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LEGAL OPINION

FOR THE

INTER-AMERICAN COURT OF HUMAN RIGHTS

SUBMITTED BY

THE IMPACT LITIGATION PROJECT

AT AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

WASHINGTON, D.C., FEBRUARY 14, 2017

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1. INFORMATION ABOUT THE IMPACT LITIGATION PROJECT AT AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

1.1. Name of the Institution: The Impact Litigation Project (ILP) is part of the Center for Human Rights & Humanitarian Law (CHRHL) at American University Washington College of Law (WCL). The Dean of American University Washington College of Law is Professor Camille Nelson. The CHRHL is directed by Professor Macarena Saez and the ILP is directed by Professor Jennifer de Laurentiis. For information about the CHRHL see

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2. INTEREST IN SUBMITTING LEGAL OPINION

The Impact Litigation Project of the Center for Human Rights & Humanitarian Law at American University Washington College of Law respectfully requests that this brief be admitted by the Inter-American Court of Human Rights (IACtHR) within the process opened in accordance with Article 73(3) of the Rules of Procedure of the IACtHR, within the context of the request for an Advisory Opinion by the State of Costa Roca.

The ILP seeks to promote the rule of law and democracy, and works to strengthen the

development of jurisprudence and international standards on human rights. As a project sponsored by an academic institution, ILP maintains a level of objective analysis that is conducive to promoting human rights in legal systems throughout the world.

ILP has a substantial interest in the issues addressed in this brief, and these issues aptly fall within the realm of ILP's expertise. Specifically, ILP has a substantial interest in the promotion of rights that particularly affect vulnerable groups such as transgender individuals.

This intervention provides a legal analysis about the protections provided by Articles 11(2), 18, and 24 in relation to Article 1 of the American Convention on Human Rights (Convention or ACHR) with regard to state recognition of a change in a person's name and gender based on their preferred gender identity. The brief specifically focuses on the first two questions issued by the government of Costa Rica to the IACtHR. This legal opinion was drafted by WCL students Facundo Capurro Robles, Juan Sebastian Jaime Pardo, Whitney Washington, Natalia Gomez, and Alina Husain, under the supervision of Professors Macarena Saez and Jennifer de Laurentiis.

3. FIRST ISSUE: “THE LEVEL OF PROTECTION PROVIDED BY ARTICLES 11.2, 18 AND 24 IN RELATION WITH ARTICLE 1 OF THE ACHR TO THE RECOGNITION OF A PERSON’S NAME CHANGE, ACCORDING TO THEIR GENDER IDENTITY.”

International human rights law establishes that the right to privacy includes the prohibition of abusive interference in a person’s life. The term “abusive interference” includes both unlawful and arbitrary interferences. The United Nations Human Rights Committee has stated that an unlawful interference is one that takes place without being envisaged by a specific law. Any law that permits an interference to the right to privacy must comply with the objectives of the ICCPR.¹ An arbitrary interference would be a law that it is not in accordance with the provisions of the ICCPR, and is not reasonable in a case-by-case scenario.²

Even though the Inter-American Human Rights system has not reviewed a case that directly answers the issue at hand, both the Inter-American Commission and the Inter-American Court have referred to situations regarding the right to privacy, right to equality and right to a name, providing a framework of protection of gender identity in the context of a person’s name change. Additionally, other regional treaty bodies and the UN system of human rights have also issued decisions and recommendations that inform the protection of gender identity in a country such as Costa Rica.

The historic and present discrimination against transgender persons has been recognized under international human rights law. In 2012 the IACtHR expressly established that gender

¹ General Comment 16 (1998) ¶ 3.

² *Id.* ¶ 4.

identity and sexual orientation were protected categories and that governments could not have statutes, acts or practices that could discriminate against individuals based on these categories.³ Any measure that may affect the lives of individuals based on their sexual orientation or gender identity demands a critical and meticulous review. One of the most important aspects of the right to privacy is the opportunity for transgender persons to develop their personality in accordance with their gender identification. The States not only have the duty to refrain from unlawful attacks to one person's intimate sphere but also ought to take appropriate measures to ensure the full enjoyment of the person's rights. Both the Inter-American Court of Human Rights and the European Court of Human Rights (ECtHR) have emphasized the tight bond linking the right to identity to the right to a name, as pre-conditions to the recognition of legal personality.

The lack of recognition of transgender persons' identity in official records poses not only philosophical problems in terms of restricting pluralism and diversity in society. It also creates all sort of barriers for the daily exercise of transgender persons' rights as parents, children, workers, consumers, business people, and healthcare users; in sum, it creates barriers for transgender individuals to live as full citizens of their country.

3.1. Discrimination and violence faced by transgender individuals in the full exercise of their rights.

Historically the transgender community has been subject to human rights violations for

³ See *Caso Atala Riffo e hijas vs. Chile, Par. 91. Fondo, Reparaciones y Costas*, 24 de febrero de 2012. ¶91

differing from the stereotypes of “being female” or “being male”.⁴ Violence and discrimination against transgender individuals are very common in Latin America and have been recognized by States as major concerns in the region.⁵ This behavior is intensified by the lack of recognition of their preferred and self-defined gender identity. When a State does not allow a transgender person to legally change his/her name or sex in his/her identification documents, or when the process to achieve this change presents too many difficulties, transgender individuals are particularly vulnerable.

Different levels of the human rights systems have catalogued violence against some historically marginalized groups as structural or systematic. As a result, the international community has recognized the vulnerable situation of transgender individuals and has started to take actions to ensure protection of their rights.⁶

In 2011, the Inter-American Commission of Human Rights (IACHR) created the Special Rapporteurship on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex Persons (LGBTI) Persons,⁷ and in 2016 the first Core Group on the rights of LGBTI persons was created at the

⁴ Int’l Comm’n of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law*, at 2, (2009), <http://icj2.wpengine.com/wp-content/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf>.

⁵ In 2008 the Organization of American States adopted a resolution which stated the concern of the states in the region for the human rights violations perpetrated against people because of their gender identity. *See* Org. of American States, AG-RES_2435_XXXVIII-O-08, (June 3, 2008), https://www.oas.org/dil/esp/AG-RES_2435_XXXVIII-O-08.pdf.

⁶ Earlier this year, the Human Rights Council adopted a resolution appointing a new Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity. *See* Res 32/2, July 15, 2016.

