



THE NETHERLANDS

Controlling Bodies, Denying Identities

Human Rights Violations against Trans People in the Netherlands

H U M A N
R I G H T S
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ISBN: 1-56432-808-2
Cover design by Rafael Jimenez

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SEPTEMBER 2011

ISBN: 1-56432-808-2

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A Note on Terminology

Terminology relating to transgender issues is still fluid and subject to debate. This report uses the following definitions:

- We use **gender identity** to refer to a person's internal, deeply felt sense of being male or female, or something other than or in between male and female. **Gender expression** refers to the external characteristics and behaviors which societies define as “masculine” or “feminine”—including such attributes as dress, appearance, mannerisms, speech patterns, and social behavior.
- **Transgender people, or trans people,** are people whose gender identity or gender expression differs from the sex they were assigned at birth on the basis of their bodily characteristics. Understanding the experiences of trans people means recognizing how gender is not the same as biological sex. Biological sex is the classification of bodies as male or female on the basis of biological factors, including hormones, chromosomes, and sex organs. Gender describes the social and cultural meanings attached to ideas of “masculinity” and “femininity.”
- **Intersex people** are people whose bodily characteristics (genetic, hormonal or anatomical) are such that their biological sex cannot readily be determined to be male or female. The phenomenon of intersexuality is different from the existence of transgender people (whose biological sex is unambiguous, but whose gender identity is different from their biological sex). However, where parents or others decide to raise an intersex child as belonging to a particular gender (or even subject the child to surgery to modify its body so as to correspond more closely to society's ideas of male and female bodies), the intersex child may grow up to be transgender if its own gender identity does not correspond with the gender identity imposed on the child.
- The transgender community is diverse. It includes **transsexual people**, whose gender identity is opposite to the sex they were assigned at birth. A **trans woman** refers to someone who was born with a male body but who has a female gender identity; a **trans man** is someone born with a female body but with a male gender identity. The term transsexual people is sometimes used to refer exclusively to people who wish to alter their bodies physically, or who have already done so. (This usage in turn gives rise to the problematic terms “pre-operative” and “post-operative” transsexual people, which seem to set greater store by people's physical appearance than their gender identity.) However, this report uses the term transsexual people to refer to people who have a persistent desire to live and be accepted as members of the opposite sex. For some transsexual people, this desire may be accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to make his or her body as

congruent as possible with their gender identity through surgery and hormone therapy. For others, the desire to live and be accepted as a member of the opposite sex is not accompanied by a wish to have hormone therapy and/or have sex reassignment surgery (SRS).*

- It should be noted that while some transsexual people use the identity labels **trans woman** and **trans man** to signify that they are women and men respectively while still affirming their history as males and females respectively, other trans people experience these labels as an attempt to deny that they are “real” women or “real” men; they prefer to be referred to simply as women or men in accordance with their gender identity. This report follows the preferences of individual transgendered people interviewed in the course of the research.
- Not all transgender people are either trans women or trans men: the trans community also includes other **gender variant people** (who sometimes use the term **genderqueers** to refer to themselves), whose gender identity is neither exclusively male nor exclusively female, but in between or beyond genders. Gender variant people challenge all notions that insist on a **gender dichotomy** according to which there are only two genders, male and female. The trans community also includes transvestites/cross-dressers (whose gender identity corresponds with their sex assigned at birth but who dress at times in clothes typical of the opposite sex) and transgenderists (whose gender identity has both male and female elements).
- **Gender Identity Disorder** is a diagnosis contained in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)[†] and in the World Health Organization’s International Classification of Diseases (ICD-10). The DSM and ICD are both in the process of being revised. The current proposal for the DSM-V is to replace gender identity disorder with **gender dysphoria**. The proposal would retain the classification of gender dysphoria as a mental disorder, something which many trans people strongly contest.
- **Sex Reassignment Surgery (SRS)** refers to surgical interventions to change the body so as to resemble a body of the opposite sex as closely as possible. SRS is usually preceded by a minimum period of **hormone therapy** to induce secondary sex characteristics of the desired sex.

* See also World Health Organization, “International Statistical Classification of Diseases and Related Health Problems,” 10th Revision (ICD-10), May 1990, Chapter V: Mental and Behavioural Disorders, code F64: Gender identity disorders (F64.0: Transsexualism).

[†] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th edition (DSM-IV), 1994 (text revision, DMS-IV-TR, 2000), codes 302.6 and 302.85.

Summary

The state should stay out of our underwear.

— Vreer, Amsterdam, March 7, 2011

After a while, you're just done with it. You just want to live, just like everybody else.

— Linda, Rotterdam, April 1, 2011

In 1985, the Netherlands was among the first European nations to adopt legislation granting transgender people—individuals whose gender identity differs from the sex assigned them at birth—legal recognition of their gender identity, albeit under onerous legal conditions.

Over a quarter of a century later, the Netherlands has lost its leading edge. Legislation that at the time represented a progressive development is wholly out of step with current best practice and understandings of the Netherlands' obligations under international human rights law.

Most egregiously, Dutch law allows trans people to change their gender on official documents only on condition that they have altered their bodies through hormones and surgery, and that they are permanently and irreversibly infertile.

These requirements routinely leave trans people with identity documents that do not match their deeply felt gender identity, resulting in frequent public humiliation, vulnerability to discrimination, and great difficulty finding or holding a job. "Right now, you have to brace yourself at every moment of your life, because you never know when will be the next time you have to explain yourself," one woman said.

The conditions imposed by article 1:28 of the Civil Code violate transgender people's rights to personal autonomy and physical integrity and deny transgender people the ability to define their own gender identity, which the European Court of Human Rights has deemed to be "one of the most basic essentials of self-determination."

This report details the impact the current Dutch law has on the daily life of transgender people and analyzes the existing Dutch legal framework from a human rights perspective.

Human Rights Watch calls upon the Netherlands to amend article 1:28 of the Civil Code to respect transgender people's right to personal autonomy and physical integrity. It should separate medical and legal questions for transgender people. Legal recognition of the gender identity of transgender people should not be made conditional on any form of medical intervention.

An Outdated Law and Its Impact on Transgender People

Most people's internal, deeply felt sense of belonging to a particular gender corresponds to the sex they were assigned at birth on the basis of their external sex organs. For transgender people, or trans people, this is not the case: their gender identity differs from their birth sex.

The transgender community is diverse, and precisely how their gender identity differs from their sex assigned at birth differs from person to person. Transsexual people want to live and be accepted as members of the gender opposite to the sex they were assigned at birth. Besides transsexual people, the trans community also includes gender variant people whose gender identity is neither male nor female: it may be somewhere on the spectrum between male and female, or it may not be susceptible at all to definition in terms of the male/female dichotomy.

Article 1:28 of the Civil Code impacts different groups of transgender people in the Netherlands in different ways.

According to the law, transsexual people who wish to undergo surgery to alter their bodies can change their papers only after they have completed the lengthy medical trajectory. It takes years, not weeks or months, before people meet the conditions imposed by article 1:28. During that time, they must live with identity documents that do not match their gender identity, and thus deny a fundamental aspect of their personality. "People are left dangling in between two worlds for far longer than is necessary," Jochem Verdonk, the chairman of the Transman Foundation, a Dutch advocacy organization, told us. "It is needlessly traumatizing for people who are already very vulnerable."

For trans people who do not want surgery, and who will therefore never be able to change their gender markers under the current legislation, these obstacles last a lifetime. A popular shorthand phrase for trans people refers to people who are "trapped in the wrong bodies." But trans people who do not want surgery are not trapped in the wrong bodies, since they have in fact decided to accept their bodies as they are, they are trapped by the law. Such individuals are confronted on a daily basis by a gulf between their deeply felt

identity and what their documents say, made manifest in countless fraught interactions with government agencies, employers, and often, as explained below, even complete strangers. The pressure on trans people who find themselves in this situation is enormous. A woman who does not want surgery and who has suffered countless indignities when applying for jobs because her papers say she is male, told Human Rights Watch: “I have even thought about having the operations after all, just to be done with all the crap. But if I come to regret the operations later on, I’ll be deeply unhappy for the rest of my life.”

Finally, transgender people who are not transsexual but whose gender identity differs in other ways from the sex they were assigned at birth do not currently have any means of obtaining legal recognition of their gender identity. For these gender variant people, neither a male nor a female gender marker accurately reflects their gender identity, but in 2007 the Dutch Supreme Court (*Hoge Raad*) ruled that neither article 1:28 nor any other provision of the Civil Code allows for such people to have the gender marker on their birth certificate removed. Even if as a stopgap measure some gender variant people might prefer to change to the opposite gender marker because it may be a closer approximation to their gender identity, the only avenue open to them would be through the surgery and irreversible infertility requirements stipulated in article 1:28 of the Civil Code.

Registering Gender

The information about people’s gender is contained in the Dutch register of civil status records (*Gemeentelijke Basisadministratie van Persoonsgegevens*, known by the abbreviation GBA), along with other personal data derived from people’s birth certificates such as their names and date of birth. Several hundred agencies and institutions that require personal data to discharge their public duties have access to GBA data, including the police, the internal revenue service (*belastingdienst*) and pension funds. A wide array of other actors are under a legal obligation to ensure that their own records are in line with GBA data, including banks and insurance companies, employers and educational institutions.

This system of interconnected recordkeeping means that information about people’s gender as registered in the GBA is ubiquitous. For trans people who are unable to change their gender marker on their birth certificate, and hence their registered gender in the GBA, the inevitable consequence is that the incongruity between their sex assigned at birth and their gender identity pursues them in all aspects of their lives. Official correspondence is invariably addressed wrongly, to Mr. X instead of Mrs. X, or Mrs. Y instead of Mr. Y. Trans people also often have no choice but to put their signature under forms that are based on their birth sex, or to tick the wrong box on the many forms that ask one to identify one’s

gender as well as one's name and other personal data: to do otherwise might leave them open to accusations of fraud. To many trans people, this deliberate act of denying their own gender identity feels like self-betrayal. "I can't bear to tick that box with 'M' myself," one woman told Human Rights Watch. "Everything in me resists that. That's not who I *am*. I'm not just *called* Sabrina, I *am* Sabrina."

Even more distressing are the many occasions when, as a direct result of 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. Trans people emphasized that the examples they gave to Human Rights Watch were not exceptions, but typical of situations they face daily. A woman who lives with male identity papers said, "Each time that information derived from the GBA is called up by some official is hurtful, because each time I'm met with a raised eyebrow, each time I have to provide an explanation, over and over and over again."

A man told Human Rights Watch, "You have no option, you're forced, always, to provide an explanation. Sometimes I'm in the right mood for that, but not always. 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." A woman said of such situations where she was challenged about her identity: "At a stroke, it's like they pull the rug from underneath you. It leaves me very, very tired, you're always having to explain. After a while, you're just done with it. You just want to live, just like everybody else."

A further problem that trans people in the Netherlands face relates to the ability to choose a first name that suits their gender identity. For trans people who do not happen to have one of the few first names that society considers to be gender neutral, the ability to choose a new first name is as important as changing the gender marker in civil status records. Changes of first names are governed by article 1:4 of the Civil Code. While article 1:4 does not explicitly provide that first names must correspond to a person's registered gender, it does state that first names may not be "inappropriate" (*ongepast*), without specifying what renders a name inappropriate. However, a number of trans people who did not meet the requirements of article 1:28 of the Civil Code told Human Rights Watch that the courts had denied their applications to change their first names, on the grounds that their chosen first names were deemed to be "inappropriate" within the meaning of article 1:4 of the Civil Code, since they did not correspond to the person's registered gender. One man told Human Rights Watch:

It is up to the judge to decide whether a first name is appropriate. In my case, this particular judge decided that for me it was inappropriate to have a male first name, because in the eyes of the law I'm still female. I can't change my registered gender because I don't yet meet the infertility requirement, and I can't change my name because I can't change my registered gender.

In deciding name change applications, some judges evidently accord primacy to people's registered gender, ignoring the social reality of the people in question and their own expressly stated wish to adopt a forename that suits their gender identity. A woman said:

The court rejected my application: it argued that my chosen name was inappropriate for me because I'm still registered as a man. There was no court hearing, my application was decided on the papers. So the judge never had an opportunity to see me, to see that I am a woman.

In these instances, judges in effect make name changes for trans people conditional on the applicants having had surgery and being infertile, requirements that are not in fact provided by law.

A New Law

States have legitimate reasons for registering people's sex at birth, and hence for regulating the manner in which people can change their gender marker in civil status records later in life. Sex is one characteristic used to identify people and government bodies such as national security agencies may need to have access to this information to carry out their duties. In some contexts the state has specific, positive obligations to protect people from risk, for example, by mandating separate facilities, such as prisons, for men and women; or it may need to use data segregated by gender to further policies on equality or inform gender-specific health policies such as those targeting maternal health and prostate cancer. Countries with conscription armies might only call up men for military duty.

But while the state may have a legitimate interest in regulating the manner in which people can change their legally recognized gender, it should do so in ways that do not violate an individual's human rights. However, the two conditions imposed by article 1:28 of the Civil Code for recognition of people's gender identity violate trans people's right to personal autonomy and physical integrity. The Dutch Constitution protects these rights, subject to restrictions imposed by law, as do several international human rights instruments ratified by the Netherlands, including the International Covenant on Civil and Political Rights and

the European Convention on Human Rights. Significantly, in a January 2011 decision the German Constitutional Court struck down as unconstitutional two conditions in German law similar to those in Dutch law, on the grounds that they violated the right to physical integrity.

As it stands, article 1:28 conflates medical and legal questions. The use of hormones and surgery should be guided exclusively by considerations relating to the individual's health. Article 1:28 of the Civil Code—which predicates legal recognition of gender identity conditional on hormone therapy, surgery, and permanent infertility—is incompatible with this principle.

For individual trans people, hormones and surgery may be necessary to restore them to the best possible state of health. In the Netherlands this is reflected by the fact that hormones and most forms of surgery for trans people are covered by health insurance policies. However, as the Standards of Care developed by the World Professional Association for Transgender Health affirm, not all transgender people need hormones and surgery: decisions whether to use hormones or to undergo surgery should be left to individual transgender people and the medical professionals assisting them.

Making hormones and surgery leading to infertility a mandatory requirement for recognizing trans people's gender identity ignores the individual circumstances of trans people, and leaves some trans people with the impossible choice between having surgery so as to have access to correct identity documents, or not having surgery and living with the wrong documents. As a woman told Human Rights Watch:

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.

Article 1:28 also places medical professionals in a difficult position in terms of medical ethics. Professional codes of ethics for physicians require that physicians act in the patient's best interest when providing medical care. However, the Civil Code places medical professionals in the invidious position of gatekeepers who are required to act to protect the supposed interests of the state, as opposed to the interest of their patients: no transgender

person can obtain legal recognition of their gender identity without a statement from medical professionals certifying that they meet the conditions of article 1:28, including irreversible infertility. For trans people for whom surgery is medically unnecessary and thus inappropriate, medical professionals know that without surgery leading to irreversible infertility they cannot provide the required statements to the court. This cuts off their patients from the only access route to legal recognition of their gender identity, which is in most cases essential to safeguard the welfare of the trans person in question.

Five Proposed Amendments

Both the previous and the current Dutch governments have acknowledged the need to amend article 1:28 of the Civil Code. Since the previous government failed to act on its commitment to present the necessary draft legislation to parliament, it has fallen to the current government to bring article 1:28 into line with the state's obligations under international human rights law. The government committed itself to making draft legislation available for consultation before the summer of 2011, but has yet to do so.

Human Rights Watch calls upon the Netherlands to amend article 1:28 of the Civil Code to respect transgender people's right to personal autonomy and physical integrity. It should separate medical and legal questions for transgender people. Legal recognition of the gender identity of transgender people should not be made conditional on any form of medical intervention.

In particular, Human Rights Watch urges the Netherlands to amend the existing legal framework for the legal recognition of gender identity in five ways.

First, parliament should abolish the condition of bodily adaptation by means of hormones and surgery and the condition of irreversible infertility.

Second, the Netherlands should reconsider the process provided for in article 1:28 of the Civil Code. The existing process makes legal recognition of trans people's gender identity dependent on trans people submitting to the court a statement signed by certified experts confirming their enduring conviction that they belong to the gender opposite to that assigned at birth. Best practice, as detailed below, would be instead to afford primacy to trans people's own self-defined gender identity.

Third, a new law on legal recognition of gender identity should safeguard the right of transgender people to choose a forename that suits their gender identity. Applications to change one's forenames are governed by article 1:4 of the Civil Code, which provides that

forenames may not be “inappropriate.” Human Rights Watch calls on the Dutch government to take the necessary steps to ensure that the courts, in applying article 1:4, do not import a requirement into the Civil Code that first names correspond to people’s registered gender.

Fourth, a new legal framework for the legal recognition of trans people’s gender identity should allow for the fact that it may be in the best interest of some transgender children to change their legal gender before they reach the age of adulthood. The inclusion of a minimum age in such a legal framework should be avoided; instead, the individual circumstances of each child should determine whether it is in their best interest to change their legal gender. A new legal framework for legal recognition of gender identity in relation to transgender children should be informed by the Netherlands’ obligations under the Convention on the Rights of the Child, including allowing the transgender child to give their opinion on the need to change their legal gender, with increasing weight given to that opinion as the child grows closer to adulthood.

Fifth, the existing legal framework for the legal recognition of gender identity does not recognize the existence of gender variant people whose gender identity is neither exclusively female nor exclusively male. Human Rights Watch does not contend that international human rights law has, as yet, evolved in such a manner as to impose a positive obligation on the state to give legal recognition to gender identities other than male or female. Nevertheless, Human Rights Watch calls upon the Netherlands to explore ways to accommodate the gender identity of gender variant people. Specific suggestions are detailed below.

Methodology

This report is based on research conducted by Human Rights Watch in the Netherlands from March 14 to April 15, 2011. Human Rights Watch conducted 28 in-depth interviews with trans people, of which 12 identified as men, 10 identified as women, and 6 identified as gender variant. Of these 28 people, some had had SRS; some had had some forms of surgery but were still waiting for other operations; some were waiting for the first operation; and others were living in their desired gender role without intending to have surgery. Two of the interviewees were under age 18.

Where they have given permission to do so, interviewees' names are provided in the report. Other interviewees chose to remain anonymous: their full names and other identifying information have been withheld to protect their privacy. All interviews were conducted in Dutch.

Transgender interviewees were identified largely with the assistance of the Transgender Network Nederland, a lobby and advocacy organization working to promote the rights of transgender people in the Netherlands, and Transvisie, a Dutch foundation providing counseling and support to transgender people.

Human Rights Watch also conducted interviews with Dr. M. van Trotsenburg, director of the Knowledge and Care Center for Gender Dysphoria at the medical center of the Free University in Amsterdam (VUmc), and with Prof. Dr. W. C. M. Weijmar Schultz and A. Pascal, director and coordinator respectively of the Gender Dysphoria Center at the Groningen University Hospital (UMCG).

Human Rights Watch also interviewed a senior legal officer at the Ministry of Security and Justice, as well as NGO representatives, lawyers and academics. Our interviewees included directors and staff of the Transgender Network Nederland, Transvisie and the Stichting Patientenorganisatie Transvisie (POST).

All documents cited in this report are either publicly available or on file with Human Rights Watch.

Recommendations

To the Government of the Netherlands

On Legal Recognition of Gender Identity

- Amend article 1:28 of the Civil Code in such a way that transgender people can apply to have the gender marker on their birth certificate changed without having to satisfy any medical conditions. In particular, abolish the current conditions of sex reassignment surgery and irreversible infertility.
- Ensure that legal recognition of transgender people's gender identity applies to all aspects of people's lives. In particular, where transgender people have children, their parental relation with their child should be in line with trans people's gender identity. Thus a trans man who has a child should be recognized as the father of that child, and a trans woman having a child should be recognized as the mother of that child.
- In light of the Netherlands' commitment to the Yogyakarta Principles, explore avenues to amend article 1:28 of the Civil Code so that it recognizes the primacy of self-identification advanced by principle 3 of the Yogyakarta Principles. In particular, explore options for enabling transgender people to change the gender marker on their birth certificate without having to provide expert statements, relying instead on transgender people's testimony about their own self-identified gender identity.
- If legal recognition of transgender people's gender identity is made conditional on expert statements being provided to the court, ensure that there is sufficient capacity on the part of the designated experts to provide the required documents within a reasonable time.
- Ensure that transgender people are able to choose a first name that suits their gender identity, whether or not they have applied to change the gender marker on their birth certificate. To this end, provide clarification to the courts on the meaning of the term "inappropriate" in article 1:4 of the Civil Code, to ensure that judges do not refuse applications for name changes on the basis that transgender people's chosen first names are deemed to be inappropriate for their gender.
- Recognize that it may in the best interest of some transgender children to change their legal gender before the age of adulthood at 18, and ensure that transgender children are not excluded from the possibility of applying for legal recognition of their gender identity and changing their first names. Procedures for the consideration of transgender children's applications should include a mechanism for the transgender child to give his or her opinion on the need to change his or her legal gender. The child's freely expressed opinion must be given due weight. In line with the Netherlands' obligation under the Convention on the Rights of the Child, the relevant

procedures must be designed in such a way as to acknowledge that as children grow and acquire capacities, they are entitled to an increasing level of responsibility for the regulation of matters affecting them.

- Explore ways to grant legal recognition to the gender identity of transgender people whose gender identity is neither male nor female, including removing the gender marker on the identity documents of gender variant people.
- Ensure that information about people's gender as contained in the register of civil status records (*Gemeentelijke Basisadministratie van Persoonsgegevens*, or GBA) is only made available to institutions, organizations and businesses in situations where this information is relevant.
- Encourage institutions, organizations and businesses to develop forms for recording personal information that allow people not to specify their gender.
- In developing and implementing the measures referred to above, involve and consult transgender persons and organizations representing transgender people. Ensure that transgender children are included in these consultation processes.

On Nondiscrimination and Equality

- Include a provision in the General Law on Equal Treatment (*Algemene Wet Gelijke Behandeling*) specifying that “discrimination on the grounds of sex” also means “discrimination on the grounds of gender identity and on the grounds of gender expression.”
- In consultation with transgender people and organizations representing them, develop and implement policies to combat discrimination against and exclusion of transgender people, including in relation to employment.
- In consultation with transgender people and organizations representing them, develop education and training programmes and awareness-raising campaigns to promote respect for the human rights of transgender people.
- Collect and analyze data on the human rights situation of transgender persons, including the discrimination and intolerance they encounter, with due regard to the right to privacy of the persons concerned.

On Medical Assistance and Psychological Support for Transgender People

- Ensure that transgender people have access to the medical and psychological assistance and support they require, and that such support and assistance is available to transgender individuals within a reasonable time.
- In consultation with transgender people, the organizations representing them and the two gender teams at the university hospitals at the Free University in Amsterdam and

the University of Groningen, ensure that all medical interventions deemed to be necessary under the sex reassignment protocols for transgender people are covered by health insurance schemes.

- Ensure that training is available to health service professionals, including psychologists, psychiatrists and general practitioners, as well as social workers, with regard to the specific needs and rights of transgender persons and the requirement to respect their dignity.

