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## Forced Sterilization and Mandatory Divorce: How a Majority of Council of Europe Member States' Laws Regarding Gender Identity Violate the Internationally and Regionally Established Human Rights of Trans\* People

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# Forced Sterilization and Mandatory Divorce: How a Majority of Council of Europe Member States' Laws Regarding Gender Identity Violate the Internationally and Regionally Established Human Rights of Trans\* People

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*Government identification is a ubiquitous aspect of modern life, something most adults the world over take for granted. For many, the presence of gender markers on their official identification is something entirely unremarkable. Unfortunately for many trans\* people, many countries make it extraordinarily difficult or even impossible to obtain official identification that correctly reflects their gender identity. Most countries still have no legal mechanism for trans\* people to change their legal gender categorization. Others allow trans\* people to update their official legal gender, but only after proving that they have undergone certain surgeries, up to and including irreversible sterilization, whether they want to or not. Still others only allow trans\* people to update their legal gender after they have shown that they have dissolved their marriages, regardless whether they and their partner wish to remain married. As a result, many trans\* people the world over may be literally risking their lives when they seek to do something as mundane as ordering a beer.*

*This Note examines why compulsory sterilization and mandatory divorce laws violate international and regional*

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*human rights norms, and proposes how the European Court of Human Rights and individual COE Member States can redress the situation to protect one of Europe’s most vulnerable populations. It also examines these failures as bellwethers of an ongoing tension within the international human rights community: whether the specificity of human rights treaties is overall a positive or a negative development, and whether the current international legal regime is equipped to protect the rights of sexual minorities generally. This Note proposes that a novel LGBTQ-specific human rights treaty should ultimately be proposed and promulgated to ensure that these minorities are protected.*

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INTRODUCTION

“It is of great concern that transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation.”

– Thomas Hammarberg, Former Council of Europe Commissioner for Human Rights<sup>1</sup>

“[C]itizens [do] not want their government to mess around in their underwear. You would assume all hell would break loose if the government would tell them: you won’t get a new passport or other identification document unless you have become irreversibly infertile.”

– Boris Dittrich, Advocacy Director, Human Rights Watch Lesbian, Gay, Bisexual and Transgender Program<sup>2</sup>

Government identification is a ubiquitous aspect of modern life, something many adults the world over take for granted. Most people (in countries with established government bureaucracies at least) would not think twice if asked to show an identification card when applying for a job, going to the doctor, opening a bank account, or traveling both within and outside of their<sup>3</sup> country of residence; most people are privileged to be able to do these activities without consequence. Imagine, however, if instead, every time you produced your government-issued identification, you were exposing yourself to a serious risk of ridicule, verbal harassment, and violence, up to and including murder? For trans\*<sup>4</sup> people in many parts of the world, this is unfortunately not a hypothetical: because they cannot obtain governmental identification that correctly reflects their gender identity, many trans\* people literally risk their lives when they seek to do something as mundane as ordering a drink at a bar. As one Dutch trans\* man recounted:

I once had a bad experience in a pub in the UK. I ordered a beer and was asked for identification to prove my age. . . . I showed him my passport. When he saw the F in my passport, he waved the passport above his head and called his colleagues and the other customers around the bar and shouted, “Look, it’s a girl!” There were a lot of people who had quite a bit to drink, and I was afraid that there might be some idiot who would start beating me up. So I asked for my passport and I left. Ever since then, I’m very hesitant about showing my passport

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1. COMMISSIONER FOR HUMAN RIGHTS, ISSUE PAPER: HUMAN RIGHTS AND GENDER IDENTITY 19 (2009), available at <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1824655&SecMode=1&DocId=1433126&Usage=2>.

2. Boris Dittrich, *Swedish Government Should Stay out of its Citizens’ Underwear*, HUMAN RIGHTS WATCH (Jan. 10, 2012), <http://www.hrw.org/news/2012/01/10/swedish-government-should-stay-out-of-its-citizens-underwear>.

3. In this Note, I will use the nonbinary, gender-neutral (though occasionally grammatically frowned-upon) singular pronouns “they” and “their” instead of “he or she” to refer to persons generally, to reflect the fact that some people do not identify as either male or female but as both, or neither.

4. In this Note, I will use the term “trans\*” to refer to people whose gender identity does not correspond with the sex they were assigned at birth. See Olga Tomchin, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans\* People*, 101 CALIF. L. REV. 813, 815 n.4 (2013):

Trans\* is an umbrella term . . . [that] includes identity categories such as transgender, transsexual, gender-variant, genderqueer, and sometimes intersex (if the intersex person so identifies). Some people who identify as transsexual object to being called transgender, and vice-versa, so trans\* is a more inclusive term that is gaining favor in some activist communities.

in these kinds of situations.<sup>5</sup>

Unfortunately, this is not an anomaly: this is the lived experience of trans\*people in dozens of countries throughout the world, including the twenty-one Council of Europe (COE) Member States that currently require proof of sterilization to change one's legal sex categorization.<sup>6</sup> Several other COE member countries require that married trans\* persons divorce their spouses or convert their marriages to civil unions or domestic partnerships before they can update their legal sex categorization.<sup>7</sup> And despite the fact that some COE Member States do not permit trans\* people to change their legal sex at all,<sup>8</sup> compulsory sterilization of trans\* people is still a widespread practice in many of these countries.<sup>9</sup> Though some COE Member States have recently updated their laws to remove these sterilization and divorce requirements, even in those countries, trans\* people continue to be subject to discriminatory State action and given lesser legal rights than cisgender<sup>10</sup> people.<sup>11</sup>

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5. HUMAN RIGHTS WATCH, *CONTROLLING BODIES, DENYING IDENTITIES: HUMAN RIGHTS VIOLATIONS AGAINST TRANS PEOPLE IN THE NETHERLANDS* 40 (2011), available at <http://www.hrw.org/sites/default/files/reports/netherlands0911webwcover.pdf>.

6. As of the time of writing, the twenty-one COE Member States that currently require sterilization as a prerequisite to legal gender change are: Azerbaijan, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Greece, Italy, Latvia, Luxembourg, Malta, Montenegro, Norway, Romania, Russia, Slovakia, Switzerland, Turkey, and Ukraine. TRANSGENDER EUROPE, *TRANS RIGHTS EUROPE MAP 2014* (2014), available at [http://www.tgeu.org/sites/default/files/Trans\\_Rights\\_Map\\_2014.pdf](http://www.tgeu.org/sites/default/files/Trans_Rights_Map_2014.pdf) (indicating which European countries require sterilization to process legal gender change); see also *47 Member States*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/portal/47-members-states> (last visited February 13, 2015); the eleven COE Member States do not require sterilization to change legal gender are Austria, Croatia, Estonia, Germany, Iceland, the Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom. See TRANSGENDER EUROPE, *TRANS RIGHTS EUROPE MAP*, 2014.

7. See *Divorce Requirement Is Interference in Private Life Says European Court for Human Rights*, TRANSGENDER EUROPE (Nov. 13, 2012), <http://www.tgeu.org/book/export/html/37> [hereinafter *Divorce Requirement is Interference in Private Life*] (noting at the time of writing that, in addition to Finland, the "Czech Republic, France, Hungary, [the] UK and some cantons in Switzerland have registered partnerships while requiring couples to divorce for an official recognition of a trans person's gender"; though note, the United Kingdom has since repealed its divorce requirement. See *infra* Part III.B.).

8. There are fifteen COE Member States that do not permit persons to change their legal sex categorization: Albania, Andorra, Armenia, Bosnia & Herzegovina, Bulgaria, Hungary, Ireland, Liechtenstein, Lithuania, Macedonia, Moldova, Monaco, San Marino, Serbia, and Slovenia.. See TRANSGENDER EUROPE, *TRANS RIGHTS EUROPE MAP*, *supra* note 6.

9. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Rep. on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, H.R. Council, ¶ 78, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013) (by Juan E. Mendez) [hereinafter Report on Torture].

10. Tomchin, *supra* note 4, at 816 n.12:

Cisgender is a term describing individuals whose gender corresponds with the legal sex that they were assigned at birth. Cisgender people are not trans\*. Cis is the Latin prefix which is the antonym of trans. This term has been gaining favor in activist circles since its introduction in the 1990s, including in legal scholarship.

11. See *infra* Part III.

Forced sterilization and divorce are of particular concern both because these practices are common through COE Member States, and because they represent official State discrimination and violence against trans\* people. These requirements officially stigmatize and denigrate trans\* people, and this State disapprobation encourages private parties to subject members of this vulnerable group to harassment and violence as well.<sup>12</sup> In addition, the countries that impose these requirements also often subject trans\* people to further forms of discrimination and abuse, for example by making it difficult for them to obtain appropriate medical care.<sup>13</sup>

These practices should also be particularly troubling to human rights legal scholars because the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or European Convention),<sup>14</sup> to which all COE members are signatories,<sup>15</sup> establishes broad rights to respect for private and family life,<sup>16</sup> “to marry and to found a family,”<sup>17</sup> to nondiscrimination,<sup>18</sup>

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12. The United Nations has recognized, in other contexts, that eliminating official discrimination is essential to ending private violence. *See, e.g.*, Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993), available at <http://www.refworld.org/docid/3b00f25d2c.html> (“Recognizing that effective implementation of the Convention on the Elimination of All Forms of Discrimination against Women would contribute to the elimination of violence against women.”); *see also* Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 27 U.S.T. 1909, 1249 U.N.T.S. 13, available at [http://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch\\_IV\\_8p.pdf](http://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch_IV_8p.pdf) [hereinafter CEDAW]. Queer theorists have also noted the link between official discrimination and private violence. *See, e.g.*, Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1435 (1992) (“[Anti-sodomy laws] legitimize homophobic violence, [and thereby] violate the right to be free from State-legitimated violence at the hands of private and public actors.”); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 103 (2000) (“[T]he very existence of sodomy laws creates a criminal class of gay men and lesbians, who are consequently targeted for violence, harassment, and discrimination because of their criminal status.”).

13. *See, e.g.*, HUMAN RIGHTS WATCH, CONTROLLING BODIES, *supra* note 5, at 31 (noting that waiting lists for required genital surgeries for trans\* people in the Netherlands were far longer than those for comparable treatments for cisgender people).

14. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5, available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm> [hereinafter ECHR].

15. HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 936–37 (3d ed. 2007).

16. ECHR, *supra* note 14, art. 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

17. *Id.* art. 12.

18. *Id.* art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or

and to be free of inhuman or degrading treatment.<sup>19</sup> All of these recognized rights are in potential conflict with the COE Member States' discriminatory laws, although, as this Note will examine, to date the European Court of Human Rights (ECtHR) has been hesitant to interpret the ECHR in a way that protects trans\* people from sterilization and mandatory divorce requirements. Moreover, most COE countries are also signatories to several United Nations (UN) conventions and treaties that many human rights experts agree should be deemed incompatible with such requirements.<sup>20</sup>

Because the COE was the first regional system to protect lesbian, gay, and bisexual rights, "the discriminatory requirements imposed on trans\* people today by many COE Member States is both troubling and surprising.<sup>21</sup> It is particularly disappointing given that several COE countries have declared an intention to lead on human rights and LGBTQ equality issues."<sup>22</sup>

The widespread nature of these human rights violations in COE Member States speaks to the failure of regional and international human rights standards to introduce meaningful social and legal change amongst signatories. It also demonstrates the need for further progressive interpretation of preexisting international and regional human rights norms, in combination with domestic legal reform. Perhaps most importantly, it may signal that trans\* rights advocates should push for the development of LGBTQ-specific human rights treaties on international and regional levels.