⁷ Organization of American States, Rapporteurship on the Rights of LGBTI Persons (last

Organization of American States (OAS) by the initiative of eight countries from the region.⁸

The same year, Rapporteur Rashida Manjoo used the concept of structural violence to describe violence against women, although she acknowledged that it also affects other groups such as people with disabilities.⁹ The IACHR revisits this concept and connects it to violence against persons with non-normative gender identities or sexual orientations:

[S]imilarly, societal beliefs and prejudices that perpetuate the notion that heterosexual, cisgender and non-intersex persons are superior to LGBTI persons contributes to a culture of structural violence based on prejudice towards non normative sexual orientations, gender identities and diverse bodies.¹⁰

Describing the cycle of violence and exclusion faced by transgender women, the IACHR recognized that:

[t]he vast majority of trans women are immersed in a cycle of violence, discrimination and criminalization which generally begins at an early age, due to exclusion and violence they are subjected to in their homes, communities and educational institutions. This is coupled to the lack of recognition, in the majority of countries in the region, of their gender identity. (...) according to the information received and the data produced by the IACHR, trans women are killed mostly before 35 years of age and are particularly vulnerable to violence by law enforcement agents.¹¹

visited Nov. 15, 2016), <http://www.oas.org/en/iachr/lgtbi/default.asp>.

⁸ Organization of American States, *Joint Statement by the Founding Members of the OAS LGBTI Core Group*, (June 15, 2016), <http://www.oas.org/es/cidh/lgtbi/docs/JointDeclaration-FoundingMembers-OAS-LGBTI-CoreGroup.pdf>.

⁹ UN, Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/17/26, May 2, 2011, Par. 26.

¹⁰ IACHR. *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. 2015. P. 46. (retrieved from <http://www.oas.org/en/iachr/reports/pdfs/ViolenceLGBTIPersons.pdf> , February 10, 2017).

¹¹ *Id.*, P. 34.

American scholar Dean Spade argues that the elimination of structural forms of violence against transgender individuals should not focus primarily on legal reforms. Spade, however, identifies three specific places in the law where violence against transgender individuals concentrates and should be modified: “1) the rules governing identity documents, 2) sex segregation in institutional spaces, and 3) access to health care for the reaffirmation of the sex of a person.”¹²

With the intention to establish a common legal framework to reverse this process of structural violence, a coalition of human rights experts launched the Yogyakarta Principles at the United Nations headquarters in 2007. This set of legal principles represents an unavoidable guidance to clarify States’ human rights obligations to safeguard individuals based on sexual orientation and gender identity.¹³

Despite these initiatives, the violation of human rights of transgender persons continues, and demands from States and international organizations the adoption of the necessary measures to ensure human rights protections of this group.

¹² Dean Spade. *Una Vida «Normal» La Violencia Administrativa, la Política Trans Crítica y Los Límites Del Derecho*. Edicions Bellaterra, S.L., 2015. P. 15.

¹³ Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity, at 7, (2007), http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

3.2. The scope of the right to privacy (Article 11 ACHR) in the context of gender identity recognition.

3.2.A. The IACtHR and the right to privacy

The right to privacy has been recognized by many international human rights law instruments.¹⁴ The obligations imposed by international human rights law have been interpreted as a requirement for the State to adopt legislative and other measures to give effect to the prohibition against interferences and to protect the right to privacy.¹⁵

Privacy as a human right has also been protected by the American Convention on Human Rights. The Inter-American Court has interpreted the right to privacy as: “*a series of factors associated with the dignity of the individual, including, for example, the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships*”¹⁶. This right is inextricably linked to identity, which has been defined by the IACtHR as “*the collection of attributes and characteristics that allow for the individualization of the person in a society, and, in that sense, encompasses a number of other rights according to the subject it treats and the circumstances of the case.*”¹⁷

¹⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art 12 (Dec. 10, 1948); G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, at art 17 (Dec. 16, 1966).

¹⁵ U.N. CCPR. *General Comment 16*, supra note 1 at 8.

¹⁶ *Artavia Murillo et al (In Vitro Fertilization) v. Costa Rica*, Preliminary objections, merits, reparations and costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶143 (Nov.28, 2012).

¹⁷ *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser C) No. 221, ¶122 (Feb. 24, 2011).

The concept of private life, therefore, incorporates both aspects of physical and social identity.¹⁸ The Court has stated that privacy is a broad concept that should not be subject to exhaustive definitions, and it ultimately includes the way in which persons view themselves and how they decide to project this perception to others.¹⁹ Sexual orientation and gender identity are, undoubtedly, part of an individual's private life.²⁰

In the Inter-American System, Article 11 of the ACHR requires States to protect individuals against arbitrary actions that may affect their private life. The IACtHR has held that the private sphere of an individual's life should be immune to abusive or arbitrary interferences or attacks by third parties or by State agents.²¹ To define whether there was an arbitrary interference with private life, it is necessary to scrutinize the legality and purpose of the legal measure in the specific case.²²

The Court has held that there is an arbitrary and excessive interference in a person's life when the sexual orientation of a parent is analyzed in a child's custody judicial process,²³ and when infertile couples are prohibited from accessing in vitro fertilization treatments.²⁴ In the context of legal gender recognition, any statute should guarantee the right to privacy and should not include any measure that can be an arbitrary interference in an individual's life. This means

¹⁸ In vitro Fertilization, *supra* note 16, ¶ 143.

¹⁹ Atala Riffo and Daughters v. Chile, *supra* note 3 ¶ 162.

²⁰ *Id.* ¶ 165.

²¹ In vitro Fertilization, *supra* note 16, ¶ 142.

²² Atala Riffo and daughters, *supra* note 3, ¶ 225.

²³ *Id.*

²⁴ In vitro Fertilization, *supra* note 16.

that laws that address an individual's legal gender identity should not force an individual to discuss his or her gender identity with anyone.

The right to privacy is affected when the lack of legal recognition of one person's real identity forces her/him to live according to a life plan different than the one chosen. The right to identity, an enforceable basic human right which does not admit derogation or suspension, is the keystone through which the full enjoyment of the rights to legal capacity, the right to a name and most of the family and personal relations are facilitated.²⁵ Transgender individuals often need to adjust central decisions of their daily life to an unlawful status-quo when their legal identity does not match with their real one. As the long-term effect of such policy will most likely result in more segregation from society, it also creates several practical problems for transgender individuals in their daily relationships with the employment market, the health care services, or the adoption of business and parenthood decisions.

Article 11 of the American Convention also provides that all persons have the right to have their honor respected and their dignity recognized. Hence, this article imposes limitations to the interference of individuals and the State in a person's life.²⁶ Similarly, the ICCPR contains a specific prohibition to unlawful attacks on a person's honor and reputation as an element of the right to privacy.²⁷ The UNHRC established that the State has an obligation to provide adequate

²⁵ Gelman v. Uruguay, *supra* note 17, ¶ 123.

²⁶ Kimmel v. Argentina, Merits, reparations and costs, Judgement, Inter-Am. Ct. H.R., (Ser. C) No. 177, ¶ 55 (May. 2, 2008).