To the Gender Teams at the Free University Hospital in Amsterdam and the Groningen University Hospital

- Advocate for the rights of transgender people, including legal recognition of their gender identity regardless of whether they have had hormone treatment or surgery, in line with the Standards of Care developed by the World Professional Association for Transgender Health.

To Council for the Judiciary (Raad voor de Rechtspraak) and the Dutch Association for the Judiciary (Nederlandse Vereniging voor Rechtspraak)

- Work to ensure that the term “inappropriate” as used in article 1:4 of the Civil Code is not interpreted to deny transgender people legal recognition of their chosen first names.

To Health Insurance Companies

- In consultation with transgender people, the organizations representing them and the gender teams at the Free University in Amsterdam and the University of Groningen, ensure that all medical interventions deemed to be necessary under the sex reassignment protocols for transgender people are covered by health insurance schemes.

To the American Psychiatric Association

- Ensure that the diagnosis of gender dysphoria in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) does not pathologize trans identities.

I. Recognition of Gender Identity: The Dutch Legal Framework

Being Transgender in the Netherlands

The Dutch government estimates the number of transgender people in the Netherlands between 30,000 and 100,000.¹ Transgender people face a complex set of interrelated problems. Relations with family, friends, and colleagues may come under strain when transgender people seek acceptance of their gender identity, which in turn may lead to social isolation. They may struggle to obtain appropriate and timely psychological or medical assistance, or they may not be able to pay for the cost of certain medical procedures that are not covered by their insurance. They may experience discrimination at their workplace, or when they apply for jobs, or in accessing services. They may also encounter harassment, aggression, and even physical violence as a result of their gender expression.²

Social and economic indicators for transgender people provide some insight into the combined impact of this situation. A 2009 study focusing on transgender people in Belgium found that 22 percent of transgender people had attempted at least once to commit suicide, a figure that Dutch transgender advocacy groups hold to be indicative for the Netherlands also.³ A 2010 study in the Netherlands found that for nearly half of all transgender people who lost their jobs for reasons other than the regular expiry of their contracts, their transgender identity played a role.⁴ Of transgender people in employment, 77 percent of trans women and 66 percent of trans men surveyed had had at least one negative experience with their colleagues in the last six months on account of their gender

¹ Ministry of Education, Culture and Science, “Simply Gay: Policy for the Emancipation of Lesbian Women and Gay Men 2008-2011” (“Gewoon Homo Zijn: Lesbisch en Homo Emancipatiebeleid 2008-2011”), The Hague, November 9, 2007, p. 24.

² See, for example, the results of a qualitative preliminary study into the situation of transgender people in the Netherlands: Rutgers WPF (Utrecht), “Freedom and Visibility: Qualitative Preliminary Study of Transgender People and Safety” (“Vrijheid en Zichtbaarheid: Kwalitatief Vooronderzoek naar Transgenders en Veiligheid”), February 2011.

³ Instituut voor de Gelijkheid van Vrouwen en Mannen (Brussels), “Living as a Transgender Person in Belgium: Mapping the Social and Legal Situation of Transgender Persons” (“Leven als Transgender in België: De Sociale en Juridische Situatie van Transgender Personen in Kaart Gebracht”), 2009. The most recent figures for the Netherlands (also incorporating Flanders, the Flemish-speaking region of Belgium) date back to 1997, with 16 percent of transsexual people having attempted at least once to commit suicide, while a 1990 study found that 21.4 percent of transsexual people in the Netherlands had tried to commit suicide at least once. See Paul Vennix, *Transvestites in the Netherlands and Flanders (Travestie in Nederland en Vlaanderen)* (Delft: Eburon, 1997), p. 357, and references therein.

⁴ Rutgers Nisso Groep (Utrecht, the Netherlands), “Transgender People and Employment: An investigation into the job situation of transgender people in the Netherlands and Flanders” (“Transgenders en Werk: Een Onderzoek naar de Arbeidsituatie van Transgenders in Nederland en Vlaanderen”), May 2010, <http://www.rutgersnissogroep.nl> (accessed April 22, 2011), pp. 80-81.

expression, ranging from gossip and insulting jokes to social exclusion, threats, and sexual intimidation.⁵ Transgender people are far more likely to be unemployed than the rest of the population.⁶

This report focuses on one particular problem faced by transgender people in the Netherlands, namely the exceedingly restrictive framework for obtaining legal recognition of their gender identity. This does not mean that Human Rights Watch expects trans people's other difficulties to be solved once this particular issue has been addressed, or that Human Rights Watch deems this problem to be of greater significance for every transgender person than any of the other problems they may encounter. However, the current framework for legal recognition of the gender identity of trans people does amount to a particularly egregious violation of their human rights. It also is a problem that affects all trans people in the Netherlands without exception. Finally, a human-rights-compliant framework for legal recognition of gender identity is a necessary, if not a sufficient, step towards addressing other abuses of the human rights of transgender people, notably various forms of discrimination.

The Netherlands' Claim to being a Role Model on LGBT Rights

As will be discussed in more detail in chapter IV of this report, the Netherlands is far from the only country with a legal framework for recognition of gender identity that violates the human rights of transgender people. This report focuses on the Netherlands for two reasons. First, on a number of occasions the Dutch government has acknowledged the need to amend the Civil Code in relation to the recognition of gender identity, but without then taking the necessary steps to translate these expressions of political will into a new law. The first such promise was made in June 2009, when the then Minister of Justice stated that a draft law to this effect would be presented for consultation in the fall of that year. However, no such bill had been presented by year's end. Following the 2010 elections, the government program published by the new coalition government stated: "The Cabinet guarantees the emancipation of lesbian women, homosexual men, bisexual people and transgender people, and shall develop a policy for this purpose."⁷ This was followed by a promise in March 2011 by the State Secretary for Security and Justice to

⁵ Ibid., pp. 69-70.

⁶ Ibid., pp. 2-3.

⁷ "Het kabinet staat ook borg voor de emancipatie van lesbische vrouwen, homoseksuele mannen, biseksuelen en transgenders en zal daartoe concreet beleid ontwikkelen." VVD and CDA, "Freedom and Responsibility: Government Program VVD-CDA" ("Vrijheid en Verantwoordelijkheid: Regeerakkoord VVD-CDA"), undated (2010).

present a draft law on legal recognition of the gender identity of transsexual people before the summer of 2011.⁸ This specific commitment was repeated in the 2011-2015 policy document on emancipation presented by the government to parliament on April 8, 2011, setting out the main priorities for policy initiatives for the emancipation of women and of homosexual and transgender citizens.⁹

Secondly, the Dutch government takes pride in the fact that the Netherlands was the first country to legalize same-sex marriage, and has taken the initiative in safeguarding the rights of homosexual people both in the Netherlands and abroad. Regrettably, in the minds of policymakers the pioneering role the Netherlands has played in relation to same-sex marriage has given rise to the unfounded assumption that the Netherlands is equally in the vanguard in relation to the protection of the rights of trans people, and that the Netherlands should now work towards strengthening the protection of the rights of homosexual and transgender people abroad. For example, the government's 2011-2015 policy document on emancipation states:

No international treaty exists as yet for the rights and safety of gay, lesbian, bisexual and transgender people. By becoming the first country in the world to legalize same-sex marriage, the Netherlands has become an important role model in the world. The cabinet wants to use that position, together with other like-minded countries, to ensure that the rights and safety of homosexual and transgender people are better protected internationally.¹⁰

While welcoming the willingness of the Dutch government to take a lead role internationally on these important issues, with this report Human Rights Watch seeks to

⁸ COC, "Opstelten Makes Pledge about Safety Gays" ("Opstelten Doet Toezegging over Veiligheid Homo's"), March 3, 2011, http://www.coc.nl/dopage.pl?thema=any&pagina=viewartikel&artikel_id=4063 (accessed March 20, 2011). The promise was repeated in a letter from the State Secretary for Security and Justice to the Transgender Netwerk Nederland, dated May 31, 2011, <http://www.rijksoverheid.nl/ministeries/venj/documenten-en-publicaties/kamerstukken/2011/05/31/b-transgender-netwerk-nederland-herziening-artikel-28-boek-1-bw-26600.html> (accessed August 9, 2011).

⁹ VVD and CDA, "Policy Priorities: Emancipation of Women and Homosexual People" ("Hoofddlijnen Emancipatiebeleid: Vrouwen- en Homo-Emancipatie 2011-2015"), Kamerstukken II, 2010-2011, 27 017, nr. 74, <https://zoek.officielebekendmakingen.nl/kst-27017-74.html> (accessed June 16, 2011), p.4.

¹⁰ "Voor de rechten en veiligheid van homoseksuelen en transgenders bestaat nog geen internationaal verdrag. Nederland heeft, door als eerste land ter wereld het huwelijk tussen paren van gelijk geslacht juridisch mogelijk te maken, een belangrijke voortrekkersrol in de wereld. Het kabinet wil die positie gebruiken om samen met gelijkgestemde landen te komen tot een betere internationale bescherming van de rechten en veiligheid van homoseksuelen en transgenders. Ook zal Nederland actief bijdragen aan de veiligheid van homoseksuelen en transgenders in Europa." VVD and CDA, "Policy Priorities: Emancipation of Women and Homosexual People" ("Hoofddlijnen Emancipatiebeleid: Vrouwen- en Homo-Emancipatie 2011-2015"), Kamerstukken II, 2010-2011, 27 017, nr. 74, p. 2.

focus attention on the urgent need to bring the Netherlands' own laws into line with its obligations under international human rights law.

Article 28 of the Civil Code: Conditions for Recognition of Gender Identity

Under Dutch law, a child's sex must be registered on their birth certificate, as either female (F) or male (M), on the basis of the child's external reproductive organs.¹¹ If no sex is registered, the birth certificate has no legal validity.¹² The only exception to this rule is the situation of intersex children, whose biological sex is ambiguous. When an intersex child is born a temporary birth certificate must be prepared, which must be replaced within three months with a definitive certificate stating the child's sex. If three months after the birth it is still impossible to determine the child's sex, a definitive birth certificate must be drawn up which states that it has been impossible to determine whether the child is male or female.¹³ As far as is known, no such birth certificate has ever been drawn up.¹⁴

For transgender people, the problem is not that their biological sex cannot be determined, but that their gender identity does not accord with the sex they were assigned at birth. Accordingly, for transsexual people, whose gender identity is opposite to the sex they were assigned at birth, legal recognition of their gender identity has two aspects: the amendment of civil status records to change their registered sex to the sex corresponding to their gender identity, and, if they do not happen to have a forename that is generally considered to be gender neutral, the right to choose a new forename (or forenames) that suits their gender identity. For gender variant people whose gender identity is neither male nor female, legal recognition of their gender identity entails an amendment of their civil status records to reflect this fact, plus the right to choose an appropriate forename. The situation of gender variant people is discussed in more detail in chapter V.

Transsexual people in the Netherlands have been able to obtain legal recognition of their gender identity under the terms described above since 1985, when a law was adopted to amend the Civil Code for this purpose.¹⁵ Article 1:28 of the Civil Code allows transsexual

¹¹ Civil Registry Decree (Besluit burgerlijke stand), Bbs 1994, article 18(5) and article 43(1)(e).

¹² See, for example, Supreme Court (Hoge Raad), March 24, 1987, NJ 1987, 867 m.nt. ThWvV.

¹³ Civil Code, art. 1:19d.

¹⁴ See Marije Graven and Marjolein van den Brink, "Trans M/F: Gender Diversity, Sexual Equality and the Law" ("Trans m/v: Genderdiversiteit, Seksegelijkheid en het Recht"), *Tijdschrift voor Genderstudies*, issue 11, no. 2 (2008). <http://rjh.ub.rug.nl/genderstudies/article/view/575/561> (accessed May 20, 2011).

¹⁵ "Further rules for the benefit of transsexual people in relation to changing the sex registration on birth certificates" ("Nadere regelen ten behoeve van transseksuelen omtrent het wijzigen van de vermelding van de kunne in de akte van geboorte"), law of April 24, 1985, Law Gazette (Staatsblad) 243 (Parliamentary Records (Kamerstukken) 17 297).

people to request the court to order their birth certificate to be amended so as to bring their registered sex into line with their gender identity, and where necessary to register new first names.¹⁶ Other civil status records are then updated on the basis of the amended birth certificate, enabling the person in question to apply for new identity documents that are in line with their gender identity.¹⁷

However, the conditions imposed by the existing law for legal recognition of transsexual people's gender identity are extraordinarily burdensome. First, they must show that their body has been altered so as to resemble a body of the opposite sex by means of hormone therapy and sex reassignment surgery (SRS). This requirement is subject to the important qualification that physical adaptation is necessary only to the extent that this is medically and psychologically possible and justified. Examples of circumstances where the requirement of bodily adaptation does not need to be met are pre-existing medical conditions that render surgery too risky, or the person in question having a great fear of operations.¹⁸

Second, transsexual people must prove that they have become irreversibly infertile: trans women must never again be able to beget children and trans men must never again be able to bear children. This is a separate requirement from the first requirement. Moreover, unlike the first requirement this second requirement is absolute: while the first requirement of bodily alteration may be lifted in whole or in part when there are medical or psychological contra-indications for surgery, no such circumstances can be relied upon in relation to the second requirement of irreversible infertility.

This second requirement is often referred to as the “sterilization requirement,” but this label does not in fact quite capture the drastic nature of the requirement: ordinary sterilization techniques used for family planning purposes do not suffice, since in principle these are reversible. Hormone treatment alone is also insufficient: while it often leads to infertility, it does not necessarily result in permanent and irreversible infertility. In practice what is required is the removal of the ovaries (trans men) or testes (trans women), unless

¹⁶ Dutch Civil Code (Burgerlijk Wetboek), art. 28(1) and art. 28b(2). <http://www.wetboek-online.nl/wet/Burgerlijk%20Wetboek%20Boek%201/28.html> (accessed April 3, 2011).

¹⁷ Transsexual people who do not have Dutch nationality but who have legally resided in the Netherlands for at least one year immediately preceding their application to the court are also eligible to apply to have their birth certificates amended: Civil Code, art. 28(3).

¹⁸ Memorandum of Explanation (Memorie van Toelichting), Parliamentary Records (Kamerstukken) II, 17 297, nr. 3, http://resourcessgd.kb.nl/SGD/19811982/PDF/SGD_19811982_0005331.pdf (accessed April 4, 2011).

there are, for example, pre-existing medical conditions that have resulted in permanent infertility.¹⁹

The requirement of bodily adaptation by means of SRS was included in article 1:28 of the Civil Code on the grounds that it was taken to be the only way to protect the interests of public order. Registering people's sex at birth was deemed to be necessary to serve those interests, and changing someone's registered sex later in life would have important consequences for the legal relations between individuals (for example, their relation as husbands and wives, or as mothers and fathers) and for people's participation in society. It was argued that, consequently, even the most unwavering conviction to belong to the other sex could not in itself form the basis in law for changing someone's registered sex.²⁰ SRS was seen as a necessary requirement to guarantee legal certainty and to preclude abuses of the law.²¹

The reason provided by the legislature for the infertility requirement was that it was necessary to protect the interest of the unborn child by ruling out situations where a person legally registered as a man would give birth to a child, or where a person legally registered as a woman would father a child.²² This report will argue that the conditions of mandatory surgery and irreversible infertility are an unjustified interference with trans people's rights to personal autonomy and physical integrity. Moreover, the manner in which the law is applied in practice, and the changes in Dutch family law since article 1:28 of the Civil Code came into force in 1985, demonstrate that neither requirement is in fact necessary to protect the interests of public order.

Court Procedures

Trans people who meet the legal requirements can instruct a lawyer to submit an application to one of the 19 district courts in the Netherlands for an amendment of their birth certificate. Such applications must be accompanied by an expert statement comprising three elements: the statement must confirm that the person in question is convinced that he or she belongs to the opposite gender and that in the opinion of the experts this conviction is durable; that

¹⁹ See the parliamentary records of the debates preceding the adoption of the 1985 law: Memorandum of Explanation (Memorie van Toelichting), Parliamentary Records (Kamerstukken) II, 17 297, nr. 3, pp. 19-20, and Memorandum of Reply (Memorie van Antwoord), Parliamentary Records (Kamerstukken) II, 17 297, nr. 6, http://resourcessgd.kb.nl/SGD/19821983/PDF/SGD_19821983_0002619.pdf (accessed April 4, 2011), p. 12.

²⁰ Memorandum of Explanation (Memorie van Toelichting), Parliamentary Records (Kamerstukken) II, 17 297, nr. 3, pp. 14-15.

²¹ Ibid., p. 15.

²² Ibid., pp. 19-20.

the person's body has been physically adapted (or, where this has not been done, on what medical and/or psychological grounds operations have been ruled out); and that the person is irreversibly infertile. Such statements can only be signed by experts who have been authorized to do so: these include registered psychologists, psychiatrists, surgeons and medical doctors specialized in internal medicine.²³

Once an application has been made, the court decides whether a court hearing must be held; most applications are decided on the papers and without a court hearing, normally within one to two months after the application is made. Even if the court grants the request in full, the normal 3-month period for appeals to be lodged is adhered to: only after the expiry of these three months is the applicant's birth certificate amended as per the court's decision.²⁴

The costs of the legal procedure, including the court costs (*griffierecht*) and the lawyer's fee, vary from about €800 to about €1,100. Applicants may qualify for legal aid, depending on their level of income.

Sex Reassignment Surgery

The phrase sex reassignment surgery (SRS) is somewhat deceptive. It conjures up the image of one straightforward surgical procedure leading to the desired result, namely a body whose appearance approaches a body of the opposite sex as much as possible. The reality is more complex. For both trans men and trans women, SRS involves major surgery, requiring considerable recovery time. Moreover, these operations carry significant risks of complications, which may necessitate further surgery.²⁵ For trans men in particular, SRS involves a number of separate operations.

In the Netherlands, two specialist gender teams provide medical assistance to trans people. The gender team at the university hospital of the Free University in Amsterdam (*Vrije Universiteit medisch centrum*, VUmc) deals with an estimated 85 percent of the caseload: annually it receives 300 requests for assistance from adults, and 100 from children. The gender team at Groningen University Hospital (*Universitair Medisch Centrum*

²³ Royal Decree (Koninklijk Besluit), December 21, 1994, Law Gazette (Staatsblad) 951.

²⁴ Civil Code, art. 20(1)(a).

²⁵ As an indication of these risks, Dr. M.A.A. van Trotsenburg, director of the gender team at the Free University Hospital in Amsterdam, told Human Rights Watch that for trans men there is up to a 40-50 percent chance of complications in relation to urethra-lengthening. Human Rights Watch interview with Dr. M.A.A. van Trotsenburg, Amsterdam, April 5, 2011.

Groningen, UMCG) assists a further 5 percent of the annual caseload, while an estimated 10 percent of trans people seek assistance outside the recognized gender teams.²⁶

Both gender teams work on the basis of protocols grounded in the Standards of Care for Gender Identity Disorders developed by the World Professional Association for Transgender Health.²⁷ These Standards of Care are based on the diagnosis of gender identity disorder (GID) as contained in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) and the World Health Organization's International Classification of Diseases (ICD-10).²⁸

Following an initial diagnostic phase of at least 6 months, the assistance provided to people diagnosed with GID comprises three elements: "real-life experience," in which trans people live full-time in the desired gender role; hormone therapy; and surgery. To be eligible for surgery, people must have had hormone therapy for at least 12 months, during which time they must also live in the desired gender role. While the effects of hormone therapy are still partially reversible, the consequences of SRS are irreversible.²⁹

The actual sex reassignment surgery itself comprises different elements for trans men and trans women. Here a distinction must be made between the range of interventions that are medically necessary to restore a trans person to health, and the interventions required to meet the conditions contained in article 1:28 of the Civil Code that one's body has been physically adapted as much as possible to a body of the opposite sex and that one has become irreversibly infertile. To meet the requirements of article 1:28, trans women require a genital operation, in which the penis and testes are removed and a neo-vagina is created. Other operations that may be medically indicated for individual trans women to assist feminization include voice modification surgery, tracheal shave (reducing the thyroid cartilage to create a less pronounced Adam's apple), breast augmentation, and facial

²⁶ Email communication from Dr. van Trotsenburg, director of the gender team at the Free University Hospital in Amsterdam, to Human Rights Watch, June 5, 2011.

²⁷ World Professional Association for Transgender Health (previously the Harry Benjamin International Gender Dysphoria Association), "Standards of Care for Gender Identity Disorders," Sixth Version, February 2001, www.wpath.org/Documents2/socv6.pdf (accessed April 4, 2011).

²⁸ American Psychiatric Association, "*Diagnostic and Statistical Manual of Mental Disorders*," 4th edition (DSM-IV), 1994 (text revision, DMS-IV-TR, 2000), codes 302.6 and 302.85; and World Health Organization, "*International Statistical Classification of Diseases and Related Health Problems*," 10th Revision (ICD-10), May 1990, Chapter V: Mental and Behavioural Disorders, code F64: Gender Identity Disorders.

²⁹ World Professional Association for Transgender Health, "Standards of Care for Gender Identity Disorders," Sixth Version, February 2001, <http://www.wpath.org/Documents2/socv6.pdf>, p. 10.

feminization surgery.³⁰ The courts do not deem any of these procedures necessary for trans women to meet the conditions of article 1:28 of the Civil Code. Trans women must, however, have had genital surgery before they are deemed eligible for legal recognition of their female gender identity under article 1:28 of the Civil Code.³¹

For trans men the first operation is usually a mastectomy to remove the breasts, followed by an operation to remove the womb and ovaries (sometimes these two operations can be carried out in one procedure). This may be followed by the reconstruction of a functional male outer genital; here trans men must choose between different operative techniques. Some trans men opt for the construction of a penis (phalloplasty), which involves a number of separate stages of surgery. Others opt for the construction of a so-called microphallus (metoidioplasty), which in theory is a one-stage procedure. Yet others choose not to have genital surgery, mostly because they deem the current medical possibilities to be unsatisfactory. Other interventions to assist masculinization for trans men include liposuction to reduce fat in hips, thighs and buttocks.³²

Given that surgical techniques are still insufficiently developed to produce reliably satisfactory results for penis reconstruction, many trans men decide against the genital operation, or postpone the operation until such time that surgical techniques will have advanced. As Marc (pseudonym) told Human Rights Watch:

I don't want the third [i.e. genital] operation. I'm not a patient, and I have no desire to live like a patient for 18 months or 2 years. That's what it means in practice if you decide to have the operation, I see it happening to [transsexual] friends. One friend had his [genital] operation in 2007 and now, 4 years later, he needs yet another follow-up operation. My sex is important to me, but my life is more important still.³³

³⁰ See M.A.A. van Trotsenburg and C.R. Smand, "Recommendations on Health Insurance Coverage for Care Provided to Transsexual People" ("Advies Vergoeding van Zorg aan Transseksuelen ten Laste van de Basisverzekering"), February 2007, http://tonderzoek.files.wordpress.com/2007/07/pakketadvies07_transseksuelen-advies_tcm28-22701.pdf (accessed May 10, 2011), Chapter 4, "Guiding Principles for Sex Reassignment Surgery for Transsexual People" ("Beoordelingskader geslachtenaanpassende chirurgie bij transseksuelen").

