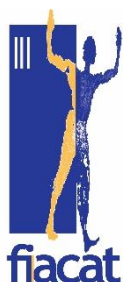




PRIMER ON TRANSGENDER INDIVIDUALS FACING THE DEATH PENALTY



Cornell Law School

Cornell Center on the
Death Penalty Worldwide



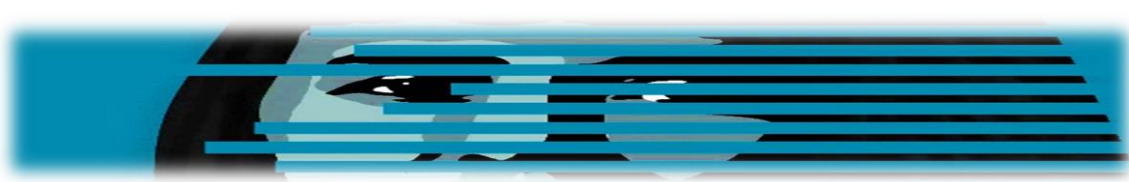
On 10 October 2021, the World Coalition Against the Death Penalty and other abolitionist organizations worldwide will celebrate the 19th World Day Against the Death Penalty. This year the World Day is dedicated to women who risk being sentenced to death, who have received a death sentence, who have been executed, and to those who have had their death sentences commuted, have been exonerated or pardoned. Included in this theme, are trans women and other gender diverse individuals, who are a minority on death row but who are discriminated against on the basis of gender. Capital punishment disproportionately targets socially marginalized individuals; it is no different for transgender people, who may face discrimination in every aspect of their lives.

INTRODUCTION

Extensive discrimination based on sex and gender, often coupled with other elements of identity, such as age, disability, sexual orientation, and race can expose women and gender diverse individuals to intersecting forms of structural inequalities. This discrimination can lead to critical mitigating factors not being considered during arrest and trial, such as being subjected to gender-based violence and abuse.

It is difficult to access information about transgender individuals facing the death penalty. According to the Cornell Center on the Death Penalty Worldwide database, as of September 2021, there were five people who identify as transgender on death row in the **United States (USA)**.¹ It is likely that there are more trans people facing capital punishment in the **USA** and other countries, but this information is difficult to document and quantify and therefore is not reliably reported. The reasons for this are varied and include detention centers not providing options of self-identifying as transgender or non-binary, and fear on behalf of those individuals to disclose the

¹ Research for this publication was, in large part, conducted by the Cornell Center on the Death Penalty Worldwide, based in New York, USA. Many of the statistics come from the USA, not because no other countries sentence gender diverse individuals to death, but because of reduced access to this information on a global scale : <https://deathpenaltyworldwide.org/>



information due to harmful stigmas. Accordingly, it is difficult to confirm how trans people who are on death row may have faced discrimination for being transgender in the criminal justice system. This factsheet provides an overview of the issues faced by transgender people who come into contact with the criminal justice system.

We have divided this report into three sections. The first section summarizes human rights violations affecting transgender individuals. The second section explores how discrimination against transgender people leads to an increased risk of incarceration. The third section provides an overview of currently applicable international human rights laws and how they apply to transgender people.

METHODOLOGY

This factsheet has been prepared by the World Coalition Against the Death Penalty in partnership with the Advocates for Human Rights, the Cornell Center on the Death Penalty Worldwide, FIACAT (International Federation of ACATs) and with the assistance of the law firm Ballard Spahr LLP. The authors drew heavily from research conducted by The Cornell Center on the Death Penalty Worldwide, Human Dignity Trust, and ILGA World.

BACKGROUND: WHAT DOES THE TERM ‘TRANSGENDER’ MEAN?