²⁷ G.A. Res. 2200, *supra* note 14, at article 17.

legislation at the national level for the protection of personal honor and reputation.²⁸

In the Inter-American System, the IACtHR has stated that: “the right to have honor respected relates to self-esteem and self-worth, whereas reputation refers to the opinion other persons have about someone.”²⁹ Article 11 also prohibits illegal attacks on an individual’s honor or reputation, and imposes on States the obligation to provide protection against such attacks.³⁰ Therefore, in the context of gender recognition laws, States should ensure that the dignity and honor of individuals are respected, and prevent any attack to the individuals’ reputation.

3.2.B The European Court of Human Rights and the right to privacy

The European Court of Human Rights has explicitly recognized gender identity within the personal sphere protected by the right to privacy under the European Convention on Human Rights (European Convention or ECHR). In 1992 the ECtHR recognized for the first time that official documents that force transgender individuals to disclose the discrepancy between their gender and the sex recorded in the birth certificate can violate the right to privacy.³¹ In the case *B. v. France*, a transgender woman argued that the denial of a change in her French identity documents in accordance with her gender identity created daily obstacles to the enjoyment of her rights. The ECtHR concluded that the applicant found “herself daily in a situation which, taken as a whole,

²⁸ General Comment 16, *supra* note 1, ¶ 1.

²⁹ Tristan Donoso vs Panama, Preliminary objections, merits, reparations and costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 193, ¶ 57 (Jan. 27, 2009).

³⁰ *Id.*

³¹ *B. v. France*, Eur.Ct.H.R, 1992 . ¶ 63.

[was] not compatible with the respect due to her private life.”³² In the case of *Christine Goodwin v. the United Kingdom*, the plaintiff argued that “the fact that she keeps the same NI number has meant that her employer has been able to discover that she previously worked for them under another name and gender, with resulting embarrassment and humiliation.”³³ In this case, the ECtHR only referred to the discrepancy between legal documents and the identity of a post-operative transgender woman. The Court stated that

[i]t must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, mutatis mutandis, *Dudgeon v. the United Kingdom* judgment of 22 October 1981, Series A no. 45, § 41). 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.³⁴

In the case of *Van Kuck v. Germany*, a male-to-female transgender individual challenged an insurance company’s denial of coverage of the medical expenses of her gender-reassignment surgery. The Court ruled in favor of the plaintiff, establishing that gender identity was a characteristic of the private life of the plaintiff.³⁵

3.2.C. Comparative Law

National courts in the Americas have also discussed gender identity as a matter of private

³² *Id.*

³³ *Christine Goodwin v. the United Kingdom*, Eur.Ct.H.R. ¶1, (2002).

³⁴ *Id.* at 77.

³⁵ *Van Kuck v. Germany*, Eur.Ct.H.R. ¶ 69, 75 (2003).

life. In 2011, the Colombian Constitutional Court analyzed rights violations of a transgender individual in prison. In that case, the Court held that sexual identity³⁶ is part of the private sphere of a person and should be protected under the rights to human dignity and free development of personality.³⁷ Therefore, any restrictive measure, by either the State or a private party, or any sanction or consequence imposed on an individual based on his/her sexual identity, is a breach of the Colombian Constitution.

Another important aspect in the analysis of the right to privacy is the right to choose whether to disclose one's gender identity publicly. This right has been recognized within the Yogyakarta Principles. According to this international instrument, States should ensure that persons have the right to choose whether or not to disclose information about their gender identity, and States have the obligation to protect persons from unwanted publicity or the threat of disclosure of their personal information by others.³⁸ Similarly, the Mexican Supreme Court has held that a public annotation in the civil register of a transgender person is an act of arbitrary

³⁶ The Colombian Constitutional Court has had several decisions in the past where it uses sexual identity as both sexual orientation and gender identity. However, in decision T/062/2011, the Court was considering the case of a transgender person and was making reference to gender identity. "Although the applicant identifies herself as "gay transsexual", the Court in this decision did not accurately address the conceptual difference between sexual orientation and gender identity. In addition, it did not use the applicant's identity name but only with her legal name." Aquejarre Trans, PAIS and Outright International, *Mapping Trans Rights in Colombia*, P. 9. https://www.outrightinternational.org/sites/default/files/TransRpt_Colombia_En.pdf (last visited Feb. 12, 2017).

³⁷ Corte Constitucional (C.C.) (Colombian Constitutional Court), febrero 4, 2011, M.P: L.E. Vargas, Sentencia T/062/2011. § 6.1- 6.3.

³⁸ Yogyakarta Principles, *supra* note 13, Principle 6.

interference in a person's life and could make the individual the object of discrimination.³⁹

In 2015, the Colombian Constitutional Court decided the case of a female-to-male transgender individual seeking recognition of his gender identity by the civil register office.⁴⁰ In its decision, the Colombian Constitutional Court protected the right of every person to autonomously define his or her gender identity and to have that gender identity legally recognized in the civil records. The court held that the lack of legal recognition was affecting the plaintiff's right to self-determination and the right to life without humiliation.⁴¹ The Court established that this change in the register should not be accessible by the public.⁴² Unwanted publicity could make transgender persons subject to discrimination or to attacks against their honor and reputation.

3.3. The scope of the right to a name (Article 18 ACHR) in the context of gender identity recognition.

The right to a name is a fundamental human right and its importance is recognized in numerous international treaties. The American Convention, as well as numerous other persuasive international treaties, recognize the importance of a right to a name for all individuals.

³⁹ Amparo Directo Civil, Relacionado con la facultad de atracción 3/2008PS, Suprema Corte de Justicia (SCJN), enero 2009, 6/2008.
<http://dsyr.cide.edu/documents/302584/303331/05.-Amparo-Directo-Civil-62008.pdf>.

⁴⁰ Corte Constitucional de Colombia (C.C.) (Colombian Constitutional Court), febrero 13, 2015, M.P: M.V. Calle, Sentencia T-063-15.

⁴¹ Colombian Constitutional Court, *supra* note 37.

⁴² *Id.*

Article 24 of the ICCPR protects the right to a personal name.⁴³ The UN Human Rights Committee stated that a person's name is an important part of one's identity and therefore the protection against arbitrary interference with private life includes the protection of the right to choose and change one's own name. In the same sense, the refusal of national authorities to legally recognize a change of name is not within the threshold of a non-arbitrary interference as required by article 17 of the ICCPR.⁴⁴

In the context of children's rights, Article 7 of the Convention on the Rights of the Child states that all children have the right to a name and that the State must ensure that this right is implemented according to its national laws.⁴⁵ UNICEF, too, has deemed that the right to a name is a fundamental right.⁴⁶

Article 18 of the American Convention states, "Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which the right shall be ensured for all, by the use of assumed names if necessary."⁴⁷ While the right to a name is often associated with an individual's name at birth and the ability to register with the government, Courts have also interpreted the right to allow an individual to choose or

⁴³ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, Art 24.