³¹ Human Rights Watch interview with Dr. van Trotsenburg, Amsterdam, April 5, 2011; and Human Rights Watch interview with Dr. W.C.M. Weijmar Schultz, Groningen, April 15, 2011.

³² World Professional Association for Transgender Health, "Standards of Care for Gender Identity Disorders," Sixth Version, February 2001, www.wpath.org/Documents2/socv6.pdf, pp. 21-22.

³³ Human Rights Watch interview with Marc (pseudonym), Amsterdam, March 29, 2011.

In terms of legal recognition of their male gender identity under article 1:28 of the Civil Code, trans men are not required to undergo a reconstruction of the outer genital. As long as they have had surgery to remove their breasts, womb and ovaries, they are deemed to fulfill the requirement that their body has been adapted to that of the other sex as much as is medically and psychologically possible and justified, even in the absence of a genital operation.³⁴

SRS as a Medical Necessity

For many trans people, SRS is a medical necessity. The Standards of Care of the World Professional Association for Transgender Health state:

In persons diagnosed with transsexualism or profound GID [gender identity disorder], sex reassignment surgery, along with hormone therapy and real-life experience, is a treatment that has proven to be effective. Such a therapeutic regimen, when prescribed or recommended by qualified practitioners, is medically indicated and medically necessary. Sex reassignment is not “experimental,” “investigational,” “elective,” “cosmetic,” or optional in any meaningful sense.³⁵

The European Court of Human Rights has ruled that states should provide transsexual people with the possibility of SRS, and as medically necessary treatment it should be included with other such treatment provided by the state and/or covered by health insurance.³⁶ While not the focus of this report, Human Rights Watch notes that trans people in the Netherlands face two obstacles in this regard. First, the two university hospitals that provide specialist assistance to trans people do not have sufficient capacity

³⁴ Human Rights Watch interview with Dr. van Trotsenburg, Amsterdam, April 5, 2011; and Human Rights Watch interview with Dr. Weijmar Schultz, Groningen, April 15, 2011.

³⁵ World Professional Association for Transgender Health, “Standards of Care for Gender Identity Disorders,” Sixth Version, February 2001, www.wpath.org/Documents2/socv6.pdf, p. 18.

³⁶ Failure to ensure that this is the case would impose a disproportionate burden on a person “in one of the most intimate areas of private life”: see European Court of Human Rights, *Van Kück v. Germany*, no. 35968/97, Judgment of 12 June 2003, paras. 77, 82; and *L. v. Lithuania*, no. 27527/03, Judgment of 11 September 2007, para. 59, available at <http://www.echr.coe.int>. Thomas Hammarberg, commissioner for human rights at the Council of Europe, deems the European Court of Human Rights to have set clear standards on the requirement that SRS be publicly funded or covered by insurance plans; see “Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe,” June 2011, http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf (accessed June 29, 2011), p. 109. Also commenting on the fact that many countries do not provide publicly funded SRS, or only offer it partially, he states, “This is clearly against the standards set by the European Court of Human Rights.” See Thomas Hammarberg, commissioner for human rights, Council of Europe, “Human Rights and Gender Identity,” issue paper, July 2009, <http://wcd.coe.int/ViewDoc.jsp?id=1476365> (accessed April 4, 2011), p. 27.

to respond to the demands for their services. As a consequence, trans people face a waiting period of many months for each step in the process, undermining the principle of meaningful access to SRS within a reasonable time (see also Chapter II). Second, not all medical procedures that are part of SRS are covered by insurance plans. The two gender teams and two transgender organizations published recommendations in a 2007 policy paper to address these concerns; to date these recommendations have not been implemented by Dutch health insurers. As a result, some trans people have to pay themselves for procedures that are deemed medically necessary by the gender teams.³⁷

Surgery Imposed by the State

Operations carried out on a healthy body are also a form of physical violence.

— Marc (pseudonym), Amsterdam, March 29, 2011

While the Standards of Care make clear that SRS has proven to be an effective treatment for trans people, they also emphasize that whether SRS is in fact a medical necessity depends on the individual and needs to be assessed on a case-by-case basis:

After the diagnosis of GID is made the therapeutic approach usually includes three elements or phases (sometimes labeled triadic therapy): a real-life experience in the desired role, hormones of the desired gender, and surgery to change the genitalia and other sex characteristics....

However, the diagnosis of GID invites the consideration of a variety of therapeutic options, only one of which is the complete therapeutic triad.

Clinicians have increasingly become aware that not all persons with gender identity disorders need or want all three elements of triadic therapy.³⁸

Human rights norms require that medical treatment should be subject to the best interest of the individual, and tailored to the specific needs and situation of the person in question.³⁹ Professional codes of ethics for physicians also require that physicians “shall

³⁷ See M.A.A. van Trotsenburg and C.R. Smand, “Recommendations on Health Insurance Coverage for Care Provided to Transsexual People” (“Advies vergoeding van zorg aan transseksuelen ten laste van de basisverzekering”), February 2007, http://tonderzoek.files.wordpress.com/2007/07/pakketadvies07_transseksuelen-advies_tcm28-22701.pdf (accessed May 10, 2011).

³⁸ World Professional Association for Transgender Health, “Standards of Care for Gender Identity Disorders,” Sixth Version, February 2001, www.wpath.org/Documents2/socv6.pdf, p. 3.

³⁹ The best interest of the individual is particularly relevant in relation to the health of children and adolescents, in accordance with Article 3 of the Convention on the Rights of the Child, but it is a relevant and applicable human rights norm in relation to all forms of imposed treatment (see, for example, European Court of Human Rights, *H.L. v. United Kingdom*, 45508/99 (2004), ECHR 471; *Glass v. United Kingdom*, 61827/00 (2004), ECHR 102). The right to the highest attainable

act in the patient's best interest when providing medical care.”⁴⁰ The Civil Code poses particular challenges for medical professionals in this regard. Although the Standards of Care lay out carefully designed procedures to decide whether irreversible changes to the body are indeed an appropriate form of assistance for an individual diagnosed with gender identity disorder,⁴¹ article 1:28 of the Civil Code, which makes legal recognition of gender identity conditional on SRS, is at variance with this approach.

Medical professionals are therefore in the invidious position of gatekeepers who are required to act to protect the supposed interests of the state, as opposed to the interest of their patients: no transgender person can obtain legal recognition of their gender identity without a statement from medical professionals certifying that the applicant has had surgery (or is exempt from surgery) and has become permanently infertile, and thus meets the conditions of article 1:28. Medical ethics dictate that decisions whether to offer surgery to a trans person should be guided exclusively by considerations of how to restore the person in question to the highest attainable standard of health. However, in the case of trans people for whom surgery is medically unnecessary and thus inappropriate, medical professionals know that in the absence of surgery leading to irreversible infertility, they are unable to provide the required statements to the court, thus cutting off their patients from the only access route to legal recognition of their gender identity, something which in most cases will itself be essential to safeguard the welfare of the trans person in question.

Thomas Hammarberg, the commissioner for human rights of the Council of Europe, observes about requirements such as those contained in article 1:28 of the Dutch Civil Code:

In reality, this means that the state prescribes medical treatment for legal purposes, a requirement which clearly runs against the principles of human rights and human dignity.⁴²

standard of health under international law requires medical services to be respectful of medical ethics, scientifically and medically appropriate and of good quality. (See UN Committee on Economic, Social and Cultural Rights, “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights,” General Comment No. 14, The Right to the Highest Attainable Standard of Health, E/C.12/2000/4 (2000), [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En) (accessed August 9, 2011).) To be medically appropriate, treatment should follow an individually prescribed plan.

⁴⁰ World Medical Association, *International Code of Medical Ethics*, adopted October 1949 (amended August 1968, October 1983 and October 2006), <http://www.wma.net/en/30publications/10policies/c8> (accessed June 29, 2011).

⁴¹ World Professional Association for Transgender Health, “Standards of Care for Gender Identity Disorders,” Sixth Version, February 2001, www.wpath.org/Documents2/socv6.pdf, p. 21.

⁴² Thomas Hammarberg, commissioner for human rights, Council of Europe, “Forced Divorce and Sterilisation: A Reality for Many Transgender Persons,” August 31, 2010, http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=74 (accessed April 8, 2011).

Human Rights Watch spoke with a number of trans people who live full-time in their desired gender role, but who do not want SRS. Some take hormones, others do not. Sabrina ter Horst said:

I have a very healthy body. My wish is to live as a woman, and to be treated and accepted as a woman by others. 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? People assume that the only solution is a medical one, and we have elevated certain surgical procedures to "sex reassignment surgery." But even doctors can never create a woman's body out of a man's body. When we talk about sex change operations, what we mean is operations that change the external appearance of our bodies. But there are other ways to change the appearance of your body, to conceal what I see as a few biological mistakes of my body. My gender identity doesn't match the configuration between my legs. But does that mean I must go to the VU [university hospital] or to Groningen [University Hospital]? Why is it of such overriding importance to remove that biological mistake between my legs? 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.⁴³

Linda told Human Rights Watch:

Why should I let myself be mutilated because I want an F in my passport? You must learn to accept your body. You can have a sex change operation, but they cannot change your body into that of a woman, it is impossible. They can create an artificial vagina, but you're never going to have the body of someone who was born as a woman. Why then should I have the operations?⁴⁴

A man who had a mastectomy but no other operations, and who was thus unable to obtain male papers, said, "One way or another, you're violating people, either through operations,

⁴³ Human Rights Watch interview with Sabrina ter Horst, Amsterdam, March 28, 2011.

⁴⁴ Human Rights Watch interview with Linda, Rotterdam, April 1, 2011.

or by denying them new papers.”⁴⁵ Marc (pseudonym), whose decision to have his ovaries removed had been motivated in part by the legal requirements for getting new identity documents, told us:

As far as I was concerned, those ovaries could have stayed where they were; I was already more than 50 years old when I had the operations, and my ovaries no longer did anything. But I’m a pragmatist, and since there was a legal reason to have them removed, I had the operation. There was also a medical reason, because you may be at a higher risk of getting cancer if you don’t have them removed.

It is odd that the legislature demands operations of transgender people. The Netherlands is prepared to defend the physical safety of transgender people, and it calls on other countries to follow the Yogyakarta Principles. But operations carried out on a healthy body are also a form of physical violence.⁴⁶

One person summed up the objections to article 1:28 by stating simply, “The state should stay out of our underwear.”⁴⁷

State-Enforced Sterilization

Many transgender people experience the infertility requirement as an affront to their dignity, embodying a judgment by society that as citizens they are not deemed fit to enjoy the right to found a family on the same basis as other people. In his report on the rights of transgender people, Human Rights Commissioner of the Council of Europe Thomas Hammarberg argues strongly against infertility requirements for transgender people:

It is of great concern that transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation.⁴⁸

⁴⁵ Human Rights Watch interview with Jasper (pseudonym), Amsterdam, April 7, 2011.

⁴⁶ Human Rights Watch interview with Marc (pseudonym), Amsterdam, March 29, 2011. The reference is to the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. For further discussion of the Yogyakarta Principles, see chapter IV.

⁴⁷ Human Rights Watch interview with Vreer, Amsterdam, March 7, 2011.

⁴⁸ Thomas Hammarberg, commissioner for human rights, Council of Europe, “Human Rights and Gender Identity,” issue paper, July 2009, <https://wcd.coe.int/ViewDoc.jsp?id=1476365> (accessed April 4, 2011), p. 19. See also Thomas Hammarberg, “Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe,” June 2011, http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf (accessed June 29, 2011).

Human Rights Watch spoke with a number of transgender people who had had SRS and who met the legal requirements to apply to change their registered gender, but who refused to do so because of their strongly-felt objections to the law. Alice Verheij said, “I live with male identity documents. I refuse to apply to change my registered gender: I’m not going to subject myself to a law that violates human rights.”⁴⁹ Sophie told us, “I could have been registered as a woman by the end of 2010. But I am *not* going to change my registered gender under the current law: I don’t want to support the government in infringing my rights. The state can’t dictate what medical procedures I must follow.”⁵⁰

The infertility requirement in Dutch law was designed to rule out situations where a person legally registered as a man would give birth to a child, or where a person legally registered as a woman would father a child. This, it was claimed, was necessary to protect the interest of the unborn child.⁵¹ Article 1:28 of the Civil Code cannot and does not stop trans people from having children before they apply to change their registered gender. In the eyes of the law, a trans man remains the mother of any children to whom he gave birth before changing his registered gender to male, while a trans woman remains the father of any children she fathered before changing her registered gender to female.⁵² Conversely, if a trans man adopts a child after the change of his registered gender, he becomes the father of that child, but, in legal terms, he remains the mother of any children he gave birth to before having SRS (and vice versa for trans women).

What the legislature did not foresee in the early 1980s was the development of reproductive techniques allowing genetic material (sperm or eggs) to be frozen for later use by means of artificial insemination or in vitro fertilization. With the arrival of these techniques, the possibility arose for trans women to freeze their sperm before they started taking hormones and had SRS. As a result, trans women in a lesbian relationship can have their own genetic child with their partner even after having had SRS. Both gender teams in the Netherlands discuss this possibility with trans women before prescribing hormones (which result in the reduction and ultimately the cessation of sperm production).⁵³ In terms of the infertility requirement contained in article 1:28 of the Civil Code, this indirect route to a biological child by means of freezing one’s sperm is not interpreted by the courts as

⁴⁹ Human Rights Watch interview with Alice Verheij, The Hague, March 16, 2011.

⁵⁰ Human Rights Watch interview with Sophie, Amsterdam, April 7, 2011.

⁵¹ Memorandum of Explanation (Memorie van Toelichting), Parliamentary Records (Kamerstukken) II, 17 297, nr. 3, http://ressourcesgd.kb.nl/SGD/19811982/PDF/SGD_19811982_0005331.pdf (accessed April 4, 2011), pp. 19-20.

⁵² Civil Code, art. 28c(2).

⁵³ Human Rights Watch interview with Dr. van Trotsenburg, Amsterdam, April 5, 2011; and Human Rights Watch interview with Dr. Weijmar Schultz, Groningen, April 15, 2011.

violating the requirement that a trans woman must never again be able to beget a child. Trans women who have had sperm frozen for the purposes of having a child after surgery are therefore not barred from legal recognition of their female gender identity.⁵⁴

Until recently, freezing eggs was subject to much stricter regulation than freezing sperm, as a result of which this indirect route to a biological child was not generally available for trans men. However, following a vote in the lower house of parliament (Tweede Kamer) on April 14, 2011, all women in the Netherlands until the age of 45 are allowed to have their eggs frozen, opening the way for trans men to have a biological child even after having had SRS, while still being able to apply for legal recognition of their male gender identity.⁵⁵

Convention on the Recognition of Decisions Recording a Sex Reassignment

In July 2004, the Netherlands became the first country to ratify the Convention on the Recognition of Decisions Recording a Sex Reassignment, a convention adopted under the auspices of the International Commission on Civil Status (ICCS).⁵⁶ The convention does not take a particularly human rights-friendly approach to the standards states should apply in granting recognition of gender identity changes; however, it does require that contracting states recognize decisions taken by competent authorities in another contracting state to grant legal recognition of a person's gender identity following SRS.⁵⁷ The purpose of the convention is to avoid situations where someone is registered as belonging to one gender in one country, and belonging to another gender in another country.⁵⁸ According to the convention's Explanatory Note, for a decision to be eligible for recognition, "the body of the person concerned must have been adapted, before the decision recording the sex reassignment, as much as possible by medical treatment and surgery to give it the physical appearance of the sex to which the person claims to belong. This physical

⁵⁴ See, for example, Leeuwarden Court of Appeal (Gerechtshof Leeuwarden), LJN BO8039, December 23, 2010, <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BO8039> (accessed May 10, 2011), paras. 16-18.

⁵⁵ "Majority in House of Representatives for Freezing Eggs" ("Kamermeerderheid voor Invriezen Eicellen"), Volkskrant, April 14, 2011, <http://www.volkskrant.nl/vk/nl/2672/Wetenschap-Gezondheid/article/detail/1875378/2011/04/14/Kamermeerderheid-voor-invriezen-eicellen.dhtml> (accessed April 15, 2011).

⁵⁶ Convention on the Recognition of Decisions Recording a Sex Reassignment, International Commission on Civil Status (ICCS), Convention No. 29, signed September 12, 2002; entered into force March 1, 2011. The ICCS is a 16-member, inter-government institution, with all its members drawn from Europe except Mexico which joined in 2010. It was founded in the Netherlands in 1948 and has its seat in Strasbourg, France. Its aim according to its rules is "to facilitate international co-operation in civil-status matters and to further the exchange of information between civil registrars." See *Information Note Prepared by the Secretariat General*, April 2011, <http://www.ciec1.org/CIEC-note-information-ENG-avril2011.pdf> (accessed August 9, 2011).

⁵⁷ ICCS, Convention on the Recognition of Decisions Recording a Sex Reassignment, art. 1. The fact that the convention starts from the premise that mutual legal recognition of gender identity would only be applicable to persons who have undergone SRS is inconsistent with human rights standards on the rights to personal autonomy and physical integrity.

⁵⁸ ICCS, Convention on the Recognition of Decisions Recording a Sex Reassignment, *Explanatory Report*.

adaptation must not only have been carried out, it must also be expressly recorded in the sex reassignment decision.”⁵⁹ The convention then provides that recognition does not have to be granted “if the physical adaptation of the person concerned has not been carried out” or it “is contrary to public policy.”⁶⁰

It would seem therefore that while the convention includes the requirement of SRS, it does not necessarily include a requirement of infertility.⁶¹ A growing number of the 16 member states of the ICCS provide trans people with the possibility of obtaining legal recognition of their gender identity without imposing an infertility requirement, including Hungary, Spain, Portugal, and the United Kingdom (see chapter IV).

In a letter accompanying the text of the convention, addressed to Parliament’s Senate (Eerste Kamer) and House of Representatives (Tweede Kamer), the Dutch Minister of Foreign Affairs stated that the infertility requirement was implied in the requirement of bodily adaptation by means of SRS.⁶² However, this is not how it is addressed in Dutch law: the Civil Code sets out the requirements of SRS and infertility as two separate requirements. Moreover, the purpose of the convention, namely to enable transsexual people to have the same legal gender identity in different countries, would be undermined if states parties were to reapply the conditions for legal recognition of gender identity contained in their national legislation.

Unless the Dutch government invokes public policy considerations that override an individual’s right to have his or her legal gender identity changed without proof of irreversible infertility, it should recognize decisions taken in other states that grant legal recognition of gender identity to transsexual people who have undergone SRS but who do not meet the irreversible infertility requirement. To date, Spain is the only other state to have ratified the convention (in 2010, bringing the convention into force on March 1, 2011), and Spain recognizes changes to gender identity without imposing an infertility requirement.⁶³

⁵⁹ Ibid.

⁶⁰ Ibid., art. 2. The *Explanatory Report* clarifies that recognition can be rejected on policy grounds, as long as “sex reassignment” in itself is not considered to be contrary to public policy.

⁶¹ However, the Dutch Minister of Foreign Affairs stated in 2004 that the infertility requirement was implied in the requirement of bodily adaptation by means of SRS (see below).

⁶² Letter of the Ministry of Foreign Affairs to the Chairpersons of the Upper and Lower Houses of Parliament, The Hague, March 30, 2004 (Brief van de Minister van Buitenlandse Zaken Aan de de Voorzitters van de Eerste en van de Tweede Kamer der Staten-Generaal, Den Haag, 30 maart 2004), Parliamentary Records (Kamerstukken), Parliamentary Year 2003–2004, 29 501, nr. 1, p. 4.

⁶³ In Spain transsexual nationals can obtain legal recognition of their gender identity without having to meet an infertility requirement (see Chapter IV). Therefore transsexual Spanish nationals who have obtained recognition of their gender

II. “It Is Like Your Life Is On Hold”

My life consists of waiting. That’s the most difficult thing, even more difficult than all the psychological challenges of being transgender. You’re waiting all the time for other people to make decisions about you.

— Maarten (pseudonym), Amsterdam, March 30, 2011

Even transgender people who want to have SRS have to contend with many obstacles before they can obtain legal recognition of their gender identity under article 1:28 of the Civil Code. These range from exceedingly long waiting lists at the two university hospitals that provide medical assistance to trans people, to lengthy and costly legal procedures and a lack of legal certainty in relation to changing forenames.

Waiting Lists

The combined capacity of the two gender teams in the Netherlands is insufficient to respond to requests for assistance from trans people in a timely manner. There are waiting lists at every step in the process. The length of these waiting lists fluctuates, but is usually several months for each step. For trans people these periods of waiting, often without knowing exactly when they can progress to the next step, are difficult, since they are dependent on the assistance of the gender teams to give full expression to their gender identity. As one man said, “All that time, it’s like your life is on hold. I am now waiting for the last operation and it feels like I’m left in no-man’s land.”⁶⁴

The website of the gender team at the Free University states that there is “a long waiting list” for the first appointment with a member of the gender team.⁶⁵ The initial waiting period is followed by another waiting list for the start of the diagnostic phase. Several of the trans people who spoke with Human Rights Watch and who were currently receiving

identity in Spain could subsequently demand recognition of their gender identity in the Netherlands on conditions that are less demanding than those applicable to other transsexual people residing in the Netherlands, who must meet the conditions of article 28 of the Civil Code before they are eligible for legal recognition of their gender identity. Dutch transgender people cannot circumvent the requirements contained in the Dutch Civil Code by seeking recognition of their gender identity in Spain first, because the Spanish law applies only to transgender people of Spanish nationality. In contrast, the provisions on recognition of gender identity in the Dutch Civil Code do not apply exclusively to Dutch nationals.

⁶⁴ Human Rights Watch interview with Marius Heijnis, Amsterdam, April 6, 2011.

⁶⁵ See VU medisch centrum, Kenniscentrum Genderdysphorie, “Question Relating to Sex Reassignment Surgery” (“Vraag met Betrekking tot Geslachtsaanpassende Behandeling”), <http://www.vumc.nl/afdelingen/zorgcentrum-voor-gender/faq/gabvragen/322620> (accessed May 12, 2011).

assistance from the Free University gender team gave examples of a total period of 16 – 18 months between their initial call to the gender team and the start of the diagnostic phase. A woman observed, “Between the time when I first called the gender team and my first consultation with them, six months passed. After that first consultation I had to wait another ten months for the start of the diagnostic phase. It felt interminable.”⁶⁶ With a further six months for the diagnostic phase itself, about two years can thus pass before trans people start the 12-month “real-life experience” phase and have access to hormones. After the real-life phase, further waiting lists exist for each of the operations.