This Note makes several contributions to the field. It is the first to analyze the current status of and several recent developments in the treatment of trans\* people within the COE in the context of human rights norms, with a focus on Sweden and the United Kingdom as example bellwethers of the evolving protection of trans\* people in Europe. This Note concludes that, although significant strides have been made on important fronts in these countries and in several others, the majority of COE Member States must continue to update their laws regarding gender identity to achieve compliance with international and regional human rights norms. Moreover, those ECtHR decisions that have not interpreted compulsory sterilization and divorce requirements to violate the

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other status.”).

19. *Id.* art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment . . .”).

20. *See infra* Part II.A.

21. *See, e.g.*, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 222 (2012) (noting that “[t]he European Court of Human Rights was the first international institution to recognize LGB rights”); *id.* at 224 (noting that, in the 1990s, “European institutions succeeded in establishing the most protective laws and policies concerning LGB rights” as compared to other regional systems).

22. *See, e.g.*, United Kingdom Dep’t for Culture, Media & Sport and United Kingdom Gov’t Equal. Office, *Policy: Creating a Fairer and More Equal Society*, GOV.UK (Dec. 13, 2013), <https://www.gov.uk/government/policies/creating-a-fairer-and-more-equal-society> (“We want the UK to be a leader in equality and human rights. At our best, we are defined by our tolerance, freedom and fairness.”) [hereinafter UK Policy].

ECHR should be revisited when these issues arise again and be overruled as wrongly decided. This Note also concludes that the fact that these cases were so decided reveals the current inability of extant regional and international standards to robustly protect the rights of sexual minorities. As a normative matter, courts should hold that the discriminatory requirements *do* violate the human rights of trans\* people. But because these rights have not been protected successfully by existing treaties thus far, this Note proposes that international and regional human rights standards should be updated to extend expressly to trans\* persons, by promulgating new LGBTQ-specific<sup>23</sup> human rights treaties.

This Note proceeds in three parts. The first Part provides background and context on the trans\* rights movement generally. The second Part identifies the relevant international and regional human rights norms that should be interpreted and applied to protect trans\* people's fundamental human rights. The third Part analyzes whether recent developments in the example countries (Sweden and the United Kingdom) have assisted those States in complying with international and regional norms. The conclusion will examine the broader implications of this analysis on the protection of vulnerable populations through international and regional human rights systems.

## I.

### BACKGROUND AND CONTEXT: THE TRANS\* RIGHTS MOVEMENT AND NOTES ON TERMINOLOGY

Transgender and transsexual people face a lifetime of inequalities and discrimination . . . . As children, they can be bullied and abused for being gender different. As adults their families, friends, and [neighbors] can reject them once their trans status is known, and they are very likely to experience assault and abuse at home, in the workplace and out on the streets . . . .<sup>24</sup>

This section will attempt to summarize some of the common interests of the trans\* community that are implicated in the context of international and regional human rights. It will also address concerns with the terminology of “gender” and “sex,” and it will explore how social constructions indicate the ways in which “gender” and “sex” are far from settled factual or medical/scientific terms but, rather, are deeply inflected by social constructions and conventions, which may

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23. Although trans\* interests and LGBTQ interests are not always or necessarily aligned, many transgender people consider the gay community to be their only viable social and political home. In part, this is because a sizable percentage of transgender people also identify as lesbian, gay, or bisexual. More fundamentally, it is because homophobia and transphobia are tightly intertwined, and because antigay bias so often takes the form of violence and discrimination against those who are seen as transgressing gender norms.

Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion*, in *TRANSGENDER RIGHTS* 141, 141–142 (2006). For this reason, trans\* activists might prefer to seek a broader LGBTQ rights treaty rather than one limited to trans\* issues alone.

24. ALLY WINDSOR HOWELL, *TRANSGENDER PERSONS AND THE LAW* 14 (2013).



have implications for the ways in which human rights law defines rights to nondiscrimination on the basis of “sex.”

The term “transgender” is “generally used to refer to individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth.”<sup>25</sup> By contrast, people whose gender identity corresponds with the sex they were assigned at birth are referred to as “cisgender.”<sup>26</sup> The trans\* community represents a small but meaningful proportion of the population: one recent study, for example, suggests that as many as 1 in every 250 people in the United States (or 0.4% of the population) may be trans\*.<sup>27</sup> Although statistics regarding the prevalence of trans\* people in COE countries are limited, existing data suggest that the United States estimate of 1 in every 250 persons is likely an accurate reflection of the prevalence of trans\* people in other communities.<sup>28</sup>

Queer scholars use the term “gender identity” “to reflect each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms.”<sup>29</sup> By contrast, queer theorists have described the term “sex,” which is “commonly used to denote one’s status as a man or woman based upon biological factors,”<sup>30</sup> as “the legal fiction that occurs when the appearance of an infant’s genitals at birth (as formalized by an ‘M’ or ‘F’ on a birth certificate) results in each person’s placement into a legal category of ‘male’ or ‘female.’”<sup>31</sup>

Though the term “sex” is often perceived as a neutral term that merely reflects medical and scientific fact, in reality, it is far from such: there is no

25. Paisley Currah et al., *Introduction* to *TRANSGENER RIGHTS* xiii, xiv (Paisley Currah et al. eds., 2006).

26. See Tomchin, *supra* note 4, at 816 n.12:

Cisgender is a term describing individuals whose gender corresponds with the legal sex that they were assigned at birth. Cisgender people are not trans\*. Cis is the Latin prefix which is the antonym of trans. This term has been gaining favor in activist circles since its introduction in the 1990s, including in legal scholarship.

27. HOWELL, *supra* note 24, at 10.

28. See, e.g., BERNARD REED ET AL., *GENDER VARIANCE IN THE UK: PREVALENCE, INCIDENCE, GROWTH AND DISTRIBUTION (2009)*, available at <http://www.gires.org.uk/assets/Medpr-o-Assets/GenderVarianceUK-report.pdf> (estimating that 6 in every 1000 British people or 0.6% of the population may identify as trans\*).

29. INT’L COMM’N OF JURISTS, *THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY* 6 (2007), available at <http://www.refworld.org/cgi-bin/txis/vtx/rwmain?docid=48244e602> [hereinafter *YOGYAKARTA PRINCIPLES*].

30. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *ARIZ. L. REV.* 265, 271 (1999).

31. Tomchin, *supra* note 4, at 819. See also Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 *U. Pa. L. Rev.* 1, 40 (1995).

consensus view as to what aspects of biology or physiology conclusively determine a person's sex.<sup>32</sup> Factors including chromosomes, the appearance of external genitalia, phenotype, and morphology may determine a person's sex at birth or later in life.<sup>33</sup> Thus, scholars have urged that the legal categorization of people into the sex categories of "male" and "female" is a socially contingent act that reflects society's normative assumption of the truth and naturalness of the gender binary.<sup>34</sup> Such a rigid and arbitrary classification of people into gender categories often harms trans\* people and others: "[w]e live in a binary society; one must be either female or male . . . [but] not everyone fits into a neat little male or female box."<sup>35</sup>

Trans\* people may choose to "transition" from the gender that corresponds to the sex they were assigned at birth to another gender identity or multiple gender identities, though not all do.<sup>36</sup> Some trans\* people decide to transition because they experience "gender dysphoria," which is the medically accepted term for the psychological distress that may arise "from not being recognized as one's gender or from not having one's body appear in a way that aligns with one's gendered understanding of oneself."<sup>37</sup>

The transition process usually includes a social transition, which primarily involves altering one's external gender expression to conform to one's gender identity, including changing one's hairstyle, makeup, accessories, and clothing.<sup>38</sup> Transition may or may not also include taking hormones and/or undergoing gender-confirming surgery, either on one's secondary sex characteristics or on one's external and/or internal genitalia.<sup>39</sup>

Despite society's misconceptions about the subject, "there is no such thing as a 'sex change' surgery or a 'sex reassignment surgery' that . . . [can convert] a woman into a man or a man into a woman."<sup>40</sup> In reality, there are a series of potential surgical interventions that trans\* people<sup>41</sup> may elect to undergo so that their external appearance conforms more closely to their gender identity.<sup>42</sup>

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32. Greenberg, *supra* note 30, at 271.

33. *Id.*

34. See generally, e.g., MARTINE ROTHBLATT, THE APARTHEID OF SEX: MANIFESTO ON THE FREEDOM OF GENDER (1995) (arguing that "male" and "female" are socially constructed fictions based in patriarchal views rather than reflections of biological reality).

35. HOWELL, *supra* note 24, at 31.

36. JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT ON THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 26 (2011).

37. Tomchin, *supra* note 4, at 821.

38. *Id.* at 843; see also Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 754 (2008) ("For those who wish to enhance the masculinization or feminization of their appearance, changing external gender expressions such as hairstyle, clothing, and accessories is often an effective, affordable, non-invasive way to alter how they are perceived in day-to-day life.").

39. Tomchin, *supra* note 4, at 843.

40. *Id.* at 820–21.

41. Cisgender people also seek out gender-confirming surgery (for example, some cisgender men with gynecomastia, a condition that causes development of what doctors consider an excessive

Though a significant number of trans\* people do undergo or hope to undergo such surgeries, many trans\* people do not wish to have surgery.<sup>43</sup> Other trans\* individuals are unable to access gender-confirming surgeries due to a lack of resources<sup>44</sup> or because of medical conditions that contraindicate such surgeries.<sup>45</sup> In fact, “the vast majority of trans people do not undergo surgery” at all.<sup>46</sup> Moreover, even those trans\* people who do desire *some* gender-confirming surgery may not wish to or are not able to undergo the complicated, expensive, and potentially dangerous procedures that would be required to leave them irreversibly sterilized.<sup>47</sup> Indeed, even those trans\* people who do desire some form of genital gender-confirming surgery may still wish to preserve their ability to procreate biologically, or they may prefer to make the decision on their own terms, rather than at the insistence of the government.

For trans\* people, “administrative gender classification and the problems it creates for those who are difficult to classify or are misclassified is a major vector of violence and diminished life chances and life spans.”<sup>48</sup> As one trans\* man explained to Human Rights Watch, having to present his official identification, which incorrectly categorized him as a woman (the sex he was assigned at birth), meant that, “[y]ou have no option, you’re forced, always, to provide an explanation . . . . You feel diminished as a man whenever you need to explain that you are in fact a man. Sex registration is like administrative violence that is condoned by the state.”<sup>49</sup>

Administrative gender classification without recourse to legal gender change actively harms trans\* people on a daily basis: “as a direct result of

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amount of breast tissue in a man, may choose to have such tissue surgically removed to reduce the size of their breasts). See DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF THE LAW* 148 (2011).

42. Tomchin, *supra* note 4, at 821 n.40.

43. See *id.* at 844; see also GRANT, *supra* note 36, at 26 (“For some [trans\* people], the journey traveled from birth sex to current gender may involve primarily a social change but no medical component; for others, medical procedures are an essential step toward embodying their gender.”); HUMAN RIGHTS WATCH, *CONTROLLING BODIES*, *supra* note 5, at 25 (noting that many trans\* people are content with gender-confirming hormone therapy alone, and that some do not wish to have any medical treatment at all).

44. Tomchin, *supra* note 4, at 844–45.

45. *Id.*

46. SPADE, *NORMAL LIFE*, *supra* note 41, at 145; see also GRANT, *supra* note 36, at 79 (finding less than a quarter of transwomen respondents to a recent, large-scale survey had undergone gender-confirming surgery, and less than half of transmen respondents had undergone gender-confirming surgery).

47. Compare HUMAN RIGHTS WATCH, *CONTROLLING BODIES*, *supra* note 5, at 17 (“In practice what is required [by the legal sterilization requirement] is the removal of the ovaries (trans men) or testes (trans women).”), with GRANT, *supra* note 36, at 79 (finding that twenty-one percent of transmen respondents did not desire hysterectomy and that fourteen percent of transwomen respondents did not desire removal of the testes).

