019.

247 Pathak, Sushmita. “India Just Passed a Trans Rights Bill. Why Are Trans Activists Protesting It?” NPR. NPR, December 4, 2019. <https://www.npr.org/sections/goatsandsoda/2019/12/04/784398783/india-just-passed-a-trans-rights-bill-why-are-trans-activists-protesting-it>.

248 Ibid

249 Kizilbash, Mariam. “Pakistan’s Inspirational Transgender Persons’ Law- Some Years Later.” OHRH, January 10, 2022. <https://ohrh.law.ox.ac.uk/pakistans-inspirational-transgender-persons-law-some-years-later/>.

250 the Transgender Persons (Protection of Rights) Act 2018, Chapter I.

https://na.gov.pk/uploads/documents/1526547582_234.pdf

251 “Transgender Persons (Protection of Rights) Act, 2018 (Pakistan).” South Asian Translaw Database, October 14, 2021. <https://translaw.clpr.org.in/legislation/the-transgender-persons-protection-of-rights-act-2018-pakistan/>.

252 17-1618 Bostock v. Clayton County (06/15/2020)

253 Totenberg, Nina. “Supreme Court Delivers Major Victory to LGBTQ Employees.” NPR. NPR, June 15, 2020. <https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees>.

254 Ibid

255 北京市第二中级人民法院 (2019) 京02民终11084号民事判决书

surgery. Moreover, the company refused to renew the plaintiff's contract citing discomfort from her colleagues to share restrooms with her.²⁵⁶

The Beijing Court refused the company's reasoning behind the termination and the refusal to renew the plaintiff's contract. The Court found that the plaintiff had the right to go on sick leave to recover from her sex reassignment surgery. The Court awarded the plaintiff damages for illegal termination and emotional distress due to the way the company treated her.²⁵⁷ However, the Court had a very narrow understanding of gender identity. In its judgment, the Court focused on the fact that the plaintiff has met the regulatory criteria of being trans in China including receiving a "Transsexuality" diagnosis. Thus, the scope of protection in this case is limited to trans people within the official system in China only.²⁵⁸

In 2015, The High Court of Kenya at Nairobi ruled that refusal by the state to register LGBTI rights groups is considered a violation of the right of assembly under Kenya's Constitution.²⁵⁹ The Court found that the refusal to register LGBTI rights groups was made based on moral and religious grounds and not legal ones; the Court affirmed that LGBTI people have a constitutional right to assembly and they should be able to enjoy this right without discrimination.²⁶⁰ The Court relied on international and regional human rights standards to reach its judgment. In the judgment, the Court cited ACHPR, ICCPR, UDHR, as well as case law from the African Commission of Human Rights regarding the right of assembly: ACmHPR, *Jawara v. The Gambia*, Comm. Nos. 147/95 and 149/96 (2000), ACmHPR, *Amnesty International v. Zambia*, Comm. No. 212/98 (1999), and ACmHPR, *Civil Liberties Organization v. Nigeria*, Comm. No. 101/93 (1995).²⁶¹

In 2015, Botswana's Court of Appeals delivered a similar judgment that affirms the Constitutional rights to assembly and association of LGBTI rights groups.²⁶² The LGBTI NGO was denied registration without legal justification, as again like the Kenyan case, the authorities denied registration based on moral and religious grounds. The Court refused this act of discrimination stating that: "*Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity*²⁶³." To reach its judgment, the Court cited ACHPR, ICCPR, UDHR, as well as the recent aforementioned Kenyan case.²⁶⁴

256 Longarino, Darius. "Was the Dang Dang Case a Successful Transgender Discrimination Lawsuit?" China Law Translate, September 15, 2020. <https://www.chinalawtranslate.com/en/was-the-dang-dang-case-a-successful-transgender-discrimination-lawsuit/>.

257 Ibid

258 Ibid

259 EG v Non-Governmental Organizations Co-ordination Board & 4 others [2015] eKLR

260 "Gitari v. Non-Governmental Organizations Co-Ordination Board." Global Freedom of Expression, January 7, 2017. <https://globalfreedomofexpression.columbia.edu/cases/gitari-v-non-governmental-organisations-co-ordination-board/>.