⁴⁴ *Coeriel et al. v. The Netherlands*, U.N. Doc. CCPR/C/52/D/453, ¶10.2. (1991).

⁴⁵ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, Art. 7.

⁴⁶ See UNICEF, *The Right to a Name and Nationality*, available at <https://www.unicef.org/pon96/coname.htm>.

⁴⁷ American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143, Art. 18.

change a name that he or she wishes to adopt.⁴⁸

The Inter-American Court has linked the right to a name to other fundamental rights. In *Serrano Cruz Sisters v. El Salvador*,⁴⁹ a case regarding the right to identity and forced disappearances in the context of the civil war in El Salvador, the IACtHR stated that the right to identity and right to a name are “intimately associated.”⁵⁰ The Court further asserted that the right to identity and to a name includes the right to the recognition of legal personality, as well as the right to a nationality, to a family, and to have family relationships.⁵¹ In particular, the Court held that the “right to a name is linked intrinsically to the recognition of personal identity, which also implied belonging to a family and to a community.”⁵²

The jurisprudence of the ECtHR has been often endorsed by the IACtHR as guidance on how to address some issues from a human rights perspective. Although the European Convention of Human Rights does not expressly include a right to a name, the ECtHR has identified such rights within the right to respect for private and family life of Article 8 of the European Convention.⁵³ Furthermore, when the ECtHR considers the protection of the right to a name, it often also turns to rights and freedoms guaranteed in Article 10 to freedom of expression and in

⁴⁸ See e.g., Ivana Roagna, *Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights*, Council of Europe (2012) at 17, available at http://www.coe.int/t/dgi/hr-natimplement/Source/documentation/hb11_privatelife_en.pdf.

⁴⁹ *Serrano-Cruz Sisters v. El Salvador*, Judgment of March 1, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 120.

⁵⁰ *Id.* at para. 117.

⁵¹ *Id.*

⁵² *Id.* at para. 120.

⁵³ See *Burghatz v. Switzerland*, 1994 Eur. Ct. H.R. 2 and *Stjerna v. Finland*, 1994, ECtHR.

Article 14 to the prohibition of discrimination.⁵⁴

Additionally, the Council of Europe, in its handbook on human rights, has indicated that

[T]he protection of and respect for human dignity and human freedom would be deprived of most of its meaning if it were to be interpreted as excluding the rights of transsexuals to personal development and physical and moral security. Although Article 8 does not contain a right to self-determination as such, in *Van Kück* the Court clarified that it would be contrary to the Convention not to regard one's freedom to define oneself as female or male as one of the most basic essentials of self-determination. Change of name and the issuing of official papers reflecting gender reassignment have therefore been found to concern the right to respect for private life under Article 8 § 1.⁵⁵

In addition to the rights outlined in the European Convention, there are a number of cases that have been heard by the ECtHR that address the right to a name. In *Burghatz v. Swizerland*,⁵⁶ the ECtHR explicitly invoked Article 8 when discussing an individual's right to keep or adopt a specific name. In that case, a husband wanted to adopt his wife's last name in place of his own, and have her surname passed onto their children. The ECtHR stated that "despite not being explicit in Article 8, one's name, as a means of personal identification and of linking to a family, must be viewed as part of one's private and family life, which must be enjoyed without discrimination based on gender."⁵⁷ The Court's decision and reasoning in this case demonstrates that an individual's right to a name necessarily triggers the protections that the individual is guaranteed under Article 8 to privacy and family life.

⁵⁴ See Roagna, *supra* note 48, at 17.

⁵⁵ *Id.*

⁵⁶ *Id.* P. 2.

⁵⁷ Roagna, *supra* note 48, at 17.

Similarly, the ECtHR has recognized that the placement of an individual's choice of name is strictly in the private sphere. In *Guillot v. France*,⁵⁸ parents of a baby girl brought a complaint when French authorities did not allow them to name their daughter Fleur de Marie. The French authorities stated that such a name was impermissible because it was not present in the All Saint's Calendar. The ECtHR ruled that the "choice of a child's forename by parents amounts to a personal, emotional matter and therefore comes within the private sphere."⁵⁹ In making such a determination, the Court effectively placed choosing a name strictly in the hands of the individual being named or with his or her parents, and outside the scope of State influence.

An individual's name is tied inextricably to that individual's legal identity. As such, it is linked to the protections and benefits that one's legal identity derives. In particular, an individual's right to a name is related to an individual's right to freedom of expression in choosing or adopting that name. It is also encompassed in an individual's right to privacy and to freedom to have a family life. Moreover, the right to a name is often viewed from the lens of an individual's freedom from discrimination.

For transgender individuals, in particular, the right to a name holds special significance. It is important for transgender individuals to exercise their right to a name and legally change their name in line with their gender identity, if they opt to do so. This choice, for one, ensures that individuals have the autonomy to refer to themselves as they choose, and upholds a person's

⁵⁸ *Guillot v. France*, 1996 Eur. Ct. H.R. 52.

⁵⁹ *Roagna supra* note 48, at 18.

right to freedom of expression. Additionally, transgender individuals often need to have a legal name that reflects their gender expression and outward appearance to preserve their freedom from discrimination and violence.

Forcing an individual to bear a legal name on identification cards or documents that are not in line with his or her gender identity puts that individual at risk of exposing him or herself as transgender. Not having a legal name change policy for transgender individuals strips them of their right to privacy, and of their right to choose whether to reveal themselves as transgender. Furthermore, it leaves individuals susceptible to discrimination. One transgender individual emphasized the hazards of having a name that is not in line with his outward appearance or gender identity as follows: “Without legal name change, I am forced to use ID that is inconsistent with who I am and puts me in danger of harassment, violence, and being outed as transgender whenever I present it.”⁶⁰

Considering the overwhelming obstacles that transgender individuals face generally, being forced to identify oneself as transgender can lead to an inability to obtain employment, increased instances of harassment, violence and discrimination, and general marginalization.

⁶⁰ See Samantha Cowan, *Trans Immigrant Fights Indiana for the Right to Change his Name*, Take Part (Sep. 18, 2016), <http://www.takepart.com/article/2016/09/18/indiana-trans-name> (outlining the difficulty the transgender individuals face when attempting to change their legal names, with particular reference to a case in Indiana, United States).

