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Rights in Transition: Making Legal Recognition for Transgender People a Global Priority

By Neela Ghoshal and Kyle Knight

The process is as universal as it gets: when a baby is born, a doctor, parent, or birth attendant announces the arrival of a “girl” or “boy.” That split-second assignment dictates multiple aspects of our lives. It is also something that most of us never question.

But some people do. Their gender evolves differently from their girl/boy birth assignment and might not fit rigid traditional notions of female or male.

Gender development should have no bearing on whether someone can enjoy fundamental rights, like the ability to be recognized by their government or to access health care, education, or employment. But for transgender people, it does—to a humiliating, violent, and sometimes lethal degree.

The Trans Murder Monitoring Project, an initiative that collects and analyzes reports of transgender homicides worldwide, recorded 1,731 murders of transgender people globally between 2007 and 2014. Many were of a shockingly brutal nature, sometimes involving torture and mutilation.

Outright violence is not the only threat to the lives of transgender people. They are as much as 50 times more likely to acquire HIV than the population as a whole, in part because stigma and discrimination create barriers to accessing health services. Studies in the United States, Canada, and Europe have found high rates of suicide attempts among transgender people, a response to systematic marginalization and humiliation.

Several countries, including Malaysia, Kuwait, and Nigeria, enforce laws that prohibit “posing” as the opposite sex—outlawing transgender people’s very existence. In scores of other countries, transgender people are arrested under laws that criminalize same-sex conduct.

This data only gives a glimpse of the horrific variants of violence and discrimination transgender people face. Absent legal recognition in the gender with which

they identify, and associated rights and protections, every juncture of daily life when documents are requested or appearance is scrutinized becomes fraught with potential for violence and humiliation, driving many transgender people into the shadows.

The demand for legal gender recognition provokes moral panic in many governments. But it is a crucial fight to wage. If transgender communities are to thrive, and if the rights to privacy, free expression, and dignity are to be upheld for all, the human rights movement needs to prioritize eliminating abusive and discriminatory procedures that arbitrarily impede the right to recognition. Governments should acknowledge that the state should no longer be in the business of denying or unjustly restricting people's fundamental right to their gender identity.¹

Turning Tide

In recent years, transgender people around the world have made tremendous strides toward achieving legal recognition.

Argentina broke ground in 2012 with a law that is considered the gold standard for legal gender recognition: anyone over the age of 18 can choose their gender identity, undergo gender reassignment, and revise official documents without any prior judicial or medical approval, and children can do so with the consent of their legal representatives or through summary proceedings before a judge.

In the subsequent three years, four more countries—Colombia, Denmark, Ireland, and Malta—explicitly eliminated significant barriers to legal gender recognition. This evolution sets them apart from countries that either do not allow a person to change their “male/female” designation at all, or only allow them to do so when certain conditions have been met, which may include surgery, forced sterilization, psychiatric evaluation, lengthy waiting periods, and divorce. For the first time, people can change their gender marker on documents simply by filing the appropriate forms.

This progress, long in the making, has often come on the backs of courageous individuals willing to have their lives and identities adjudicated by often unfriendly courts.

For instance, Ireland's 2015 Gender Recognition Bill was the product of a 22-year legal fight by Lydia Foy, a now-retired dentist. Braving a gauntlet of legal procedures, she made her case to be recognized as a woman before Ireland's High Court in 1997, and again in 2007, backed by domestic and international human rights bodies that called on Ireland to institute a gender recognition procedure based on identity and human rights, not surgeries and expert opinions. Despite the consistent pressure, it was not until 2015, after an overwhelming victory on a same-sex marriage referendum, that the government instituted identity-based legal gender recognition.

In South Asia—where hijras, an identity category for people assigned male at birth who develop a feminine gender identity, have long been recognized culturally, if not legally—activists have pursued a related aim: the formal recognition of a third gender. Hijras' traditional status, which included bestowing blessings at weddings, had provided some protection and a veneer of respect. But rather than being viewed as equal to others before the law, they were regarded as exotic and marginal—an existence dictated by boundaries and limitations, not rights.

Nepal's Supreme Court, in a sweeping 2007 ruling, ordered the government to recognize a third gender category based on an individual's "self-feeling." The ruling rested largely on the freshly minted Yogyakarta Principles—the first document to codify international principles on sexual orientation, gender identity, and human rights. Armed with the ruling, activists successfully advocated with government agencies to include the third gender category on voter rolls (2010), the federal census (2011), citizenship documents (2013), and passports (2015).

