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## I. Introduction

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The International Commission of Jurists (ICJ) submits this *Amicus Curiae* brief to the Central Administrative Court of Thailand in support of the petitioner in the case of *Samart Meecharoen v. Defense Minister as First and others (Undecided Case No. 2118/2006)*.

The ICJ, founded in 1952, is composed of 60 eminent jurists who are representatives of the different legal systems of the world. It works to advance the rule of law and to ensure the domestic implementation of international human rights law. In this context it promotes States' compliance with their international human rights legal obligations. The ICJ is headquartered in Geneva, Switzerland, with offices in Bangkok, Kathmandu, Johannesburg, and Guatemala City.

The ICJ has significant expertise in the application of international human rights law to violations, including discrimination, based on sexual orientation and gender identity. It helped elaborate and develop the *Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity*, which were signed by twenty-nine leading human rights experts in 2007. In 2009 it published the *Practitioner's Guide on Sexual Orientation, Gender Identity, and International Human Rights Law*. On a regular basis, the ICJ submits written interventions in cases before the European Court of Human Rights, the UN treaty bodies, and national courts.

The petitioner, Samart Meecharoen, alleges that the conscription committee, consisting of representatives from the Defense Ministry, the Army Reserve Command and the Lopburi Province Military Registrar, violated her right to be free from discrimination and her right to privacy when it first classified her as suffering from a “permanent psychosis” on her Conscription Result Certificate (Sor Dor 43) and then refused to alter or change its classification.

The ICJ understands that the Sor Dor 43 is a critical document, which must be presented along with application forms for jobs in public services, state enterprises and the private sector. The ICJ further understands that, although it may not be explicitly required, many individuals include the Sor Dor 43 in their applications for post-graduate studies to show that they have fulfilled the necessary military obligations. The Defense Ministry requires government agencies and business enterprises to check the Sor Dor 43 of applicants before hiring them. Samart Meecharoen has since undergone a psychological exam, which showed that she is not suffering from any kind of

psychosis. However, since receiving Samart Meecharoen's request to have the military papers corrected, the Defense Ministry has failed to act.

This brief will address international human rights law as it applies to gender identity issues. Specifically, this brief will discuss the rights of non-discrimination and privacy in international law.

## **II. The Treatment of Petitioner Violates Her Right to be Free from Discrimination**

Categorizing the petitioner as suffering from “permanent psychosis” on her Sor Dor 43 discriminates against her on the basis of gender identity. The Yogyakarta Principles define “gender identity” as

Each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>1</sup>

The right to be free from discrimination on the basis of gender identity is recognized in Yogyakarta Principle 2.

All international and regional human rights instruments recognize the right to be free from discrimination. Article 2 of the Universal Declaration of Human Rights (UDHR) provides: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Similarly, the International Covenant on Civil and Political Rights (ICCPR), to which Thailand acceded on 29 October 1996, and the International Covenant on Economic, Social and Cultural Right (ICESCR), to which Thailand acceded on 5 September 1999, require that state parties guarantee the rights contained in the respective Covenants without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International law also guarantees equal protection of the law. Article 26 of the ICCPR provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The categories enumerated in these instruments are intended to be illustrative and not exhaustive. Inclusion of “or other status” was provided to encompass protection for other categories of persons that might be targeted for discrimination. In its General Comment No. 20, the Committee on Economic, Social and Cultural Rights explained:

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<sup>1</sup> Yogyakarta Principles at n.2.

The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in Article 2(2). These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.<sup>2</sup>

The Committee on Economic, Social and Cultural Rights has explained that “gender identity” is included within the concept of “other status” for the purposes of the non-discrimination provision of the ICESCR.<sup>3</sup> Other treaty bodies and a number of UN Special Rapporteurs have also made clear that “gender identity” is a prohibited ground of discrimination.<sup>4</sup>

The Council of Europe, interpreting a parallel non-discrimination provision in the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>5</sup>, gave a similar explanation as to why it was unnecessary to add new grounds to those expressly enumerated. The explanatory report appended to Protocol 12 of the Convention, upon its adoption, noted that “the list of non-discrimination grounds is not exhaustive” and that “inclusion of any particular additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination on grounds not so included.”<sup>6</sup>

In its jurisprudence, the European Court of Justice adopts a slightly different approach, using discrimination on the basis of sex, but with an effectively similar normative outcome. Since 1996, the ECJ has held that discrimination on the basis of “gender identity” is covered by the prohibition on discrimination on the basis of sex in Council Directive 76/207 (equal treatment

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<sup>2</sup> Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 20*, 10 June 2009, UN Doc. E/C.12/GC/20, at para. 27.