The term **gender identity** reflects a deeply felt and experienced sense of one’s own gender. A person’s gender identity is often aligned with the sex assigned to the person at birth. The word **transgender** (sometimes shortened to “**trans**”) is an umbrella term for people whose gender identity is different from the sex assigned at birth, but it is not limited to people who have had previous surgical intervention or hormonal treatment. This term includes people who present themselves or identify differently from the cultural gender expectations of the sex assigned to them at birth and is used to describe a wide range of gender identities, including people who identify as third gender or other non-binary terms. Trans women identify as women but were classified as male at birth. Trans men identify as men but were classified female at birth.²

Gender identity should not be confused with **sexual orientation**, which refers to an individual’s physical, romantic, or emotional attraction towards other people. A transgender person’s sexual orientation is as diverse as a person whose gender identity matches the gender that is culturally affiliated with the sex assigned at birth (“**cisgender**”). One cannot infer a person’s sexual orientation from that person’s gender identity.³

² <https://www.unfe.org/wp-content/uploads/2018/10/FAQs-English.pdf>

³ This primer uses nonbinary pronouns out of respect for individuals whose gender identity differs from male/masculine or female/feminine, and who choose to use these pronouns in referring to themselves.



1. HUMAN RIGHTS VIOLATIONS AFFECTING TRANSGENDER PEOPLE

Anti-trans discrimination can potentially cause egregious human rights violations and can be a question of life and death. Around the world, trans individuals face violent attacks, ranging from aggressive verbal abuse and psychological bullying to physical assault, beatings, torture, kidnapping and targeted killings.⁴ Trans individuals face discriminatory treatment before public authorities, in workplaces, schools, family homes and hospitals. Indeed, according to the 2018 Human Rights Campaign Foundation's analysis on USA statistics, 23% of LGBTQIA+⁵ adults of color, 22% of trans adults and 32% of trans adults of color have no form of health coverage. Trans people are often denied identity papers that reflect their gender identity, without which they cannot work, travel, open a bank account or access services.⁶ Furthermore, trans people can face discriminatory criminal laws. In some 69 countries, discriminatory laws criminalize private, consensual same-sex relationships, and at least 13 countries have laws criminalizing gender expression targeting the gender diverse community.⁷ This exposes these individuals to the risk of arrest, prosecution, imprisonment, and in 5 countries, a potential death sentence.⁸ While gender identity does not denote sexual orientation, many countries use these laws against transgender people regardless of their sexual orientation.⁹

Violence and Abuse

Violence against transgender people is pervasive worldwide. Often the violence is under reported due to transphobia and misgendering, (i.e. referring to someone in a way that does not correctly reflect their gender).¹⁰ Between January 1, 2008 and September 30, 2020, there were 3,664 reported murders of transgender people worldwide.¹¹ Central American countries are particularly

⁴ According to the European Union Agency for Fundamental Rights, 1/3 of transgender people are facing physical attacks and threats. *Being trans in the EU – Comparative analysis of EU LGBT survey data, 2014*: <https://fra.europa.eu/en/publication/2014/being-trans-eu-comparative-analysis-eu-lgbt-survey-data>

⁵ Lesbian, Gay, Bisexual, Trans, Queer, Intersex, Asexual, and plus sign meant to cover anyone else not included.

⁶ According to the European Union Agency for Fundamental Rights, 1/3 of transgender people are facing physical attacks and threats. *Being trans in the EU – Comparative analysis of EU LGBT survey data, 2014*: <https://fra.europa.eu/en/publication/2014/being-trans-eu-comparative-analysis-eu-lgbt-survey-data>

⁷ #Outlawed: "The Love That Dare Not Speak Its Name," Human Rights Watch, Available here: http://internap.hrw.org/features/features/lgbt_laws/ and *Trans Legal Mapping Report: Recognition Before the Law*, ILGA World, Available at: https://ilga.org/downloads/ILGA_World_Trans_Legal_Mapping_Report_2019_EN.pdf

⁸ Ibid

⁹ *Injustice Exposed: The Criminalization of Transgender People and its Impacts*, Human Dignity Trust. Available at: <https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminisation-of-trans-people.pdf>

¹⁰ *Dismantling A Culture of Violence: Understanding Anti-Transgender Violence and Ending the Crisis*, Human Rights Campaign Foundation, Available here: <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Dismantling-a-Culture-of-Violence-010721.pdf>