Similarly, in 2009, the Supreme Court in Pakistan called for a third gender category to be recognized, and in Bangladesh, the cabinet issued a 2013 decree recognizing hijras as their own legal gender. In 2014, India's Supreme Court issued an expansive judgment recognizing a third gender, affirming "the right of every person to choose their gender," and calling for transgender peoples' inclusion in state welfare programs.

In a few countries, the very purpose of gender markers is now being interrogated. New Zealand and Australia now offer the option to have gender listed as "unspecified" on official documents, while the Dutch parliament has begun con-

sidering whether the government should record a person's gender on official identification documents at all.

A Matter of Dignity

The right to recognition as a person before the law is guaranteed in numerous human rights treaties, and is a fundamental aspect of affirming the dignity and worth of each person. However, even in countries that allow for people to be recognized in the gender with which they identify, the requisite procedures may subject applicants to humiliating and harmful treatment.

For example, transgender people in Ukraine who wish to be legally recognized must undergo a mandatory in-patient psychiatric evaluation lasting up to 45 days to confirm or reject a diagnosis of "transsexualism"; coerced sterilization; numerous medical tests, which often require extensive time commitment, expense, and travel, and that are unrelated to the legal gender recognition procedure requirements itself; and a humiliating in-person evaluation by a government commission to further confirm the diagnosis of "transsexualism" and authorize the change in legal documents. These procedures fail to respect the right to health and may expose transgender people to prohibited inhuman or degrading treatment.

Tina T., a 38-year-old Ukrainian transgender woman, told Human Rights Watch that during her stay in a psychiatric institution, the staff forced her to live in a high security male ward with bars and metal doors. She said she was only allowed to walk around the perimeter of a 30 square meter yard for 45 minutes each day; the restrooms did not have locks, making her feel unsafe; and doctors did not allow her to take female hormones while she was under their care.

It may seem obvious: subjecting people to unwanted or unnecessary medical procedures has no place in a recognition process for an identity. However, even in countries that consider themselves progressive with regards to LGBT rights, including some Western European and Latin American countries and the US, transgender people are still forced to undergo demeaning procedures—even sterilization—to change the gender marker on their identity documents. These negative consequences of seeking legal gender recognition seriously and harm-

fully limit individuals' ability to access crucial services and live safely, free of violence and discrimination.

A Gateway to Other Rights

Legal gender recognition is also an essential element of other fundamental rights—including the right to privacy, the right to freedom of expression, the right to be free from arbitrary arrest, and rights related to employment, education, health, security, access to justice, and the ability to move freely.

A Delhi High Court ruling in October 2015 lay out the intrinsic link between the right to legal gender recognition and other rights. Affirming a 19-year-old transgender man's right to recourse against harassment by his parents and the police, Justice Siddharth Mridul wrote:

Gender identity and sexual orientation are fundamental to the right of self-determination, dignity and freedom. These freedoms lie at the heart of personal autonomy and freedom of individuals. A transgender [person's] sense or experience of gender is integral to their core personality and sense of being. Insofar as, I understand the law, everyone has a fundamental right to be recognized in their chosen gender.

Employment and Housing

Transgender people routinely report that they are turned down for jobs and housing when it becomes evident that their appearance does not match the gender marker on their official documents. In the US, a 2011 national survey by the National Center on Transgender Equality and the National LGBTQ Taskforce found that among respondents whose identification documents did not "match" the gender that they presented with, 64 percent said they had experienced discrimination in hiring, as compared to 52 percent of respondents who had updated the gender marker on their documents. Similar evidence of discrimination was found when transgender people without "matching" documents sought to rent or buy a home or apartment.

Sharan, a transgender woman in Malaysia, told Human Rights Watch that although she presents as a woman, the absence of legal gender recognition in

Malaysia means she must submit male identity documents when applying for a job. She described her experience at job interviews:

When I go for an interview, if the interviewer is male, the first thing he asks me is, 'Are your breasts real? When did you decide to change?' I explain I'm a transsexual woman. 'Do you have a penis or a vagina? Do you have sex with men or women? Which toilet do you go to? Did you do your operation? Why did you choose to take hormones?' It's nothing relevant to the job.... And then they tell you they'll call you in two weeks, but you don't get any phone calls.

Education

Transgender children and young adults face abuses in school settings ranging from sexual assault, to bullying, to being forced to attend a single-sex school or wear a uniform based on the gender marker assigned at birth.

In Japan, junior high and high school students told Human Rights Watch that strict male/female school uniform policies that often do not allow children to change uniforms without a diagnosis of "Gender Identity Disorder" caused them extreme anxiety, leading to extended and repeated absence from school and even dropouts. Some said the country's legal gender recognition procedure, which mandates sex reassignment surgery, put pressure on them to undergo the full procedure before they became adults so that they could enter university or apply for jobs according to their gender identity.