<sup>3</sup> CESCR, *General Comment 20*, at para. 32.

<sup>4</sup> Committee Against Torture, *General Comment 2*, UN Doc. CAT/C.GC.2/CRP.1/Rev.4, at para. 21; Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment. Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2002/76, 27 December 2001 (noting that discrimination on the grounds of sexual orientation or gender identity may contribute to the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place); Independent Expert on Minority Issues, Report of the Independent Expert on Minority Issues, UN Doc. E/CN.4/2006/74, 6 January 2006, at para. 28 (noting discrimination based on gender, gender expression, gender identity and sexual orientation as an issue of multiple forms of discrimination); Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/64/211, 3 August 2009, para. 21.

<sup>5</sup> Article 1 (1) of Protocol 12 to the Convention for Human Rights and Fundamental Freedoms 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.”

<sup>6</sup> Council of Europe, *Explanatory Report to Protocol 12 to the Convention for Human Rights and Fundamental Freedoms*, at para. 20. The European Court of Human Rights has heard a number of cases involving transgender individuals. Thus far, however, it has considered claims concerning Article 14 (non-discrimination) to be subsumed within claims regarding Article 8 (privacy) such that they do not warrant separate treatment. See *L v Lithuania*, Application no. 27527/03, Judgment dated 11 September 2007, at para. 68 (finding violation of Article 8 and deciding that complaint of discrimination was essentially the same as the claim already considered); *Grant v. United Kingdom*, Application no. 32570/03, Judgment of 23 May 2006, at para. 51 (holding that refusal to grant pension was “essentially an Article 8 matter” and that no separate issue arose in conjunction with Article 14).

for men and women in employment). The Court held, “Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavorably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.”<sup>7</sup>

Furthermore, Article 30 of the Constitution of the Kingdom of Thailand, adopted in 1997, protects individuals from discrimination on the basis of *phet*. *Phet* is a much broader term than “sex” and refers to sexual identity and gender diversity as well. According to the “Intentions of the Constitution of the Kingdom of Thailand,” issued by the Constitution Drafting Assembly, “Differences in *phet*, in addition to meaning the differences between men and women, also denote the differences between individuals in sexual identity or gender or sexual diversity, which may be different from the *phet* in which the person was born. Consequently, the word *phet* already denotes the above meanings and the individuals within the above categories should not be discriminated against.”<sup>8</sup> Thus the Constitution of Thailand protects against discrimination on the basis of gender identity.

### *Gender identity*

Petitioner in the instant case was diagnosed as psychotic solely on the basis of her gender identity.<sup>9</sup> While not every difference in treatment amounts to prohibited discrimination, a difference in treatment must be reasonable and objective and have a legitimate aim.<sup>10</sup> The difference in treatment complained of here meets none of these criteria. Classifying petitioner as suffering from “permanent psychosis” is inaccurate. A subsequent evaluation confirmed that she does not suffer from psychosis at all. The inaccuracy of the medical diagnosis means it cannot possibly be a reasonable and objective basis for a difference in treatment.

Even the use of the much less-stigmatizing label “gender identity disorder” is diminishing. Proposed revisions to the Diagnostic and Statistical Manual replace “gender identity disorder” with the term “gender incongruence.” Gender incongruence is defined as “a marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by two or more indicators.” The American Psychiatric Association DSM-V Task Force explained the rationale for the change:

The latter is a descriptive term that better reflects the core of the problem: an incongruence between, on the one hand, what identity one experiences and/or expresses and, on the other hand, how one is expected to live based on one’s assigned gender (usually at birth) . . . In a recent survey that we conducted among consumer organizations for transgendered people . . . many very clearly indicated their rejection of the GID term because, in their view, it contributes to the stigmatization of their condition.<sup>11</sup>

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<sup>7</sup> *P v. S and Cornwall County Council*, Case C-13/94, 30 April 1996, at paras. 21-22.

<sup>8</sup> The CDA document is available at [www.sapaan.org/article/72\\_hrm](http://www.sapaan.org/article/72_hrm). This translation comes from Douglas Sanders, “The Rainbow Lobby” (publication forthcoming; on file with the ICJ).

<sup>9</sup> See Complaint at 5-6.

<sup>10</sup> Human Rights Committee, *General Comment No. 18*, UN Doc. HRI/GEN/1/Rev. 6 at 26 (1994), at paragraph 13. See also Human Rights Committee, Views of 22 September 2003, *Althammer v. Austria*, Communication No. 998/2001, para. 10.2.