¹¹ *Transrespect Versus Transphobia Worldwide*, Press Release, Available here: https://transrespect.org/wp-content/uploads/2020/11/TvT_TMM_TDoR2020_PressRelease_EN.pdf



inhospitable to transgender people, accounting for nearly 80% of reported global killings.¹² Data suggests that Black and migrant trans women of color are more frequently targeted, showing intersectional forms of discrimination.¹³ Trans people are frequently tortured before being killed, most commonly being shot, stabbed, beaten, strangled or stabbed.¹⁴

By challenging the binarity of gender, transgender people are exposed to myriad forms of violence, including physical violence. This can also be the case for intersex children. Some intersex children are also subjected to medical procedures that can be qualified as torture or as inhumane or degrading treatments, such as surgeries and hormonal treatments, in order to force their appearance to align with binary gender stereotypes.¹⁵

2. TRANSGENDER PEOPLE IN THE CRIMINAL JUSTICE SYSTEM

According to a 2016 report co-authored by the Center for American Progress and the Movement Advancement Project that provides the most comprehensive treatment of this subject in the USA, 21% of transgender women, 10% of transgender men, and 16% of all transgender and gender non-conforming adults reported spending time in a prison or jail, compared to 5% of the general adult USA population.¹⁶

Lack of family acceptance, hostile political climates, cultural marginalization and invisibility all lead to anti-trans stigma and the dehumanization of transgender people.¹⁷ Rejection from family members can have a devastating effect on transgender people's well-being, affect their educational, economic and housing stability, and have long-term effects on mental health.¹⁸ In the USA, so-called "bathroom bills" designed to restrict transgender people from accessing public spaces, efforts to strop transgender youth from accessing transition-related medical care including counseling, and attempts to remove gender identity from non-discrimination policies, send the harmful message that transgender people are not worthy of equal protection under the law.¹⁹

¹² Transrespect Versus Transphobia Worldwide, Available here: https://transrespect.org/wp-content/uploads/2020/11/TvT_TMM_TDoR2020_Tables.pdf

¹³ Transrespect Versus Transphobia Worldwide, Press Release, Available here: https://transrespect.org/wp-content/uploads/2020/11/TvT_TMM_TDoR2020_PressRelease_EN.pdf

¹⁴ Transrespect Versus Transphobia Worldwide, Available here: https://transrespect.org/wp-content/uploads/2020/11/TvT_TMM_TDoR2020_Tables.pdf

¹⁵ Report of the Office of the UN High Commissioner for Human Rights on Discrimination and violence against individuals based on their sexual orientation and gender identity 2015 (A/HRC/29/23)

¹⁶ Unjust: How the Broken Criminal Justice System Fails Transgender People, Movement Advancement Project.

¹⁷ Dismantling A Culture of Violence: Understanding Anti-Transgender Violence and Ending the Crisis, Human Rights Campaign Foundation, Available here: <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Dismantling-a-Culture-of-Violence-010721.pdf>

¹⁸ Ibid.

¹⁹ Ibid.



Entry Points to the Legal System

Transgender individuals face substantial barriers to obtaining identification documents that accurately reflect their gender. ID discrepancies limit access to daily transportation, travel, housing, health care, education, employment, public accommodations, and exercising the right to vote.²⁰ Identification that does not match a person’s gender identity may lead to discriminatory and potentially dangerous interactions with medical professionals, law enforcement and community members.²¹ This is particularly true for countries repealing or not yet fully granting gender recognition rights, including **Guatemala, Hungary, Mongolia, New Zealand, the United Kingdom, the USA, Uruguay** and many more.²² The discrimination, family rejection, and harassment that trans people face in obtaining identification documents, school, work, and health care, can hinder their ability to live lives of fulfillment and dignity and, as described below, often forces them to engage in “survival economies” to support themselves.²³ As a result, trans people come into contact with police more frequently than the general population.