48. SPADE, *NORMAL LIFE*, *supra* note 41, at 142.

49. HUMAN RIGHTS WATCH, *CONTROLLING BODIES*, *supra* note 5, at 4.

having a wrong gender marker in their identity documents, trans people have no option but to reveal to perfect strangers, often within earshot of a larger audience of yet more strangers, details of one of the most intimate aspects of their private lives—that they are transgender.”<sup>50</sup> In addition to being both humiliating and degrading, the process also exposes trans\* people to the risk of harassment and violence at the hands of State and non-State actors alike.<sup>51</sup> For example, one recent study found that trans\* people in New York City were 3.3 times more likely to be subjected to police violence than cisgender people.<sup>52</sup> When considering the fact that trans\* people are more likely to become victims of police brutality, it is no wonder that private actors feel emboldened to subject trans\* people to violence as well. As a result, “[g]ender nonconforming people consistently have been among the most visible and vulnerable members of gay communities—the most likely to be beaten, raped, and killed; among the most likely to be criminalized and labeled deviant; among the most likely to be denied housing, employment, and medical care; and among the most likely to be separated from their own children.”<sup>53</sup>

Other studies confirm that being “outed” as trans\* by your identity documents is distinctly dangerous for trans\* people: “Forty percent (40%) of respondents [to a recent U.S. survey of American trans\* people] who presented gender incongruent identification reported harassment and 3% reported being assaulted or attacked”;<sup>54</sup> trans\* people of color reported even more frequent physical assault when presenting gender-incongruent identification (between 6% and 9%).<sup>55</sup>

The trans\* community’s experience of humiliation and violence documented in this study is hardly limited to the United States. Unfortunately, as the advocacy group Transgender Europe has documented, violence against trans\* people appears to be on the rise globally, with more than 1100 reported killings of trans\* people worldwide between 2008 and 2012.<sup>56</sup> And since many countries do not systematically produce the relevant data, these figures are likely an underestimate. Though this violence is not solely attributable to the lack of access to gender-appropriate governmental identification, lack of access is a

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50. *Id.*

51. GRANT, *supra* note 36, at 154.

52. Press Release, Nat’l Coal. of Antiviolence Programs, National Report on Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities Released Today (June 4, 2013), available at [http://www.avp.org/storage/documents/2012\\_mr\\_ncavp\\_hvreport.pdf](http://www.avp.org/storage/documents/2012_mr_ncavp_hvreport.pdf).

53. Minter, *supra* note 23, at 141–142.

54. GRANT, *supra* note 36, at 153.

55. *See id.* at 154.

56. Press Release, Transgender Europe, *Constant Rise in Murder Rates: Transgender Europe’s Trans Murder Monitoring Project Reveals More Than 1,100 Reported Murders of Trans People in the Last Five Years* (Mar. 12, 2013), available at [http://www.transrespect-transphobia.org/uploads/downloads/2013/TMM-english/TvT-TMM2013-Update-PR\\_EN.pdf](http://www.transrespect-transphobia.org/uploads/downloads/2013/TMM-english/TvT-TMM2013-Update-PR_EN.pdf).

contributing factor that many trans\* people wish to see changed: “73% of trans respondents to an EU-wide survey expressed that easier gender recognition procedures would allow them to live more comfortably [and safely] as a transgender person.”<sup>57</sup>

Without the ability to change their legal gender categorization, “trans people are revealed as trans in all aspects of life. This is . . . true for official documents such as ID cards, passports, social security card[s] or driving licenses. But . . . other certificates such as school and university degrees, job references, credit and bank cards, student cards etc. can also become a source for daily trouble.”<sup>58</sup> As a result, trans\* people’s official “stigmatization is engrained in every aspect of life, often resulting in [their] exclusion from meaningful participation in social and economic life.”<sup>59</sup> The cumulative toll of these experiences, unsurprisingly, results in serious mental health consequences for the trans\* community: “41% of respondents [to the U.S. study of American trans\* people] reported attempting suicide, compared to [only] 1.6% of the general population.”<sup>60</sup>

Though the trans\* community is not a monolith but rather a diverse population with different priorities and interests, at a minimum<sup>61</sup> trans\* people want to be treated with the same dignity and respect that is afforded cisgender people.<sup>62</sup> For many trans\* people, this means changing relevant laws to allow them to update their legal sex categorization to comport with their gender identity.<sup>63</sup> For many trans\* people, this would also include being able to do so without having to prove that they have undergone specific and often unwanted

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57. RICHARD KÖHLER ET AL., *TRANSGENER EUROPE, LEGAL GENDER RECOGNITION IN EUROPE* 8 (2013), available at [http://www.tgeu.org/sites/default/files/Toolkit\\_web.pdf](http://www.tgeu.org/sites/default/files/Toolkit_web.pdf).

58. KÖHLER ET AL., *supra* note 58, at 10.

59. *Id.*

60. GRANT, *supra* note 36, at 2.

61. Tomchin, *supra* note 61, at 819; see also Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 271 (2005) (“There is no one way to be transgender . . . [T]here is no prototypical transgender experience.”).

62. See, e.g., *Mission Statement*, TRANSGENER EUROPE, <http://www.tgeu.org/missionstatement> (last updated Oct. 2, 2010) (“Transgender Europe envisions a Europe free from all discrimination—especially including discrimination on grounds of gender identity and gender expression; a Europe where transgender people are respected and valued, a Europe where each and every person can freely choose to live in whichever gender they prefer, without interference.”).

63. COMMISSIONER FOR HUMAN RIGHTS, *supra* note 1, at 17 (“Access to procedures to change one’s sex and one’s first name in identity documents is vital for a transgender person to live in accordance with one’s preferred gender identity.”); see also KÖHLER ET AL., *supra* note 58, at 8 (noting that a significant majority of respondents to a recent survey of trans\* Europeans want the gender recognition procedures in their countries to be made easier). A growing number of trans\* activists and their allies instead advocate that the State stop classifying people on the basis of sex/gender entirely. See generally, e.g., Tomchin, *supra* note 4 (concluding that the only way to prevent ongoing harms to trans\* people is for the legal fiction of sex to be completely abolished).

or inaccessible medical procedures.<sup>64</sup> As the nongovernmental organization World Professional Association for Transgender Health (WPATH) explains:

No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker [should] recognize the person's lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.<sup>65</sup>

Or, as one trans\* person succinctly put it, “[t]he state should stay out of our underwear.”<sup>66</sup>

## II.

### THE STATUS OF THE INTERNATIONAL AND REGIONAL RECOGNITION OF THE HUMAN RIGHTS OF TRANS\* PEOPLE

#### *A. International Context: The Development of Trans\* Rights in the International System*

Some say that sexual orientation and gender identity are sensitive issues. I understand. Like many of my generation, I did not grow up talking about these issues. But I learned to speak out because lives are at stake, and because it is our duty under the United Nations Charter and the Universal Declaration of Human Rights to protect the rights of everyone, everywhere.

– UN Secretary-General Ban Ki-moon to the Human Rights Council, 7 March 2012<sup>67</sup>

This section will present a brief (and necessarily selective) survey of the United Nations human rights conventions and reports that assist in defining rights to bodily integrity and personal autonomy, and that may be used to support trans\* rights specifically.

Several UN conventions and declarations incorporate human rights norms that either could be or have been interpreted to protect the interests of trans\* people in seeking to change their legal gender categorization without proof of sterilization or singlehood (though of course these documents were not drafted with trans\* people specifically in mind). Indeed, the foundational principles of international human rights law reflect this potential: “[t]he international community attempted indirectly to protect [future categories of] minorities

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64. COMMISSIONER FOR HUMAN RIGHTS, *supra* note 1, at 19 (“[M]edical treatment must always be administered in the best interests of the individual and adjusted to her/his specific needs and situation.”).

65. Press Release, World Prof’l Ass’n of Transgender Health (June 16, 2010), *available at* [http://www.wpath.org/uploaded\\_files/140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf](http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf).

66. HUMAN RIGHTS WATCH, CONTROLLING BODIES, *supra* note 5, at 26.

67. *Combating Discrimination Based on Sexual Orientation and Gender Identity*, OFF. OF THE HIGH COMMISSIONER OF H.R., <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx> (last visited January 24, 2014).

through the principle of nondiscrimination,” which “are included in the Charter, the Universal Declaration, the International Covenant on Civil and Political Rights [ICCPR], and the International Covenant on Economic, Social and Cultural Rights [ICESCR].”<sup>68</sup> As evidenced by a growing consensus amongst UN human rights treaty bodies, “[t]he principle of nondiscrimination prohibits distinctions based on group characteristics such as race, religion, language, or nationality”<sup>69</sup> and requires that the foundational universal human rights treaties should be interpreted to bar State discrimination on the basis of sexual orientation and gender identity.<sup>70</sup>

The recognition of LGBTQ rights by international authorities is a comparatively recent phenomenon. Although the LGBTQ rights movement began in earnest in the United Kingdom and United States in the 1950s and 1960s, picking up speed in the United States after the Stonewall Riots of 1969,<sup>71</sup> international authorities did not begin to formally recognize LGBTQ rights until the 1980s.<sup>72</sup> As noted above, “[t]he European Court of Human Rights was the first international institution to recognize [LGBTQ] rights” in its 1981 decision *Dudgeon v. United Kingdom*.<sup>73</sup> *Dudgeon* held that criminalizing consensual, adult same-sex sexual activity was a breach of ECHR-protected the right to respect for private life.<sup>74</sup> Though certainly a watershed moment for the recognition of LGBTQ rights, *Dudgeon* did not inspire immediate followers amongst other regional or international human rights authorities, and it was not until 1994 that an international authority, the UN Human Rights Committee, determined that “discrimination on the basis of sexual orientation was regulated by the right to equality under the [International Covenant on Civil and Political Rights].”<sup>75</sup> In the time since, many other UN human rights treaties “have been interpreted by their supervisory organs to cover sexual orientation [and gender identity] discrimination,”<sup>76</sup> but it was not until 2011 that the UN adopted a resolution specific to sexual orientation and gender identity, after a decade of unsuccessful attempts to do so.<sup>77</sup>

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68. Olivia Q. Goldman, *The Need for an Independent International Mechanism to Protect Group Rights: A Case Study of the Kurds*, 2 *TULSA J. COMP. & INT’L L.* 45, 52 (1994).

69. *Id.*

70. See ALSTON & GOODMAN, *supra* note 21, at 223 (noting that, as of 2012, five of the universal human rights treaties had been interpreted by their respective supervisory organs to cover sexual orientation discrimination (ICCPR in 1994, CEDAW in 1999, CESCR in 2000, CRC in 2000 and CAT in 2001)).

71. *Id.* at 220–21.

72. *Id.* at 220.

73. See *id.* at 222.

74. *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. 149 (1981).

75. *Id.* at 223.

76. *Id.*

77. See *id.* at 230; see also Human Rights Council Res. 17/19, Human Rights, Sexual Orientation and Gender Identity, 17th Sess., U.N.Doc. A/HRC/RES/17/19 (July 14, 2011).

As the International Committee of Jurists has recognized, although “the international system has seen great strides toward gender equality and protections against violence in society, community and in the family . . . the international response to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent.”<sup>78</sup> It is surprising that international authorities have been slow and disjointed in their efforts to recognize LGBTQ rights, particularly when considering the likelihood that the drafters of the foundational universal human rights instruments chose an individual-rights-focused nondiscrimination framework to protect a broad range of potential vulnerable groups in the future.

The foundational international human rights document, the Universal Declaration of Human Rights (UDHR),<sup>79</sup> contains several provisions that could easily be interpreted to protect the interests of the trans\* community (though, of course, it should be noted that the UDHR is a declaration, not a treaty, and was therefore not considered legally binding on UN Member States when it was passed, though it is now widely acknowledged to be customary law).<sup>80</sup> First, the equality and nondiscrimination principles in Articles 1,<sup>81</sup> 2,<sup>82</sup> and 7<sup>83</sup> indicate that all persons are entitled to equal treatment and equal respect for their human dignity and to be free from State discrimination on the basis of “sex . . . or other status.”<sup>84</sup> The Preamble to the UDHR also broadly sets forth that “the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>85</sup> Further, Articles 12 and 16 establish universal rights to marriage and family integrity and noninterference with private and family life.<sup>86</sup> And,

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78. YOGYAKARTA PRINCIPLES, *supra* note 29, at 6.

79. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (1948) [hereinafter UDHR].

80. Compare Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 61, 74 (2013) (noting hortatory nature of UDHR: “the initial goal was to pass a non-binding, yet authoritative, statement of the broad panoply of rights that all sovereign states should observe vis-à-vis their own people”) with Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT’L L. 903, 913 (2008) (“[T]he reference to customary law has become a standard argument in discussions of the legal nature of the Declaration and individual provisions thereof.”).

81. UDHR, *supra* note 79, art. 1 (“All human beings are born free and equal in dignity and rights.”).

82. *Id.* art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

83. *Id.* art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”).

84. *Id.* art. 2.

85. *Id.* preamble.

86. *Id.* art. 12 (“No one shall be subjected to arbitrary interference with his privacy, [or] family . . . .”); art. 16:



Article 5 states that “[n]o one shall be subjected . . . to cruel, inhuman or degrading treatment.”<sup>87</sup>

The ICCPR<sup>88</sup>, which intended to bring the aspirational norms of the UDHR into being through binding international law,<sup>89</sup> contains many similar principles to the UDHR, including a recognition in the preamble that the rights contained in the Covenant spring from “the inherent dignity of the human person.”<sup>90</sup> Following the UDHR, the ICCPR also contains a broad nondiscrimination principle:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>91</sup>

Moreover, ICCPR Article 16 states “[e]veryone shall have the right to recognition everywhere as a person before the law.”<sup>92</sup> And in terms similar to those used in the UDHR, the ICCPR creates broad rights to family integrity: Article 23 states “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State,” and it exhorts that “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”<sup>93</sup> And in language identical to Article 5 of the UDHR, ICCPR Article 7 states “[n]o one shall be subjected . . . to cruel, inhuman or degrading treatment.”<sup>94</sup>

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Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. . . . The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

87. *Id.* art. 5.

88. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

89. *See id.* preamble; *see also* Elkins et al., *supra* note 80, at 66 (“[T]he normative consensus embodied in the UDHR took legal form only later through the two international covenants promulgated in 1966: the ICCPR and the International Covenant on Economic, Social and Cultural Rights . . .”).

90. ICCPR, *supra* note 88, preamble.

91. *Id.* art. 26; *see also id.* art. 2:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

92. *Id.* art. 16.

93. *Id.* art. 23.

94. *Id.* art. 7.

Like the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”)<sup>95</sup> also begins by broadly recognizing the inherent dignity of all persons.<sup>96</sup> Article 1 specifically prohibits “torture,” which the instrument defines as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>97</sup>

In addition to the basic interpretation of the plain language of international treaties, UN officials have also applied these principles specifically to trans\* people in the course of their work. For example, in 2013 the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment published a report to the UN Human Rights Council, which concluded in part by:

call[ing] upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery[,] [and] involuntary sterilization . . . , when enforced or administered without the free and informed consent of the person concerned . . . . [and] to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.<sup>98</sup>

Specifically, the report noted with disapproval that “[i]n many countries transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender,” particularly in Europe.<sup>99</sup> The report implies that such practices constitute “abuses in health-care settings . . . [that] cross a threshold of mistreatment that is tantamount to torture or cruel, inhuman or degrading treatment or punishment,” and the report recommends abolishing “the policies that promote these practices.”<sup>100</sup> These practices impliedly “run afoul of the prohibition on torture and ill-treatment,” and thus implicate “State’s obligations to regulate, control and supervise health-care practices with a view to preventing mistreatment under any pretext.”<sup>101</sup> Following similar reasoning, Human Rights Watch and other NGO human rights groups have similarly urged that the ICCPR-protected “rights to personal autonomy and physical integrity” are prima facie violated by COE countries’ sterilization requirement for trans\* people.<sup>102</sup> As one group of NGOs agreed in its response to the Special Rapporteur report, “[r]equiring an

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95. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

96. *Id.*, preamble.

97. *Id.* art. 1.

98. Report on Torture, *supra* note 9, ¶ 88.

99. *Id.* ¶ 78.

100. *Id.* summary.

101. Report on Torture, *supra* note 9, summary.

102. HUMAN RIGHTS WATCH, CONTROLLING BODIES, *supra* note 5, at 55.

individual to be sterilized in order to secure gender affirming documentation necessary to interact safely and productively in his or her daily life cannot reasonably be classified as a voluntary or non-coercive condition.”<sup>103</sup>

Like the Special Rapporteur, other UN bodies have concluded that international human rights norms apply to the specific context of trans\* people. For example, the UN Human Rights Council has urged signatories to the ICCPR to “recognize the right of transgender persons to a change of gender.”<sup>104</sup> In so doing, the UN Human Rights Council cited ICCPR Article 2 (States’ obligation not to discriminate in affording rights protected by the ICCPR), Article 16 (right to recognition as persons under the law), Article 17 (right to noninterference with privacy and family), Article 23 (right to found a family), and Article 26 (equality and nondiscrimination).<sup>105</sup>

The United Nations High Commissioner for Human Rights also issued a report in 2011 recommending that Member States “[f]acilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights.”<sup>106</sup> The report noted with concern that “[r]egulations in countries that recognize changes in gender often require, implicitly or explicitly, that applicants undergo sterilization surgery as a condition of recognition,” and that “[s]ome States also require that those seeking legal recognition of a change in gender be unmarried, implying mandatory divorce in cases where the individual is married.”<sup>107</sup> This report was the result of the first ever LGBTQ-specific resolution passed by the UN in 2011, a Human Rights Council resolution that specifically urged “the United Nations High Commissioner for Human Rights to commission a study . . . documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.”<sup>108</sup>

Similarly, a recent United Nations Development Programme’ Discussion Paper noted that “many trans people are required to undergo forced sterilization

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103. Gay Japan News et al., *Human Rights Violations on the Basis of Sexual Orientation and Gender Identity in Japan: NGO Input for the Task Force for Adoption of the List of Issues International Covenant on Civil and Political Rights 24* (2013), *available at* [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JPN/INT\\_CCPR\\_NGO\\_JPN\\_14886\\_E.doc](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JPN/INT_CCPR_NGO_JPN_14886_E.doc).

104. Human Rights Comm., *Concluding Observations (Ireland)*, ¶ 8, U.N. Doc. CCPR/C/IRL/CO/3 (30 July 2008).

105. *Id.*

106. U.N. High Comm’r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity*, ¶ 84(h), U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

107. *Id.* ¶ 72; *see also id.* ¶ 73 (noting Human Rights Committee’s “concern”).

108. H.R.C. Res. 17/19, *supra* note 77, ¶ 1.

in order to gain legal recognition of their gender identity,” and that “[t]his has a profound impact on their bodily autonomy and right to found a family” as protected by international human rights conventions.<sup>109</sup> The Discussion Paper also suggested that mandatory divorce requirements contravene “[t]he right to recognition before the law . . . set out in core human rights treaties” and “create a conflict between a person’s right to marry and their privacy, which includes their self-determined sexual and gender identity.”<sup>110</sup>

Most recently, the Office of the High Commissioner for Human Rights, in combination with several other UN bodies and NGOs including the World Health Organization issued an interagency statement that condemned forced sterilization as a violation of human rights and a derogation of “States parties’ obligation . . . to respect the rights of . . . [among others] transgender . . . persons.”<sup>111</sup> The statement explained: “these sterilization requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender and intersex persons.”<sup>112</sup>

Many international NGOs have long advocated for broadly interpreting existing international human rights norms to set implied standards for the respectful treatment of LGBTQ persons. Perhaps most notably, the influential International Commission of Jurists (ICJ) produced the extensive 2006 Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles).<sup>113</sup> While the Yogyakarta Principles are not binding interpretations of international law because the ICJ is merely an advisory NGO, they are nevertheless influential, and the ICJ’s impartial interpretation of law is often accorded respect in the international sphere and amongst domestic actors.<sup>114</sup> The Yogyakarta Principles’ firm basis in extant international law is further bolstered by “extensive citations to existing legal authority supporting each of the provisions in the final text.”<sup>115</sup>

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109. UNITED NATIONS DEVELOPMENT PROGRAMME, DISCUSSION PAPER: TRANSGENDER HEALTH AND HUMAN RIGHTS 17 (Dec. 2013), *available at* <http://www.undp.org/content/dam/undp/library/HIVAIDS/Governance%20of%20HIV%20Responses/Trans%20Health%20&%20Human%20Rights.pdf>.

110. *Id.* at 24.

111. WORLD HEALTH ORGANIZATION ET AL., ELIMINATING FORCED, COERCIVE AND OTHERWISE INVOLUNTARY STERILIZATION: AN INTERAGENCY STATEMENT 10 (2014), *available at* [http://apps.who.int/iris/bitstream/10665/112848/1/9789241507325\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/112848/1/9789241507325_eng.pdf?ua=1).

112. *Id.* at 7.

113. YOGYAKARTA PRINCIPLES, *supra* note 29.

114. *See, e.g.,* Makau Mutua, *Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, 10 BUFF. HUM. RTS. L. REV. 15, 29 (2004) (noting that the ICJ is a “respected” organization worldwide).

115. ALSTON & GOODMAN, *supra* note 21, at 231.

The most relevant Yogyakarta Principle for trans\* rights is Principle 3, “The Right to Recognition Before the Law.” Principle 3 explains:

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, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.<sup>116</sup>

The text of Principle 3 further explains that to comply with this Principle, States must “take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex—including birth certificates, passports, electoral records and other documents—reflect the person’s profound self-defined gender identity.”<sup>117</sup> States must also “ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned,” and “that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy.”<sup>118</sup>

In sum, though extant international human rights conventions have only recently begun to be interpreted by official UN entities in a manner that protects the rights of trans\* people who wish to change their legal gender without forced sterilization or divorce, there are several strong arguments that such practices do impermissibly conflict with binding international human rights norms. As the next section will demonstrate, this is also true of regionally protected human rights within the COE.

#### *B. Regional Context: The Development of Trans\* Rights in the European System*

This section will briefly survey the European regional human rights norms that have been interpreted generally to create individual rights to bodily integrity and decisional autonomy, and that could be applied to protect trans\* people’s interests specifically. Like the international authorities covered in the prior section, the European regional human rights system has recognized several individual human rights norms that could be interpreted to protect the rights of trans\* people seeking to be free from compulsory sterilization and divorce. For trans\* people in COE countries, there are therefore at least two independent sources of international law that militate in favor of barring enforcement of these

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116. YOGYAKARTA PRINCIPLES, *supra* note 29, at Principle 3, at 11–12.

117. *Id.*

118. *Id.* at Principle 3, at 12.

laws. And, given that the EcCtHR has the capacity to consider a greater volume of individual complaints against States than the international human rights treaty bodies, these regional norms are particularly important for vindicating individual persons' rights.<sup>119</sup> In addition, the ECtHR's decisions interpreting the ECHR are precedential, which means that one favorable decision interpreting the treaty to protect trans\* people from specific kinds of discriminatory State behavior could have large ripple effects.<sup>120</sup>

The ECHR protects many of the same rights as the international human rights documents discussed in the previous section.<sup>121</sup> ECHR Article 14 sets forth an expansive prohibition of discrimination that applies to all other rights enumerated in the European Convention, mandating that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."<sup>122</sup>

ECHR Article 8 protects a broad right to privacy and respect for family life for all persons in the signatories' jurisdictions: "[e]veryone has the right to respect for his private and family life."<sup>123</sup> Article 8 further states that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."<sup>124</sup> In this way, Article 8 is even more protective of these rights than comparable provisions in the UDHR or the ICCPR, in that it limits the kinds of justifications States Parties can advance to defend their interference with individuals' privacy and family life. ECHR Article 8 is complemented in part by Article 12, which provides that men and women of marriageable age have the right to marry and "to found a family."<sup>125</sup> Finally, in language identical to the antitorture provisions in the UDHR, the ICCPR, and the CAT, ECHR Article 3 states that "no one shall be subjected to torture or to inhuman or degrading treatment."<sup>126</sup>

Precedential decisions of the European Court of Human Rights interpreting the application of the ECHR to Member States shed some light on how that

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119. See STEINER ET AL., *supra* note 15, at 938.