The waiting lists are not just difficult for trans people to contend with because they delay access to hormones and surgery. The waiting lists also mean that the date when trans people are eligible to change their registered gender is pushed back repeatedly. While the state demands SRS as a condition for legal recognition of trans people’s gender identity, itself an unjustified demand as it violates trans people’s human rights, it has failed to ensure that the gender teams have sufficient capacity to assist trans people within a reasonable time.⁶⁷ While waiting lists exist for many non-life threatening medical procedures in the Netherlands, they are generally much shorter than those for medical assistance to trans people.⁶⁸

A Name to Match an Identity

I can’t change my registered gender because I don’t yet meet the infertility requirement, and I can’t change my name because I can’t change my registered gender.

— Jonathan, Amsterdam, March 31, 2011

For trans people, as important as the ability to change the gender marker on their identity documents is the ability to adopt new forenames appropriate to their gender. Transsexual people in the Netherlands have two options for changing their forenames. The easiest and cheapest method is to wait and apply to change one’s forenames at the same time as the

⁶⁶ Human Rights Watch interview with Janiek, Amsterdam, March 18, 2011.

⁶⁷ In April 2011 the Transgender Network Netherlands sent a dossier of documented complaints about waiting times to the Healthcare Inspection (Inspectie voor de Gezondheidszorg); on May 9, 2011 a Member of Parliament asked parliamentary questions to the Minister of Health about the waiting lists for transgender people. Transgender Netwerk Nederland, “Klachten over Wachtlijsten Transgenderzorg naar Inspectie,” May 4, 2011, <http://transgendernetwerk.org> (accessed May 13, 2011); and “Zorg Voor Transgenders Moet Sneller en Beter,” May 9, 2011, <http://tweedekamer.groenlinks.nl/node/67426> (accessed May 13, 2011). See also Nora Uitterlinden, “Je Leven een Paar Jaar Uitstellen,” *Het Continuüm*, April 11, 2011, <http://continuum.nl/index.php?id=350> (accessed May 13, 2011).

⁶⁸ See Nationale Atlas Volksgezondheid, <http://www.zorgatlas.nl/> (accessed June 14, 2011).

application to change the gender marker on one's birth certificate. Article 1:28b(2) of the Civil Code provides that, where the court grants a request to change the registered gender of a transsexual person, it may grant a request for the applicant's forenames to be amended on their birth certificate at the same time.⁶⁹

The alternative option is to change one's forenames in a stand-alone procedure. The Civil Code provides for the possibility of a change of forenames by means of an application to the court.⁷⁰ This procedure is open to anyone, not just trans people.

The Civil Code places only two restrictions on the choice of forenames: they may not be inappropriate (*ongepast*), and they may not correspond to surnames unless these surnames are also commonly in use as forenames.⁷¹ The Civil Code does not provide explicitly that forenames must be gender specific.⁷² The Civil Code itself does not elaborate on the meaning of "inappropriate" in this context, but according to guidance provided by the government to parents inappropriate names include names that are in conflict with existing morals, names that ridicule the bearer of these names, and names that consist of an absurdly large number of separate forenames.⁷³

Human Rights Watch spoke with a number of trans people who had applied to the court to change their forenames at a point in time when they were not yet eligible to apply to change their registered gender under article 1:28. In some cases these applications had been successful, enabling the trans people in question to start using forenames that matched their gender identity on their driver's licenses, bank cards, contracts, etc, even if they could not yet change the gender marker on these documents. However, in a number of other cases the court had turned down such applications on the grounds that the chosen forenames were inappropriate for someone who was still legally registered as belonging to the other sex. Maud told us:

⁶⁹ Civil Code, art. 28b(2).

⁷⁰ Ibid., art. 4(4).

⁷¹ Ibid., art 4(2).

⁷² Unlike in Germany, for example, where by law only those forenames are allowed which enable the person's gender to be inferred from their forenames (an exception is made for Maria, which is allowed as a forename for men). See Gerrit Bloothoof, "Remarkable Names in the Register of Civil Status Records (3): 'We Call Him Maria,'" ("Opmerkelijke Namen in de GBA (3): 'We Noemen Hem Maria'"), *Burgerzaken & Recht*, No. 2, February 2008, pp. 39-41.

⁷³ See the "Questions and Answers" provided by the government about choosing a forename, at <http://www.rijksoverheid.nl/documenten-en-publicaties/vragen-en-antwoorden/welke-regels-gelden-er-voor-het-kiezen-van-een-vornaam-voor-kinderen-door-ouders.html> (accessed April 12, 2011).

I submitted an application to change my first names as soon as I had received my diagnosis and had been given the go-ahead from the gender team to start taking hormones. I included a letter from Professor Cohen-Kettenis from the VU [university hospital], stating that the gender team supported the name change. The court rejected my application: it argued that my chosen name was inappropriate for me because I'm still registered as a man. There was no court hearing, my application was decided on the papers. So the judge never had an opportunity to see me, to see that I am a woman. I lodged an appeal and submitted two other expert letters, one of which provided proof that the forename I had chosen [Maud] is in fact in use not only by women but also by men. I don't know whether it was this that convinced the court, but on appeal my application was granted.⁷⁴

Jonathan explained to Human Rights Watch:

It is up to the judge to decide whether a first name is appropriate. In my case, this particular judge decided that for me it was inappropriate to have a male first name, because in the eyes of the law I'm still female. I can't change my registered gender because I don't yet meet the infertility requirement, and I can't change my name because I can't change my registered gender. I didn't have the money to lodge an appeal against the decision.⁷⁵

The Civil Code does not specifically address the question of name changes from a male to a female forename or vice versa, and in particular does not impose any conditions such as SRS for name changes for transgender people. But as these examples make clear, some judges (but not all) interpret the general "appropriateness" condition for forenames to mean that female forenames are inappropriate for people who are legally registered as men and vice versa, even with respect to trans people who have been diagnosed with gender identity disorder by one of the two gender teams and who have embarked on hormone therapy. These judges thus accord primacy to people's registered gender, ignoring the social reality of the people in question, and their own expressly stated wish to adopt a forename that is appropriate for their gender identity. In this way, judges make

⁷⁴ Human Rights Watch interview with Maud Kon, Amsterdam, April 6, 2011.

⁷⁵ Human Rights Watch interview with Jonathan, Amsterdam, March 31, 2011.

forename changes for trans people conditional on SRS and infertility, requirements that are not in fact provided by law.

For example, in the case of a trans woman who received medical assistance from the Amsterdam gender team and who would eventually have SRS but who had not yet had surgery, the 's-Hertogenbosch Court of Appeal held that she did not yet meet the requirements of article 1:28 of the Civil Code and therefore the court could not order her birth certificate to be amended. In relation to the trans woman's application to change her forename, the court said:

Although [applicant] presents herself as a woman in society and uses a female forename, the Court is of the opinion that, since the applicant's request to have her gender marker on her birth certificate changed has been refused and the gender marker "male" will therefore be left unchanged, the requested (female) forenames are undesirable and moreover inappropriate in the meaning of article 1:4 of the Civil Code.⁷⁶

It should be noted that in relation to changes of surnames (which are subject to a different procedure), the UN Human Rights Committee, in the case of *A. R. Coeriel and M. A. R. Aurik v. The Netherlands*, held that the state's refusal to allow the applicants to change their surnames constituted a violation of the right to privacy under the International Covenant of Civil and Political Rights, stating:

[T]he notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationship with others or alone. The Committee is of the view that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name.⁷⁷

⁷⁶ "Hoewel [X.] zich in het maatschappelijke leven presenteert als vrouw en een vrouwelijke roepnaam hanteert, is het hof van oordeel dat nu de gevraagde wijziging van de geslachtsaanduiding in de geboorteakte wordt afgewezen en de aanduiding 'mannelijk' dus gehandhaaft blijft, de gevraagde (vrouwelijke) voornamen niet wenselijk en tevens ongepast zijn in de zin van artikel 1:4 lid 2 BW." 's-Hertogenbosch Court of Appeal (Gerechtshof 's-Hertogenbosch), LJN BA5428, May 22, 2005, <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BA5428> (accessed May 10, 2011), para. 4.4.2.

⁷⁷ UN Human Rights Committee, Views of October 31, 1994, case of *A. R. Coeriel and M. A. R. Aurik v. The Netherlands*, Communication no. 453/1991, <http://www.ohchr.org/Documents/Publications/SDecisionsVol5en.pdf>, p. 72, para. 10.2.

Clearly, not just surnames but forenames too constitute an important component of one's identity. To the extent that forenames are gender specific, this applies especially to transgender people who have a forename associated with the gender opposite to that of their gender identity. Therefore, instances where transgender people who apply to have their forenames changed are denied on the basis that the chosen names are "unsuitable" for the person in question, arguably amount to arbitrary interferences with the right to privacy.

Quite apart from the current lack of legal predictability with regard to applications for name changes, many trans people are also deterred from applying for a name change by means of a separate court procedure because of the costs involved. The state has valid reasons to ensure that name change procedures take into account the administrative costs to the state. However, the current costs are prohibitive for many trans people who have a legitimate and pressing need to change their forenames. As things currently stand, choosing to apply for a name change in a separate procedure means that transgender people need to pay for a lawyer and the court costs twice: first for their name change and then for the change of gender registration (although people on low incomes would qualify for legal aid for both procedures). As one man said,

I applied to change my name at the same time as my gender registration. If it hadn't been so expensive I would probably have tried to change my name earlier, because it is very unpleasant to walk around with an ID with the wrong name.⁷⁸

A new law on recognition of gender identity that would do away with the current medical conditions would go a long way to address these obstacles related to forename changes: by removing the main barriers for transgender people to change their registered gender, the main reason for transgender people to change their forenames in a separate legal procedure would fall away.

⁷⁸ Human Rights Watch interview with Hans (pseudonym), Utrecht, April 8, 2011.

III. Living With the Wrong Identity Papers

I used to be open and outgoing. But I notice that more and more I make the impression of being somewhat autistic, because I avoid all forms of contact that could lead to questions about my gender identity. It changes your character. People say to me, “What’s the big deal, having an F in your papers?” But it creates a lot of stress.

— Maarten (pseudonym), Amsterdam, March 30, 2011

Due to the restrictive nature of article 1:28 of the Civil Code, many trans people in the Netherlands live with identity documents of the wrong gender. Women with male identity documents and men with female identity documents face a wide array of problems on a daily basis, the cumulative effect of which is to thwart trans people’s participation in society. The European Court of Human Rights, discussing the situation of so-called post-operative transsexual people who were denied access to identity documents with the correct gender markers, observed:

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.⁷⁹

What is true for trans people who have had SRS is equally true for trans people who live in the gender role opposite to that of their birth sex without having had SRS. After all, the “anomalous position” to which the court referred arises out of a “conflict between social reality and law,” and the social reality of trans people is determined not by whether they have undergone SRS but by the gender role in which they live.

Trans people in the Netherlands told Human Rights Watch of the many obstacles, large and small, which they must overcome on a daily basis due to the misidentification of their gender on their identity documents and in the underlying civil status records. This chapter

⁷⁹ European Court of Human Rights, *Christine Goodwin v. United Kingdom*, no. 28957/95, Judgment of 11 July 2002, available at <http://www.echr.coe.int>, para. 77.

documents examples given by trans people of the “feelings of vulnerability, humiliation and anxiety” of which the European Court of Human Rights spoke.

For trans people who do not want SRS, and who will therefore never be able to change their gender markers under the current legislation, these obstacles last a lifetime. A popular shorthand phrase for trans people refers to people who are “trapped in the wrong bodies.” But trans people who do not want SRS are not so much trapped in the wrong bodies, since they have in fact decided to accept their bodies as they are, but trapped by the law into an existence that is shaped every day of their lives by the impossibility of obtaining identity documents that match their gender identity. The pressure on trans people who find themselves in this situation is enormous. A woman who did not want SRS, who had lost her own business once she started living as a woman, and who had then suffered countless indignities when applying for jobs said, “I have even thought about having the operations after all, just to be done with all the crap. But if I come to regret the operations later on, I’ll be deeply unhappy for the rest of my life.”⁸⁰

For trans people who want SRS, and who would want SRS even if it were not a requirement for obtaining new identity documents, these obstacles are of a temporary nature: once they meet the legal requirements they can apply to have their gender markers changed. Nevertheless, in practice this still means that people spend many years with the wrong identity documents, due to the delays they face at every stage of the medical process. Jochem Verdonk, chairman of the Transman Foundation, summed up the impact of this situation as follows: “People are left dangling in between two worlds for far longer than is necessary. It is needlessly traumatizing for people who are already very vulnerable.”⁸¹

Some trans people succeed in officially changing at least their first names before they can apply to have their gender marker changed. But as the previous chapter showed, such attempts sometimes founder on the unwillingness of judges to allow changes of first names for trans people who have not had SRS.

For many trans people, the period in their lives when they have just started to take hormones is a particularly vulnerable phase. In accordance with the protocols used by the two gender teams, trans people who are prescribed hormones are expected to live full-time in the desired gender role. But it takes time, at least several months, for someone’s

⁸⁰ Human Rights Watch interview with Linda, Rotterdam, April 1, 2011.

⁸¹ Human Rights Watch interview with Jochem Verdonk, chairman of the Transman Foundation, Utrecht, April 8, 2011.

appearance to be altered sufficiently under the influence of hormones until they are fully “passable” in the opposite gender role, that is, until others identify them correctly. During that time, many trans people feel they must brace themselves for each interaction with strangers. Having papers with the wrong gender marker often undermines their confidence, as invariably their papers call forth the need for explanations about their gender identity. A man who now has male papers described the time when he first started to take hormones and when he still had female documents:

It is an uncertain phase. In my case people continued to address me as a woman for another year to 18 months after I started taking hormones. At these moments it would help to have new papers, then you have at least that to hold on to.⁸²

Another man, who was taking hormones but who had not yet had SRS, told Human Rights Watch:

When I’m in a queue at a counter, all I think about is how I can avoid showing my ID. Even when I know that many people don’t even pay attention to the M or F in your papers. I just feel a bit ridiculous with that F in my passport, it feels like I’m acting in some kind of play. I would feel much stronger if I had new papers, then I would be able to let go at least of that particular issue.⁸³

The Identity Card Requirement

I leave my ID at home, despite the identity card requirement. I’m not going to show it, I’d rather be fined. If I were to show my ID, I would really be showing them a false ID, because that person has ceased to be me a long time ago.

— Matthew, Amsterdam, April 13, 2011

Since January 1, 2005, everyone in the Netherlands aged 14 years and older has been required to be able to show a valid ID at the request of the police and certain authorized civil servants such as tax inspectors. People who cannot produce a valid ID when asked

⁸² Human Rights Watch interview with Marc (pseudonym), Amsterdam, March 29, 2011.

⁸³ Human Rights Watch interview with Maarten (pseudonym), Amsterdam, March 30, 2011.

for it may have to report to the nearest police station to have their identity checked. They also risk a fine.

In most situations Dutch citizens have a choice between three IDs: their passport, their identity card (which can be used for travel within the European Union), or their driver's license. All three documents carry people's first names in full; only passports and identity cards also carry a gender marker. As a result, many trans people who have not yet been able to obtain new identity documents prefer to carry their driver's license. However, driver's licenses do not qualify as valid IDs in situations where people need to provide proof of nationality or immigration status, because driver's licenses do not contain this information. Thus when one enters into a new employment contract, applies for social welfare, or is dealing with the internal revenue service, one must use either one's passport or one's identity card.

And of course not everyone has a driver's license. Children in particular have no choice but to use their identity card or their passport, since in the Netherlands one must be at least 18 to qualify for a driver's license. For many transgender children, having to show an ID with the wrong gender marker is so awkward and humiliating that they leave their IDs at home on purpose: they prefer the risk of being fined over being "caught with the wrong ID." (See chapter IV for a detailed discussion of the position of transgender children.) As 17-year-old Matthew told Human Rights Watch:

Ever since I started using a male first name, I have the impression that that other person no longer exists. But my new identity doesn't officially exist yet. It is like they are trying to punish me because I don't identify with that person on my ID. Really you should be punished if you're trying to provide a false ID, but in my case I would be punished if I tried giving them the right identity information. What's official is wrong, and what's right doesn't exist yet.⁸⁴

Many trans people who do not yet have the right papers avoid certain situations or interactions in order to avoid having to show their ID, such as paying with a credit card in shops that demand to see an ID in the same name as the credit card, or buying alcohol or renting DVDs with an age certificate, where people must show an ID to prove their age.

⁸⁴ Human Rights Watch interview with Matthew, Amsterdam, April 13, 2011.

These latter situations can be problematic for trans men in their twenties especially, since they often look much younger than their age. A man said,

They sometimes ask me for proof of identity when I order a drink. When that happens, I prefer to order something else. 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. First I showed two different documents that didn't have any gender markers, but the bartender didn't accept those as proof of identity. So then 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 in these kinds of situations.⁸⁵

The impact of such incidents was something echoed by many trans people. A woman told Human Rights Watch:

Other people don't even notice, but you must show your ID so often. People don't realize how much of an impact this has on trans people. My friend [who is also a trans woman] was forced to get off the train once, because the ticket inspector would not believe that she was the same person as the person on her travel card.⁸⁶

The Register of Civil Status Records

The Netherlands has 12 so-called basic registers, one of which is the register of civil status records (*Gemeentelijke Basisadministratie van Persoonsgegevens*, known by the abbreviation GBA). For each person residing in the Netherlands, the GBA contains three sets of data under the headings general, special and administrative. The general data includes, among other things, one's surname, first names, sex, and date and place of birth. This information is included in the GBA on the basis of the information contained in someone's birth certificate. For each person registered in the GBA, the general information

⁸⁵ Human Rights Watch interview with Jonathan, Amsterdam, March 31, 2011.

⁸⁶ Human Rights Watch interview with Maud Kon, Amsterdam, April 6, 2011.

section also includes the unique identifying number allocated by the state to each Dutch citizen and resident (*burgerservicenummer*, BSN).⁸⁷

Several hundred agencies and institutions that require personal data to discharge their public duties have access to the data contained in the GBA, including state agencies such as the police and the internal revenue service (*belastingdienst*), but also, for example, pension funds and public notaries. Subsets of data are made available to specific agencies; for example, a limited set of data about all registered women older than 50 years is made available to designated screening organizations for the purposes of breast cancer screening programs.

A wide array of other actors are under a legal obligation to ensure that data contained in their own records are in line with those in the GBA, including, for example, banks and insurance companies, employers and educational institutions.

This system of interconnected recordkeeping means that information about people's gender as registered in the GBA is ubiquitous. For most people this might not pose any particular problems, but for trans people who are unable to change their gender marker on their birth certificate and hence their registered gender in the GBA, the inevitable consequence is that the incongruity between their birth sex and their gender identity pursues them in all aspects of their lives. Pay slips and other official communications from employers, letters from insurance companies and pension funds, bank statements: all will be wrongly addressed to Mr. X instead of Mrs. X, or Mrs. Y instead of Mr. Y. Trans people whose gender identity is neither male nor female find it impossible to have correspondence addressed to them simply with their initials and their surname, without the addition of Mr. or Mrs.

For many trans people, such communications feel like recurring denials of who they are; however much they try to shrug their shoulders about it, for many it remains painful to be addressed incorrectly. A woman said, "Letters addressed to Mr. S. are hurtful. I try hard not to let it affect me, but each time you receive a letter like that, you're upset."⁸⁸ A man stated, "When they're addressing Mrs H., they're addressing someone who doesn't exist, who has never existed."⁸⁹ Another woman told Human Rights Watch:

⁸⁷ Law on the Basic Register of Civil Records (Wet Gemeentelijke Basisadministratie Persoonsgegevens), June 9, 1994, art. 34.

⁸⁸ Human Rights Watch interview with Sophie, Amsterdam, April 7, 2011.

⁸⁹ Human Rights Watch interview with Marius Heijnis, Amsterdam, April 6, 2011.

Recently I came home after having been abroad for a few weeks. Nineteen of the 20 letters that were waiting for me were addressed to Mr. V. This happens to me a hundred times a year. It harms me, it marks me out, it affects me. It hurts, permanently, and it's stressful. It leaves me feeling isolated, disconnected from the rest of society.⁹⁰

More difficult still for many trans people are situations where they are left with no choice but to put their signature on forms that are based on their birth sex, or having to tick the wrong box on the many forms that ask one to identify one's gender as well as one's names and other personal data. To many this deliberate act of denying their own gender identity feels like self-betrayal. A woman said, "I can't bear to tick that box with 'M' myself. Everything in me resists that. That's not who I *am*. I'm not just *called* Sabrina, I *am* Sabrina."⁹¹

Another woman told us:

To sign forms that are addressed to Mr. J., I can really hardly get myself to do that any longer. I need to ask for an amendment of my employment contract, because my terms of employment have changed but this is not reflected in my contract. I keep postponing this, because my contract is in the name of Mr. J. I can't bear the thought of receiving a letter addressed to Mr. J. with the amended contract, which I will then have to sign as Mr. J. I *cannot* sign as Mr. J.⁹²

Getting Around the GBA: Informal Solutions

Many trans people try to get organizations and institutions to make a note in their own records so as to ensure that letters and other communications from these organizations are addressed correctly, even if it is impossible permanently to change the underlying data contained in the files because of the link to the data in the GBA. However, such attempts often fail. A woman explained:

My previous health insurance company insisted that they could no longer register me as Mrs. H., only as Mr. H., due to their legal obligation under the

⁹⁰ Human Rights Watch interview with Alice Verheij, The Hague, March 16, 2011.

⁹¹ Human Rights Watch interview with Sabrina ter Horst, Amsterdam, March 28, 2011.

⁹² Human Rights Watch interview with Janiek, Amsterdam, March 18, 2011.

2006 law to ensure consistency between their client database and the GBA. As a consequence, one time in the hospital the nurse arrived in the waiting room and called out for Mr. H. Can you imagine what that is like, when you then have to stand up in a full waiting room? I then wrote to 15 different health insurance companies, to ask if they would register me as Mrs. H. if I took out an insurance policy with them. Only one insurer replied to say they would. I then submitted an official complaint to the umbrella organization of health insurers about this situation. The response I got only stated that it was too difficult for the insurers to comply with my request because they were bound by the GBA data. They would have to change the information about my gender in their own files by hand, and this they were not willing to do.⁹³

A man remarked that organizations often felt they had no choice: “At most institutions, staff are kind and understanding, but they say they cannot change the information about my gender because of the GBA.”⁹⁴ What is often particularly upsetting to transgender people is that in almost all cases their gender is in fact completely irrelevant to the issue at hand. As Jiro Ghianni put it wryly, referring to the bills from the electricity company which the company insisted could only be addressed to Mrs. G: “Surely my gender is irrelevant here. Or do men get a different kind of electricity than women?”⁹⁵

Trans people also gave examples of encounters with officials who tried to be helpful. Trans people found that in some cases it was possible to persuade institutions to make a note in their files about their gender, even if the data in the main register could not officially be changed. On that basis, these institutions would then at least address their letters and other communications correctly, and issue insurance cards, membership passes, etc., in the right names and gender. As one woman said:

It’s not like it’s completely impossible to get institutions to change your details; on the contrary, sometimes one phone call is enough, if you’re prepared to explain things calmly. In my experience, daily practice is miles ahead of the law; many institutions show a real understanding of my situation. There is a lot of room to find practical solutions. I have a health

⁹³ Human Rights Watch interview with Sabrina ter Horst, Amsterdam, March 28, 2011.