Laws criminalizing HIV exposure and transmission, drug use and possession, and sex work — all of which are realities of life for many trans people,²⁴ and especially so for trans people of color located in countries like the USA— function effectively as entry points for trans people into the criminal justice system.²⁵

The criminalization of bathroom use, either directly or through public indecency statutes, appears to be another route into the criminal justice system for trans people.²⁶ The operation of these laws, combined with police behaviors such as profiling and using violence when intervening in cases of domestic violence, causes transgender people to be arrested and incarcerated at disproportionate rates.²⁷

Academic studies have also found that trans people face discrimination and micro-aggressions within the court system.²⁸ Even some in the broader law enforcement community have documented the trust deficit between police and trans people and have called for additional police training to address this issue.²⁹ Prisons are places of grievous abuse for trans people,³⁰ once they

²⁰ Ibid.

²¹ Ibid.

²² [Trans Legal Mapping Report: Recognition Before the Law](https://ilga.org/downloads/ILGA_World_Trans_Legal_Mapping_Report_2019_EN.pdf), ILGA World, Available at: https://ilga.org/downloads/ILGA_World_Trans_Legal_Mapping_Report_2019_EN.pdf

²³ [Unjust: How the Broken Criminal Justice System Fails Transgender People](#), Movement Advancement Project. Evan Urquhart, [Decriminalizing Prostitution is Central to Transgender Rights](#), Slate.

²⁴ [Unjust: How the Broken Criminal Justice System Fails Transgender People](#), Movement Advancement Project.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ [LGBT Issues in the Criminal Justice System](#), Society for the Psychology of Sexual Orientation & Gender Diversity; Samantha LaMartine, Mark Brennan-Ing, Nadine Nakamura, Transgender Women of Color and HIV, American Psychological Association.

²⁹ [Law Enforcement and Transgender Communities](#), Law Enforcement Bulletin.

³⁰ [Transgender Inmates](#), The Marshall Project; Melanie Asmar, [Even With Legal Help, Transgender Prisoners Are Never Safe in Prison](#).



leave prison, they face a tough road to successfully reintegrate themselves and rebuild their lives, in part because a criminal record only exacerbates the discrimination they face in housing, education, and employment.³¹

A CLOSER LOOK: TRANSGENDER PEOPLE IN THAILAND’S PRISONS

“In prison, Thai transgender people live in overcrowded and unhygienic conditions. The level of overcrowding was documented at 339.1% in 2018, and prisoners had no sleeping space, insufficient water, and woefully inadequate medical care. There is no systematic collection of statistics about transgender prisoners, they are not allowed to change their gender on their identity cards, their proper names and pronouns are not used, they are escorted with wardens who are not of their preferred gender, and they have no access to hormone therapy. A UNDP report also identified the lack of access to gender-affirming surgery, HIV services, psychosocial support, conjugal visits, information, and complaints mechanisms as other issues transgender people faced. Our research suggests that the transgender people who are in Thai prisons are there because of laws targeting drug use and sex work. We were not able to verify whether or not there are any transgender people on death row in Thailand.”

Source: Cornell Center on the Death Penalty Worldwide Primer on *Transgender People in Thailand’s Prisons*.

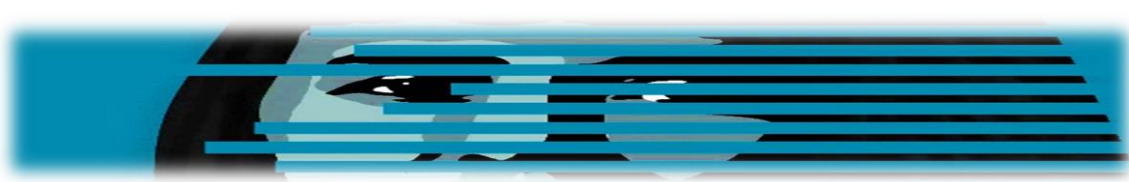
Discriminatory Laws

At least thirteen countries, including **Brunei, the Gambia, Indonesia, Jordan, Kuwait, Malawi, Malaysia, Nigeria, Oman, Saudi Arabia, South Sudan, Tonga, and the United Arab Emirates**³² have national laws criminalizing forms of gender expression that target transgender people, often in the form of so-called “cross dressing” laws that explicitly prohibit “imitating the opposite sex.” In these states, legal gender recognition is not available. This leaves trans people, or those perceived to be trans, at risk of arrest and prosecution. **Brunei, Oman, and Kuwait** have national laws that criminalize “posing as” or “imitating” a person of a different sex.³³ Police routinely arrest people in **Saudi Arabia** based on their gender expression. **Malaysia** criminalizes “posing as” a different sex under the Sharia codes of each of its states and its federal territory. In Nigeria’s northern states, Sharia law also criminalizes transgender people. These laws only apply