4. SECOND QUESTION: “THE COMPATIBILITY OF THE PRACTICE OF ENFORCING ARTICLE 54 OF THE CIVIL CODE OF THE REPUBLIC OF COSTA RICA, LAW NO. 63 OF SEPTEMBER 28, 1887, TO PERSONS WISHING TO CHANGE THEIR NAME BASED ON THEIR GENDER IDENTITY, WITH ARTICLES 11.2, 18 AND 24, IN RELATION WITH ARTICLE 1 OF THE CONVENTION.”

We will argue through this section that only a model of self-determination recognition of transgender persons’ gender and name is compatible with the protection provided by the ACHR. Unlike other countries of the hemisphere, Costa Rica’s domestic legislation is not aligned with a model of self-determination. The lengthy, expensive and stigmatizing judicial procedures to change transgender persons’ name and gender should be replaced by one that ensures the official recognition of real identity in a less burdensome and harmful fashion.

4.1. Practical effects of discrimination and lack of legal recognition in the daily lives of transgender individuals.

The lack of legal recognition of transgender persons directly affects daily life because it damages an individual’s ability to perform and enjoy central activities of their daily life. In many countries, such as Costa Rica, a legal identification is essential to participate in society and have access to basic services such as health insurance, to obtain a driver’s license, or to apply for a job.⁶¹ For example, if submitting a birth certificate is a requirement to start a new job, transgender persons are forced to reveal their transgender status, which puts them at risk of

⁶¹ Thomas Hammarberg, Council of Europe Commissioner H.R., Human Rights and gender identity, CommDH/IssuePaper, at 7 (2009), <https://wcd.coe.int/ViewDoc.jsp?p=&id=1476365&direct=true>.

discrimination, which could lead to violence and/or exclusion from the market.⁶² The lack of legal recognition can also create conditions for the violation of other human rights of transgender individuals. The United Nations High Commissioner for Refugees has found that transgender persons are frequently forced to leave their countries of origin because of the harassment they suffer.⁶³ Similarly, political rights can be affected when transgender individuals do not have identification cards that match their physical appearance.⁶⁴

Long and bureaucratic processes to change their name or recognize their preferred sex can lead to the denial of rights of transgender people. Lengthy processes with many requirements or processes demanding individuals to undergo specific medical treatment deny transgender individuals meaningful participation in society and create an unreasonable burden on them to constantly justify who they are.⁶⁵ Moreover, a difficult and lengthy process can make transgender persons decide not to pursue their legal recognition because of the high economic and psychological burden.⁶⁶ The lack of legal recognition not only impacts the way transgender persons live their lives on a daily basis but also can create conditions that inflict additional

⁶² *Id.* at 7.

⁶³ U.N.High. Comm’r. Ref. *GUIDELINES ON INTERNATIONAL PROTECTION NO. 9*. U.N. Doc. CR/GIP/12/09 (Oct.23, 2009).

⁶⁴ Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters*, at 1-2 (April, 2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Voter-ID-Apr-2012.pdf>

⁶⁵ Thomas Hammarberg, *supra* note 61, at 9.

⁶⁶ Marina Gomez-Robledo, *Un único trámite para cambiar de género en la Ciudad de México*, El país (Mar. 31, 2015), http://internacional.elpais.com/internacional/2015/03/28/actualidad/1427510687_253205.html.

violations of their rights.

4.2. Legal frameworks for name and gender change required by the American Convention on Human Rights.

Countries around the world have different approaches to laws surrounding name and gender change for transgender individuals. Two legal approaches to addressing name and gender change are the surgery and/or hormone requirement model, and a self-determination model. A surgery and hormone requirement model forces individuals to undergo sex reassignment surgery⁶⁷ or to take hormones that address bodily gender presentation as a precondition to the individual's eligibility to change the gender marker on her identity documents. A self-determination legal framework allows an individual to change his or her identity documents based on how he or she identifies, with little to no medical intervention.⁶⁸ Costa Rica should implement a self-determination model to ensure the rights of transgender individuals under the American Convention.

⁶⁷ National Center for Transgender Equality, *Transgender Terminology*, <http://www.transequality.org/issues/resources/transgender-terminology>, (defining sex reassignment surgery as "Surgical procedures that change one's body to better reflect a person's gender identity. This may include different procedures, including those sometimes also referred to as "top surgery" (breast augmentation or removal) or "bottom surgery" (altering genitals). Contrary to popular belief, there is not one surgery; in fact there are many different surgeries. These surgeries are medically necessary for some people, however not all people want, need, or can have surgery as part of their transition. "Sex change surgery" is considered a derogatory term by many.").

⁶⁸ See Jules Morgan, *Self Determining Legal Gender*, *The Lancet* (2016), [http://www.thelancet.com/pdfs/journals/landia/PIIS2213-8587\(16\)00002-4.pdf](http://www.thelancet.com/pdfs/journals/landia/PIIS2213-8587(16)00002-4.pdf).

4.2. A. Surgery and hormone requirements as a violation of Article 5: right to humane treatment.

Many countries in the world now legally recognize transgender persons preferred gender, but some may impose medical requirements that violate human rights and thus could constitute ill-treatment or even torture. In his report on forms of abuse in health-care settings, the former UN Special Rapporteur on Torture Juan Mendez found that many countries require sterilization surgeries as a requirement for transgender persons to get legal gender recognition.⁶⁹

Psychological, psychiatric, and physical tests are also often part of legal requirements in some countries.⁷⁰ These kinds of procedures could compromise the physical integrity of a person and his or her right to privacy.⁷¹

Surgery or hormone treatment often results in sterilization.⁷² Therefore, if the State imposes sterilization requirements on a transgender individual to change her gender, the State forces sterilization on an individual. Most European countries have banned such requirements either through court rulings or by passing legislation.⁷³ The Commissioner for Human Rights of the

⁶⁹ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, United Nations Human Rights Council (Feb. 2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf.

⁷⁰ *Id.*

⁷¹ Thomas Hammarberg, *supra* note 61, at 7.

⁷² *License to Be Yourself: Forced Sterilization*, OPEN SOCIETY FOUNDATION, 3 (2015), <https://www.opensocietyfoundations.org/sites/default/files/lgr-forced-sterilization-20151120.pdf>.

⁷³ *Trans persons' Rights in the EU Member States*, EUROPEAN PARLIAMENT, 5 (2010), <http://www.lgbt-ep.eu/wp-content/uploads/2010/07/NOTE-20100601-PE425.621-Transgender-Persons-Rights-in-the-EU-Member-States.pdf>.