120. See *Goodwin v. United Kingdom*, App. No. 28957/95 35 Eur. H.R. Rep. 18, ¶ 66 (2002) (noting that prior decisions of the ECtHR are precedential).

121. See *supra* Part II.A.

122. ECHR, *supra* note 14, Art. 14.

123. *Id.*

124. *Id.*

125. *Id.* art. 12.

126. *Id.* art. 3.

Court's jurisprudence might continue to evolve to protect the rights of trans\* people. Importantly, the ECtHR held in *Case of I.G and Others* that the unconsented sterilization of a cisgender woman in the course of a Caesarean section was degrading treatment in violation of ECHR Article 3.<sup>127</sup> The Court rested its 2012 decision in large part on the fact that the 'plaintiff's tubal ligation "sterilisation was not a life-saving intervention,"<sup>128</sup> and that "neither the applicant's nor her legal guardians' informed consent had been obtained prior to it."<sup>129</sup> Indeed, because the plaintiff was a minor at the time of her sterilization, she could not legally give consent even if she had been properly advised about the procedure,<sup>130</sup> which she was not.<sup>131</sup> The Court concluded:

Taking into account the nature of the intervention, its circumstances, the age of the applicant and also the fact that she belongs to a vulnerable population group . . . the Court considers that the treatment complained of attained a level of severity which justifies its qualification as degrading within the meaning of Article 3.<sup>132</sup>

The *I.G.* court further explained that:

[A] person's treatment is considered to be "degrading" when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority; it may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others.<sup>133</sup>

The Court also held that the *I.G.* plaintiff's sterilization violated her right to respect for private and family life, explaining that "the respondent State failed to comply with its positive obligation under Article 8 to secure through its legal system the rights guaranteed by that Article, by putting in place effective legal safeguards to protect the reproductive health of . . . women."<sup>134</sup>

The plaintiff's sterilization might also have been found to be a violation of Article 12, which, again, states that men and women have the right to marry and "to found a family."<sup>135</sup> However, though the applicant did raise Article 12, the Court declined to reach its application because it had already found her

127. *I.G. and Others v. Slovakia*, App. No. 15966/04, Eur. Ct. H.R. (2012), at ¶ 123, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114514>.

128. *Id.* ¶ 122.

129. *Id.*

130. *See id.* ¶ 16 ("The first applicant submitted that her sterilisation had been contrary to Slovakian law, as at the relevant time she was 16 years old and her legal guardians had not consented to the operation.")

131. The procedure was carried out on the applicant during the Caesarean surgery, without her foreknowledge. *See id.* ¶ 9. It was only after the fact that doctors asked her to sign a sterilization consent form, and she "was [falsely] told [at the time] that she had to sign the document because she had undergone a Caesarean section and all women who had Caesarean sections had to sign it." *Id.* ¶ 12.

132. *Id.* ¶ 123.

133. *Id.* ¶ 121.

134. *Id.* ¶ 144.

135. ECHR, *supra* note 14, art. 12.

sterilization was a substantive violation of other Articles, particularly Article 8.<sup>136</sup> This suggests, perhaps, that the Court was not willing to rule that compulsory sterilization necessarily infringes on the right to marry and found a family, and preferred to ground the violation in the right to respect for private and family life. In a similar decision, *Case of V.C.*, the Court also declined to find a violation of Article 12:

[T]he sterilisation performed on the applicant had serious repercussions on her private and family life, and the Court has found that it was in breach of Article 8 of the Convention. That finding absolves the Court from examining whether the facts of the case also give rise to a breach of the applicant's right to marry and to found a family.<sup>137</sup>

The ECtHR has decided a small number of cases specifically applying the ECHR's protections to trans\* people. The most favorable decision to date is *Goodwin v. United Kingdom* in 2002.<sup>138</sup> In that case, the applicant was a heterosexual transwoman who had undergone gender-confirming surgery and wanted to be able to marry a cisgender man. At the time, the UK did not allow trans\* persons to change their legal sex and limited marriage to opposite-sex couples. Because the applicant's legal sex was still recorded as "male," she was unable to marry her male partner.<sup>139</sup> The Court recognized that:

serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity. The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.<sup>140</sup>

Accordingly, the Court held that the UK's denial of the applicant's ability to update her official legal gender categorization was a violation of both Article 8 and Article 12 because this prevented her from marrying.

Unfortunately, there are several other ECtHR decisions involving trans\* applicants that are distinctly unfavorable to trans\* persons wishing to challenge discriminatory legal gender-change requirements. In a 1997 decision, *Roetzheim v. Germany*, the ECtHR held that requiring a trans\* person to prove sterility as a prerequisite to changing their legal gender was not a violation of Article 8 of the ECHR (respect for private and family life).<sup>141</sup> In that case, the applicant was a transwoman German citizen who wanted to update her legal gender

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136. *I.G. and Others*, App. No. 15966/04, at ¶ 150.

137. *V.C. v. Slovakia*, App. No. 18968/07, 59 Eur. H.R. Rep. 29, ¶ 160 (2011).

138. *Goodwin v. United Kingdom*, App. No. 28957/95 35 Eur. H.R. Rep. 18 (2002).

139. *Id.* ¶¶ 21, 93, 95, 104.

140. *Id.* ¶ 77.

141. *Roetzheim v. Germany*, App. No. 31177/96 Eur. Ct. H.R. (1997), available at <http://echr.ketse.com/doc/31177.96-en-19971023/view/>; see also KÖHLER ET AL., *supra* note 58, at 35–36 (describing the *Roetzheim* decision).



categorization but did not wish to undergo genital surgery that would leave her irreversibly sterile, as the German gender-change law then in effect required. She complained that “the requirements under the [version of the] German Transsexuals Act [then in effect] for a change of the civil status of transsexuals, [which required proving] . . . inability to procreate and gender reassignment surgery[,] amount[ed] to a violation of [her] right to respect for [her] private life under Article 8 of the Convention.”<sup>142</sup> In rejecting her claim, the Court reasoned that there was “remaining uncertainty as to the essential nature of transsexualism,” and that it could be “extremely complex” for a State to recognize a person’s preferred gender without such surgeries.<sup>143</sup>

Relying on a narrow, external-genitalia-focused definition of “sex,” the ECtHR agreed with the State that it was “not required to treat persons, who, according to physical factors, still belonged to the original sex and were still able to procreate as member of this sex, in every respect as members of the other sex, corresponding to their psychological situation.”<sup>144</sup> The Court also appeared to be particularly concerned that the applicant wanted to retain her fertility, noting that “following the dissolution of [her] first marriage, the applicant married again in 1994 and had another child.”<sup>145</sup> Impliedly, the Court disapproved of the applicant’s desire to found a family, a right that, it is worth noting, is protected elsewhere in the ECHR by Article 12.<sup>146</sup> The Court concluded that, in allowing for recognition of a person’s legal gender change only after proving genital surgeries that resulted in infertility, “the respondent State has in principle taken appropriate legal measures in this field.”<sup>147</sup> The ECtHR also distinguished precedent finding that States have an obligation to recognize the preferred gender identity of “post-operative transsexuals”: “In the above-mentioned cases, the Convention organs were faced with complaints brought by post-operative transsexuals, while the present case relates to a transsexual refusing gender reassignment surgery.”<sup>148</sup> As such, despite *Goodwin*’s recognition of some limited rights for trans\* persons who have undergone surgeries, *Roetzhem*’s approval of surgery as a prerequisite to obtain those rights is likely still good law.

The ECtHR also has unfavorable precedent regarding mandatory divorce requirements. In *H. v. Finland*, the Court considered a Finnish law requiring that applicants for a change of legal sex categorization be unmarried or that their partners consent to their marriage being converted into a civil partnership. The

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142. *Roetzhem*, App. No. 31177/96. The text has been updated to correct for the fact that the ECtHR referred to the applicant, Dora Roetzhem, by the incorrect pronoun (the ECtHR decision uses male pronouns, though the applicant identified as a woman).

143. *Id.*

144. *Id.*

145. *Id.*

146. The applicant did not raise an Article 12 complaint.

147. *Roetzhem*, App. No. 31177/96.

148. *Id.*

applicant in the case, a married transwoman, complained that the law violated her rights under the ECHR: since “the applicant’s wife did not give her consent to the transformation of their marriage into a civil partnership . . . [because both wanted to remain married], the applicant’s new gender could not be introduced in the population register.”<sup>149</sup> Essentially, the applicant urged, the law forced her to choose between remaining married to her wife or having her identity documents match her gender identity, infringing her right to respect for private and family life.<sup>150</sup>

Though the Court agreed that the law did represent an interference with the applicant’s private and family life, it nevertheless concluded that the law did not violate the ECHR. Specifically, Article 8 was not violated, the Court explained, because “the interference . . . pursued the legitimate aim of protecting the ‘health and morals’ and the ‘rights and freedoms’ of others, as argued by the Government.”<sup>151</sup> What “health and morals” and “rights and freedoms of others” were precisely in need of protection was, however, left unsaid.<sup>152</sup>

The Court also explained that its decision was required by adverse precedent, because “according to its case-law, Articles 8 and 12 do not impose an obligation on Contracting States to grant same-sex couples access to marriage.”<sup>153</sup> Thus, the Court opined:

[T]here are two competing rights which need to be balanced against each other, namely the applicant’s right to respect for her private life by obtaining a new female identity number and the State’s interest to maintain the traditional institution of marriage intact. Obtaining the former while remaining still married would imply a same-sex marriage between the applicant and her spouse, which is not allowed by the current legislation in force in Finland.<sup>154</sup>

While the Court has elsewhere had occasion to revisit its prior determinations as to what the ECHR requires of COE Member States,<sup>155</sup> it declined to do so in this case, again hewing to the rule that Articles 8 and 12 do not create a right to same-sex marriage.

Although the outcome of *H. v. Finland* was a disappointment to trans\* rights activists, at least some saw a silver lining in the Court’s reasoning: “the court acknowledged that private and family life was affected. It also reiterated that member States have only narrow leeway when setting conditions for recognizing a person’s gender identity. We remain optimistic that excessive

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149. *H. v. Finland*, App. No. 37359/09 Eur. Ct. H.R. (2012), ¶ 10, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114486>.

150. *Id.* ¶ 13.

151. *Id.* ¶ 45.

152. See *Divorce Requirement is Interference in Private Life*, *supra* note 7. As Richard Köhler, TGEU Policy Officer, noted, “It remains incomprehensible how ‘health and morals’ and ‘rights and freedoms’ of others’ could be threatened by the intact family life of Ms H.”

153. *H. v. Finland*, App. No. 37359/09, ¶ 49, ¶ 66.

154. *Id.* ¶ 48.

155. See, e.g., *Goodwin v. United Kingdom*, App. No. 28957/95 35 Eur. H.R. Rep. 18 (2002).

conditions trans people are still exposed to will eventually be banned in Europe.”<sup>156</sup>

The next Part of this Note will consider two examples of domestic legal reform as alternatives to relying on the ECtHR to robustly protect trans\* people’s ECHR rights, given that the ECtHR has been slow to reassess its precedent and so far unwilling to hold that compulsory sterilization and mandatory divorce are violations of the COE’s human rights norms.