³¹ [LGBT People With Criminal Records Face Challenges to Rebuilding Their Lives](#), Movement Advancement Project.

³² [#Outlawed: “The Love That Dare Not Speak Its Name.”](#) Human Rights Watch, Available here: http://internap.hrw.org/features/features/lgbt_laws/ and [Trans Legal Mapping Report: Recognition Before the Law](#), ILGA World, Available at: https://ilga.org/downloads/ILGA_World_Trans_Legal_Mapping_Report_2019_EN.pdf

³³ Ibid.



in **South Sudan** to men who “dress as women” and in **Malawi** to men who wear their hair long.³⁴ **Tonga** prohibits any “male person” from presenting as a female while “soliciting for an immoral purpose, in a public place with intent to deceive any other person as to his true sex.”³⁵ In the **United Arab Emirates**, laws prohibit men “posing as” women to enter women-only spaces. The UAE has used this law to prosecute gay and transgender people, even in mixed-gender spaces.³⁶

Trans people, and in particular trans women, are disproportionately targeted by institutions of authority in almost every country in the world.³⁷ Many of the laws used against trans people are minor offences like public nuisance, morality, and loitering. They are often used to arrest and lock-up, but not subsequently charge individuals. “It’s a case of the police using what is available to them to harass trans people,” notes Zhan Chiam, author of the ILGA World: Trans Legal Mapping Report.³⁸ This systemic targeting of trans people using seemingly innocuous laws can be just as damaging as so-called “cross dressing” laws that overtly target gender expressions.³⁹

Laws That Discriminate Based on Sexual Orientation

Sexual orientation and gender identity are distinct concepts. Laws regulating sexual orientation, however, may have pernicious effects on transgender people. In countries without legal gender recognition, gender identity and sexuality are often conflated.⁴⁰ This means that by extension, transgender people are facing the same penalties as those suspected of engaging in same-sex sexual activity. For instance, and according to Human Rights Watch, 24 people were arrested, beaten or threatened by **Cameroon**’s security force between February and April 2021 for alleged homosexual acts or gender non-conformity, among whom one was under 17 and another one was allegedly forced to undergo an HIV test and anal examination.⁴¹

In its FAQs on the civil liberties of transgender people, the ACLU acknowledges that laws protecting against discrimination on the basis of sexual orientation may protect trans people as well, especially when the laws themselves define “sexual orientation” to encompass gender identity.⁴²

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Trans Legal Mapping Report: Recognition Before the Law, ILGA World, Available at: https://ilga.org/downloads/ILGA_World_Trans_Legal_Mapping_Report_2019_EN.pdf

³⁸ New Report Shows Where It’s Illegal to be Transgender in 2020, Forbes, Sept. 30, 2020, available here: <https://www.forbes.com/sites/jamiewareham/2020/09/30/this-is-where-its-illegal-to-be-transgender-in-2020/?sh=448180245748>

³⁹ Ibid.

⁴⁰ Injustice Exposed: The Criminalization of Transgender People and its Impacts, Human Dignity Trust. Available at: <https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminsalisation-of-trans-people.pdf>

⁴¹ Human Rights Watch: <https://www.hrw.org/news/2021/04/14/cameroon-wave-arrests-abuse-against-lgbt-people>

⁴² Transgender People and the Law: Frequently Asked Questions, ACLU, at 2–3.