Council of Europe has labeled surgery and hormone requirements a violation of an individual's physical integrity.⁷⁴ Additionally, the UN Special Rapporteur on Torture addressed forced sterilization, within the context of transgender individuals, as a violation of the right to physical integrity, which might amount to torture or ill treatment.⁷⁵

Article 5(2) of the American Convention provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”

Involuntary sterilization occurs in different ways and the processes to perform it vary according to the person. Several reports from United Nations' institutions have recognized this form of violence, classifying it as a violation of several human rights.⁷⁶

Coerced sterilization occurs when financial or other incentives, misinformation, or intimidation tactics are used to compel an individual to undergo the procedure. Additionally, sterilization may be required as a condition of health services or employment. Forced sterilization occurs when a person is sterilized without her knowledge or is not given an opportunity to provide consent.⁷⁷

In addition, the procedure may not have as the main objective the elimination of

⁷⁴ Thomas Hammarberg, *supra* note 61, at 6.

⁷⁵ See *supra* note 69, at para. 78, 79 & 88.

⁷⁶ OPEN SOCIETY FOUNDATIONS, *Against her will. Forced and Coerced Sterilization of Women Worldwide* (2011), <https://www.opensocietyfoundations.org/sites/default/files/against-her-will-20111003.pdf> (last visited Feb 12, 2017) P. 2.

⁷⁷ *Id.*

reproductive capacity, but it may be the consequence of other treatment.⁷⁸ Transgender people, for example, can lose their reproductive capacity if they are not informed of all the consequences related to treatments usually associated with transitioning. That is, transgender persons are at risk of losing their reproductive capacity not only in cases where there is a requirement to "demonstrate a change of sex", but also when there is no access to complete and adequate information of the consequences of other treatments, such as hormone therapy. The latter has been condemned by Anand Gorver, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, because it "violate[s] the right to physical and mental integrity and may constitute torture and ill-treatment."⁷⁹

Involuntary sterilizations have historically been targeted at particular demographic groups and, in general, have had a greater impact on women.⁸⁰ In addition to transgender persons, these policies have also been targeted at people with disabilities, people living with HIV, indigenous people, and intersex people, among others.⁸¹ However, not all involuntary sterilizations are the

⁷⁸ *Id.* “[S]terilization refers not just to interventions where the intention is to limit fertility – for example tubal ligation and vasectomy – but also to situations where loss of fertility is a secondary outcome.”

⁷⁹ “Women are often provided inadequate time and information to consent to sterilization procedures, or are never told or discover later that they have been sterilized. Policies and legislation sanctioning non-consensual treatments... including sterilizations... violate the right to physical and mental integrity and may constitute torture and ill-treatment.” Anand Grover (Special Rapporteur On The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), U.N. Doc A/64/272, (Aug. 10, 2009). Para. 55.

⁸⁰ OHCHR, UN Women, WHO, et. al., *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement*, http://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf (last visited Feb 12, 2017) P. 3.

⁸¹ *Id.* “[...] people belonging to certain population groups, including people living with

product of a policy that openly requires such procedures. In the case of transgender persons, in some countries it is explicitly required to undergo sterilization or hormone therapy.⁸² In other countries, however, it is a more complex configuration of the legal framework that makes these treatments an implicit requirement.

For example, in Colombia, prior to Decree 1227 of 2015, transgender persons had to undergo a judicial process similar to that required by Costa Rica to modify sex in identity documents.⁸³ Although Colombian laws did not explicitly require medical treatment, since sex was considered a biological fact, judges demanded proof that there was an "objective" change in this "biological fact".⁸⁴ In other words, transgender persons had to provide medical expertise to demonstrate that they changed their "biological sex" and this meant that they were sterilized. In this way, the legal framework effectively required the sterilization of transgender people even though sterilization was not an explicit requirement.

Gender stereotypes have an impact on this legal balance, weighing against transgender people. Despite scientific advances, there is still a widespread idea that "real" women or men are those who have a coherence between their gender identity and their genitalia.⁸⁵ These sex-gender

HIV, persons with disabilities, indigenous peoples and ethnic minorities, and transgender and intersex persons, continue to be sterilized without their full, free and informed consent (6–16).” P. 1.

⁸² *Id.* at 2.

⁸³ *Mapping Trans Rights in Colombia*, supra note 36, at 11.

⁸⁴ *Id.* at 12.

⁸⁵ Cole Thaler, *What Does It Mean to Be Real? Transgender Identity and the Law*, GPSolo, Vol. 27, No. 1, SEX AND THE LAW (JANUARY/FEBRUARY 2010), pp. 26-29, American Bar Association.

stereotypes result in the mistaken idea that there are "complete transitions", that some procedures are necessary for a person to "reach the opposite side" of the sex-gender spectrum. As stated by Sabatello:

[D]espite the common assumption that there is one clear set of procedures which would qualify one as having his or her sex changed, this is not the case. There are multiple surgical interventions one may take, including bilateral mastectomy, pheloplasty hysterectomy, vaginoplasty, vaginal closure, and voice surgery. In some cases transgender individuals only opt for hormonal treatment or group or individual counseling and psychotherapy. Still in other cases, individuals may choose to forgo any body modification, yet present themselves as the opposite sex. One's decision on which medical procedure to select is influenced by an array of factors, including costs, medical conditions (e.g. age, weight, preexisting medical illness), risk of complications, practical considerations (such as taking time off work), and sense of satisfaction with one's own body. Thus, a universal image of how and what transgender individuals look like is ostensibly impossible. It is also perhaps for this reason why to date there is still no clear estimate of the prevalence of transgenderism.⁸⁶

These gender stereotypes affect both judges and health professionals and have an impact on the way transgender persons access sexual and reproductive health services. In Costa Rica the Ombudsman's Office insists that there continues to be failures in the full guarantee of the rights of transgender persons. "Trans people face [...] ignorance and inadequacies in a system that does not include comprehensive and intersectoral care programs with specialized medical personnel and which is still rife with social prejudices."⁸⁷

The IACtHR has concluded that these gender stereotypes have a differential impact on the

⁸⁶ Maya Sabatello, *Advancing Transgender Family Rights through Science: A Proposal for an Alternative Framework*, Human Rights Quarterly, Vol. 33, No. 1 (February 2011), pp. 43-75. The Johns Hopkins University Press.

⁸⁷ *Mapping Trans Rights in Costa Rica*. Supra note 36, at 35.

access that some people have to their rights. In particular in *I.V. v. Bolivia*, the IACtHR concluded that gender stereotypes "result in discriminatory treatment in health services and especially in the provision of sexual and reproductive health services"⁸⁸ and, "consequently, the Commission argued that non-consensual sterilization of I.V. constituted a form of discrimination against [petitioner] in guaranteeing her right to humane treatment under Article 5 (1) of the American Convention."⁸⁹

4.2. B. Surgery and hormone requirements as a violation of Article 1(1) obligation to respect rights, and Article 24 Right to equal protection.