⁹⁴ Human Rights Watch interview with Tim (pseudonym), Amsterdam April 6, 2011.

⁹⁵ Human Rights Watch interview with Jiro Ghianni, Utrecht, April 8, 2011.

insurance card with an F, a hospital card with an F, and my bank statements are also addressed correctly. Even when I was summoned to appear as a witness in a court case, my lawyer arranged for me to be addressed in court as Mrs., not Mr.

She drew a larger lesson from her positive experiences with these institutions:

These positive examples are shameful for the government, because it shows that in fact there is no real resistance in society to the idea of letting transgender people change their papers. The government can't maintain that they cannot amend the law because society isn't ready for such things; in fact, most people appear perfectly capable of dealing with such requests.⁹⁶

However, as she also observed, "The only problem is that, as long as you can't change your ID officially, each time you *have to* explain your situation to get them to amend your details. That is unpleasant: I wish I could determine myself when I disclose the fact that I am transgender."

Another person added:

With institutions whose records are linked to the GBA, you have to ask every year again whether they can send you a new insurance pass with an M, for example, because automatically their data revert to those contained in the GBA. I don't like the fact that I'm registered as F with many institutions, but it's too much work to try to get it all changed every year.⁹⁷

"They Don't Believe That I Am Who I Say I Am"

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.

— Jasper (pseudonym), Amsterdam, April 7, 2011

⁹⁶ Human Rights Watch interview with Janiek, Amsterdam, March 18, 2011.

⁹⁷ Human Rights Watch interview with Jiro Ghianni, Utrecht, April 8, 2011.

For many trans people, one of the most distressing consequences of having the wrong gender in their identity documents is that they repeatedly have no option but to reveal to perfect strangers, often within earshot of a larger audience of yet more strangers, details of a particularly intimate aspect of their private lives, namely that they are transgender. A woman recounted her battle to have her prescription for hormones issued in the name of Mrs. L. instead of Mr. L., so that she would not get any questions about her identity at her pharmacy, where she was already registered as Mrs. L.:

I've managed to persuade the hospital to do it, even though at first they said it was impossible. But I had to have a long argument about it at the counter, with a full waiting room behind me. Similarly, each time I have an appointment at the hospital, I have to remind the nurses at the counter to call for Mrs. L., not Mr. L., when they come to get me from the waiting room.⁹⁸

A man described what had happened to him in similar circumstances:

One day I sat in the waiting room at the hospital. I was the only person in the room. A nurse came in, she didn't say anything, but she looked at her papers and she must have been looking for a Mrs. K., because she looked at me, saw a man, and then she left. A few minutes later she came back, she still didn't see a woman in the waiting room so she left again. When she came back a third time I addressed her and gave her my surname. Then she realized she had been looking for me. These situations are so humiliating and embarrassing.⁹⁹

A student explained:

A few weeks ago I was at the offices of the student loan company, because I wanted to apply for a loan. They wouldn't help me, because they didn't believe that I was the same person as the person on my papers. So I had to have them call first the VU Hospital, and then my lawyer, before they would assist me.

She went on:

⁹⁸ Human Rights Watch interview with Linda, Rotterdam, April 1, 2011.

⁹⁹ Human Rights Watch interview with Michael (pseudonym), Amsterdam, March 17, 2011.

When I started my new degree course, 18 months ago, the first thing I did was to ask for a meeting with my mentor to explain my situation, because I wanted to be listed on the class list [which schools use every day to record students' grades, absences, etc.] with an F, not an M. It was yet another occasion at which I needed to explain my story to a stranger. Now at least I'm listed as F on the class list. But in the school's main records I'm listed as M, because my student number is coupled to the GBA data, including my official gender. So all of my teachers can see that I'm registered as M. Why could it possibly be of value to the teachers to know that I'm transgender?¹⁰⁰

Another woman explained how even urgent requests for help can be sidetracked by misunderstandings about one's gender:

Last Sunday I was hit by a hockey ball on my eyebrow during a match. Because it was Sunday I couldn't reach my own doctor, so I called the weekend emergency clinic. They asked for my BSN [the unique number allocated to everyone registered in the GBA] and my date of birth. Automatically, both my name and my gender appeared in their system, so then there was great confusion because they didn't understand how a woman could be calling when their records said Mr. S.¹⁰¹

Trans people emphasized that the examples they gave were not exceptions, but that they were confronted with such situations on a daily basis. A woman told us:

Each time that information derived from the GBA is called up by some official is hurtful, because each time I'm met with a raised eyebrow, each time I have to provide an explanation, over and over and over again.¹⁰²

A man said:

You have no option, you're forced, always, to provide an explanation. Sometimes I'm in the right mood for that, but not always. You feel diminished as a man whenever you need to explain that you are in fact a

¹⁰⁰ Human Rights Watch interview with Maud Kon, Amsterdam, April 6, 2011.

¹⁰¹ Human Rights Watch interview with Sophie, Amsterdam, April 7, 2011.

¹⁰² Human Rights Watch interview with Alice Verheij, The Hague, March 16, 2011.

man. Sex registration is like administrative violence that is condoned by the state.¹⁰³

A woman said of such situations where she was challenged about her identity, “At a stroke, it’s like they pull the rug from underneath you.” She went on:

It makes me very, very tired, you’re always having to explain. After a while, you’re just done with it. You just want to live, just like everybody else. New papers would help, then there would be no need anymore to discuss it all the time.¹⁰⁴

Another woman said, “It would be such a relief if you could already obtain new papers before you have surgery. Right now, you have to brace yourself at every moment of your life, because you never know when will be the next time you have to explain yourself.”¹⁰⁵

One activity where transgender people run a particularly high risk of having to explain the discrepancy between their identity and their papers is international travel and crossing borders. As a result, for many trans people international travel is the subject of much anxiety. They may try to limit their journeys abroad for as long as they do not have papers with the correct gender marker, but for people whose jobs require international travel, or who have family abroad, this is not always an option.

Several trans people who had traveled internationally with identity documents that did not conform to their gender identity gave examples of the humiliating situations they had encountered at airports. One person said, “When I travel internationally, they often take me out of the queue for questioning: people think I have stolen my passport.”¹⁰⁶ A man who did not yet have papers with the right gender marker gave another example: “Once when I flew to France they thought I had the wrong ticket. They asked where the rest of my family was, because they thought that I had my mother’s or my sister’s ticket. I had to explain to them that I am transgender.”¹⁰⁷

¹⁰³ Human Rights Watch interview with Jasper (pseudonym), Amsterdam, April 7, 2011.

¹⁰⁴ Human Rights Watch interview with Linda, Rotterdam, April 1, 2011.

¹⁰⁵ Human Rights Watch interview with Janiek, Amsterdam, March 18, 2011.

¹⁰⁶ Human Rights Watch interview with Carole, Amsterdam, April 6, 2011.

¹⁰⁷ Human Rights Watch interview with Jonathan, Amsterdam, March 31, 2011.

For some transgender people, examples of this kind are enough to limit international travel to the absolute minimum. A woman who was about to receive her new papers, almost five years after she first approached the gender team at the Free University Hospital, said: “It is something I have taken into account these past years, I’ve only traveled to Schengen countries [between which passport free travel is possible], for example.”¹⁰⁸ A man who was probably still at least two years away from receiving a new passport said, “I have been wanting to go traveling in South America, but I have postponed that until after I get a new passport.”¹⁰⁹ Another man had adopted the same approach: “During that time [after he had started to take hormones, but before he obtained new papers] I did not travel abroad, based on unpleasant experiences of other trans people who tried to cross borders.”¹¹⁰

Employment

If I had new papers, my job interviews wouldn’t be about being transgender.

— Linda, Rotterdam, April 1, 2011

For many transgender people, keeping the jobs they are in, or finding new employment, is a major concern. Their identity documents are by no means the only reason for this: many of the problems trans people experience in the workplace, or when they are applying for jobs, derive from a lack of understanding or acceptance of trans people by society at large. Identity documents that match trans people’s gender identity do not, by themselves, suffice to solve these issues, including the discrimination of which many trans people complain. Nevertheless, in this area of their lives too, the fact that trans people cannot change their identity documents to reflect their gender identity forms an impediment to their participation in the labor market. A woman who does not want SRS, and who therefore has no possibility of ever changing her papers under the current law, described her experience:

I applied for a job as Mrs. L. [female first name]. I was invited for an interview, and at that stage you don’t need to show your passport. But before they offer you a job, they check your records, through your BSN [the unique identifying number allocated to everyone registered in the GBA]. So then they saw that I am registered as a man, and they called me back with all kinds of questions. After that I had another interview with them, and during that entire interview the only subject was my being transgender.

¹⁰⁸ Human Rights Watch interview with Frederique, Amsterdam, March 30, 2011.

¹⁰⁹ Human Rights Watch interview with Maarten (pseudonym), Amsterdam, March 30, 2011.

¹¹⁰ Human Rights Watch interview with Hans (pseudonym), Utrecht, April 8, 2011.

Trans people face problems with traveling, in shops, etc., but in the end you can get over all of that. But the biggest problem is employment, and applying for jobs.¹¹¹

A woman who had to follow an obligatory course to update her qualifications to keep her job had faced the prospect of receiving her certificate in the name of Mr. J. instead of Mrs. J. She explained:

Several times I was on the verge of calling in sick to avoid having to do the course under a male identity. In the end, after a long battle with the training institute, they arranged for me to be listed as a woman in their internal records, even if they could do nothing about the fact that in their official records I had to be listed as a man: the institute must provide details to the national examination register and these records must be in line with the GBA. We then agreed that they would issue the certificate to me with my initials only, so as not to show my former [male] first name. When I graduated, I didn't want to go to the graduation ceremony, because I would be the only person whose certificate would have initials only, rather than the full name: it would be yet another confirmation that as a transgender you don't have the same rights as everybody else. To my great surprise my certificate had my full [female] names after all. It was very emotional.¹¹²

A man told Human Rights Watch:

Each time you apply for a job, you have to show your papers. I apply for jobs as Mr. A. [male first name] but on my papers there are different [female] names. People might not pay particular attention to the M/F in your passport, but of course they see your names. Without new papers, you must *always* explain your situation. If I already had new papers, it wouldn't be an issue, maybe it would simply come up at some point later on, when you're already in the job.¹¹³

¹¹¹ Human Rights Watch interview with Linda, Rotterdam, April 1, 2011.

¹¹² Human Rights Watch interview with Janiek, Amsterdam, March 18, 2011. The training college's decision was prompted by a letter from the Minister of Education sent to all educational institutions in the Netherlands, following a decision by the Equal Treatment Commission in the case of Justus Eisfeld. Mr Eisfeld had demanded a new graduation certificate from the University of Amsterdam showing his male names following his change of legal gender identity after he graduated. In November 2010 the Equal Treatment Commission ruled in Mr. Eisfeld's favor.

¹¹³ Human Rights Watch interview with Tim (pseudonym), Amsterdam, April 6, 2011.

Another man said:

Before I could pass as male, when I showed up in men's clothes for a job interview I would be rejected straight away. But even once I began to pass as a man, if I succeeded in getting past the interview stage I would run into another problem: my documents. As a result, I could only get horrible jobs for which I was overqualified. It took me ages to find a good job. My current employer is great, but even there I initially had a problem: because of the discrepancies in my documents, the payroll administration—handled by a separate firm—was a mess and it took two-and-a-half months before I received any salary at all."¹¹⁴

¹¹⁴ Human Rights Watch interview with Jonathan, Amsterdam, March 31, 2011.

IV. Evolving Norms, Evolving Practices

Calls to Change the Law

In the 1980s the Netherlands was among the first group of European countries to legislate for the legal recognition of the gender identity of transsexual people. While this was a progressive step at the time, more than a quarter century after article 1:28 of the Civil Code came into force the country has been left with what is now widely perceived as outdated legislation. This seems due mostly to legislative inertia, rather than any strong political opposition to the idea of legislative reform in this area. Trans people point to various causes for this lack of political initiative: on the one hand, the fact that it concerns a relatively small group of people, who are, furthermore, mostly invisible in society as a group, and on the other hand a sense of complacency fed by a conviction that at least in terms of the provision of medical assistance to trans people the Netherlands has done relatively well.

The Netherlands is far from the only country to make SRS and infertility a requirement for the legal recognition of the gender identity of trans people. In fact, the commissioner for human rights at the Council of Europe has noted that in the majority of the 47 Council of Europe member states similar provisions are in place. In another, smaller group of member states the possibility of legal recognition of the gender identity of trans people does not exist at all. In the third and smallest group of member states, including Hungary, Portugal, and the United Kingdom, transsexual people can change their registered gender by submitting an expert statement to a competent authority to the effect that the applicant is indeed transsexual, but without having to provide proof of either SRS or infertility.¹¹⁵

However large the number of other countries that have legislation that is equally restrictive, this cannot serve to justify the Dutch approach to legal recognition of trans people's gender identity as embodied in its current law. On the contrary, the Dutch government should, without further delay, bring its legal framework into line with current understandings of human rights-compliant ways of regulating recognition of gender

¹¹⁵ Thomas Hammarberg, commissioner for human rights, Council of Europe, "Human Rights and Gender Identity," issue paper, July 2009, <https://wcd.coe.int/ViewDoc.jsp?id=1476365> (accessed April 4, 2011), p. 18; and "Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe," June 2011, http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf (accessed June 29, 2011), pp. 85-87. For an overview of the situation in the 27 European Union member states by the end of 2009, see European Union Agency for Fundamental Rights (FRA), "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: Comparative Legal Analysis, 2010 Update," 2010, <http://fra.europa.eu/fraWebsite/attachments/FRA-LGBT-report-update-corr2010.pdf> (accessed April 9, 2011), pp. 17-18.

identity. In doing so, it should pay heed to the calls of the Council of Europe's human rights commissioner, who, following his visit to the Netherlands in September 2008, recommended that the Netherlands

[a]bolish the legal condition of sterilisation and other compulsory medical treatment as a requirement for legal recognition of a person's gender identity.¹¹⁶

Similarly, in its Concluding Observations of February 5, 2010, the UN Committee on the Elimination of Discrimination against Women (CEDAW) stated:

The Committee also expresses concern at specific health problems experienced by transgender women, in particular the compulsory sterilization they should undergo to get their birth certificates changed ...¹¹⁷

In March 2010 the Committee of Ministers of the Council of Europe recommended to member states, including the Netherlands:

Prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements.

Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.¹¹⁸

¹¹⁶ Council of Europe, "Report by the commissioner for human rights, Mr. Thomas Hammarberg, on his Visit to the Netherlands, 21 - 25 September 2008," CommDH(2009)2, March 11, 2009, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1417061> (accessed April 9, 2011), recommendation 32.

¹¹⁷ Committee on the Elimination of Discrimination Against Women, "Concluding Observations, The Netherlands," CEDAW/C/NLD/CO/5, February 5, 2010, para. 46.

¹¹⁸ Council of Europe, "Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity," adopted by the Committee of Ministers on March 31, 2010 at the 1081st meeting of the Ministers' Deputies, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1606669> (accessed April 4, 2011), Appendix, Section IV, Right to respect for private and family life, Recommendations 20 and 21.

Promises to Change the Law

On a number of occasions, the Dutch government acknowledged the need to amend article 1:28 of the Civil Code, but without then taking the necessary steps to translate these expressions of political will into a new law. On May 17, 2009 the then minister of foreign affairs, Maxime Verhagen, gave a speech in the “Old Hall” of the House of Representatives, in which he indicated that the law would change. He said: “I consulted with Minister Hirsch Ballin of the Ministry of Justice and we both agree that the law [article 1:28] should be changed. We will take care of this. I promise.”¹¹⁹ In June 2009 the then minister of justice, Ernst Hirsch Ballin, stated that a bill to amend article 1:28 would be presented for consultation in the fall of that year, taking into account the March 2009 recommendations of the commissioner for human rights at the Council of Europe.¹²⁰ The promise was repeated in October of that year by the minister of education, culture and science.¹²¹ However, no such bill had been presented by year’s end, and in 2010 the promise was overtaken by events when a cabinet crisis led to new parliamentary elections.

Following these elections, the government program published by the new coalition government stated: “The cabinet guarantees the emancipation of lesbian women, homosexual men, bisexual people, and transgender people, and shall develop a policy for this purpose.”¹²² This was followed by a promise in March 2011 by the state secretary for security and justice to present a bill before the summer of 2011 to abolish the infertility requirement for legal recognition of the gender identity of transsexual people.¹²³ The government committed itself to this undertaking in the policy document on emancipation presented by the government to parliament on April 8, 2011, which sets out the main

¹¹⁹ Minister Verhagen gave the speech after accepting the first copy of the book “Elke Liefde Telt” (Every Love Counts) written by Boris Dittrich, advocacy director of the LGBT rights program at Human Rights Watch. Boris Dittrich, *Elke Liefde Telt* (Amsterdam: Nieuw Amsterdam, 2009).

¹²⁰ Letter of the Minister of Justice, E. M. H. Hirsch Ballin, to the House of Representatives, June 15, 2009, parliamentary year 2008-2009, 27 017, nr. 53.

¹²¹ Letter from the Minister of Education, Culture and Science, R. H. A. Plasterk, to the Speaker of the House of Representatives, October 1, 2009, reference no. DE/153374.

¹²² “Het kabinet staat ook borg voor de emancipatie van lesbische vrouwen, homoseksuele mannen, biseksuelen en transgenders en zal daartoe concreet beleid ontwikkelen.” VVD and CDA, “Freedom and Responsibility: Government Program VVD-CDA” (“Vrijheid en Verantwoordelijkheid, Regeerakkoord VVD-CDA”), undated (2010).

¹²³ COC, “Opstelten Makes Pledges about Safety Gays” (“Opstelten Doet Toezegging over Veiligheid Homo’s”), March 3, 2011, http://www.coc.nl/dopage.pl?thema=any&pagina=viewartikel&artikel_id=4063 (accessed March 20, 2011). See also Letter from the State Secretary for Security and Justice Fred Teeven to Transgender Netwerk Nederland, May 31, 2011, <http://www.rijksoverheid.nl/ministeries/venj/documenten-en-publicaties/kamerstukken/2011/05/31/b-transgender-netwerk-nederland-herziening-artikel-28-boek-1-bw-26600.html> (accessed August 9, 2011).

priorities for policy initiatives for the emancipation of homosexual and transgender citizens and of women.¹²⁴

The Right to Private Life and the Right to Physical Integrity

Presently, most countries' legal systems are based on the principle that people are either men or women. The state's interest in knowing people's gender derives in part from the fact that one's gender determines what type of legal relations one can have with other people: for example, in countries where same-sex marriage has not been legalized, only people of opposite genders can marry each other. The law differentiates between men and women in other ways too: for example, countries with conscription armies often only call up men for military duty. There is also a positive duty on states to promote and ensure gender equality, and in order to fulfill this duty, states need to collect information and data that can be segregated by gender, thereby making it possible to determine the extent of any inequalities.

Against this background, states have an interest not only in registering people's sex at birth, but also in regulating the ways in which people can change their legal gender later in life. There are different ways of doing so, but all legal frameworks for the recognition of gender identity should respect certain minimum conditions. The commissioner for human rights at the Council of Europe has drawn attention to the fact that "[g]ender identity is one of the most fundamental aspects of life."¹²⁵ Similarly, the European Court of Human Rights referred to the freedom of a trans woman applicant to define herself as a woman as "one of the most basic essentials of self-determination."¹²⁶ Given the fundamental nature of the right to define one's own gender identity, it follows that any conditions imposed on the legal recognition of gender identity must be subjected to close scrutiny. In particular, such conditions must comply with international human rights obligations. The current legal framework for gender recognition in the Netherlands as embodied by article 1:28 of the Civil Code does not meet this minimal requirement.

¹²⁴ Hoofdlijnen emancipatiebeleid: vrouwen- en homo-emancipatie 2011-2015, Kamerstukken II, 2010-2011, 27 017, nr. 74. The document states, under "Undertakings to Parliament": "The Cabinet abolishes the so-called sterilization requirement for changing the registered sex on birth certificates. The draft law on transsexuality ... is in preparation and will be made available for consultation before the summer of 2011," p. 4.

¹²⁵ Thomas Hammarberg, commissioner for human rights, Council of Europe, "Human Rights and Gender Identity," issue paper, July 2009, <https://wcd.coe.int/ViewDoc.jsp?id=1476365> (accessed April 4, 2011), p. 5.

¹²⁶ European Court of Human Rights, *Van Kück v. Germany*, available at <http://www.echr.coe.int>, para. 73.

First, the two conditions of SRS and infertility are an unjustified interference with the rights to personal autonomy and physical integrity. The rights to personal autonomy and physical integrity are protected by the Dutch Constitution, subject to restrictions imposed by law.¹²⁷ They are also protected by several international human rights instruments ratified by the Netherlands, including the International Covenant on Civil and Political Rights¹²⁸ and the European Convention on Human Rights (ECHR), as part of the right to private life.¹²⁹ Article 8 of the ECHR provides:

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.

To make surgery and infertility a requirement for the enjoyment of the right to recognition of gender identity is a *prima facie* infringement of the rights to personal autonomy and physical integrity. Consequently, for such a requirement to be justified under article 8 of the ECHR it must be lawful; it must be necessary for one of the purposes specified in article 8(2) of the convention; and it must be a proportional means for achieving that purpose. While the conditions of SRS and infertility are indeed prescribed by law, they place a disproportionate burden on transgender persons that cannot be justified by reference to the purposes specified in article 8(2).

¹²⁷ See Constitution for the Kingdom of the Netherlands of August 24, 1815 (Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815), art. 11: "Everybody has a right to physical integrity, subject to restrictions imposed by law." ("Ieder heeft, behoudens bij of krachtens de wet te stellen beperkingen, recht op onaantastbaarheid van zijn lichaam.")

¹²⁸ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the Netherlands on December 11, 1978, art. 17.

¹²⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively. See, for example, European Court of Human Rights, *X and Y v. The Netherlands*, no. 8978/80, Judgment of 26 March 1985, available at <http://www.echr.coe.int>, para. 22 and European Court of Human Rights, *Pretty v. United Kingdom*, no. 2346/02, Judgment of 29 April 2002, available at <http://www.echr.coe.int>, para. 61.