First-person accounts by trans people also suggest that many may experience shifts in sexual orientation as a result of transitioning.⁴³ If someone maintains a stable sexual preference for one gender throughout a transition, that individual may also transition between being perceived as homosexual and being perceived as heterosexual. This means that heterosexual trans individuals may have faced consequences for perceived same-sex relationships that occurred before their transitions.

Transgender People on Death Row

Global information regarding transgender people facing the death penalty is very difficult to access and not accurately reported. As such, data on how many trans individuals are subjected to death sentences in retentionist countries is largely unavailable.

Of the 52 women currently under sentence of death in the **USA**, 4 identify as trans women, representing 8% of the female death row population. There is also 1 trans man under a sentence of death in the USA.⁴⁴ Nationwide, 0.6% of United States adults identify as transgender.⁴⁵ As such, trans women are both overrepresented and underreported by organizations that provide data on the US death row population.

3. INTERNATIONAL HUMAN RIGHTS LAWS AND TRANSGENDER PEOPLE

The existing legal obligations of States to safeguard the human rights of transgender people are already well established in international human rights law. While not expressly referring to gender identity, international and regional human rights treaties apply to “all people,” “all persons,” or “everyone” and therefore include trans and gender-diverse people. Additionally, human rights mechanisms have broadly interpreted many non-discrimination provisions that prohibit discrimination on grounds of sex or gender or that are non-exhaustive to prohibit discrimination based on gender identity.⁴⁶

The human rights of transgender people are protected under the **following treaties**:

- Universal Declaration of Human Rights⁴⁷
- European Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁸

⁴³ Ana Valens, 10 Misconceptions About Being a Trans Woman, Pride.

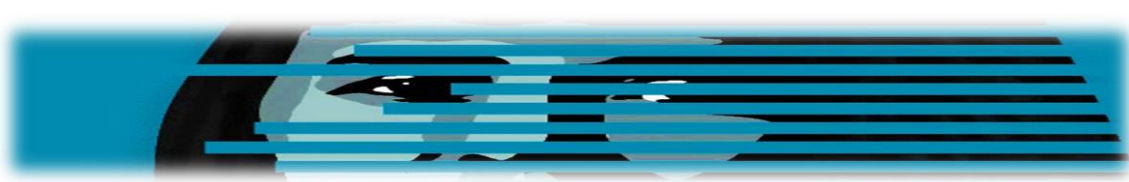
⁴⁴ Database at The Cornell Center on Death Penalty Worldwide, available here: <https://deathpenaltyworldwide.org/database>.

⁴⁵ Andrew R. Flores, Jody L. Herman, Gary J. Gates, Taylor N. Brown, How Many Adults Identify as Transgender in the United States?.

⁴⁶ OHCHR, Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law, 2012, p.40-45. Available at: <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>.

⁴⁷ Available at: <http://www.un.org/en/universal-declaration-human-rights/>

⁴⁸ Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf.



- International Covenant on Civil and Political Rights⁴⁹
- International Covenant on Economic, Social and Cultural Rights⁵⁰
- Convention on the Rights of the Child⁵¹
- Convention on the Elimination of all forms of Discrimination against Women⁵²
- African Charter on Human and Peoples' Rights
- American Convention on Human Rights
- ASEAN Human Rights Declaration

The core legal obligations of States include:

- Protecting individuals from transphobic violence;
- Preventing torture and cruel, inhuman, and degrading treatment;
- Repealing laws criminalizing transgender identity;
- Prohibiting discrimination based on gender identity; and
- Safeguarding freedom of expression, association, and peaceful assembly for all trans people.

GENERAL RECOMMENDATIONS

1. Educate yourself on gender identity and anti-trans discrimination.
2. Understand the reasons behind the use of gender-neutral pronouns.
3. Gather information on human rights violations that target transgender individuals facing capital punishment, when it is possible to do so with regard to your safety and the safety of trans people behind bars.
4. Share that data with the wider abolitionist community.
5. Where possible, plan national advocacy on behalf of transgender people in the criminal justice system. If not, contribute to regional or international research and advocacy campaigns.

⁴⁹ Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

⁵⁰ Available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

⁵¹ Available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁵² Available at: <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>.