A surgery requirement forces a transgender individual to choose between the right to bodily integrity and the right to privacy. According to the Yogyakarta Principles, the right to privacy includes whether to disclose transgender status.⁹⁰ As mentioned above, both the Mexican Supreme Court and the Colombian Constitutional Court have found that a State must ensure the privacy of an individual's transgender status because the lack of privacy could subject an individual to discrimination and violence. Beyond civil registries, transgender individuals are forced to disclose their transgender status each time they show an identity card that does not match their gender expression. Such a discrepancy between identification and appearance leaves

⁸⁸ *I.V. v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 329, ¶¶ 137-138 (Nov. 30, 2016), (only in Spanish. Unauthorized translation by authors).

⁸⁹ *Id.*

⁹⁰ Yogyakarta Principles, *supra* note 13, Principle 6.

a transgender individual once again vulnerable to discrimination and violence.⁹¹

Transgender individuals are then forced to decide between a surgery that leads to sterilization, or the right to choose when or if to disclose transgender status. This situation creates a denial of either an individual's right to humane treatment or an individual's right to privacy. According to the American Convention, all people are ensured the full and free access of all rights and freedoms without discrimination. Article 1(1) of the American Convention ensures all people "the free and full exercise of those rights and freedoms, without discrimination for reasons of race, sex, language, religion, political, or other opinion, national or social origin, economic status, birth, or any other social condition. Article 24 of the American Convention provides that "all persons are equal before the law. Consequently they are entitled, without discrimination, to equal protection of the law." Under Articles 1(1) and 24, surgery or hormone requirements in gender identity laws are contrary to the American Convention because they do not allow transgender individuals full enjoyment of all rights under the Convention. Therefore, Costa Rica should not implement a legal framework that requires surgery or hormone treatment of any sort because it hinders or denies a transgender individual's ability to enjoy all rights. To ensure that transgender individuals have full enjoyment of their rights, Costa Rica should utilize a self-determination model.

⁹¹ See Fabiola Pomareda, *Transgender Costa Ricans Fight Discrimination Over Name-Change Rights*, Tico Times (2014), <http://www.ticotimes.net/2014/09/06/transgender-costa-ricans-fight-discrimination-over-name-change-rights>.

4.2. C. State parties should implement a self-determination framework for transgender individuals to change their gender.

The self-determination framework can be further separated into two categories: partial self-determination and full self-determination. Partial self-determination requires that an individual receive a medical note from a medical professional certifying that the individual identifies in a different way than that assigned at birth.⁹² Full self-determination allows an individual to change her gender of her own free will and volition.⁹³

In partial self-determination countries, a legal name and gender change requires as a prerequisite obtaining and providing a note from a medical professional that indicates the individual does have gender dysphoria.⁹⁴ European countries such as the Netherlands, Sweden and Portugal do not require surgery but require medical certification.⁹⁵ Although a partial self-determination framework would address the violation of Article 5, a medical requirement does

⁹² See e.g. Jules Morgan, *Self Determining Legal Gender*, *The Lancet* (2016), [http://www.thelancet.com/pdfs/journals/landia/PIIS2213-8587\(16\)00002-4.pdf](http://www.thelancet.com/pdfs/journals/landia/PIIS2213-8587(16)00002-4.pdf).

⁹³ See e.g. *Id.*

⁹⁴ See “Gender Dysphoria,” AMERICAN PSYCHIATRIC ASSOCIATION, (last viewed Dec. 1, 2016), https://www.psychiatry.org/patients-families/gender-dysphoria?_ga=1.196381032.596104358.1480677426.

(“Gender dysphoria involves a conflict between a person’s physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender”).

⁹⁵ See *The Netherlands: Victory for Transgender Rights*, HUMAN RIGHTS WATCH (2013), <https://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights>; see also *Sweden, Gender Identity Watch* (2013), <https://genderidentitywatch.com/tag/sweden/>; *Portugal Gender Identity Law*, TRANSGENDER EUROPE (2014), <http://tgeu.org/portugal-gender-identity-law/>.

not necessarily address the issues that arise under an Article 11 right to privacy. A transgender individual would still be required to disclose his or her transgender status to a medical professional under a partial self-determination framework. Several organizations of transgender people have been advocating for a legal framework that does not require pathologization (a medical or psychiatric diagnosis) in order to have access to their rights:

It is also essential to continue to insist that health access and gender identity recognition are human rights and that their realization must not depend on diagnostic categories. It is necessary to consider the very construction of the proposed chapter, to advance towards the depathologization of body diversity, and break the association between transgender health issues and other pathologizing categories.⁹⁶

A full self-determination framework allows an individual to decide for his or herself what gender s/he identifies with without any medical involvement. Laws in alignment with the pure self-identification framework may have limitations in terms of the ages of the individuals applying, but ultimately the individual is eligible to change her name based on how she identifies. States whose laws fall into the pure self-determination model are Malta,⁹⁷ Denmark,⁹⁸

⁹⁶ Global Action for Trans Equality. New Developments in the ICD Revision Process. Available at: http://www.stp2012.info/old/en/news#information_ICD_revision_process

⁹⁷ *Gender Identity Bill Approved Unanimously*, TIMES OF MALTA (2015), <http://www.timesofmalta.com/articles/view/20150401/local/gender-identity-bill-approved-unanimously.562316>.

⁹⁸ *Denmark: Changing Legal Sexual Identity Simplified*, LIBRARY OF CONGRESS (2014), <http://www.loc.gov/law/foreign-news/article/denmark-changing-legal-sexual-identity-simplified/>.

and Ireland⁹⁹ in Europe; and Argentina,¹⁰⁰ Bolivia,¹⁰¹ and Colombia¹⁰² in South America¹⁰³.

4.3. Gender identity recognition in Costa Rica’s domestic law in the light of ACHR principles.

Costa Rican law does not generally allow for legal name change to correlate with one’s gender identity. While there are some policies that seemingly favor legal name change for transgender individuals, these policies are generally applied in a manner that is contrary to assuring transgender individual’s human rights. For instance, Article 2, Regulations on Photographs in Identity Documents by the Supreme Electoral Court, Decree 08-2010, provides, “Every person has the right to have their image and gender identity respected at the moment of their taking the photograph that is attached to their identity card.”¹⁰⁴ While this law would seem

⁹⁹ See Gender Recognition Bill 2013, explanatory memorandum, <https://www.oireachtas.ie/documents/bills28/bills/2013/5613/b5613dmemo.pdf>; see also Henry McDonald, *Ireland Passes Law Allowing Trans People To Choose Their Legal Gender*, THE GUARDIAN (July 2015), <https://www.theguardian.com/world/2015/jul/16/ireland-transgender-law-gender-recognition-bill-passed>.