Relevant case law can be found in a January 2011 decision from the Constitutional Court in Germany: it ruled that two conditions in German law similar to those in Dutch law violated the right to physical integrity. The court struck down the two provisions as unconstitutional.¹³⁰ Sections 8(1) nos. 3 and 4 of the German Transsexuals Act (Transsexuellengesetz (TSG), 1980) required infertility and SRS respectively for the legal recognition of the gender identity of transsexual people. The Constitutional Court first pointed out that it was “constitutionally unobjectionable that the legislature ... makes the gender determination under the law of civil status contingent on objectifiable prerequisites in order to render the civil status permanent and unambiguous” and that it was therefore reasonable for the legislature to specify “how evidence of the stability and irreversibility of transsexual persons’ perception and life in the other gender is to be provided.” However, the court observed that there were limits to the conditions the state could impose:

... by unconditionally and without exception requiring them under § 8.1 nos. 3 and 4 TSG to undergo surgery that modifies their genitals and leads to infertility, the legislature places excessive demands on such evidence which are unreasonable to expect of the persons concerned.¹³¹

In relation to the condition of SRS (section 8.1 no. 4 TSG), the court said, “Gender reassignment surgery constitutes a massive impairment of physical integrity, which is protected by Article 2.2 GG [Grundgesetz, Germany’s Basic Law], and it involves considerable health risks and side effects for the person concerned.” The court argued moreover that the assumption that had informed the Transsexuals Act, namely that SRS is always medically indicated for people with a diagnosis of transsexuality, was no longer considered correct:

However, according to the current state of scientific knowledge, it is not always indicated even in the case of a diagnosis of transsexuality that is certain to a large extent. The permanent nature and irreversibility of transsexual persons’ perceived gender cannot be assessed against the degree of the surgical adaptation of their external genitals but rather

¹³⁰ Federal Constitutional Court (Bundesverfassungsgericht), “Prerequisites for the statutory recognition of transsexuals according to § 8.1 nos. 3 and 4 of the Transsexuals Act are unconstitutional, Order of January 11, 2011” (“Voraussetzungen für die rechtliche Anerkennung von Transsexuellen nach § 8 Abs. 1 Nr. 3 und 4 Transsexuellengesetz verfassungswidrig, Beschluss vom 11. January 2011”), Press release no. 7/2011, January 28, 2011, 1 BvR 3295/07 (English translation provided by the court), http://www.bundesverfassungsgericht.de/entscheidungen/rs20110111_1bvr329507.html (accessed April 18, 2011).

¹³¹ Ibid., consideration 2.b.

against the consistency with which they live in their perceived gender. The unconditional prerequisite of a surgical gender reassignment according to § 8.1 no. 4 TSG constituted an excessive requirement because it requires of transsexual persons to undergo surgery and to tolerate health detriments even if this is not indicated in the respective case and if it is not necessary for ascertaining the permanent nature of the transsexuality.¹³²

In relation to the infertility requirement (section 8.1 no. 3 TSG), the court said:

The same applies with regard to the permanent infertility which is required under § 8.1 no. 3 TSG for the recognition under the law of civil status to the extent that its permanent nature is made contingent on surgery. By this prerequisite, the legislature admittedly pursues the legitimate objective to preclude that persons who legally belong to the male sex give birth to children or that persons who legally belong to the female sex procreate children because this would contradict the concept of the sexes and would have far-reaching consequences for the legal order. Within the context of the required weighing, however, these reasons cannot justify the considerable impairment of the fundamental rights of the persons concerned because the transsexual persons' right to sexual self-determination safeguarding their physical integrity is to be accorded greater weight. Here, it has to be taken into account that in view of the fact that the group of transsexual persons is small, cases in which the legal gender assignment and the role of procreator, or person bearing a child, diverge will only rarely occur.¹³³

On these grounds, the Constitutional Court struck down both provisions of the Transsexuals Act as unconstitutional. In February 2009 the Austrian Administrative High Court also held that mandatory SRS as a condition for legal recognition of gender identity was unlawful.¹³⁴ There can be no doubt that, on the same grounds, the requirements of SRS

¹³² Ibid. See also BVerfG, 1 BvL 3/03 vom 6.12.2005, Absatz-Nr. (1 - 73), http://www.bverfg.de/entscheidungen/ls20051206_1bvlo00303.html (accessed April 12, 2011), paras. 25 and 66.

¹³³ Federal Constitutional Court (Bundesverfassungsgericht), Press release no. 7/2011, January 28, 2011, 1 BvR 3295/07 (English translation provided by the court), http://www.bundesverfassungsgericht.de/entscheidungen/rs20110111_1bvr329507.html (accessed September 1, 2011), consideration 2.b.

¹³⁴ Administrative High Court (Verwaltungsgerichtshof), no. 2008/17/0054, judgment of February 27, 2009, http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vwgh&Dokumentnummer=JWT_2008170054_20090227X00 (accessed April 12, 2011). See also Rechtskomitee Lambda, "Austrian Administrative High Court lifts Mandatory Surgery for Transsexuals," press release April 28, 2009, <http://www.RKLambda.at> (accessed April 12, 2011). Austria has had no specific

and infertility as contained in article 1:28 of the Dutch Civil Code are an unjustified interference with the right to private life. Their replacement with a human rights compliant way of regulating legal recognition of gender identity is long overdue.

Second, the infertility requirement, demanding that trans people are never again able to have a biological child, deprives trans people of the right to found a family, a right protected by the ECHR under article 12:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

As the European Court has pointed out, article 12 does not provide that the right to found a family can be restricted on such grounds as “the protection of health or morals” or “the protection of the rights and freedoms of others.”¹³⁵ Instead the test for the lawfulness of any measure which interferes with the right to found a family is whether it is arbitrary or disproportionate.¹³⁶ The measure in this case should be considered both arbitrary and disproportionate. For example, as it targets trans people on the basis of gender identity it is discriminatory. The right to nondiscrimination is protected by article 1 of the Dutch Constitution,¹³⁷ as well as several of the international treaties to which the Netherlands is a party, including article 14 of the ECHR and protocol 12 of the ECHR.¹³⁸ Moreover, the fact that transgender people are able to freeze their semen or eggs before applying for recognition of their gender identity, without this being interpreted by the courts as violating the infertility requirement (see chapter I), shows that if there ever was a sound reason for making recognition of gender identity conditional on infertility, there certainly is none today.

law to provide for legal recognition of gender identity for transsexual people (a new law is now in preparation); applications for legal recognition of gender identity must be made using an administrative procedure rather than a judicial one.

¹³⁵ See, for example, European Court of Human Rights, *O'Donoghue and Others v. United Kingdom*, no. 34848/07, Judgment of 14 December 2010, available at <http://www.echr.coe.int>, para. 84; *Frasik v. Poland*, no. 22933/02, Judgment of 5 January 2010, available at <http://www.echr.coe.int>, para. 90.

¹³⁶ Ibid.

¹³⁷ “Everybody in the Netherlands will be treated equally in equal circumstances. Discrimination on the grounds of religion, political opinion, race, sex, or any other ground is prohibited.” (“Allen die zich in Nederland bevinden, worden in gelijke gevallen gelijk behandeld. Discriminatie wegens godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht of op welke grond dan ook, is niet toegestaan”), Constitution of the Kingdom of the Netherlands of August 24, 1815 (Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815), art. 1.

¹³⁸ Protocol 12 of the ECHR simply provides that: “The enjoyment of any right set forth by law 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.” It was ratified by the Netherlands on July 28, 2004. Protocol No. 12 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 177, entered into force April 1, 2005.

The Framework for Legal Recognition of Gender Identity in Other Countries

In recent years, a number of countries around the world have introduced laws on recognition of gender identity, in many cases starting from situations where there had been no law in place to regulate the change of registered gender for trans people. These recent laws, adopted more than two decades after article 1:28 of the Dutch Civil Code came into force, reflect current understandings of the minimum human rights requirements with which such laws must comply. They can thus serve as useful models for a new Dutch law.¹³⁹

One of the most progressive laws currently in existence is the Portuguese law, which came into force on March 16, 2011. It enables trans people to obtain new identity documents with their preferred gender and forename, using a standardized administrative procedure. Applicants must be Portuguese nationals of at least 18 years old. They must present a statement from a multi-disciplinary team of experts to the effect that they have been diagnosed with gender identity disorder.¹⁴⁰ The law does not require hormone therapy, SRS, infertility or any other medical interventions for the legal recognition of gender identity. Since same-sex marriage has been legalized in Portugal, the law does not include a condition that trans people must be unmarried or divorced.

Uruguay adopted a law to regulate changes of gender and forenames in October 2009.¹⁴¹ Under this law, anyone may apply to have their registered gender and forenames changed; the law does not prescribe a minimum age or a nationality requirement. Applicants must demonstrate a discordance between their registered gender and their gender identity, and must provide evidence, in accordance with procedures set out by the law, that this discordance has existed for at least two years.¹⁴² Applications must be accompanied by a report from a multidisciplinary team established for this purpose in the Directorate General of the civil status registry.¹⁴³ The law provides explicitly that SRS is not a requirement for

¹³⁹ More information about the legal frameworks in each of the 27 European Union member states can be found in the country background studies that were prepared for a 2010 report by the European Union Agency for Fundamental Rights (FRA): "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: Comparative Legal Analysis, 2010 Update," 2010, <http://fra.europa.eu/fraWebsite/attachments/FRA-LGBT-report-update-corr2010.pdf> (accessed April 9, 2011).

¹⁴⁰ Cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração ao Código do Registo Civil, Diário da República, 1.ª série, No. 52, 15 de Março de 2011, Lei no. 7/2011. See also European Parliament's Intergroup on LGBT Rights, "MEPs welcome new gender change law in Portugal; concerned about Lithuania," March 21, 2011, <http://www.lgbt-ep.eu> (accessed March 28, 2011); Transgender Europe, "Portugal Adopts Trans Law: 8 Days for Legal Gender Recognition," November 27, 2010, http://www.tgeu.org/PR_Portuese_Trans_Law (accessed March 28, 2011).

¹⁴¹ Gender Identity Law (Ley de identidad de género), *Cámara de senadores*, October 12, 2009.

¹⁴² *Ibid.*, art. 3.

¹⁴³ *Ibid.*, art. 4.

changing one's registered gender or forenames. However, applicants who have had SRS need not provide evidence that the discordance between their registered gender and their gender identity has been present for at least two years.¹⁴⁴

In Spain a new law came into force in March 2007, enabling Spanish nationals age 18 or older to request that their registered gender and forenames be changed in the Civil Register.¹⁴⁵ This allows Spanish trans people to obtain a new National Identity Card (*Documento Nacional de Identidad*, DNI), a document that must be carried by Spaniards at all times. The law makes changes of the registered gender and forename in the Civil Register conditional on the applicant providing adequate evidence of their change in gender identity, in the form of a report from a certified doctor or clinical psychologist stating that the applicant has been diagnosed with gender dysphoria. They must also submit a medical report stating that they have received medical treatment for at least two years to adapt their physical characteristics to those of the preferred sex. Such treatment need not, however, include SRS. Moreover, medical treatment is not required where reasons of health or age preclude such treatment.¹⁴⁶ There is no requirement of infertility, and no requirement that transgender people must be unmarried or divorced, same-sex marriage having been legalized in Spain in 2005.

In the United Kingdom the Gender Recognition Act 2004 came into force on April 4, 2005.¹⁴⁷ It enables transgender people to apply for a Gender Recognition Certificate (GRC), which in turn allows applications to obtain a new birth certificate.¹⁴⁸ Applicants must be at least 18 years old.¹⁴⁹ Applicants need not be British nationals: applicants who have changed their gender under the laws of another country can obtain a Gender Recognition Certificate if the country in question is on a pre-approved list.¹⁵⁰ There are no requirements of hormone therapy, SRS, infertility or other medical conditions of any kind. However, applications must include a statutory declaration by the applicant that he or she has lived in the desired gender for at least two years and intends to continue to do so until death; a report from a registered medical practitioner or a registered psychologist practicing in the field of gender

¹⁴⁴ Ibid., art. 3(2).

¹⁴⁵ "The Rectification of Gender in the Civil Registry" ("Rectificación registral de la mención relativa al sexo de las personas"), Law 3/2007 of March 15, 2007. See European Union Agency for Fundamental Rights (FRA), "Thematic Study Spain," February 2010, pp. 47-52.

¹⁴⁶ Law 3/2007, art. 4(2).

¹⁴⁷ Gender Recognition Act, *United Kingdom Parliament*, 2004 Chapter 7.

¹⁴⁸ See European Union Agency for Fundamental Rights (FRA), "Thematic Study United Kingdom," February 2010, pp. 50-57.

¹⁴⁹ Gender Recognition Act, sec. 1(1).

¹⁵⁰ Ibid., secs. 1(1)(b) and 2(2)(a).

dysphoria that includes details of the applicant's diagnosis of gender dysphoria; and another medical report from a registered medical practitioner. Where the applicant has undergone or is undergoing or has been prescribed treatment for the purpose of modifying sexual characteristics, either or both of the reports by the medical practitioner(s) and/or psychologist must include details of such treatment.¹⁵¹ People who are either married or in a civil partnership when they apply are issued with an interim GRC. They can obtain a full GRC by means of a simplified procedure if their marriage or civil partnership comes to an end through divorce, annulment, or the death of their spouse or civil partner.¹⁵²

In some cases, countries without a specific law on changes of gender and forenames have nevertheless implemented the relevant procedures in a progressive manner. In Hungary there are no express legal provisions regulating changes of gender and forenames. However, it is established practice for trans people wishing to change their registered gender and name to submit a request to this effect to the Ministry of Interior. Such requests are accompanied by an expert opinion prepared by a forensic psychologist or psychiatrist, and a medical record from a urologist or gynecologist. The Ministry of Interior prepares an opinion on the basis of the submitted documents. This opinion is evaluated by the Ministry of Health; if it deems the request well-founded, it sends a resolution to this effect to the registrar of birth certificates, who amends the applicant's birth certificate. Neither surgery nor infertility are imposed as conditions for changing one's registered gender and forenames.¹⁵³

The Yogyakarta Principles

In creating a new legal framework for the recognition of trans people's gender identity, the Netherlands must at a minimum replace the requirements of SRS and infertility with requirements that respect trans people's human rights. It would represent significant progress if the Netherlands were to follow the example of countries like Portugal and the United Kingdom by substituting a diagnosis of gender dysphoria for the current requirements of SRS and infertility. The decision by an individual transgender person of whether in fact to undergo SRS would then be restored to its proper domain, namely that of the health and wellbeing of the individual in question. It would be left to the gender teams and transgender people to come to a decision in each individual case whether SRS is medically necessary and in the best interest of the person in question. The legal question

¹⁵¹ Ibid., sec. 3.

¹⁵² Ibid., secs. 4, 5 and 5A.

¹⁵³ European Union Agency for Fundamental Rights (FRA), "Thematic Study Hungary," April 2010, pp. 41-42.

of recognition of the gender identity of trans people would be separated, as it should be, from the medical question of whether SRS is necessary to restore the individual to health.

However, while such a framework would indeed signify progress compared to the current conditions in Dutch law for legal recognition of gender identity, the Netherlands should consider going one step further by ensuring that legal recognition of gender identity is no longer made dependent on a diagnosis of gender identity disorder (or gender dysphoria). With gender identity disorder classified as a mental disorder in both the DSM and ICD, making legal recognition of gender identity dependent on such a diagnosis is needlessly restrictive.

The Netherlands could derive relevance guidance in this regard from the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.¹⁵⁴ The Yogyakarta Principles were launched in 2007 by an eminent group of international law experts following a 2006 meeting analyzing how internationally recognized human rights standards should apply to issues of sexual orientation and gender identity.¹⁵⁵ While the Yogyakarta Principles are not themselves legally binding, they have been endorsed by human rights experts and governments alike, including the Dutch government.¹⁵⁶ In March 2008 the then Minister of Foreign Affairs, Maxime Verhagen, said in a statement to the UN Human Rights Council:

The Dutch government subscribes to the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity. I call upon other States to embrace these principles as well.¹⁵⁷

¹⁵⁴ Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007, <http://www.yogyakartaprinciples.org> (accessed April 3, 2011).

¹⁵⁵ The 2006 meeting of experts was sponsored by the International Commission of Jurists and the International Service for Human Rights. See International Commission of Jurists, *“Sexual Orientation, Gender Identity and International Human Rights Law,”* Practitioners Guide No. 4 (Geneva: ICJ, 2007), <http://www.icj.org> (accessed April 20, 2011), p. 4.

¹⁵⁶ See, for example, Navanethem Pillay, UN High Commissioner for Human Rights, “Ending Violence and Criminal Sanctions Based on Sexual Orientation and Gender Identity: Statement by the High Commissioner,” September 17, 2010, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10717&LangID=E> (accessed May 6, 2011); and Thomas Hammarberg, commissioner for human rights, Council of Europe, “Human Rights and Gender Identity,” issue paper, July 2009, <https://wcd.coe.int/ViewDoc.jsp?id=1476365> (accessed April 4, 2011), p. 14.

¹⁵⁷ Statement by H.E. Mr. Maxime Verhagen, Minister of Foreign Affairs of the Kingdom of the Netherlands, 7th session of the Human Rights Council, Geneva, March 3, 2008, AVTo8/BZ89826, <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Netherlands-E.pdf> (accessed April 3, 2011). In two policy documents, the previous government announced that it would use the Yogyakarta Principles to guide its international policy to protect the rights of gay men and lesbian women. These policy documents made no specific reference to the need to bring Dutch legislation into line with the Yogyakarta Principles. Ministry of Education, Culture and Science, “Simply Gay: Policy for

This statement to the Human Rights Council did not acknowledge that article 1:28 of the Dutch Civil Code contravenes principle 3 of the Yogyakarta Principles. Principle 3 concerns the right to recognition before the law. It is unequivocal in its rejection of SRS or infertility as requirements for legal recognition of gender identity, stating:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. *Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.* 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. [Emphasis added.]

The Yogyakarta Principles include the following recommendations to states in relation to principle 3:

States shall:

- A. ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;
- B. take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;
- C. 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,

the Emancipation of Lesbian Women and Gay Men 2008-2011" ("Gewoon Homo Zijn: Lesbisch en Homo Emancipatiebeleid 2008-2011"), The Hague, November 9, 2007, p. 20; and Ministry of Foreign Affairs, "Towards a Dignified Existence: A Human Rights Strategy for Foreign Policy" ("Naar een Menswaardig Bestaan: Een Mensenrechtenstrategie voor het Buitenlands Beleid"), The Hague, November 2007, p. 58.

- passports, electoral records and other documents—reflect the person’s profound self-defined gender identity;
- D. ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
 - E. ensure 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;
 - F. undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

Recommendations B and C give primacy to trans people’s ability to self-define their gender identity. In line with the commitment expressed by the Dutch government to the Yogyakarta Principles, the government should explore ways to create a new framework for legal recognition of gender identity that takes trans people’s self-identified gender identity as its starting point. Transgender advocacy groups recognize that there may be legitimate reasons to introduce some conditions modifying the underlying principle, but believe that trans people themselves should have primary say over their legal gender identity. Such conditions may be necessary to protect the interests of the state by ensuring that people do not change their legal gender identity at a whim or for reasons other than self-identifying gender motivation, such as to hide their registered legal identity for fraudulent purposes. Conditions may also be necessary to protect some people from themselves, for example, people who are not transgender but who suffer from mental health problems that may lead them to try to change their legal gender identity where this is not in fact in their own interest.

One way to guard against possible fraudulent or undesirable changes of legal gender would be to build in a delay between trans people’s applications to change their registered gender and the implementation of such a request. Applicants might, for example, be asked to deposit an affidavit, counter-signed by a witness, to the effect that they are of sound mind and that they wish to change their registered gender. The request would only be acted upon after the elapse of a certain minimum period of time, and only after the person in question has deposited a second affidavit, stating that they stand by their desire to change their registered gender.¹⁵⁸ A reasonable period of delay might be six months, based on the fact that the current proposed revision for the diagnosis of gender dysphoria includes a requirement of a “marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months duration.” The Sexual and Gender

¹⁵⁸ Transgender Netwerk Nederland, “Proposed revision Civil Code art. 28 (change of gender)” (“Voorstel herziening art. 28 BW (geslachtswijziging)”), March 14, 2008, document on file with Human Rights Watch.

Identity Disorders Work Group of the American Psychiatric Association is responsible for the proposed diagnosis and states that “a lower-bound duration of 6 months would be unlikely to yield false positives.”¹⁵⁹

It should be noted that under such proposals transgender people would still be required to go through a diagnostic trajectory to have SRS, and medical protocols would still need to be adhered to in relation to SRS. Proposals for legal gender recognition based on the Yogyakarta Principles argue for a separation between the medical and legal questions tied to trans people’s gender identity. Such proposals do not argue that individuals must be able to demand access to SRS based solely on the basis of their self-identified gender identity. Medical professionals would still have an important role to play in decisions to use medical interventions to assist trans people, especially interventions of an irreversible nature such as SRS. However, Human Rights Watch concurs with the human rights commissioner of the Council of Europe that the current classification of gender identity disorder (or gender dysphoria in the proposed revision of the DSM) as a mental disorder should be reconsidered, in close consultation with transgender advocacy groups. The commissioner has said:

[M]any international and national medical classifications impose the diagnosis of mental disorder on transgender persons. Such a diagnosis may become an obstacle to the full enjoyment of human rights by transgender people especially when it is applied in a way to restrict the legal capacity or choice for medical treatment.¹⁶⁰

Alternative classifications should be explored in close consultation with transgender persons and their organisations. From a human rights and health care perspective no mental disorder needs to be diagnosed in order to give access to treatment for a condition in need of medical care.¹⁶¹

¹⁵⁹ Sexual and Gender Identity Disorders Work Group, “P 01 Gender Dysphoria in Adolescents or Adults, Proposed Revision, updated May 4, 2011,” <http://www.dsm5.org/ProposedRevision/Pages/proposedrevision.aspx?rid=482> (accessed May 8, 2011). The proposed diagnosis requires: “A marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by 2 [footnote omitted] or more of the following indicators ...” Note 4 explains: “The 6 month duration was introduced to make at least a minimal distinction between very transient and persistent GI [gender identity]. The duration criterion was decided upon by clinical consensus. However, there is no clear empirical literature supporting this particular period (e.g., 3 months vs. 6 months or 6 months vs. 12 months). There was, however, consensus among the group that a lower-bound duration of 6 months would be unlikely to yield false positives.”

¹⁶⁰ Thomas Hammarberg, commissioner for human rights, Council of Europe, “Human Rights and Gender Identity,” issue paper, July 2009, <https://wcd.coe.int/ViewDoc.jsp?id=1476365> (accessed April 4, 2011), p. 7.

¹⁶¹ Ibid., p. 25. See also World Professional Association for Transgender Health, *WPATH De-psychopatholisation Statement*, May 26, 2010, http://www.wpath.org/announcements_detail.cfm?pk_announcement=17 (accessed June 23, 2011).