### III.

#### COE EXAMPLES: RECENT DEVELOPMENTS IN SWEDEN AND THE UNITED KINGDOM

The following subsections will consider recent developments regarding the rights of trans\* people in two COE countries, Sweden and the United Kingdom, and analyze whether these developments have brought them into line with international and regional human rights law as a normative matter. Specifically, this section will analyze two developments: first, Sweden’s Administrative Court of Appeals 2012 decision that a statute mandating proof of sterilization to change one’s legal gender was in conflict both with the Swedish constitution and with the ECHR; and second, the UK’s 2013 amendments to its law regarding gender identity, which removed the requirement that married trans\* people dissolve their marriages before proceeding with their legal change of gender categorization, and instead instituting a spousal notification and permission requirement. This section will conclude that, though these reforms are positive, more work remains to be done to ensure that these and other countries continue to afford trans\* people the rights and protections to which they should be entitled under domestic, regional, and international law.

#### *A. Sweden: Applying Domestic Law Principles and International and Regional Human Rights Norms To Strike Down Discriminatory Sterilization and Divorce Requirements*

I am lucky with my body, for me it’s possible to live as a woman without surgery and without hormones. Why then should I subject myself to a surgeon’s scalpel? Why take hormones for the rest of my life, when I don’t know what the side effects might be? . . . It should be up to each individual to decide what solution they adopt. To me, it’s unacceptable that if I want to change the M in my passport into an F, the state decides for me how I must alter parts of my body.<sup>157</sup>

Sweden ratified the ECHR on April 4, 1952; it entered into force there in March 1953.<sup>158</sup> The country also ratified the ICCPR on September 29, 1967,

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156. *Divorce Requirement Is Interference in Private Life*, *supra* note 7.

157. HUMAN RIGHTS WATCH, CONTROLLING BODIES, *supra* note 5, at 6 (alteration in original).

158. *Convention for the Protection of Human Rights and Fundamental Freedoms: Chart of Signatories and Ratifications*, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=04/02/2013&CL=ENG> (last visited Jan. 24, 2014) [hereinafter

and the treaty entered into force on December 6, 1971;<sup>159</sup> the CAT was ratified on February 4, 1985 and entered into force on January 8, 1988.<sup>160</sup> Though Sweden treats the ECHR as “an accepted source for interpretations of . . . [national] constitutional law,” it does not consider it a mandatory source of authority on Swedish law; however, Sweden does recognize the ECHR as a legally binding treaty internationally.<sup>161</sup>

Until December 2012, the Swedish statute that controlled the ability of trans\* persons to update their legal sex, Law 1972:119, required that “persons wishing to change their [legal] gender must undergo sterilization or else be lacking in the ability to reproduce in order to be eligible for the change.”<sup>162</sup> It also required that applicants be Swedish nationals and that they be either divorced or single for their legal sex categorization to be changed.<sup>163</sup> All three of these requirements were removed as a result of the Swedish Administrative Court of Appeal’s ruling in December 2012 that the provisions were in conflict with the Swedish Constitution and the ECHR.<sup>164</sup> The Administrative Court of Appeal grounded its decision in part in the Swedish Constitution, but also in Articles 8 and 14 of the European Convention.<sup>165</sup>

Under the old statutory regime, many Swedish trans\* persons chose to wait to undergo the required 1972:119 sterilization procedure until after they had had children, even though this delayed their ability to legally change their gender categorization on their State identification documents and thus prolonged their exposure to potential harassment arising from the mismatch between their external gender presentation and their official identity documents.<sup>166</sup> For those Swedish trans\* persons who wished to have biological children and also suffered from the psychological condition of gender dysphoria,<sup>167</sup> this also would mean enduring several years more of sometimes severe mental

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ECHR Signatories].

159. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv4&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv4&chapter=4&lang=en) (last visited Jan. 24, 2014) [hereinafter ICCPR Signatories].

160. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) (last visited Jan. 24, 2014) [hereinafter CAT Signatories].

161. GIUSEPPE MARTINICO & ORESTE POLLICINO, *THE NATIONAL JUDICIAL TREATMENT OF THE ECHR AND EU LAWS: A COMPARATIVE CONSTITUTIONAL PERSPECTIVE* 419-20 (2010).

162. Wendy Zeldin, *Sweden: Amended Transgender Law Now in Force*, THE GLOBAL LEGAL MONITOR, LAW LIBRARY OF CONGRESS (Jan. 11, 2013), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205403454\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403454_text).

163. *Id.*

164. *Id.*

165. *Id.*

166. Boris O. Dittrich, *Sweden: Letter to the Prime Minister Regarding Transgender Law*, HUMAN RIGHTS WATCH (Jan. 14, 2012), <http://www.hrw.org/news/2012/01/14/sweden-letter-prime-minister-regarding-transgender-law>.

167. See Grant, *supra* note 36 and accompanying text.

anguish.<sup>168</sup> Though from a cisgender person's perspective it might not seem especially onerous to have to wait to update one's official documentation, as noted in section I above, the ubiquity of gender in all aspects of life means that mismatches between official documents and gender presentation subject trans\* people to a serious, daily risk of ridicule and harassment, adverse employment consequences, and staggering rates of bias-based violence.<sup>169</sup>

One former Council of Europe Commissioner for Human Rights explained his view that sterilization requirements such as those in former law 1972:119:

clearly run counter to the respect for the physical integrity of the person. To require sterilisation or other surgery as a prerequisite to enjoy legal recognition of one's preferred gender ignores the fact that while such operations are often desired by transgender people, this is not always the case. Moreover, surgery of this type is not always medically possible, available, or affordable without health insurance funding. False . . . Yet the legal recognition of the person's preferred gender identity is rendered impossible without these treatments, putting the transgender person in a limbo without any apparent exit.<sup>170</sup>

Happily, Sweden was able to resolve the conflict between its laws, its aspirational commitment to human rights,<sup>171</sup> and binding international and regional human rights standards by applying international law in domestic courts. That the Swedish Administrative Court of Appeal's decision was grounded both in Article 8 (respect for private and family life) and in Article 14 (prohibition of discrimination) is especially important.<sup>172</sup> This fact establishes that the sterilization requirement is not merely a violation of privacy, but is also an action that involves discrimination against trans\* people, thereby recognizing that these laws represent official animus against a vulnerable population. It is also notable that the Swedish court was more willing to recognize that the law violated Article 8 of the ECHR than the European Court of Human Rights was in *Roetzheim*.<sup>173</sup> This discrepancy may be in part because *Roetzheim* was decided in 1997; during the intervening years, public opinion regarding the treatment of trans\* people has shifted significantly. But it may also demonstrate

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168. Cf. CAT, *supra* note 95, art. 1 (“[T]orture’ . . . means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind . . .”).

169. See HUMAN RIGHTS WATCH, *CONTROLLING BODIES*, *supra* note 5, at 13, 36–50.

170. Commissioner For Human Rights, *supra* note 1, at 19.

171. Commentators have noted the irony that, before law 1972:119 was struck down, “one of Europe’s most progressive nations had one of the continent’s most repressive policies on transgender people.” Rebecca Nelson, *Transgender People in Sweden No Longer Face Forced Sterilization*, TIME (Jan. 14, 2013), <http://newsfeed.time.com/2013/01/14/transgender-people-in-sweden-no-longer-face-forced-sterilization/>. Indeed, Sweden appears to have been one of the drafters of the first UN resolution specific to human rights and sexual orientation and gender identity. Compare Human Rights Council Rev. Draft Res. 17/L.9/Rev.1, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 15, 2011) (drafted by Greece, Ireland, France, Norway, Slovenia, South Africa, Sweden, Switzerland), with H.R.C. Res. 17/19, *supra* note 77.

172. See Zeldin, *supra* note 162.

173. See *supra* notes 141–148 and accompanying text.

that domestic reform may be a faster and more promising route for the protection of trans\* people's human rights, especially when the ECtHR appears so far to be unwilling to revisit its unfavorable precedent.

The Administrative Court of Appeal's decision to ground its holding not only in international law but also the Swedish Constitution also bolsters the legitimacy of the decision from the domestic perspective.<sup>174</sup> Specifically, the court found that the law ran afoul of Chapter 2, Article 6, of the Swedish Constitution, which states in relevant part:

Everyone shall be protected in their relations with the public institutions against any physical violation . . . . [E]veryone shall be protected in their relations with the public institutions against significant invasions of their personal privacy, if these occur without their consent and involve the surveillance or systematic monitoring of the individual's personal circumstances.<sup>175</sup>

As an official press release from the Swedish court system explained, the Administrative Court of Appeal held that "the sterilization requirement can no longer be justified by . . . today's values, that [the] requirement is not . . . voluntary . . . and that [the law] is discriminatory in relation to . . . transsexuals."<sup>176</sup>

The court's decision was widely celebrated by the LGBTQ community.<sup>177</sup> But given that the court was willing to hold that citizens' compliance with the law's sterilization requirement was not truly voluntary, it is perhaps surprising that the court did not find that the law also violated ECHR Article 3, which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." Following the ECtHR's decision in *Case of I.G.* that the unconsented sterilization of a cisgender woman was degrading and therefore a violation of Article 3, it would seem a logical step to hold that the involuntary sterilization of trans\* people is likewise a violation of Article 3.<sup>178</sup> But perhaps it was more politically palatable for the court to base its decision in violations of privacy than in human dignity and bodily integrity.

It is also notable that the court did not base its ruling in the nondiscrimination and equal-protection principles of the Swedish Constitution,<sup>179</sup> but rather only in the nondiscrimination principles of ECHR

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174. See Zeldin, *supra* note 162.

175. REGERINGSFORMEN [RF] [CONSTITUTION] 2:6 (Swed.), available at <http://www.riksdagen.se/en/Documents-and-laws/Laws/The-Constitution/> [hereinafter SWEDISH CONSTITUTION].

176. Press Release, Linköpings Tingsrätt (Linköping District Court), *Kravet på sterilisering vid könsbyte strider mot Europakonventionen* (The Sterilization Requirement for Sex Change is Contrary to the European Convention) (Dec. 19, 2012), available at <http://web.archive.org/web/20130305064622/http://www.linkopingstingsratt.domstol.se/Om-Sveriges-Domstolar/Pressrum/Nyheter-och-pressmeddelanden/Kravet-pa-sterilisering-vid-konsbyte-strider-mot-Europakonventionen> (translation by Google Translate).

177. See Nelson, *supra* note 171.

178. See *supra* notes 127–136 and accompanying text.

179. See SWEDISH CONSTITUTION, *supra* note 175, 2:12 and 2:13 ("Art. 12. No act of law or other provision may imply the unfavourable treatment of anyone because they belong to a minority

Article 14. This was surprising, and perhaps disappointing, because it could have strengthened the ‘court’s message that such laws are not merely invasions of privacy but also represent discriminatory, unequal treatment by the State. Though the Administrative Court of Appeals could have tied its ruling to several more civil rights recognized domestically and regionally, its decision is a significant step that demonstrates the importance of a regional human rights treaty even when the ECtHR, its supervisory organ is slow to interpret its provisions in a progressive manner.