<sup>11</sup> See American Psychiatric Association, DSM-5 Development, available at <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482>.

Similarly, in France, “transgender identity” has been removed from the list of long-term psychiatric disorders. The Ministry of Health and Sports explained that listing transgender identity as a psychological affectation was a highly stigmatizing label and that declassification would ensure continued medical assistance.<sup>12</sup> In the United Kingdom, ‘gender dysphoria’ is not classified as a mental illness at all.<sup>13</sup>

### *Impairment of other human rights*

In the case of petitioner Samart Meecharoen, the Sor Dor 43 has a negative impact on the enjoyment of human rights, including the petitioner’s ability to find work or continue her education. Thailand is under an international legal obligation to guarantee the right of “everyone to gain his living by work”, as provided under Article 6 of the Covenant on Economic, Social and Cultural Rights, and the right to an education, as provided under article 13 of the Covenant recognizes the right to education. In particular, higher education shall be made “equally accessible to all.” As indicated by the Committee on Economic, Social and Cultural Rights, “[t]he prohibition against discrimination enshrined in article 2(2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applied fully and immediately to all aspects of education and encompasses all international prohibited grounds of discrimination.”<sup>14</sup> The Committee has made the same the comment in respect of the right to work.<sup>15</sup> By interfering with petitioner’s rights to work and study on the basis of her gender identity, Thailand has failed its obligation to respect the right to work and education under international law.

### **III. The Violation of the Right to Privacy**

The right to privacy under international law protects both an individual’s decision to change gender identity and unnecessary disclosure of an individual’s medical information. These rights have been recognized by the UN Human Rights Committee interpreting Article 17 of the ICCPR, and the European Court of Human Rights interpreting the parallel privacy provision of Article 8 of the European Convention. Drawing on these instruments, Yogyakarta Principle 6 explains, in relevant part: “The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one’s sexual orientation or gender identity, as well as decisions and choices regarding both one’s own body and consensual sexual and other relations with others.”

Article 17 of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.

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<sup>12</sup> *Ministère de la Santé et des Sports*, Press Release, 18 September 2009, <http://www.sante-sports.gouv.fr/actualite-presse/presse-sante/communiqués/declassification-transsexualite-categorie-affectation-longue-duree-ald-23-affectations-psychiatriques-longue-duree.html>. For an English translation, see <http://www.tgeu.org/node/89>.

<sup>13</sup> See Department for Constitutional Affairs, *Government’s Policy Concerning Transsexual People*, <http://www.dca.gov.uk/constitution/transsex/policy.htm>.

<sup>14</sup> CESCR, *General Comment No. 13*, UN Doc E/C.12/1999/10, at para. 31.

<sup>15</sup> CESCR, *General Comment No. 18*, UN Doc E/c.12/G/18 (2006), at para. 33.

Article 8 of the ECHR provides:

Everyone has the right to respect for his private and family life, his home and his correspondence.

The right to privacy refers to intimate and personal choices in an individual's life that are central to personal dignity and autonomy. As the Human Rights Committee explains, "the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity."<sup>16</sup>

The right to keep medical information confidential "is encompassed in an individual's fundamental right to privacy."<sup>17</sup> According to the European Court:

[t]he protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention, bearing in mind that respect for the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. Consequently, domestic law must therefore afford appropriate safeguards to prevent any communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.<sup>18</sup>

For example, laws that require doctors and health personnel "to report cases of women who have undergone abortion" might constitute a failure to respect privacy rights.<sup>19</sup> The Human Rights Committee has also expressed concern about laws requiring medical doctors to give evidence, in conflict with their duty of confidentiality.<sup>20</sup> The European Court has similarly found that "information about a person's health is an important element of private life"<sup>21</sup> and that releasing sensitive medical diagnoses undisputedly "constituted [an] interference with the...right to respect for . . . private and family life."<sup>22</sup>

The European Court has examined the relationship between gender identity and the right to privacy on a number of occasions.<sup>23</sup> The judgments reaffirm that Article 8 covers "the physical and psychological integrity of a person...embrace(s) aspects of an individual's physical and social identity...(and) elements such as...gender identification, name and sexual

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<sup>16</sup> Human Rights Committee, Views of 9 December 1994, *Coerial et al v The Netherlands*, Communication N° 453/1991, para. 10.2.

<sup>17</sup> International Criminal Court Victims and Witnesses Unit, *Report on Confidentiality of Medical Records and Consent to Disclose Medical Records*, ICC-01/04-01/06, 15 October 2009, para. 2. *L. L. v. France*, Application No. 7508/02, Judgment date 10 October 2006, at para. 32.

