

IN THE EUROPEAN COURT OF HUMAN RIGHTS

A.P. v. France (App. no. 79885/12), *Garçon v. France* (App. no. 52471/13)

and

Nicot v. France (App. no. 52596/13)

WRITTEN COMMENTS

submitted jointly by

Amnesty International

ILGA Europe

Transgender Europe (TGEU)

24 July 2015

I. Introduction

1. These written comments are submitted jointly by Amnesty International, ILGA Europe and Transgender Europe (TGEU),¹ pursuant to leave granted by the President of the Fifth Section on 21 June 2015. The present cases mainly concern the validity of medical requirements imposed on those seeking legal gender recognition, including most prominently permanent sterilization. They raise the issue of serious violations of the rights to be free from inhuman and degrading treatment, to bodily integrity, to personal autonomy and of reproductive rights, and come against the background of significant developments regarding the legal situation of transgender people in Europe and beyond.

2. This submission is structured as follows. First, we examine legal consent requirements as applied in the context of transgender people submitting to medical treatment to achieve legal gender recognition. Second, we analyse the consequences of each option available to trans people – choosing legal gender recognition or bodily integrity respectively, and argue that this “choice” is illusory and in breach of their human rights. Third, we critique the various justifications commonly invoked in France and beyond to support the medical requirements attached to legal gender recognition. Fourth, we examine the test commonly applied by the Court to legal gender recognition claims brought under Article 8 of the Convention, in order to draw out critical aspects of the analysis that may have been disregarded in the past. Fifth, we provide information regarding relevant recent developments in Europe and beyond. This submission is designed to complement and should be read in conjunction with the material already covered in the statements of facts published on the Court’s website. We refer to the glossary attached for the recommended terminology to be used in relation to matters pertaining to gender identity.

II. The informed consent rule as applied to medical requirements imposed for legal gender recognition

3. The informed consent rule is synthesized in Article 5 of the Oviedo Convention, which provides that “an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.”² The notion of ‘intervention’ is to be given a broad interpretation, covering “all medical acts, in particular interventions performed for the purpose of preventive care, treatment or rehabilitation or in a research context.”³ Consent is considered to be free and informed when given without any undue constraints and pressure, and following the provision of relevant, medically indicated information.⁴ The only exception⁵ to the informed consent rule applies in a state of emergency, “for the benefit of the health of

¹ The interveners gratefully acknowledge the contribution of Constantin Cojocariu in the preparation of this submission.

² *Convention on Human Rights and Biomedicine*, Oviedo, 4.IV.1997.

³ The *Explanatory Protocol on the Oviedo Convention*, §34.

⁴ *Idem*, §35-36.

⁵ Not taking into account the situation of minors, of those unable to consent and of those who “have a mental disorder.”

the individual concerned.”⁶ Notably, sterilization is never a required emergency procedure.⁷

4. These standards are reflected in this Court’s jurisprudence. In particular, the informed consent rule has been linked to the “inalienable right to self-determination” and “the right to personal autonomy” which come within the scope of the right to respect of private life (Article 8) and the fundamental notions of human dignity and human freedom underpinning the Convention.⁸ The flip side of consent is the right to refuse medical treatment, or the “right to be ill,”⁹ which applies even in the event of a potential “fatal outcome.”¹⁰ The threshold for engaging Article 8 is low, as even “minor,” but compulsory medical interventions, such as a gynecological examination,¹¹ a urine test,¹² or the forcible medical examination in a hospital¹³ were held to constitute an interference with the right to respect for private life. The Court has found specific interferences with physical integrity to be justified under Article 8§2 in the interest of preventing disorder or crime,¹⁴ to protect public health,¹⁵ or in the interest of the person in question, where the intervention was deemed to be medically necessary,¹⁶ and taking into account the severity and manner of implementation of the measure in question as well as the existence of less intrusive alternatives.¹⁷

5. Turning to the present cases, the French legal system requires people seeking legal gender recognition to undergo a variety of medical measures. As medical treatment, these requirements are subject to the informed consent rule. However, informed consent is vitiated to the extent that some transgender people accept medical treatment that they would not have otherwise desired, in order to obtain legal identification documents. In effect, transgender people have to make a choice between two sets of fundamental rights, centered on the right to legal recognition of their gender identity and their bodily integrity respectively.

6. Different courts have recognized the deleterious character of the “choice” offered to transgender persons and acknowledged that consent given in these circumstances is not informed consent. For example, the Swedish Administrative Court of Appeal emphasized that the sterilization requirement was in effect a case of forced medical treatment, since it constituted a prerequisite to enjoying a certain benefit or right, namely legal gender recognition.¹⁸ The German Constitutional Court

⁶ The Oviedo Convention, Article 8.

⁷ See OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, WHO. *Eliminating forced, coercive and otherwise involuntary sterilization – An interagency statement*, 2014.

⁸ *V.C. v. Slovakia*, no. 18968/07, §105, ECHR 2011 (extracts).