¹⁰⁰ See *South America Citation: Johnathan Blitzer, Latin America’s Transgender-Rights Leaders*, THE NEW YORKER (Aug. 2015), available at <http://www.newyorker.com/news/news-desk/latin-americas-transgender-rights-leadership>

¹⁰¹ See “Bolivia promulgó una polémica ley de identidad de género” INFOBAE AMÉRICA, (21 May 2016), <http://www.infobae.com/2016/05/21/1813270-bolivia-promulgo-una-polemica-ley-identidad-genero/>

¹⁰² See Daniela Franco, *Colombia, the Surprising Global Leader in Transgender Rights*, TAKEPART (Jun. 2015), available at <http://www.takepart.com/article/2015/06/10/colombia-surprising-global-leader-transgender-rights>

¹⁰³ Stop Trans Pathologization. Press Release, International Day of Action for Trans Depathologization 2015, www.stp2012.info/STP_Press_Release_October2015.pdf (last visited Feb. 12, 2017).

¹⁰⁴ Reglamento de Fotografías para la Cedula de Identidad, Decreto No. 08-2010 (Jul. 1, 2010), available at <http://www.tse.go.cr/pdf/normativa/fotografiascedulaidentidad.pdf>

to benefit transgender individuals, it seems to function after a legal name change process has taken place. As such, it may not necessarily make it easier for transgender individuals to change their name to reflect their gender identity.¹⁰⁵

In practice, according to reports from different civil society sources, current policies and laws in Costa Rica do not facilitate legal name change to correlate with gender identity.¹⁰⁶ Name change policies in Costa Rica seem fairly simple. There is a straightforward bureaucratic process at the Costa Rican registry, and the process is usually free of charge. However, these procedures only facilitate name changes where a person's new name is of the same gender as that person's birth name.¹⁰⁷ This poses a severe problem for transgender individuals who instead want to change their name to one that is characteristically associated with their identity. While it is possible to challenge in court the policy of not allowing name modifications in the case of transgender persons, this process is extremely expensive and places an undue burden by forcing the person to produce evidence, generally medical statements, and to disclose personal information. Furthermore, because litigation may be the only way in which transgender individuals can change their legal name without any policy barriers, lawyers often charge exorbitant fees when representing transgender individuals fighting legal name change policies.¹⁰⁸ As such, transgender individuals are systematically mistreated and discriminated against for

¹⁰⁵ See *Human Rights Violations of Trans Women in Costa Rica, El Salvador, Guatemala, Honduras, and Panama*, Red Lactrans (2016), <http://redlactrans.org.ar/site/wp-content/uploads/2013/05/ReportREDLACTRANS.pdf>

¹⁰⁶ See *Mapping Trans Rights in Costa Rica*, supra note 36.

¹⁰⁷ See Pomareda, supra note 91.

¹⁰⁸ See *Id.*

attempting to change their legal names to align with their gender identity.¹⁰⁹

In contrast, other countries' laws adopted in accordance with a self-determination model properly guarantee the economic accessibility of the process of changing public records to reflect a person's identity, and the absence of prerequisites other than a statement made by the applicant.¹¹⁰ Thus, the lengthy, expensive and harmful effects of undertaking a judicial procedure, which unnecessarily produces more stigmatization in a group in special situations of vulnerability, are circumvented.

The self-determination model legislation provides an adequate balance between the State's legitimate interest and individual rights. Changing public records through brief administrative proceedings does not diminish the power of the State to keep accurate and precise records. Moreover, still, the rights and obligations of the individuals within the State continue to be based on individuals' identification number.¹¹¹ Furthermore, the aforementioned provisions address the possible misuses of these proceeding by recognizing that changes in public records without judicial intervention can only be conducted a limited number of times.¹¹²

¹⁰⁹ *See Id.*

¹¹⁰ Ley de Identidad de Género de Argentina, N° 26.743 (May 24, 2012), articles 4 and 6, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/197860/norma.htm>, (Recognizing the gratuity of the proceedings). In Colombia, Decreto 1.227 (June 4, 2012), articles 2.2.6.12.4.4. and 2.2.6.12.4.5., <https://www.minjusticia.gov.co/Portals/0/Ministerio/decreto%20unico/%23%20decretos/1.%20DECRETO%202015-1227%20sexo%20c%C3%A9dula.pdf>.

¹¹¹ Argentina, Ley de Identidad de Género, *Id.*, article 7; Colombia, Decreto 1.227, *Id.*, article 2.2.6.12.4.3.

¹¹² Argentina, Ley de Identidad de Género, *Id.*, article 8; Colombia, Decreto 1.227, *Id.*, article 2.2.6.12.4.6.

Civil society organizations in Costa Rica have advanced proposals for reform aimed to “guarantee a process that is administrative, quick, transparent and accessible, and one that does not require total or partial genital reassignment, hormonal therapies, or any other medical or psychological treatment, and without infringements of other human rights”¹¹³. Thus, the first step towards the elimination of structural violence is to advance priority reforms in these areas, adjusting domestic legislation with the standards of the American Convention.

5. CONCLUSIONES

This request for the Court’s advisory opinion represents a unique opportunity to develop legal standards and expand the protection of a group in special situations of vulnerability in the hemisphere. As the OAS and the IACHR have recognized, segregation, discrimination and violence against transgender persons are currently common problems.

Under international human rights law, the deep link between the right to privacy, the right to make autonomous decisions, and the legal recognition of trans-sexual and transgender individuals’ name in accordance with their real identity has been recognized as an evolving standard. According to the prohibition of abusive interferences, unlawful attacks to the honor and reputation of a person, and the principle of non-discrimination, States should take appropriate measures to ensure that transgender persons can get effective legal recognition of their preferred name and gender in official documents through legal procedures conducted in a prompt, privacy-

¹¹³ *Mapping Trans Rights in Costa Rica*, *supra* note 36, at 35.

respectful, transparent and accessible fashion.

The legal framework which forces transgender individuals to undergo medical treatment as a condition to change their names is incompatible with international human rights standards and might also amount to a torture or ill-treatment. In contrast, a full self-determination legal framework, as has been adopted by many countries in the hemisphere, allows an individual to change his or her identity documents based on how he or she identifies and guarantees the right to privacy and the right to a name.

Current domestic law in Costa Rica is not in compliance with a full self-determination framework. Transgender individuals currently need to undertake lengthy, expensive, stigmatizing and inaccessible procedures to see their gender identity reflected in official documents. It is therefore necessary for Costa Rica to align its legislation with a self-determination model.

The Court faces an important task. By this intervention, it is our wish to provide the Court with valuable information and ultimately, to contribute to the State's' implementation of legal frameworks and public policies respectful of transgender persons' rights.



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