In Malaysia, the Education Department of the Federal Territory (Kuala Lumpur) has an explicitly discriminatory policy that calls for punishment, including caning, suspension, and expulsion, for homosexuality and "gender confusion."

Malta has become a pioneer in recognizing transgender children's right to education: following its April 2015 legal gender recognition legislation, the government launched comprehensive guidelines for schools to accommodate gender non-conforming students, including through addressing issues related to uniforms and toilets.

Health Care

Absent identity documents that match their gender presentation, transgender people who seek health care are subjected to invasive questioning and humiliation. Erina, a transgender woman in Malaysia, was hospitalized for two days in 2011 for a high fever. She told Human Rights Watch that she was placed in a male ward because of the “male” gender marker on her identity card, despite her request to be placed in a female ward. Doctors and nurses quizzed her about her gender identity, asking questions unrelated to the condition for which she was seeking treatment.

Where transgender identities are criminalized, access to health care is even more fraught. In Kuwait, transgender women told Human Rights Watch that medical doctors have reported them to police after noting the gender on their government-issued IDs does not match their appearance and presentation, effectively limiting their access to health care.

After Uganda passed its notorious Anti-Homosexuality Act in February 2014, law enforcement officials and ordinary citizens targeted transgender people alongside lesbian, gay and bisexual people. Jay M., a transgender man, told Human Rights Watch that when he sought treatment for a fever,

The doctor asked me, ‘But are you a woman or a man?’ I said, ‘That doesn’t matter, but what I can tell you is I’m a trans man.’ He said, ‘What’s a trans man? You know we don’t offer services to gay people here. You people are not even supposed to be in our community. I can even call the police and report you....’

In the end, Jay paid the doctor a 50,000 Ugandan shillings (about US\$14) bribe and fled the office.

Travel

Simply moving from one place to another can be a dangerous and humiliating experience for people whose documents do not match their expression. The stakes are high, particularly for international travel, and range from fraud accusations and exposure to intense scrutiny and humiliation.

A transgender woman in the Netherlands told Human Rights Watch: “When I travel internationally, they often take me out of the queue for questioning: people think I have stolen my passport.” A transgender man in Kazakhstan explained: “Every time I have gone through the airport in Almaty—all four times—the security officers have humiliated me.” He described how “first, the guard looks at my documents and is confused; next he looks at me and asks what’s going on; then I tell him I’m transgender; then I show him my medical certificates; then he gathers his colleagues around, everyone he can find, and they all look and point and laugh at me and then eventually let me go.”

United Nations human rights experts have condemned such targeting of transgender people in security processes.

Access to Police Protection and Justice

The lack of basic recognition before the law impedes access to recourse for crimes, a significant problem for a population exposed to shockingly high rates of violence. Carrying documents that do not match appearance can mean abuse gets even worse when trying to report it to authorities.

In Mombasa, Kenya, a transgender woman, Bettina, told Human Rights Watch that vandals destroyed the market stall where she sold food during a wave of homophobic and transphobic attacks in October 2014. When Bettina reported the crime to police, they quizzed her about her gender identity and refused to give her a case number to follow up on her situation. “I left, because there was nothing there for me,” she said.

Freedom from Violence

In many countries, transgender people in detention are placed in cells with persons of a gender that they do not identify with, exposing them to abuse and sex-

ual violence. International guidelines on detention issued by the UN Office on Drugs and Crime warn that, “where transgender prisoners are accommodated according to their birth gender, especially when male to female transgender prisoners are placed with men due to their birth gender being male, this paves the way to sexual abuse and rape.”

In the US, where most correctional facilities assign detainees to wards based on gender assigned at birth rather than identity, data indicates that one in three transgender detainees are sexually assaulted in prison.

Privacy

A government’s refusal to recognize people in the gender with which they identify can amount to violation of the right to privacy. In a 2002 case in the United Kingdom, the European Court of Human Rights held that refusal to change identification documents and legal identities could amount to discrimination and violate the right to respect for private lives. In another case in 2003, that court found that Germany had failed to respect “the applicant’s freedom to define herself as a female person, one of the most basic essentials of self-determination.”

A Basic Right to Freedom

In too many countries, transgender people are criminalized simply for being who they are. Malaysia’s state Sharia laws, which prohibit “a male person posing as woman” and, in some states, “a female person posing as a man,” have resulted in countless arrests of transgender people for the simple act of walking down the street wearing clothing that state religious officials do not find appropriate to their sex as assigned at birth. They are sentenced to imprisonment, fines, or mandatory “counseling” sessions.