⁹ *Plesó v. Hungary*, no. 41242/08, §66, 2 October 2012.

¹⁰ *Idem*, §105 and references cited therein.

¹¹ *Y.F. v. Turkey*, no. 24209/94, §33-34, ECHR 2003-IX.

¹² *Peters v Netherlands* (dec.), no. 21132/93, 6 April 1994.

¹³ *Matter v. Slovakia*, no. 31534/96, §64, 5 July 1999.

¹⁴ *Peters v. the Netherlands* (dec.), no. 21132/93, 6 April 1994.

¹⁵ *Acmanne and Others v. Belgium* (dec.), no. 10435/83, 10 December 1984, DR 40, p. 251.

¹⁶ *Bogumil v. Portugal*, no. 35228/03, §77-78, 89, 7 October 2008.

¹⁷ *Jalloh v. Germany* [GC], no. 54810/00, § 71-74, ECHR 2006-IX.

¹⁸ Stockholm Administrative Court of Appeal, 19 December 2012, cited below fn. 84.

similarly stated that legal gender recognition must not be made “dependent on conditions which require severe impairments of the physical integrity and which are connected with health risks.”¹⁹ This Court applied similar reasoning in the case *Dvořáček v Czech Republic*, concerning the medical treatment applied to a sex offender allegedly as a protective measure, where it acknowledged that the applicant was presented with a “difficult choice” between accepting libidinal suppressive medication and benefiting from early release on the one hand, and treatment by psychotherapy and socio-therapy only which were less efficient, and correspondingly required a longer period of detention.²⁰ This situation raised doubts in relation to the existence of free and informed consent to the procedure in question. Summing up, the fact of compelling individuals to undergo medical procedures to obtain legal gender recognition does not meet informed consent requirements.

III. Refusing medical treatment

7. By refusing medical treatment, trans persons in France forego their right to legal recognition of their gender identity. Notably, this Court has described gender identity as “one of the most intimate areas of a person’s private life”,²¹ as a free-standing “right”,²² as “a fundamental aspect of the right to respect for private life”²³ and as “one of the most basic essentials of self-determination,”²⁴ linking it to a “right to sexual self-determination,” itself an aspect of the right to respect for private life.²⁵

8. Denying a trans person the legal recognition of their gender identity has a severe impact on their daily lives.²⁶ Legal documents that contain personal details including gender are required on a daily basis in a variety of interactions including employment, health, access to banking and to other services, or marriage. Disagreement between one’s appearance and personal documents may cause forced “outing” as a transgender person, potentially leading to humiliation and harassment. According to a recent EU Agency for Fundamental Rights (FRA) survey, the lack of correct identity documents is one of the drivers for disproportionately higher levels of discrimination and abuse suffered by trans people. Thus, one in three trans respondents felt discriminated against when showing their identification card or other official document that identifies their sex. In addition, almost nine in 10 said that easier legal procedures for gender recognition in their gender identity would help them to live a more comfortable life.²⁷

¹⁹ Federal Constitutional Court, 11 January 2011, §52, cited below fn. 82.

²⁰ *Dvořáček v. the Czech Republic*, no. 12927/13, §102-104, 6 November 2014.

²¹ *Van Kück v. Germany*, no. 35968/97, §56, ECHR 2003-VII.

²² *Idem*, §75.

²³ *Idem*, §75.

²⁴ *Y.Y. v. Turkey*, no. 14793/08, §102, 10 March 2015 (extracts).

²⁵ *Idem*, §78.

²⁶ On the impact of current legal arrangements on trans people’s daily life in France, see Haute Autorité de Santé, *Situation Actuelle et Perspectives D’Evolution de la Prise en Charge Medicale du Transsexualisme en France*, 2009, pp.44-45.

²⁷ European Union Agency for Fundamental Rights, *Being Trans in the European Union: Comparative Analysis of EU LGBT Survey Data* (“the FRA Survey”) 2014, pp. 81-82, 95.

9. Conversely, the World Professional Association for Transgender Health (WPATH)²⁸ recommended legal gender recognition as an alternative measure capable of alleviating discomfort and distress related to the discrepancy of a person's gender identity and the sex assigned at birth.²⁹ In a recently-released statement, the WPATH emphasized that “legally recognized documents matching self-identity are essential to the ability of all people to find employment, to navigate everyday transactions, to obtain health care, and to travel safely,” and that barriers to legal gender recognition may harm the physical and mental health of the person in question.³⁰ Consequently, Governments were urged “to eliminate unnecessary barriers, and to institute simple and accessible administrative procedures for transgender people to obtain legal recognition of gender, consonant with each individual's identity.”

10. Although the Court has generally recognized in its judgments the hardship that trans people lacking proper legal documentation face,³¹ at the same time it limited the scope of the obligation to ensure gender recognition to those who underwent genital surgery. However, as described for example in the above-mentioned FRA survey, trans people whose self-identified gender has not been recognized experience the same level of hardship irrespectively of whether they have had (genital) surgery or not.