*B. The United Kingdom: From Mandatory Divorce to Spousal Consent*

The United Kingdom ratified the ECHR on March 8, 1951; it entered into force there on September 3, 1953.<sup>180</sup> The UK also ratified the ICCPR on September 16, 1968, which entered into force on May 20, 1976;<sup>181</sup> it ratified the CAT on March 15, 1985, which it entered into force on December 8, 1988.<sup>182</sup> For many years, the United Kingdom recognized the ECHR and other ratified international treaties as binding, but not self-executing. However, “since coming into force on 2 October 2000, the Human Rights Act (HRA) has made rights from the ECHR (the Convention rights) [directly] enforceable in [the UK’s] own courts.”<sup>183</sup>

The UK’s Gender Recognition Act of 2004<sup>184</sup> (GRA) was introduced in response to the ECtHR decision in *Goodwin v. United Kingdom*,<sup>185</sup> which held the UK’s refusal to provide a route for trans\* people to change their legal sex categorization put the State in violation of Articles 8 and 12 of the ECHR.<sup>186</sup> However, though the ECtHR in *Goodwin* stressed that trans\* people possess the same right under the ECHR to respect for private and family life and to marry and found a family as cisgender people, the original GRA contained provisions in Section 5 that required that trans\* people seeking a change of legal gender

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group by reason of ethnic origin, colour, or other similar circumstances or on account of their sexual orientation.”) (“Art. 13. No act of law or other provision may imply the unfavourable treatment of anyone on grounds of gender, unless the provision forms part of efforts to promote equality between men and women or relates to compulsory military service or other equivalent official duties.”).

180. ECHR Signatories, *supra* note 158.

181. ICCPR Signatories, *supra* note 159.

182. CAT Signatories, *supra* note 160.

183. *Human Rights*, UNITED KINGDOM MINISTRY OF JUSTICE, <http://www.justice.gov.uk/human-rights> (last visited Jan. 24, 2014).

184. Gender Recognition Act, 2004, c.7 (U.K.), available at [http://www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpga\\_20040007\\_en.pdf](http://www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpga_20040007_en.pdf).

185. *United Kingdom Gender Recognition Act*, GENDER IDENTITY RESEARCH & EDUC. SOCIETY (GIRES), <http://www.gires.org.uk/GRA.php> (last visited February 14, 2015) (“The GRA [was] introduced in the wake of the Goodwin case in Europe.”) [hereinafter GIRES].

186. See *supra* notes 138–141 and accompanying text.

status prove that they were single (i.e. not married or in a domestic partnership).<sup>187</sup>

In practice, the requirements of Section 5 of the GRA meant that married trans\* people had to undertake a series of administrative steps: (1) obtain an Interim Gender Recognition Certificate, (2) annul their marriages, (3) prove the marriage had been annulled to obtain a full Gender Recognition Certificate (GRC)—a process that could take months—and then (4) enter a civil partnership with their former spouse.<sup>188</sup> In the interim period represented by step three, both partners would be vulnerable, as they would no longer have any formal legal relationship to one another. The government's position was that these steps were required because same-sex couples could not marry under UK law but could only enter civil partnerships.

Married trans\* people who did not wish to convert their UK marriage into a civil partnership were thus forced under the original GRA to choose between remaining married and being able to update their legal sex categorization. As the advocacy group GIRES explained, the government's position seriously disadvantaged trans\* couples:

Remaining married deprives the trans spouse of the opportunity to obtain a GRC and the civil rights and protections that it affords; annulling the marriage has a range of negative impacts . . . : annulment destabilises the family unit, causing immense stress to spouses who have no legal right to have input into the process. . . . [T]here are [also] immediate financial implications that may affect tax, shared property and small businesses, inheritance and pension arrangements; the remedy of civil partnership is not an acceptable solution to all couples . . . [in

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187. The Gender Recognition Act, 2004, c.7 (U.K.), section 5, states, in relevant part:

(4) An application [by a person who has been married for a Gender Recognition Certificate] must include evidence of the dissolution or annulment of the marriage and the date on which proceedings for it were instituted, or of the death of the spouse and the date on which it occurred.

(5) An application under subsection (2) is to be determined by a Gender Recognition Panel.

(6) The Panel—(a) must grant the application if satisfied that the applicant is neither married nor a civil partner, and (b) otherwise must reject it.

188. GIRES, *United Kingdom Gender Recognition Act*, *supra* note 185, explains that:

The act allows the creation of civil partnerships between same sex couples, but a married couple that includes a transgender partner cannot simply re-register their new status. They must first have their marriage annulled, gain legal recognition of the new gender and then register for a civil partnership. Whilst the drafters of the legislation may have expected this to . . . be a simple paper exercise, the courts take the view this is like any divorce with the associated paperwork and costs. Once the annulment is declared final and the GRC issued, the couple then have to make arrangements with the local registrar to have the civil partnership ceremony; they have four weeks grace. There are also a number of legal traps awaiting the unwary as the marriage is ended and a completely new arrangement brought into being which does not in all circumstances (such as wills) necessarily follow on seamlessly (or even contemporaneously).

*See also* EQUAL MARRIAGE – TRANS PERSPECTIVES, <http://changingattitude.org.uk/campaigns/equal-marriage-trans-perspectives> (last visited Jan. 24, 2013).



part because] it cannot necessarily be achieved in a short time-frame, during which hiatus both partners, but especially the non-trans partner and children, may be financially vulnerable . . . .<sup>189</sup>

The GRA was amended by the UK Parliament as part of the Marriage (Same Sex Couples) Act of 2013 (2013 Marriage Act), which extended marriage rights to same-sex couples for the first time.<sup>190</sup> However, instead of simply repealing singlehood or annulment/divorce requirements, the 2013 Marriage Act replaces them with new spousal consent and notice provisions:

If the applicant is married . . . an application [for a Gender Recognition Certificate] False . . . must also include—(a) a statutory declaration by the applicant’s spouse that the spouse consents to the marriage continuing after the issue of a full gender recognition certificate (“a statutory declaration of consent”) (if the spouse has made such a declaration), or (b) a statutory declaration by the applicant that the applicant’s spouse has not made a statutory declaration of consent (if that is the case). . . . If an application includes a statutory declaration of consent by the applicant’s spouse, the Gender Recognition Panel must give the spouse notice that the application has been made.

The new version of the GRA, as amended by the 2013 Marriage Act, came into effect on July 17, 2013.<sup>191</sup>

So far, most commentators writing about the passage of the 2013 Marriage Act have focused only on its implications for (mostly cisgender) same-sex couples, which are primarily positive, in that same-sex couples are now no longer subject to official discrimination and exclusion from the “marriage” label.<sup>192</sup> And in many ways, the new GRA is an improvement over the old law for trans\* people as well: it no longer puts trans\* people and their spouses in the untenable position of having to choose between remaining married versus having the trans\* spouse’s correct gender identity reflected on their official documentation.

However, as some trans\* advocates have noted, the new law’s spousal notice and consent requirements are still deeply problematic. First, there are very few, if any, other situations in which an adult individual’s relationship vis-à-vis the State is mediated through another person (here, the spouse) who retains a veto power. As one editorial explained:

Imagine: you want to set up a new company but the law requires you to have the written consent of your wife; or you’ve just got pregnant, but you haven’t got a piece of paper with your husband’s signature on it stating he’s OK with that; . . . .

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189. GIRES, United Kingdom Gender Recognition Act., *supra* note 185.

190. Marriage (Same Sex Couples) Act, 2013, c.30 (U.K.), *available at* [http://www.legislation.gov.uk/ukpga/2013/30/pdfs/ukpga\\_20130030\\_en.pdf](http://www.legislation.gov.uk/ukpga/2013/30/pdfs/ukpga_20130030_en.pdf).

191. *Marriage (Same Sex Couples) Act 2013*, PARLIAMENT, <http://services.parliament.uk/bills/2013-14/marriagesamesexcouplesbill.html> (last visited January 6, 2015) (noting the bill has attained Royal Assent and is now law).

192. *See, e.g., Same-Sex Weddings to Begin in March*, BBC (Dec. 10, 2013), <http://www.bbc.com/news/uk-25321353> (quoting a leader of a British LGBTQ-rights group referring to the new law as a “historic step” and noting “[t]he Conservative, Labour and Liberal Democrat leaderships all backed the proposals” to change the law).

Each of these actions . . . may well change the nature of your existing marriage quite considerably. . . . But the requirement that we need written consent from our spouse would be, quite rightly, treated as an outrage.

Yet that is exactly what is being proposed in the UK government's same-sex marriage bill for England and Wales for trans people in existing marriages.<sup>193</sup>

The spousal consent requirement is not only discriminatory because it is a condition that trans\* people alone are subject to, but also because it makes trans\* people more vulnerable to spousal abuse: "The concept of uncooperative spouses, especially when there are children involved, is not unknown amongst divorce lawyers. Many trans people have marriages which break up at the point of disclosure or transition. Some of these relationships become incredibly hostile, with the non-trans spouse actively blocking and ignoring letters."<sup>194</sup> As the editorial further noted, Parliament's decision "[t]o delay a trans person's gender recognition (which may impact them financially and emotionally) simply because an uncooperative spouse is already deliberately ignoring letters appears particularly cruel."<sup>195</sup>

It is also troubling that the nondiscriminatory alternative (i.e. not requiring spousal consent) would be just as effective at protecting a trans\* person's spouse's rights: if the spouse does not wish to continue their marriage after their partner transitions, they can just apply for divorce (or even annulment, if the annulment grounds are met), since the UK has no-fault divorce. When a less onerous and discriminatory position exists and the government has chosen not to use it, that should trigger especial concern about the government's motives.

Mandating spousal notice also signals an official distrust of trans\* people: it suggests that the government thinks many trans\* people might submit fraudulent spousal consent affidavits, because notice must always be given even if the affidavits are submitted. The government's official stance of suspicion may have dark roots: it likely reflects, wittingly or not, a hoary myth that has long been used to denigrate trans\* people, who are still frequently stereotyped as dissemblers or deceivers.<sup>196</sup> It also suggests the government presumes most cisgender people would not want to remain married to a trans\* person: the notification provision seems to ask, "are you *really* sure you want to remain married to a trans\* person?"

For these reasons, the spousal notice and consent requirements likely violate regional and international human rights norms. Particularly, the notice and consent requirements offend the principles of equal protection and

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193. Helen Belcher, *Trans People Left Behind in England and Wales Equal Marriage Bill*, GAY STAR NEWS (May 20, 2013), <http://www.gaystarnews.com/article/trans-people-left-behind-england-and-wales-equal-marriage-bill200513#sthash.OO4adKny.dpuf>.

194. *Id.*

195. *Id.*

196. See, e.g., Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 288 (2005) ("Transphobia is supported by a belief that doctor-assigned gender is truth and that the self-identified genders of transpeople are not truth but fraud, deception.").

nondiscrimination. These requirements single out trans\* people for different, and worse, treatment than cisgender people who are not required to obtain spousal permission under similar circumstances (e.g. adult name changes), and they represent official State disapprobation of trans\* people, as discussed above. These requirements arguably violate not only the ECHR's nondiscrimination provision,<sup>197</sup> but also the nondiscrimination principles in the ICCPR, which states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status<sup>198</sup>

The requirements also may run afoul of ICCPR Article 16, which states that “[e]veryone shall have the right to recognition everywhere as a person before the law.”<sup>199</sup> By allowing spouses to prevent trans\* people from being recognized as their preferred identity under the law, the GRA arguably is incompatible with Article 16.

Additionally, the GRA spousal notice and consent requirements are also likely in conflict with ICCPR Article 23, which exhorts that “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”<sup>200</sup> This is because the GRA raises the prospect that a trans\* spouse could enjoy lesser rights than a cisgender spouse at dissolution, in that the GRA enables a cisgender spouse to withhold consent to the trans\* spouse's gender change to extract a more favorable divorce settlement or custody agreement from the trans\* spouse. And the GRA likely also violates ECHR Article 8's requirement of “respect for private and family life” since the notice and consent requirements represent significant intrusions into the marriages of trans\* people and signal State disrespect for those marriages.

Combining these considerations, the GRA also potentially runs afoul of ICCPR Article 7, which states that “[n]o one shall be subjected . . . to cruel, inhuman or degrading treatment.”<sup>201</sup> The notice provision is degrading in that it signals to trans\* people that the government believes they are likely to be dishonest, and the consent requirement is cruel because it means trans\* people

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197. ECHR, *supra* note 14, art. 14.