261 Ibid

262 Attorney General of Botswana v. Thuto Rammoge & 19 Others [2016] CACGB-128-14 Botswana, Court of Appeal

263 Legal Grounds: Reproductive and Sexual Rights in Sub-Saharan African Courts, volume III (Pretoria, PULP, 2017). P. 151

264 Attorney General of Botswana v. Thuto Rammoge & 19 Others [2016] CACGB-128-14 Botswana, Court of Appeal. Para 68 and 72

4.3. Protection from abusive practices (Conversation Therapy)

So-called 'Conversion Therapy' (CT) is a pseudo medical science that consists of practices that aim to alter and change one's sexual orientation and gender identity.²⁶⁵ CT is considered an act of ill-treatment amounting to torture against LGBTI people. Thus, several regional and international human rights mechanisms have called for the practice to be banned globally.²⁶⁶ In 2016, the Committee against torture condemned the existence of private and government-run clinics providing CT as well as the involuntary detention of LGBTI people inside those facilities.²⁶⁷ In 2017, the Committee against torture called on Ecuador to investigate and punish those who are working in providing CT and other abusive practices against LGBTI people in the country.²⁶⁸

In 2020, the IE SOGI issued a report on CT outlining how the practice violates international and regional human rights law and its dangerous impact on the livelihood of LGBTI people.²⁶⁹ The report also provides good practice examples from different countries that tackled the issue and provided protection for LGBTI from CT. Several international medical entities such as the American Medical Association (AMA)²⁷⁰, American Psychological Association (APA)²⁷¹, and the Pan American Health Organization (PAHO)/World Health Organization (WHO)²⁷² have condemned CT and called for it to be sanctioned.²⁷³

Several countries have taken actions to partially or completely ban the practice. In 1999, Brazil's Federal Council of Psychology issued resolution No. 1/99 banning CT based on sexual orientation.²⁷⁴ It was only in 2018 that the ban was extended to include gender identity through resolution No. 1/18. The new resolution cited the YP and included a progressive definition of gender identity and expression.²⁷⁵ In 2012, Ecuador issued Ministerial Agreement No. 76725 to ban medical providers from offering CT in the country. In 2014, the penal code was amended to widen the scope of crimes of torture to include performing CT with the intention of altering one's gender identity or sexual orientation.²⁷⁶ In 2016, Malta became the first European to pass a comprehensive law banning CT. In 2020, both Germany and Albania banned CT for minors, with Germany offering protections for adults from forced CT.²⁷⁷

265 Ilias Trispiotis, Craig Purshouse, 'Conversion Therapy' As Degrading Treatment, *Oxford Journal of Legal Studies*, Volume 42, Issue 1, Spring 2022, Pages 104–132, <https://doi.org/10.1093/ojls/gqab024>

266 Ibid

267 UN Committee Against Torture, 'Concluding Observations on the Fifth Periodic Report of China' (CAT/C/CHN/CO/5, 3 February 2016) para 55.

268 UN Committee Against Torture, 'Concluding Observations on the Seventh Periodic Report of Ecuador' (CAT/C/ECU/CO/7, 11 January 2017) para 49.

269 "Conversion Therapy' Can Amount to Torture and Should Be Banned Says UN Expert." OHCHR, July 13, 2020. <https://www.ohchr.org/en/stories/2020/07/conversion-therapy-can-amount-torture-and-should-be-banned-says-un-expert>.

270 American Medical Association, "LGBTQ Change Efforts (so-called "conversion therapy")" <https://www.ama-assn.org/system/files/2019-12/conversion-therapy-issue-brief.pdf>

271 American Psychological Association. APA task force on appropriate therapeutic responses to sexual orientation. Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation, (2009). 1-130

272 Pan American Health Organization (PAHO). Cures for An Illness that Does Not Exist. (2012) <https://www.paho.org/hq/dmdocuments/2012/Conversion-Therapies-EN.pdf>

273 Adamson, Tyler Michael, Sara Wallach, Alex Garner, Marguerite Hanley, and Sean Howell. "The Global State of Conversion Therapy - A Preliminary Report and Current Evidence Brief," 2020. <https://doi.org/10.31235/osf.io/9ew78>.