Children

In the Netherlands, all transgender children are referred to the gender clinic at the Free University in Amsterdam. Transgender children from the age of 12 may be prescribed hormones that delay the onset of puberty. The purpose of administering these hormones is to suppress the bodily changes brought about by puberty, thus giving the child more time to discover what their gender identity is. The effects of these hormones are fully reversible: once the child stops taking these particular hormones, puberty resumes its normal course.¹⁶²

From the age of 16, transgender children may be prescribed masculinizing or feminizing hormone therapy. As is the case for adults, the effect of these masculinizing or feminizing hormones is only partially reversible: some of the effects of these hormones can be reversed only by means of operations. The lower age limit of 16 for the administration of these hormones is not an absolute limit: where individual circumstances so demand, a child of 15 may be prescribed masculinizing/feminizing hormones. For both puberty delaying and masculinizing/feminizing hormones, both parents of the child up to age 18 need to give their consent. This is despite the fact that in ordinary circumstances, article 7:447 of the Civil Code provides that children from the age of 16 are legally capable of giving consent to medical treatment, while article 7:465 of the Civil Code leaves open the possibility that children from the age of 12 can give such consent if they are deemed capable of understanding their own interests.¹⁶³ However, the regulatory framework currently applying to transgender children receiving medical assistance in relation to their diagnosed gender identity disorder is the framework governing medical experimental studies. For such studies more stringent rules apply than for ordinary medical treatment, including the need for parental consent from both parents in the case of child participants in such studies. In some cases, this leaves transgender children in a very difficult position. A 19-year-old woman said, talking about the time when she was a child:

I have known since I was very young that I was different. For me it was perfectly normal that I put on girls' clothes, but other people did not think it was normal. My parents were very upset when I told them I was a girl, especially my father, he was angry. I started taking hormones one week after my 18th birthday. If it had been up to me, I would have started much earlier, but I couldn't, because my parents did not agree with each other whether

¹⁶² World Professional Association for Transgender Health, "Standards of Care for Gender Identity Disorders," Sixth Version, February 2001, www.wpath.org/Documents2/socv6.pdf, p. 10.

¹⁶³ Arts. 7:447 and 7:465 of the Civil Code.

they should give permission for me to start taking hormones. My father did not want me to be a girl. The psychologist tried to persuade my parents to give permission when I was 17, they knew I would do it anyway as soon as I turned 18, but my dad wouldn't give in.¹⁶⁴

Article 1:28 of the Dutch Civil Code contains no minimum age for applications for legal recognition of a sex change. The reasoning provided was as follows. On the one hand, it was noted that only in very rare cases would children be eligible to apply for legal recognition of their gender identity, due to the law's medical requirements: the legislature noted that in the vast majority of cases hormone treatment and surgery would only be available to adults. However, at the same time it was noted that, "There may be cases, albeit very rare, where, even at a young age, waiting any longer with the administrative change may hinder and harm the person's personal development."¹⁶⁵ On that basis, the inclusion of a minimum age was deemed inadvisable.

In practice, transgender children in the Netherlands have been unable to obtain legal recognition of their gender identity, since recognition is dependent on SRS and only adults are eligible for SRS. The protocols used by the two gender teams in the Netherlands follow the Standards of Care in this regard, and apply this rule to all transgender children without exception.¹⁶⁶ According to the director of the Amsterdam gender team, "in light of the complexity of puberty and the physical and mental growth of adolescents, the Amsterdam gender team does not consider SRS and its irreversible consequences to be advisable before the age of 18."¹⁶⁷ As a result, while the legislature foresaw the possibility of harm being done to the development of transgender children by denying them access to the possibility of legal recognition of their gender identity, in practice article 1:28 and medical protocols combine in such a way as to rule out all possibilities of avoiding such harm. Seventeen-year-old Matthew told Human Rights Watch:

¹⁶⁴ Human Rights Watch interview with Maud Kon, Amsterdam, April 6, 2011.

¹⁶⁵ "Er kunnen zich gevallen voordoen, zij het zeer zelden, waarin, al is het dan op jonge leeftijd, een langer wachten met de administratieve aanpassing de geestelijk ontplooiing van de betrokkene kan belemmeren en schaden." Memorie van Toelichting (Explanatory Memorandum), Kamerstukken II, 17 297, nr. 3, p. 20, http://ressourcesgd.kb.nl/SGD/19811982/PDF/SGD_19811982_0005331.pdf (accessed April 4, 2011).

¹⁶⁶ Human Rights Watch interview with Dr. M.A.A. van Trotsenburg, director of the gender team at the Free University Hospital, Amsterdam, April 5, 2011, and Human Rights Watch interview with Prof. Dr. W.C.M. Weijmar Schultz, director of the gender team at Groningen University Hospital, April 15, 2011.

¹⁶⁷ Email communication from Dr. van Trotsenburg, director of the gender team at the Free University Hospital in Amsterdam to Human Rights Watch, June 5, 2011.

I've really always known that I'm a boy. I didn't know about transgender people, I didn't know exactly what it was that I had. But I fantasized all the time about becoming a boy, I asked God every night if he could turn me into a boy. At school I would tell other children that I had had an accident and that that had left me with a girl's body. In primary school everyone treated me as a boy, but it became more difficult in secondary school, when my body started changing. When I was 14 I went to the VU [university hospital] and when I was 16 I started taking hormones. But my papers still say I am a girl. For me, that person doesn't exist anymore. I wish they could at least give you some kind of temporary papers, if you can't change your papers officially yet. I have been using a boy's name for years, it would make sense if they let you change your papers once you start living with a new name.¹⁶⁸

As in the case of adults, Human Rights Watch supports reform of article 1:28 of the Civil Code in such a way as to separate medical and legal procedures for transgender children. Legal recognition of the gender identity of transgender children should not be conditional on any form of medical intervention. For children, as for adults, making legal recognition of their gender identity conditional on SRS and infertility is an unjustified interference with their right to physical integrity.

Considerations that should inform a new legal framework for legal recognition of gender identity in relation to transgender children must include the obligations of the Netherlands under the Convention on the Rights of the Child. Accordingly, decisions about legal recognition of the gender identity of transgender children should be guided exclusively by the best interests of the child, in accordance with article 3 of the convention:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.¹⁶⁹

Minimum age limits for medical interventions such as SRS should not be used to bar transgender children from the possibility of changing their identity papers, because doing

¹⁶⁸ Human Rights Watch interview with Matthew, Amsterdam, April 13, 2011.

¹⁶⁹ Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, ratified by the Netherlands on February 6, 1995, art. 3(1).

so means inflicting harm on children in cases where providing the child with new identity papers would be in the child's best interest.

In determining the child's best interest, the child itself should be heard, in accordance with article 12 of the Convention on the Rights of the Child:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Committee on the Rights of the Child has clarified the relation between articles 3 and 12 of the convention:

The purpose of article 3 is to ensure that in all actions undertaken concerning children, by a public or private welfare institution, courts, administrative authorities or legislative bodies, the best interests of the child are a primary consideration. It means that every action taken on behalf of the child has to respect the best interests of the child.... The Convention obliges States parties to assure that those responsible for these actions hear the child as stipulated in article 12. This step is mandatory.¹⁷⁰

A new legal framework for the legal recognition of trans people's gender identity should make allowance for the fact that it may be in the best interest of some transgender children to change their legal gender before they reach the age of adulthood. The inclusion of a minimum age in such a legal framework should be avoided; instead, the individual circumstances of each child should determine whether it is in the child's best interest to change their legal gender. Procedures created by a new legal framework to replace article 1:28 of the Civil Code should include a mechanism for the transgender child to give his or her opinion on the need to change his or her legal gender. In determining whether

¹⁷⁰ UN Committee on the Rights of the Child, General Comment No. 12, The Right of the Child to Be Heard, U.N. Doc. CRC/C/GC/12 (2009), para. 70.

changing the child's legal gender is indeed in the best interest of the child, the child's freely expressed opinion should be given due weight.

Provision should also be made for transgender children to be allowed to change their forenames, either at the same time as the change of their legal gender, or at an earlier stage than the change of legal gender. Here too, decisions should be guided by the best interests of the child. The child should be given an opportunity to make his or her views known, and the proceedings designed so as to acknowledge that "as children acquire capacities, so they are entitled to an increasing level of responsibility for the regulation of matters affecting them."¹⁷¹

¹⁷¹ Ibid., para. 85.

V. Legal Recognition of the Gender Identity of Gender Variant People

The transgender community comprises not only transsexual people, but also cross-dressers, transvestites, transgenderists and gender variant people (who sometimes self-identify as genderqueers). The commissioner for human rights at the Council of Europe has noted that, despite this diversity, “Many legal frameworks only seem to refer to transsexual persons, leaving out a decisive part of the [transgender] community.”¹⁷² The Dutch Civil Code is a case in point: while it makes provision for the gender recognition of transsexual people, albeit in a deeply flawed manner, it makes no reference at all to gender variant people, whose gender identity is something other than male or female. Whether their gender identity lies somewhere on the continuum between male and female, or outside the realm defined by male and female identities, the law makes no provision for the recognition of their gender identity. Only people whose gender identity fits within the male-female dichotomy around which the legal framework is constructed are in a position to have a legal gender identity that matches their own self-identified identity.

This situation is at variance with the Yogyakarta Principles, endorsed by the Dutch government. As was discussed in chapter IV, principle 3 of the Yogyakarta Principles affirms that people’s self-identified gender identity “is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.” Principle 3 does not restrict the type of gender identities that deserve recognition; in particular, the principle is not limited to male and female gender identities. In so far as principle 3 emphasizes that “[n]o one shall be subjected to pressure to conceal, suppress or deny their ... gender identity,” legal frameworks that do not allow for legal recognition of gender identities other than male or female inevitably mean that gender variant people are in effect required to suppress or deny their gender identity in the public sphere.

Recommendations B and C of the Yogyakarta Principles, as discussed above, encourage states to consider measures that allow all persons to define their own gender identity. In particular, states should:

¹⁷² Thomas Hammarberg, commissioner for human rights, Council of Europe, “Human Rights and Gender Identity,” issue paper, July 2009, <https://wcd.coe.int/ViewDoc.jsp?id=1476365> (accessed April 4, 2011), pp. 5-6.

B. take all necessary legislative, administrative and other measures to fully respect and legally recognise *each person's self-defined gender identity*;

C. 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* [emphasis added].¹⁷³

The changes to the legal framework for gender recognition discussed in the previous chapter would help transsexual people, whose gender identity is opposite to that of their sex assigned at birth, by enabling them to obtain legal recognition of their gender identity without having to satisfy conditions that violate their human rights. But these changes would not aid gender variant people who do not identify as transsexual: they would continue to be presented with a choice between two options, male and female, that the law considers to be mutually exclusive, while neither in fact accurately fits their gender identity.

In line with its endorsement of the Yogyakarta Principles, the Netherlands should seek to address the specific situation of gender variant people. One way it could do so is by introducing a possibility for gender variant people to suppress the gender marker on their official documents; or another possibility would be to introduce a third gender marker.¹⁷⁴

Suppressing the Gender Marker on Identity Documents

One strategy that would go some way towards recognizing the gender identity of gender variant people would be to introduce a possibility for gender variant people to suppress

¹⁷³ Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007, <http://www.yogyakartaprinciples.org> (accessed April 3, 2011).

¹⁷⁴ A third method of addressing the situation of gender variant people which has been put forward is to do away with sex registration altogether. (See, for example, the manifesto published by the feminist network of one of the political parties in the Netherlands, GroenLinks, in March 2011, arguing that possibilities should be explored for abolishing the legal distinctions between people of different genders, and for the state to stop registering people's sex. Feministisch Netwerk GroenLinks, "Obligatory information? An appeal to explore the possibilities for abolishing sex as a juridical distinction" ("Verplicht veld? Pleidooi voor verkennen van mogelijkheden voor afschaffen van geslacht als juridisch onderscheid"), March 2011, http://femnet.groenlinks.nl/files/verplicht_veld.pdf (accessed May 20, 2011). See also Marjolein van den Brink, "About the generally held conviction that people belong either to the male or the female sex" ("Over de algemeen aanvaarde opvatting dat personen hetzij tot het mannelijke hetzij tot het vrouwelijke geslacht behoren") in *Vrouw en Recht: De Beweging, De Mensen, De Issues* (Amsterdam: 2009).) The theory of this approach is that as the state would no longer make any legal distinctions between people on the basis of gender, whether male, female or something else, therefore there would be no need for a specific framework for legal recognition of transgender people's gender identity. However, there is no basis in current international human rights law for demands that states do away with sex registration.

the gender marker on their identity documents. Such a strategy would, in effect, create a third possibility besides the two currently recognized genders of male and female, to accommodate all gender identities whose common characteristic is that they are neither male nor female.

Introducing this possibility for gender variant people should be done in such a way to respect the right of transsexual people to identify as male or female: while the possibility to suppress the gender marker should be available to those people whose gender identity does not fit the male/female dichotomy, no transsexual person should have to choose between the gender marker of their sex assigned at birth or suppressing the gender marker altogether. More generally, even if the possibility of suppressing the gender marker were introduced, it would have to remain a genuine choice for gender variant people. Making gender variant people more visible and more easily distinguishable on the basis of their gender identity may leave them more vulnerable to discriminatory attitudes and practices. While individual gender variant persons may decide that such a risk is a price worth paying for no longer having to identify as either male or female, no one should be exposed to such risks against their will.

Since it is not possible to know at birth that a child is transgender, as long as the general sex registration system is maintained all newborn babies would continue to be registered as either boys or girls on the basis of their external sex organs (apart from intersex children, for whom there already is a special provision in the Dutch Civil Code).¹⁷⁵ The possibility of suppressing the gender marker on one's identity documents would then be open to gender variant people later in life, on the same basis and under the same conditions as the possibility for transsexual people to change their legal gender from male to female or vice versa.

The Dutch government could take its cue in this regard from the Australian Human Rights Commission, which has recommended that a "person over the age of 18 years should be able to choose to have an unspecified sex noted on documents and records."¹⁷⁶ Australian nationals already have the option of applying for a Document of Identity, valid for a

¹⁷⁵ Civil Code, article 1:19d.

¹⁷⁶ Australian Human Rights Commission, "*Sex Files: the legal recognition of sex in documents and government records: Concluding paper of the sex and gender diversity project*" (Sydney: Australian Human Rights Commission, March 2009), http://www.hreoc.gov.au/genderdiversity/sex_files2009.html (accessed May 20, 2011), p. 3, recommendation 5. See also Sean Nicholls, "States to consider rights of genderless people," December 9, 2010, <http://www.smh.com.au/national/states-to-consider-rights-of-genderless-people-20101208-18pxg.html#ixzz1MwP1vL7y> (accessed May 20, 2011).

maximum of three years, with the gender marker field left blank (as opposed to Australian passports, which carry a F or M gender marker). The Australian Document of Identity complies with International Civil Aviation Organisation (ICAO) regulations: it is a widely, although not universally, recognized travel document.¹⁷⁷ In contrast, ICAO regulations for passports stipulate that passports must contain information about the sex of the bearer, which may be given as either M, F or X (for unspecified): the field cannot be left blank.¹⁷⁸

Article 8 of the ECHR and the Position of Gender Variant People

In 2007 the Dutch Supreme Court upheld decisions by the lower courts in the case of a Dutch citizen who had applied to have his birth certificate amended in such a way as to suppress the information about his sex.¹⁷⁹ In effect, the applicant had asked the courts to recognize a third gender, next to the two categories of male and female. The applicant, who had been born as a man and who had twice relied on article 28 of the Civil Code to change his legal gender from male to female and then back to male, had come to the conclusion that he identified as “belonging to no sex” (*“niet geseksueerd”*). The Supreme Court upheld the decisions by the lower court to reject the application. In doing so, the court appealed to the general interest, and referred to the need to balance the interests of the individual against the interests of the state and society at large. The court held that it was the interests of society at large in registering every individual as belonging to one of two sexes that prevailed.

Although the person in question has decided not to take their case further, it raises clearly arguable issues of compatibility with the ECHR. It could be argued that the refusal by the state to comply with the request to suppress information about the person’s sex failed to respect their right to privacy under article 8. The European Court has held that under article 8 states are under an obligation to give legal recognition to the gender identity of transsexuals who have undergone SRS.¹⁸⁰ However, the court has not had occasion to address the question whether article 8 entails a positive obligation on states parties to take measures to legally recognize the gender identity of persons whose gender identity is neither male nor female. Nevertheless, guidance about the position of gender variant

¹⁷⁷ Australian Passport Office, “Sex and gender diverse passport applicants,” <https://www.passports.gov.au/web/sexgenderapplicants.aspx#quest4> (accessed May 20, 2011).

¹⁷⁸ In New Zealand transgender people have the option of applying for a passport with an X as the gender marker. Government of New Zealand, “Information for transgender applicants,” <http://www.passports.govt.nz/Transgender-applicants> (accessed June 18, 2011).

¹⁷⁹ Supreme Court (Hoge Raad), March 30, 2007, LJN AZ5686, <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=AZ5686> (accessed May 10, 2011).

¹⁸⁰ European Court of Human Rights, *Christine Goodwin v. United Kingdom*, available at <http://www.echr.coe.int>.

people can be derived from the court's case law in relation to so-called post-operative transsexual people.

The European Court has defined "private life" as "a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual and social identity. Elements such as, for example, gender identification, name, and sexual orientation and sexual life fall within the personal sphere, protected by Article 8."¹⁸¹

The right to respect for private life has two elements: a negative obligation not to interfere with people's private life, and a positive obligation to take steps to protect specific elements of the personal sphere whose protection is guaranteed by article 8. In relation to positive obligations on the part of the state entailed by article 8, the court has noted that states parties have a wide margin of appreciation:

... this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals...¹⁸²

The meaning of the term "respect" in article 8(1) is not fixed but must be determined on a case-by-case basis; in each case, the outcome depends on the proper balance between the general interest and the interest of the individual:

The Court recalls that the notion of "respect" as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that

¹⁸¹ European Court of Human Rights, *Pretty v. United Kingdom*, para. 61; *Bensaid v. United Kingdom*, no. 44599/98, Judgment of 6 February 2001, available at <http://www.echr.coe.int>.

¹⁸² European Court of Human Rights, *Johnston and others v. Ireland*, no. 9697/82, Judgment of 18 December 1986; see also European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, nos 9214/80; 9473/81; 9474/81, Judgment of 28 May 1985, available at <http://www.echr.coe.int>.

has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention...¹⁸³

In a series of cases, the court initially held that the failure by a state party to give legal recognition to the gender identity of transsexual people did not amount to a violation of article 8, arguing that the matter fell within states parties' margin of appreciation.¹⁸⁴ In 2002, in the case of *Christine Goodwin v. the United Kingdom*, the court came to the opposite conclusion, arguing that article 8 entailed a positive obligation on states parties to give legal recognition to the gender identity of transsexual persons who had undergone SRS. In explaining its departure from its previous case law, the court referred to a number of determining factors. On the one hand, the court found it significant "that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief."¹⁸⁵ It also referred to "the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."¹⁸⁶ Furthermore,

... the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.¹⁸⁷

In terms of the balancing of the state's interest against the interests of the individual, the court noted:

No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status

¹⁸³ European Court of Human Rights, *Christine Goodwin v. United Kingdom*. See also *B. v. France*, no. 13343/87, Judgment of 25 March 1992, available at <http://www.echr.coe.int>, para. 44.

¹⁸⁴ European Court of Human Rights, *Rees v. United Kingdom*, no. 9532/81, Judgment of 17 October 1986; *Cossey v. United Kingdom*, no. 10843/84, Judgment of 27 September 1990; *B. v. France; Sheffield and Horsham v. United Kingdom*, nos 31-32/1997/815-816/1018-1019, Judgment of 30 July 1998, available at <http://http://www.echr.coe.int>.

¹⁸⁵ European Court of Human Rights, *Christine Goodwin v. United Kingdom*, available at <http://www.echr.coe.int>, para. 81.

¹⁸⁶ *Ibid.*, para. 85.

¹⁸⁷ *Ibid.*, para. 90.

of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.¹⁸⁸

Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.¹⁸⁹

Although the applicant in *Goodwin* was a trans woman who had already undergone SRS, and so the inferences to be drawn from the case should be tempered by that, nevertheless, a number of guiding principles still can be gleaned from this and other cases with respect to a potential duty to give legal recognition to the gender identity of gender variant people.

The court has observed that the European Convention is “a living instrument, to be interpreted in the light of present-day conditions.”¹⁹⁰ Accordingly, the convention must be interpreted and applied in a “dynamic and evolutive” manner:

... since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved.... It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.¹⁹¹

¹⁸⁸ *Ibid.*, para. 91.

¹⁸⁹ *Ibid.*, para. 93.

¹⁹⁰ European Court of Human Rights, *Fretté v. France*, no. 36515/97, Judgment of 26 February 2002, available at <http://www.echr.coe.int>.

¹⁹¹ ECHR, *Christine Goodwin v. United Kingdom*, para 74; see also *Stafford v. United Kingdom*, no. 46295/99, Judgment of 28 May 2002, available at <http://www.echr.coe.int>, para. 68.

Taking into account this need for a “dynamic and evolutive approach” to the interpretation of the convention, gender variant people’s conviction not to belong to either of the two sexes arguably falls within the personal sphere protected by article 8 of the ECHR. If a state therefore does not take steps to ensure that people whose gender identity is neither male nor female are entitled to legal recognition of their gender identity, this would be a restriction on an aspect of their private life.

However, it does not necessarily follow that such a restriction would be incompatible with the ECHR. In view of the court’s reasoning in the case of *Goodwin*, the restriction would be incompatible if it was established that there was broad international medical recognition of gender variant identities, plus a trend towards legal recognition of this phenomenon.

In terms of the first element of medical recognition, arguably there is indeed the beginning of a trend towards recognition of these gender identities. This is apparent, for example, from the fact that the revision proposed by the DSM for the diagnosis of gender dysphoria avoids references to a male-female dichotomy, and talks instead of “the other gender (or some alternative gender different from one’s assigned gender).” The Work Group provides the following explanation for this approach:

Furthermore, in the DSM-IV, gender identity and gender role were described as a dichotomy (either male or female) rather than a multi-category concept or spectrum... The current formulation makes more explicit that a conceptualization of GI [gender identity] acknowledging the wide variation of conditions will make it less likely that only one type of treatment is connected to the diagnosis. Taking the above regarding the avoidance of male-female dichotomies into account, in the new formulation, the focus is on the discrepancy between experienced/expressed gender (which can be either male, female, in-between or otherwise) and assigned gender (in most societies male or female) rather than cross-gender identification and same-gender aversion.¹⁹²

Once the notion of a gender continuum, or gender spectrum, is taken at face value, obligatory sex registration on the basis of two mutually exclusive categories of male and female is seen to be untenable.

¹⁹² Sexual and Gender Identity Disorders Work Group, “P 01 Gender Dysphoria in Adolescents or Adults, Proposed Revision, updated May 4, 2011,” <http://www.dsm5.org/ProposedRevision/Pages/proposedrevision.aspx?rid=482> (accessed May 8, 2011), Rationale, endnote 16.

In terms of the second element of a trend towards legal recognition of gender variant identities, no such clear trend is currently identifiable. However a noticeable development is the introduction by Nepal of a third gender category which paves the way for the issuance of citizenship certificates to Nepali citizens on the basis of this third gender. This followed a Supreme Court ruling ordering the state to “amend the new constitution so as to guarantee nondiscrimination on the grounds of gender identity.” The court argued:

As the people with a third type of gender identity, other than male or female, and different sexual orientation are also Nepali citizens and natural persons, they should be allowed to enjoy the rights with their own identity as provided by the national laws, the Constitution, and international human rights instruments. It is the responsibility of the state to create an appropriate environment and make legal provisions accordingly for the enjoyment of such rights. It cannot be construed that only “men” and “women” can enjoy such rights and other people cannot enjoy them solely because they have a different gender identity and sexual orientation.¹⁹³

The extent to which this ruling is being implemented is unclear.