<sup>18</sup> *L. L. v. France* at para. 44.

<sup>19</sup> Human Rights Committee, *General Comment No. 28*, UN Doc. CCPR/C/21/Rev.1/Add.10, at para. 20.

<sup>20</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee on Portugal*, UN Doc. CCPR/CO/78/PRT, 17 September 2003, at para. 18.

<sup>21</sup> *S and Marper v. United Kingdom*, Judgment dated 4 December 2008, Applications Nos. 30562/04 and 30566/04, at para. 66.

<sup>22</sup> *Z v. Finland*, Judgment dated 25 February 1997, Application No. 22009/93, at para. 71.

<sup>23</sup> See *L. v. Lithuania*, Judgment dated 11 September 2007, Application No. 27527/03; *Grant v. United Kingdom*, Judgment dated 23 May 2006, Application No. 32570/03; *Van Kück v. Germany*, Judgment dated 12 June 2003, Application No. 35968/97; *Goodwin v. United Kingdom*, Judgment dated 11 July 2002, Application No. 28957/95; *I v. United Kingdom*, Judgment dated 11 July 2002, Application No. 25680/94.

orientation and sexual life.”<sup>24</sup> According to the Court, “gender identity is one of the most intimate areas of a person’s private life.”<sup>25</sup>

In *Goodwin v United Kingdom* and *I v United Kingdom*, the European Court found violations of Article 8 where the applicants alleged a series of difficulties that arose from the failure of the State to recognize their new gender identities. In *Goodwin*, for example, the applicant described discrimination and harassment when work colleagues discovered that she had been born male. “In a number of instances, the applicant stated that she has had to choose between revealing her birth certificate and foregoing certain advantages which were conditional upon her producing her birth certificate.”<sup>26</sup> She did not even report a theft “for fear that the investigation would require her to reveal her identity.”<sup>27</sup>

The Court held that “[t]he 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 recognize the change of gender cannot, in the Court’s view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation, and anxiety.”<sup>28</sup> The Court found that under the concept of privacy, as enshrined in Article 8, was the “right to establish details of their identity as individual human beings.”<sup>29</sup> Accordingly, the United Kingdom had violated its obligations under Article 8.

Similarly, in *I v. United Kingdom*, the applicant referred to the “difficulties and embarrassment” resulting from the disclosure of her pre-operative sex because there continued to exist the common practice of requiring official identity documents in the most mundane of contexts.<sup>30</sup> The “difficulties and embarrassment” manifested themselves on a daily basis, in her social, professional and economic life, creating obstacles that could easily be avoided through legal recognition of her new gender. The Court recognized that “serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity.”<sup>31</sup> Legal recognition of the applicant’s new gender would respect her privacy and enable her “to live in dignity and worth in accordance with the sexual identity chosen by [her] at great personal cost.”<sup>32</sup>

A person’s right to privacy is violated when State act or omission serves to reveal a change of gender identity or when a State unnecessarily discloses medical information. In the present case, the Sor Dor 43 unnecessarily discloses both petitioner’s gender identity and (incorrect) medical diagnosis, and, as such, violates her right to privacy.

The petitioner’s decision to change her gender identity is a private one and the State has a positive obligation to respect such decisions. In the present case, the petitioner has been labeled as suffering from ‘permanent psychosis’ based on the decision to live her life as a

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<sup>24</sup> *Pretty v. United Kingdom*, Judgment dated 29 April 2002, Application No. 2346/02, at para. 61.

<sup>25</sup> *Van Kück* at para. 56.

<sup>26</sup> *Goodwin* at para. 19.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at para. 77.

<sup>29</sup> *Id.* at para. 90.

<sup>30</sup> *I v. United Kingdom* at para. 46.

<sup>31</sup> *Id.* at para. 57.

<sup>32</sup> *Id.* at para. 71. See also *Goodwin* at paras. 71-93.

woman and Thailand has violated her right to privacy through disclosing this information on the Sor Dor 43.

#### **IV. Conclusion**

Labeling the petitioner as having a “permanent psychosis” and refusing to change this incorrect medical diagnosis violates Thailand’s obligations under international law. Describing her as psychotic discriminates against her on the basis of gender identity, and the fact that the document is publicly available and required in some contexts only compounds the violation, leading to an impairment of other human rights, such as the rights to work and the right to education. Furthermore, the incorrect medical diagnosis violates the petitioner’s right to privacy by disclosing her biological sex and her status as a transgendered woman and by causing undue difficulties and embarrassment on a daily basis, in her social, professional and economic life.