274 ILGA World: Lucas Ramon Mendos, Curbing Deception: A world survey on legal regulation of so-called "conversion therapies" (Geneva: ILGA World, 2020).

275 Ibid

276 Ibid

277 Wires, News. "Albania Becomes Third European Country to Ban Gay 'Conversion Therapy'." *France 24*. France 24, May 16, 2020. <https://www.france24.com/en/20200516-albania-becomes-third-european-country-to-ban-gay-conversion-therapy>.

In 2022, Vietnam's Health Ministry announced a ban on CT, citing WHO guidelines that removed "homosexuality" and "transgenderism" from the list of mental disorders.²⁷⁸ The same year, Bill C-4 became a federal law in Canada. Bill C-4 bans CT by amending the criminal code to create new criminal offenses for all those who:

- *Knowingly causing another person to undergo conversion therapy or providing such therapy, which is punishable by up to five years' imprisonment.*
- *Knowingly promoting or advertising conversion therapy, which is punishable by up to two years' imprisonment.*
- *Receiving a financial or other material benefit, knowing that it is obtained or derived directly or indirectly from the provision of conversion therapy, which is punishable by up to two years' imprisonment.*²⁷⁹

In 2021, the Madras High Court in India issued a historic judgment banning CT in *S. Sushma v. Commissioner of Police*. In the case, the Court found that CT violates the right to dignity, life, privacy, and freedom of choice of LGBTI people who are forced to undergo CT.²⁸⁰ The Court called on the National Medical Commission and the Psychiatric Society, and the Rehabilitation Council to "*Prohibit any attempts to medically "cure" or change the sexual orientation of LGBTIQ+ people to heterosexual or the gender identity of transgender people to cisgender. To take action against the concerned professional involving themselves in any form or method of conversion "therapy", including withdrawal of license to practice.*"²⁸¹

In 2022, the 9th US Circuit Court of Appeals upheld a law banning providing CT for minors in Washington State.²⁸² The law was challenged by a Christian marriage and family counselor who sued the State claiming the law "*violates his free speech rights and his religious views regarding homosexuality and gender identity.*" The Court rejected those claims stating that the law regulates the conduct and not speech.²⁸³ The Court's judgment is similar to another case: *Pickup v. Brown*, where California's ban on CT for minors was also challenged on the grounds it violates the freedom of speech and religious beliefs of Christian psychologists.²⁸⁴

278 Snell, Govi. "Vietnam Says Homosexuality 'Not a Disease' in Win for Gay Rights." LGBTQ News | Al Jazeera. Al Jazeera, September 19, 2022. <https://www.aljazeera.com/news/2022/8/22/vietnam-says-homosexuality-not-a-disease-in-major-win-for-lgbtq>.

279 "Canada: Bill C-4 Banning Conversion Therapy Comes into Force." The Library of Congress, January 7, 2022. <https://www.loc.gov/item/global-legal-monitor/2022-01-19/canada-bill-c-4-banning-conversion-therapy-comes-into-force/>.

280 Gupta, Sarthak. "The Ban on the Practice of 'Curing Queer Sexuality' in India." OpenGlobalRights, August 20, 2021. <https://www.openglobalrights.org/the-ban-on-practice-of-curing-queer-sexuality-in-india/>.

281 WPNo.7284 of 2021. Madras High Court. 07.06.2021.

282 Brian Tingley v. Robert Ferguson, et al, Docket No. 21-35815 (9th Cir. Sep 28, 2021), Court Docket

283 Pazanowski, Mary Anne. "Washington LGBTQ Conversion Therapy Ban Upheld by Ninth Circuit." Bloomberg Law, September 6, 2022. <https://news.bloomberglaw.com/litigation/washington-lgbtq-conversion-therapy-ban-upheld-by-ninth-circuit>.

284 "Pickup v. Brown and Welch v. Brown." Lambda Legal, February 4, 2013. <https://www.lambdalegal.org/in-court/cases/pickup-v-brown-and-welch-v-brown>.



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