198. ICCPR, *supra* note 88, art. 26; *see also id.* art. 2:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

199. *Id.* art. 16.

200. *Id.* art. 23.

201. *Id.* art. 7.

are placed at the mercy of their cisgender spouses, potentially in the context of a difficult divorce. When the State evinces such official mistrust of and distaste for trans\* people, it signals to the general public that similar discrimination by private parties is acceptable as well. Because State disrespect can engender private discrimination and even private violence, it is particularly important for these international norms to be robustly interpreted and applied to prevent States from making trans\* people more vulnerable to private abuse.

CONCLUSION:

FORCED STERILIZATION AND MANDATORY DIVORCE LAWS CONSTITUTE VIOLATIONS OF SEVERAL INTERNATIONAL AND REGIONAL HUMAN RIGHTS NORMS AND SHOULD BE RECOGNIZED AS SUCH; DOING SO MAY REQUIRE DEVELOPING LGBTQ-SPECIFIC INTERNATIONAL AND REGIONAL HUMAN RIGHTS TREATIES

The challenge of protecting the human rights of everyone is to apply a consistent human rights approach and not to exclude any group of people. It is clear that many transgender persons do not fully enjoy their fundamental rights both at the level of legal guarantees and that of everyday life.<sup>202</sup>

In 2010, the Council of Europe's Commissioner for Human Rights critiqued forced sterilization statutes as "provisions which demand impossible choices" in describing laws under which "only . . . transgender persons who have undergone surgery and become irreversibly infertile have the right to change their entry in the birth register," whether or not those persons independently desire to have any gender-confirming surgery at all.<sup>203</sup> As trans\* human rights advocates have argued, having to choose between being humiliated every day or being unnecessarily sterilized is really no choice at all.<sup>204</sup> One advocacy group insists: "The legal requirement of sterility is an abuse that must be denounced in the strongest terms. It is particularly disturbing as it echoes back to the eugenics theories and practices of the late 1930s to the 1970s worldwide, but most notably in Europe."<sup>205</sup> For this reason, it is encouraging that Sweden has abandoned this requirement and was able to do it by applying regional human rights norms and domestic constitutional law in its own courts. This step so also brings Swedish law into line with the country's

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202. Commissioner For Human Rights, *supra* note 1, at 7.

203. Thomas Hammarberg, *Forced Divorce and Sterilization—A Reality for Many Transgender Persons*, THE COUNCIL OF EUROPE COMMISSIONER'S HUMAN RIGHTS COMMENT (Aug. 31, 2010), [http://commissioner.cws.coe.int/tiki-view\\_blog\\_post.php?postId=74](http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=74).

204. See GAY JAPAN NEWS, ET AL., *supra* note 103, at 24 ("Requiring an individual to be sterilized in order to secure gender affirming documentation necessary to interact safely and productively in his or her daily life cannot reasonably be classified as a voluntary or non-coercive condition.")

205. STEPHEN WHITTLE ET AL., TRANSGENER EUROSTUDY: LEGAL SURVEY AND FOCUS ON THE TRANSGENER EXPERIENCE OF HEALTHCARE 26 (2008), *available at* <http://www.pfc.org.uk/pdf/eurostudy.pdf>.

aspirations to be a leader on LGBTQ rights at the international level. Sweden, incidentally, was one of the chief sponsors of the first-ever UN resolution on sexual orientation and gender identity in 2011.<sup>206</sup>

It is also encouraging that the United Kingdom has partially responded to the growing international consensus that mandatory divorce for trans\* gender recognition is a violation of several important human rights, including nondiscrimination and the right to respect for private and family life. However, the United Kingdom's updated GRA continues to violate the human rights of trans\* people, particularly their rights to equal protection and nondiscrimination, in that it requires them to obtain spousal permission for an action that is a matter of the trans\* person's self-determination, and does not require spousal permission for similar decisions made by cisgender people. If the UK wants to continue to see itself as a leader on these issues,<sup>207</sup> it must continue to strive to update its laws to afford trans\* people the same respect and rights as other citizens, as required by international and regional treaties.

More broadly, though these two countries have made some significant progress, the UK's remaining restrictions and Sweden's slow recognition process may speak to the failure of extant international and regional human rights systems to institute meaningful domestic reform amongst signatories. Contrary to the International Commission of Jurists' assumption in drafting the Yogyakarta Principles that extant international human rights treaties are sufficient to protect the rights of trans\* and other LGBQ persons,<sup>208</sup> I suggest that the country case studies above demonstrate a need to develop a new, LGBTQ-specific human rights treaty. Indeed, history also counsels in favor of adopting an LGBTQ-specific human rights treaty with stronger enumerated rights: much as feminist human rights activists in the 1960s concluded that it was necessary to enact the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to more fully protect the rights of women<sup>209</sup> even though extant human rights treaties already laid down "a comprehensive set of rights to which all persons, including women, [were] entitled,"<sup>210</sup> so might LGBTQ activists consider promoting a new international

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206. See H.R.C. Rev. Draft Res. 17/L.9/Rev.1, *supra* note 171, at 1.

207. See UK Policy, *supra* note 22 ("We want the UK to be a leader in equality and human rights.").

208. See YOGYAKARTA PRINCIPLES, preamble, *supra* note 29, at 9 ("Observing that . . . the application of *existing* human rights entitlements should take account of the specific situations and experiences of people of diverse sexual orientations and gender identities.") (emphasis added). See also ALSTON & GOODMAN, *supra* note 21, at 231 ("The [Yogyakarta] Principles are intended to affirm binding [extant] international legal standards pertaining to LGBT rights . . . [a]mong other things, the Principles helped to counter the argument of detractors that international law lacks any [current] basis for rights relating to sexual orientation and gender identity.").

209. CEDAW, *supra* note 12.

210. United Nations Entity for Gender Equality and the Empowerment of Women, *Short History of CEDAW Convention*, U.N. WOMEN, <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited Feb. 28, 2014).

human rights treaty to protect the community even though extant international human rights, properly interpreted, *do* extend to trans\* people.

Before CEDAW was adopted, even amongst feminist international human rights authorities, “it was believed that . . . women’s rights were best protected and promoted by the general human rights treaties” and that additional resolutions and specific treaties aimed at, for example, ending domestic violence were helpful, but not necessary.<sup>211</sup> Indeed some advocates felt that drafting a convention on the scale of the ICCPR or ICESCR specific to women could be counterproductive, in that it would signal that women were not entitled to the same human rights as men but needed special rights.<sup>212</sup>

Eventually, however, the drafters of CEDAW concluded that, despite the existence of these universal human rights norms, “women’s humanity [had] proved insufficient to guarantee them the enjoyment of their internationally agreed rights”: “the general human rights regime was not, in fact, working as well as it might to protect and promote the rights of women.”<sup>213</sup> Though some critics of CEDAW point out that the treaty is flawed and possibly outdated, and though CEDAW supporters also recognize that “CEDAW is not the perfect answer to achieving gender equity . . . the ratification of CEDAW allows nations to take an important step on the path towards creating greater equality of both opportunity and outcome for women and men.”<sup>214</sup>

“The CEDAW drafters’ decision to enumerate minority-specific rights in a new treaty rather than interpreting general human rights norms in favor of minorities reflects a trend in the scholarship on international human rights as well. “While the enumeration of rights was once thought to be detrimental to human rights, more recent scholarship has suggested that, in fact, the clear subdivision of these rights is beneficial in national governance and preservation of civil liberties.”<sup>215</sup> The current consensus amongst academics appears to be that failure to enumerate specific rights as nonderogable has led “to significant infringements in basic rights and a large amount of national confusion as to fundamental freedoms.”<sup>216</sup> “At this point in our international legal environment, recent constitutional developers and international policy makers have indicated that listing nonderogable rights within constitutions aids in the preservation of liberty.”<sup>217</sup> Likewise, international human rights scholars suggest that enumerating specific rights, whether derogable or not, in international treaties

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211. *Id.*

212. *Id.*

213. *Id.*

214. Kavita N. Ramdas & Kathleen Kelly Janus, *Ratifying Women’s Rights*, HOOVER INST. POLICY REVIEW (Oct. 1, 2011), <http://www.hoover.org/research/ratifying-womens-rights>.

215. Laura Conn, Comment, *The Enumeration of Vital Civil Liberties Within a Constitutional State of Emergency Clause: Lessons from the United States, the New Democracy of South Africa, and International Treaties and Scholarship*, 10 U. PA. J. CONST. L. 791, 804 (2008).

216. *Id.*

217. *Id.*

has been essential to ensuring that those rights are honored.<sup>218</sup> This is contrary to one influential strain of American legal thought, according to which detailed enumeration of fundamental rights is counterproductive to preserving those rights.<sup>219</sup> Agitating for LGBTQ-specific human rights treaties, of course, could backfire, in that individual States might vote against ratification, thereby worsening the situation for trans\* people in those countries. But if international norms continue to shift towards protecting LGBTQ rights through human rights instruments, the pressure to vote for ratification might be strong enough to carry the day.

Domestic actors in the COE countries that currently erect sterilization and divorce barriers to recognition of trans\* people's preferred gender identity must continue to work to reform their countries' laws, hopefully abolishing such requirements and ensuring trans\* people are able to obtain gender-appropriate governmental identification without stigma or unnecessary delay using domestic political and judicial processes. International and regional actors can assist in this process by more progressively interpreting extant human rights treaties to protect the rights of trans\* people not to be compelled to sterilization or divorce. Such interpretations would send a strong message to COE countries that they need to update their laws. It would be particularly important, if the issues are presented to it again, for the European Court of Human Rights to reassess its adverse precedents in *Roetzheim v. Germany* and *H. v. Finland* and hold instead that mandatory sterilization and divorce requirements do infringe the ECHR.<sup>220</sup> Doing so would allow trans\* people in other countries to sue reluctant COE Member States in the ECtHR for compliance and possibly obtain reparations within their own countries.

Additionally, as explained above, it would be advisable for LGBTQ activists to seriously consider developing LGBTQ-specific international and regional human rights treaties. Though the UN has taken an important first step in passing the June 17, 2011 Resolution on sexual orientation and gender identity,<sup>221</sup> an LGBTQ-specific treaty would likely be more effective at protecting the rights of trans\* people than more resolutions and studies. Such a document could specifically enumerate a right, for example, to change one's legal gender without undergoing any medical interventions. An LGBTQ-specific treaty would also make it more difficult for COE countries and others to

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218. *Id.*; see also *id.* at 804 n.65 (noting that such groups as the International Commission of Jurists have recognized that "rights preservation during states of emergency can be aided when the rights are specifically preserved" in the text of a treaty).

219. See, e.g., Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 359 (2007) ("The Framers of the original Constitution failed to specify what rights the Constitution protected because they did not believe enumeration was an effective strategy for securing fundamental freedoms.")

220. See *supra* notes 141–154 and accompanying text.

221. H.R.C. Res. 17/19, *supra* note 77.

continue to defend such laws domestically in the face of an explicit right to the contrary, enshrined in binding international law.

Though it is certainly difficult to be optimistic about the prospect of the UN or the COE adopting such a treaty in the near future, given the glacial pace at which LGBTQ rights have heretofore been recognized in human rights systems, it is not impossible to imagine that such a treaty could be developed in time. Perhaps patience is warranted, given that the international human rights system itself has been in existence for barely fifty years. And recent strides, though still insufficient, should give hope for continued reforms, they may remind trans\* activists that, while “[t]he arc of the moral universe is long, . . . it bends towards justice.”<sup>222</sup>

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222. Melissa Block, *Theodore Parker And The “Moral Universe,”* NPR (Sept. 2, 2010), <http://www.npr.org/templates/story/story.php?storyId=129609461> (quoting phrase often attributed to Martin Luther King, Jr.).