Nigeria, Kuwait, the United Arab Emirates, and Saudi Arabia have also carried out arrests for “cross-dressing” in recent years; although no law specifically criminalizes transgender people in Saudi Arabia, Saudi judges have ordered men accused of behaving like women to be imprisoned and flogged.

Laws prohibiting same-sex conduct are also used to arrest and otherwise harass transgender and gender non-conforming people—regardless of the fact that gen-

der identity has no direct correlation to sexual orientation or sexual behavior—as Human Rights Watch has documented in Malawi, Uganda, and Tanzania.

Transgender people are also arrested under other pretexts. In Nepal, police arrested and sexually abused transgender women in 2006 and 2007 under the guise of cleaning up public spaces. Police targeted transgender women with arrests and forced evictions in India in 2008 as part of a similar “social cleansing” effort. In 2013, police in Burma arbitrarily arrested a group of 10 gay men and transgender women and abused them in detention.

For many of the victims of these abuses, a future in which they may be legally recognized—and in which they will no longer risk imprisonment for being themselves—may seem far off. Yet it is precisely the persecution these individuals face that lends urgency to the struggle for legal gender recognition. It highlights that states should not be in the business of regulating peoples’ identity.

A Shift in Medical Thinking

The Yogyakarta Principles state that each person’s self-defined sexual orientation and gender identity is “integral to their personality” and is a basic aspect of self-determination, dignity and freedom. They are clear that gender recognition may involve, “*if freely chosen* (our emphasis), modification of bodily appearance or function by medical, surgical or other means.”

Put simply, the process for legal recognition should be separate from any medical interventions. But if an individual’s personal transition process requires medical support, those services should be available and accessible.

In 2010, the World Professional Association of Transgender Health (WPATH), an international multidisciplinary professional association, stated: “No person should have to undergo surgery or accept sterilization as a condition of identity recognition.” In 2015, WPATH broadened the scope of its claim and called on governments to “eliminate unnecessary barriers and to institute simple and accessible administrative procedures for transgender people to obtain legal recognition of gender, consonant with each individual’s identity, when gender markers on identity documents are considered necessary.”

The World Health Organization is considering major changes to its revised version of the International Classification of Diseases, due out by 2018, which will significantly transform the ways physicians around the world code and categorize transgender people's experiences. The proposed revisions, while still in draft form, would move transgender-related diagnoses out of the mental disorders chapter—an important step in destigmatizing transgender people.

A Transitioning Rights Paradigm

Learning from decades of transgender activists' assiduous work around the world, the international human rights movement has slowly begun to recognize human rights violations based on gender identity and expression, and has begun to document and condemn the abuses.

A landmark report by the Office of the High Commissioner for Human Rights in 2011 on violence and discrimination based on sexual orientation and gender identity noted that most countries do not allow for legal gender recognition, so that transgender people may face many difficulties, including applying for employment, housing, bank credit or state benefits, or when traveling abroad. The follow-up report, issued in 2015, identified progress in 10 countries, but found that the overall lack of progress continued to impact a wide spectrum of rights for transgender people.

Indicating both the groundswell of attention to legal gender recognition and its intersectional urgency, a joint statement in 2015 by 12 UN technical agencies—ranging from UNICEF to the World Food Programme—called on governments to ensure “legal recognition of the gender identity of transgender people without abusive requirements,” such as forced sterilization, treatment or divorce. In April 2015, the Council of Europe issued a resolution, adopted by its Parliamentary Assembly, calling on governments to adopt quick and transparent gender recognition procedures based on self-determination.

The law should not force people to carry an identity marker that does not reflect who they are. Recognizing, in law, peoples' self-identified gender is not asking governments to acknowledge any new or special rights; instead, it is a commit-

ment to the core idea that the state or other actors will not decide for people who they are.

Achieving the right to legal gender recognition is crucial to the ability of transgender people to leave behind a life of marginalization and enjoy a life of dignity. A simple shift toward allowing people autonomy to determine how their gender is expressed and recorded is gaining momentum. It is long overdue.

Neela Ghoshal is a senior researcher and Kyle Knight is a researcher in the LGBT Division at Human Rights Watch.

¹ While this essay focuses on transgender people, many of the law and policy reforms related to legal gender recognition that human rights obligations mandate might also improve the situation for intersex people. Intersex people, who are born with sex characteristics that do not fit typical binary notions of male or female bodies, also face unique challenges and rights violations, including being subjected to unnecessary surgical procedures for the purpose of trying to make their appearance conform to binary sex stereotypes.