India too has taken steps towards the legal recognition of the gender identity of gender variant people. Its 2011 decennial census allowed the response “other” as well as male or female as a valid response to the question about one’s sex on the census form.¹⁹⁴ In 2009 the Supreme Court of Pakistan ordered the government to recognize a separate gender for members of Pakistan’s hijra community, who are transgender or intersex, and to issue national identity cards to hijras showing a distinct gender.¹⁹⁵ As was noted above, the Australian Human Rights Commission has recommended that Australia take steps to

¹⁹³ Nepal Supreme Court, Writ No. 917, *Blue Diamond Society v. Office of the Prime Minister and Council Ministers et. al.*, 2 NJALJ (2008) 261-286, translated into English by Mr. Yadav Pokharel, documents on file with Human Rights Watch. See also “Third gender issued citizenship certificate,” *The Himalayan Times*, April 15, 2011, <http://www.thehimalayantimes.com/fullNews.php?headline=Third+gender+issued+citizenship+certificate&NewsID=284117> (accessed May 20, 2011); and “Nepal introduces transgender census category,” Agence France-Presse, January 9, 2011, <http://www.google.com/hostednews/afp/article/ALeqM5iUjXoBA5dPXY8etqO2acLBOMWBGw?docId=CNG.549d9012fb77ecdc111aaffae9ado62.371> (accessed April 3, 2011).

¹⁹⁴ Population Reference Bureau, “A First for Census Taking: The Third Sex,” January 21, 2011, <http://prbblog.org/index.php/2011/01/21/india-census-third-sex/> (accessed April 3, 2011).

¹⁹⁵ Ria Misra, “Pakistan Recognizes Third Gender,” December 25, 2009, <http://www.politicsdaily.com/2009/12/25/pakistan-recognizes-third-gender/> (accessed August 9, 2011); Reuters, “Pakistan’s Transvestites to Get Distinct Gender,” December 23, 2009, <http://in.reuters.com/article/2009/12/23/us-pakistan-transvestites-idINTRE5BM2BX20091223> (accessed August 9, 2011).07/13/2011

recognize the gender identity of gender variant people, by allowing people “to have an unspecified sex noted on documents and records.”¹⁹⁶

As to the weighing of the public interests against the interests of gender variant individuals, it should be noted that, in contrast to the situation of transsexual people discussed by the court in *Christine Goodwin v. the United Kingdom*, introducing a third category besides male and female could entail what might be deemed “concrete or substantial hardship or detriment to the public interest.” For example, whenever the law currently allows for men and women to be treated differently, despite the general prohibition on discrimination on the grounds of sex, the law would need to be rewritten to take account of this third category, and across societies measures would be required to adjust to this new legal framework. Examples would include recruitment processes for jobs where the gender of the person is shown to matter; or prescribing separate spaces or facilities for women and men such as prisons, detention facilities, and emergency refuges and safe houses for women; regulating access to sports competitions on the basis of gender; and security protocols involving body searches.

So although states can opt to grant legal recognition of the gender identity of gender variant people, given the current state of international practice, it would be unlikely that article 8 imposes a positive obligation to create space in the legal system for gender identities other than male and female.

Scope for Legal Reform in the Netherlands

The fact that mandatory sex registration with reference to male/female categories is not seen to be a violation of the human rights of gender variant people does not preclude the Netherlands, or indeed other states, from exploring possibilities for giving legal recognition to the gender identity of gender variant people, in accordance with principle 3 of the Yogyakarta Principles. Legal reform to this effect would be a welcome development in offering protection to a group of people who tend to be both invisible and vulnerable to discrimination. As transgender researcher Paul Vennix told Human Rights Watch:

The state should acknowledge that there are people whose gender identity is neither exclusively male nor exclusively female. In a sense, these people

¹⁹⁶ Australian Passport Office, “Sex and gender diverse passport applicants,” <https://www.passports.gov.au/web/sexgenderapplicants.aspx#quest4> (accessed May 20, 2011).

are even more vulnerable than transsexual people, because at the end of the day, transsexual people fit into society's generally accepted gender dichotomy. Even if their gender identity is opposite to that of their birth sex, ultimately they affirm society's expectations about appropriate gender roles. It is more difficult to position yourself in between the two sexes. But there are people who will do this anyway. The law, by denying legal recognition to these people's gender identity, cannot regulate how people identify. The only thing the law achieves is to exclude these people from society, shut them out from the labor market, and isolate them socially.¹⁹⁷

In the particular case of the Netherlands, possibilities could be explored to take article 1:19d and article 1:24 of the Civil Code as the starting point for legal reform aimed at providing legal recognition of the gender identity of gender variant people. Article 1:19d was incorporated into the Civil Code for the specific purpose of providing for intersex children, whose biological sex at birth is ambiguous. Article 1:19d provides that in cases where it is impossible to determine the child's sex, a temporary birth certificate must be prepared, which must be replaced within three months with a definitive birth certificate stating the child's sex. If three months after the birth it is still impossible to determine the child's sex, a definitive birth certificate must be drawn up which states that it has been impossible to determine whether the child is male or female. While it would appear that no definitive birth certificate in those terms has ever been drawn up, the provision in the Civil Code nevertheless demonstrates that the current legal framework does already allow for the possibility of people growing up in the Netherlands without a registered gender.¹⁹⁸

Article 1:24 of the Civil Code makes provision for the correction of mistakes in records included in the civil register. The Supreme Court has held that gender variant people cannot rely on article 1:24 to have their birth certificate "corrected" so as to remove the gender marker without replacing it with the opposite gender marker. The court argued that to use article 1:24 in this way would be to go against the legislature's original intent and the logic of the Civil Code, which is based on the notion that everyone is either a man or a woman. With reference to article 1:19d, the Supreme Court held that a distinction must be made between on the one hand a birth certificate which states that it has not been possible to determine the person's sex, and on the other hand a birth certificate without

¹⁹⁷ Human Rights Watch interview with Paul Vennix, Utrecht, March 19, 2011.

¹⁹⁸ Marije Graven and Marjolein van den Brink, "Trans M/F: Gender Diversity, Sexual Equality and the Law" ("Trans m/v: Genderdiversiteit, Seksgeeljkheid en het Recht"), *Tijdschrift voor Genderstudies*, issue 11, no. 2 (2008), <http://rjh.ub.rug.nl/genderstudies/article/view/575/561> (accessed May 20, 2011).

any information about the person's sex. The court held that while article 1:19d provides for the former circumstance, it does not admit the latter.¹⁹⁹ While the Supreme Court has thus blocked off this avenue towards the gender recognition of gender variant people on the basis of an appeal to the legislature's original intent, it would be for the legislature to initiate reform of the Civil Code aimed at fulfilling the promise contained in the Dutch government's endorsement of the Yogyakarta Principles.

¹⁹⁹ Supreme Court (Hoge Raad), March 30, 2007, LJN AZ5686, <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=AZ5686> (accessed May 10, 2011), section 3, "Beoordeling van het middel."

Acknowledgments

This report was researched and written by Katinka Ridderbos, consultant for Human Rights Watch. The report was edited by Graeme Reid, director of the LGBT Rights Program at Human Rights Watch, Boris Dittrich, advocacy director of the LGBT Rights Program, Joseph Amon, director of the Health and Human Rights Program, Zama Coursen-Neff, deputy director of the Children's Rights Division, Gauri van Gulik, researcher in the Women's Rights Division, Ben Ward, deputy director of the Europe and Central Asia division, and Joseph Saunders, deputy program director. Aisling Reidy, senior legal advisor, provided a legal review. Additional editorial assistance was provided by José Luis Hernández, associate in the LGBT Rights Program. Heather Doyle, director of the Sexual Health and Rights Project at the Open Society Foundation, provided valuable feedback. Johanna Boersen translated sections of the report into Dutch.

Human Rights Watch is deeply grateful to all the transgender people who agreed to be interviewed for this report and thus made this report possible. They include Alex von Vaupel, Alice Verheij, Azzah Wonmaly, Carole van der Linden, Frederique Retsema, Janiek, Jay, Jean, Jiro Ghianni, Jochem Verdonk (chairman of the Transman Foundation), Jonathan Todd, Kam Wai Kui, Linda, Marius Heijnis, Matthew, Maud Kon, Paul Vennix, Sabrina ter Horst, Sophie Schers, Tania Barkhuis (director of COC Amsterdam), and eight transgender people who have chosen to remain anonymous.

Human Rights Watch collaborated with the Transgender Netwerk Nederland for this report: we are indebted in particular to Thomas Wormgoor and Vreer for the assistance they provided during the research phase, and their detailed and helpful comments on drafts of the report. We would also like to thank Transvisie and the Stichting Patientenorganisatie Transvisie and their staff, including Bastiaan Franse and Simon Hugues, for the assistance they provided.

Human Rights Watch would also like to thank Mauro Cabral, Paisley Currah and Justus Eisfeld, members of the Advisory Committee of Human Rights Watch's LGBT Program, for their detailed comments on earlier drafts of the report.

Human Rights Watch gratefully acknowledges the support of the Open Society Foundations.

Appendix: Relevant Provisions of Book 1 of the Dutch Civil Code

Article 4

1

Any person shall have the forenames given to him or her on his or her birth certificate.

2

The Registrar of Births, Deaths, Marriages, and Registered Partnerships shall refuse to include any forenames in the birth certificate which are inappropriate or correspond to existing surnames unless these are also customary forenames,

4

A change of forenames may be ordered by the district court on the application of the person involved or by his or her legal representative. The change is effected by the addition of the subsequent amendment, in the court order, to the birth certificate in accordance with Article 20a, paragraph 1. In the case of a change of forenames of a person born outside the Netherlands, the district court making the order shall, where necessary *ex officio*, order either the registration of the birth certificate or of the instrument or decision referred to in Article 25g, paragraph 1, or of the order referred to in Article 25c.

Article 19d

1

Where there is doubt as regards the sex of the child, a birth certificate shall be drawn up stating that the sex of the child could not be established.

2

Within three months of the birth or in case of death, within such a period, on the occasion of the declaration of death, a new birth certificate stating the sex of the child shall be drawn up and the instrument referred to in paragraph 1 shall be cancelled, if the sex has meanwhile been established, in accordance with a medical certificate lodged in respect thereof.

3

If no medical certificate is lodged within the period mentioned in paragraph 2 or where it appears from the lodged medical certificate that the child's sex could not be established, a new birth certificate shall state that the sex of the child could not be established.

Article 24

1

On the application of any interested person or of the public prosecution service the district court may order the addition of an instrument which is lacking in the register of the Registry of Births, Deaths, Marriages and Registered Partnerships or of a subsequent record, or a correction to an instrument appearing therein or in a subsequent instrument which is incomplete or contains a mistake. When

ordering a correction of an instrument or of a subsequent record which is incorrect or contains a mistake, the district court may also order the same correction as regards an instrument or subsequent record in respect of the same person or his or her descendants which is recorded in the registers of the Registry of Births, Deaths, Marriages and Registered Partnerships outside its jurisdiction.

2

The clerk of the judicial body before which the case was last pending shall send a true copy of the court order to the Registrar of Births, Deaths, Marriages and Registered Partnerships of the municipality in whose registers the instrument or a subsequent record is or should have been recorded no sooner than three months since the date of the decision. Where such municipality no longer exists, he or she shall send the true copy of to the Registrar in whose record office the registers of the Registry of Births, Deaths, Marriages and Registered Partnerships of the municipality which no longer exists are kept.

Article 28

1

Any Dutch national who is convinced to be of a different sex than that stated in the birth certificate and whose body has been physically altered to the desired sex, insofar as this is both possible and safe, may apply to the district court for an order for a change of the sex mentioned on the birth certificate, if such a person is recorded on the birth certificate as male and will never be capable of fathering children or, if such a person is recorded on the birth certificate as female, will never be capable of giving birth to children.

2

For the purpose of the provisions in paragraph 1 and Articles 28a and 28b of this book, a 'birth certificate' includes an instrument of registration of a birth certificate drawn up outside the Netherlands or of a decision referred to in Article 25c of this book.

3

A person who does not possess Dutch nationality may make an application referred to in paragraph 1, if he or she already had his or her residence in the Netherlands for one or more years immediately preceding the application and has a valid residence permit and, moreover, satisfies the conditions laid down in paragraph 1. If the birth certificate is not registered in the registers of the Registry of Births, Deaths, Marriages and Registered Partnerships in the Netherlands, the district court shall also be requested to order registration of the birth certificate in the register of births of the municipality of The Hague.

Article 28a

1

Along with the application a true copy of the birth certificate must be lodged and a certificate jointly signed by experts nominated by Regulation and issued within six months of the date on which the petition is lodged, establishing:

- a. the conviction of the applicant to be of a different sex than that mentioned on the birth certificate and the opinion of the expert with competence in respect thereof that such a

conviction may be regarded as of an enduring nature, considering the period in which the applicant has lived as such and, where possible, any other factors or circumstances to be stated therein;

- b. whether and, if so, to what extent the body of the applicant was physically altered to the desired sex, insofar as possible and safe from a medical or psychological viewpoint;
- c. that the applicant is recorded as male on the birth certificate and will never be able to father children or, that the applicant is recorded as female on the birth certificate and will never be able to give birth to children.

2

The part referred to in paragraph 1(a) need not be included in the certificate, if the body of the applicant was already physically altered to the desired sex.

Article 28b

1

The application shall be granted if the district court considers that it has been sufficiently established that the applicant has the conviction to be of a different sex than that mentioned on the birth certificate that this conviction may be considered to be enduring and that applicant satisfies the conditions laid down in Article 28, paragraph 1.

2

When the district court grants the application for a change of the sex mentioned, it may, when this is so requested, also order a change of the applicant's forenames.

Article 28c

1

A recorded change of sex shall have the effects arising from this book from the date on which the Registrar of the Births, Deaths, Marriages and Registered Partnerships adds a subsequent record to the birth certificate of the court order to make an alteration.

2

A recorded change of sex shall not affect any legal familial ties which exist on the date mentioned in paragraph 1 and any rights, powers and duties arising there from which are based on this book. Applications in connection with Article 157 and in connection with Article 394 of this book may also be made after the date mentioned in paragraph 1.

Relevant Provisions of Book 1 of the Dutch Civil Code in Original Language

Artikel 4

1

Een ieder heeft de voornamen die hem in zijn geboorteakte zijn gegeven.

2

De ambtenaar van de burgerlijke stand weigert in de geboorteakte voornamen op te nemen die ongepast zijn, of overeenstemmen met bestaande geslachtsnamen tenzij deze tevens gebruikelijke voornamen zijn.

3

....

4

Wijziging van de voornamen kan op verzoek van de betrokken persoon of zijn wettelijke vertegenwoordiger worden gelast door de rechtbank. De wijziging geschiedt doordat van de beschikking een latere vermelding aan de akte van geboorte wordt toegevoegd, overeenkomstig artikel 20a, eerste lid. In geval van wijziging van de voornamen van een buiten Nederland geboren persoon geeft de rechtbank die de beschikking geeft, voor zoveel nodig ambtshalve hetzij een last tot inschrijving van de akte van geboorte dan wel van de akte of de uitspraak, bedoeld in artikel 25g, eerste lid, hetzij de in artikel 25c bedoelde beschikking.

Artikel 19d

1

Indien het geslacht van het kind twijfelachtig is, wordt een geboorteakte opgemaakt, waarin wordt vermeld dat het geslacht van het kind niet is kunnen worden vastgesteld.

2

Binnen drie maanden na de geboorte, of, bij overlijden binnen die termijn, ter gelegenheid van de aangifte van het overlijden, wordt onder doorhaling van de in het eerste lid bedoelde akte een nieuwe geboorteakte opgemaakt, waarin het geslacht, indien dit inmiddels is vastgesteld, wordt vermeld aan de hand van een ter zake overgelegde medische verklaring.

3

Is binnen de in het tweede lid genoemde termijn geen medische verklaring overgelegd, of blijkt uit de overgelegde medische verklaring dat het geslacht niet is kunnen worden vastgesteld, dan vermeldt de nieuwe geboorteakte dat het geslacht van het kind niet is kunnen worden vastgesteld.

Artikel 24

1

Aanvulling van een register van de burgerlijke stand met een daarin ontbrekende akte of latere vermelding, doorhaling van een daarin ten onrechte voorkomende akte of latere vermelding, of verbetering van een daarin voorkomende akte of latere vermelding die onvolledig is of een misslag bevat, kan op verzoek van belanghebbenden of van het openbaar ministerie worden gelast door de rechtbank. De rechtbank kan bij haar beschikking tot verbetering van een akte of latere vermelding

die onvolledig is of een misslag bevat, eveneens dezelfde verbetering gelasten ten aanzien van een akte of latere vermelding betreffende dezelfde persoon of zijn afstammelingen, die buiten haar rechtsgebied in de registers van de burgerlijke stand is opgenomen.

2

De griffier van het college waarvoor de zaak laatstelijk aanhangig was, zendt niet eerder dan drie maanden na de dag van de beschikking een afschrift daarvan aan de ambtenaar van de burgerlijke stand van de gemeente, in welker registers de akte of latere vermelding is of had moeten zijn opgenomen. Is deze gemeente opgeheven, dan zendt hij het afschrift aan de ambtenaar van de gemeente in wier archieven de registers van de burgerlijk stand van de opgeheven gemeente berusten.

Artikel 28

1

Iedere Nederlander die de overtuiging heeft tot het andere geslacht te behoren dan is vermeld in de akte van geboorte en lichamelijk aan het verlangde geslacht is aangepast voor zover dit uit medisch of psychologisch oogpunt mogelijk en verantwoord is, kan de rechtbank verzoeken wijziging van de vermelding van het geslacht in de akte van geboorte te gelasten, indien deze persoon als mannelijk in de akte van geboorte vermeld staande, nimmer meer in staat zal zijn kinderen te verwekken, dan wel als vrouwelijk in de akte van geboorte vermeld staande, nimmer meer in staat zal zijn kinderen te baren.

2

Voor de toepassing van het bepaalde in het eerste lid en de artikelen 28a en 28b van dit boek wordt onder akte van geboorte mede verstaan een akte van inschrijving van een buiten Nederland opgemaakte akte van geboorte of van een beschikking als bedoeld in artikel 25c van dit boek.

3

Degene, die de Nederlandse nationaliteit niet bezit, kan een verzoek als bedoeld in het eerste lid doen, indien hij reeds gedurende een tijdvak van ten minste één jaar, onmiddellijk voorafgaande aan het verzoek, woonplaats in Nederland heeft en een rechtsgeldige verblijfstitel heeft en voor het overige voldoet aan de in het eerste lid gestelde voorwaarden. Indien de akte van geboorte niet hier te lande in de registers van de burgerlijke stand is ingeschreven, wordt tevens de rechtbank verzocht de inschrijving te gelasten van de akte van geboorte in het register van geboorten van de gemeente 's-Gravenhage.

Artikel 28a

1

Bij het verzoek moeten worden overgelegd een afschrift van de akte van geboorte alsmede een gezamenlijk ondertekende verklaring van bij algemene maatregel van bestuur aangewezen deskundigen, afgegeven ten hoogste zes maanden voor de datum van indiening van het verzoek, waaruit blijkt:

- a. de overtuiging van de verzoeker dat hij tot het andere geslacht behoort dan in de akte van geboorte is vermeld en waarin is vervat het oordeel van de daartoe bevoegde deskundige

dat die overtuiging, gelet op de periode waarin de verzoeker als zodanig heeft geleefd en zo mogelijk op andere daarbij te vermelden feiten of omstandigheden, als van blijvende aard kan worden beschouwd;

- b. of en zo ja, in hoeverre de verzoeker lichamelijk aan het verlangde geslacht zodanig is aangepast als uit medisch of psychologisch oogpunt mogelijk en verantwoord is;
- c. dat de verzoeker als mannelijk in de akte van geboorte vermeld staande, nimmer meer in staat zal zijn kinderen te verwekken, dan wel als vrouwelijk in de akte van geboorte vermeld staande, nimmer meer in staat zal zijn kinderen te baren.

2

In de verklaring behoeft het in het eerste lid onder a bedoelde onderdeel niet te worden opgenomen indien de verzoeker lichamelijk reeds aan het verlangde geslacht is aangepast.

Artikel 28b

1

Het verzoek wordt toegewezen indien de rechtbank van oordeel is dat voldoende is komen vast te staan dat de verzoeker de overtuiging heeft tot het andere geslacht te behoren dan in de akte van geboorte is vermeld en dat deze overtuiging als van blijvende aard kan worden beschouwd en de verzoeker voldoet aan de in het eerste lid van artikel 28 gestelde voorwaarden.

2

Indien de rechtbank het verzoek om wijziging van de vermelding van het geslacht inwilligt, kan zij desverzocht tevens de wijziging van de voornamen van de verzoeker gelasten.

Artikel 28c

1

De wijziging van de vermelding van het geslacht heeft haar gevolgen, die uit dit boek voortvloeien, vanaf de dag waarop de ambtenaar van de burgerlijke stand aan de akte van geboorte een latere vermelding toevoegt van de last tot wijziging.

2

De wijziging van de vermelding van het geslacht laat de op het in het eerste lid genoemde tijdstip bestaande familierechtelijke betrekkingen en de daaruit voortvloeiende op dit boek gegronde rechten, bevoegdheden en verplichtingen onverlet. De verzoeken in verband met artikel 157 en in verband met artikel 394 van dit boek kunnen ook worden gedaan na het in het eerste lid genoemde tijdstip.

Controlling Bodies, Denying Identities

Human Rights Violations against Trans People in the Netherlands

In 1985, the Netherlands was among the first European nations to adopt legislation granting transgender people legal recognition of their gender identity, albeit under onerous legal conditions. Over a quarter of a century later, the Netherlands has lost its leading edge. Legislation that at the time represented a progressive development is wholly out of step with current best practice and understandings of the Netherlands' obligations under international human rights law. Most egregiously, the 1985 law allows transgender people to change their gender on official documents only on condition that they have altered their bodies through hormones and surgery, and that they are permanently and irreversibly infertile.

These requirements routinely leave transgender people with identity documents that do not match their deeply felt gender identity, resulting in frequent public humiliation, vulnerability to discrimination, and great difficulty finding or holding a job.

The conditions imposed by the 1985 law violate transgender people's rights to personal autonomy and physical integrity and deny transgender people the freedom to define their own gender identity, which the European Court of Human Rights has called "one of the most basic essentials of self-determination."

Controlling Bodies, Denying Identities documents the impact the 1985 law has on the daily life of transgender people. The report calls upon the Netherlands to amend the law to respect transgender people's human rights. It should separate medical and legal questions for transgender people. Legal recognition of the gender identity of transgender people should not be made conditional on any form of medical intervention.

Marvin with his boxing trainer Izi, 2010.

From: ***Inside Out/Portraits of Cross-gender Children***, published by WBOOKS. ***Inside Out*** is a collaborative project in the Netherlands involving photographer Sarah Wong and Volkskrant journalist Ellen de Visser who documented the lives of transgender children, over a period of seven years.

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