IV. Choosing legal gender recognition

11. Trans people in France seeking legal gender recognition are routinely required to undergo a combination of hormonal and surgical treatments, which may include bilateral mastectomy and reconstruction (“top surgery”), hysterectomy (removal of uterus and other internal pelvic organs) and phalloplasty (creation of a penis) for trans men and breast augmentation, penectomy (removal of penis), orchiectomy (removal of the testicles) or vaginoplasty (creation of a vagina) for trans women. These are major medical interventions, involving substantial health risks, which have not been fully established yet.³²

12. Many courts in France also require surgery resulting in sterilization as a *de minimis* marker of irreversibility. Some of the treatments mentioned above necessarily lead to permanent infertility as they involve the removal of reproductive organs. Numerous human rights bodies, including this Court, have consistently found forced sterilization to be in breach of human rights, including the right to health,

²⁸ The WPATH publishes the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (SoC), which outline the treatment protocols for gender reassignment treatment, “based on the best available science and expert professional consensus”. The latest version from 2011 is available here: <http://www.wpath.org/>.

²⁹ *Idem*, p. 10.

³⁰ *WPATH Statement on Legal Recognition of Gender Identity*, 19 January 2015, http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf.

³¹ See for example *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §§77-80, ECHR 2002-VI;

³² See for example Sutcliffe et al, *Evaluation of surgical procedures for sex reassignment: a systematic review* in *Journal of Plastic, Reconstructive & Aesthetic Surgery* (2009) 62, 294-308. This systematic literature review found that „some satisfactory outcomes were reported, but the magnitude of benefit and harm for individual surgical procedures cannot be estimated accurately using the current available evidence.“

reproductive rights, inhuman and degrading treatment or the prohibition of discrimination.³³ This applies in equal measure to the forced sterilization of transgender people.³⁴

13. Currently many legal gender recognition schemes, including that in France, operate under a pathologisation model, linking trans identities to mental illness. The WPATH emphasized that “the expression of gender characteristics, including identities, that are not stereotypically associated with one’s assigned sex at birth is a common and culturally-diverse human phenomenon which should not be judged as inherently pathological or negative.”³⁵ Furthermore, the WPATH stressed that “gender identity disorder” (GID) or equivalent diagnoses contribute to the stigmatization and social exclusion of trans people, without contributing to their physical or mental wellbeing, and called for the “de-psychopathologisation of gender variance worldwide.” National studies confirm these assertions – for example, 63% of trans respondents to a German quantitative study felt that the GID diagnosis is a source of significant distress for them.³⁶ Accordingly, a clear trend may be detected across Europe and beyond towards depathologisation, manifest in legal reform work at the national level described further below, and planned changes to the WHO International Classification of Diseases, aimed at removing trans identities from the mental health section.³⁷

14. The German Constitutional Court has analyzed in detail the forced medical treatment requirement and concluded that it was disproportionate to the objectives pursued, and therefore in breach of the right to physical integrity in the Basic Law. In doing so, the Constitutional Court noted that it was “unacceptable” to demand trans persons to undergo interventions that carried considerable health risks and potentially life long adverse effects, as proof of their sincerity and of the permanent character of their “transsexuality” for the purposes of achieving legal gender recognition.³⁸ This Court has also effectively recognized the arduous character of gender reassignment treatment (GRT), but did so in order to legitimize the conclusion that states had to recognize its effects by providing legal gender recognition.³⁹ Seen from a different angle, genital surgery should only be provided to those who seek it, based on free and informed consent, precisely because of its serious implications, rather than being manipulated for non-medical purposes.

³³ See for example *V.C. v. Slovakia*, no. 18968/07, §105, ECHR 2011 (extracts), CEDAW Committee, *A.S. v. Hungary*, Comm. No. 4/2004, 12 February 2004.

³⁴ See for example *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, 1 February 2013, A/HRC/22/53, §88 or the UN Interagency statement, 2014, see above fn. 6.

³⁵ WPATH *De-psychopathologisation Statement*, 26 May 2010, http://www.wpath.org/uploaded_files/140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf.

³⁶ LesMigras “...nicht so greifbar und doch real” *quantitative und qualitative Studie zu Gewalt und (Mehrfach-) Diskriminierungserfahrungen von lesbischen bisexuellen Frauen und Trans* in Deutschland*, 2012, www.lesmigras.de/ergebnisse.html.

³⁷ GATE – Global Activists for Trans* Equality, *New developments in the ICD Revision Process*, <http://transactivists.org/2014/08/19/new-developments-in-the-icd-revision-process/>.

³⁸ Federal Constitutional Court, 11 January 2011, §65, cited below fn. 82.

³⁹ See for example *Christine Goodwin v United Kingdom*, cited above, §81.

V. Critique of current justifications used to attach medical requirements to legal gender recognition

15. It is respectfully submitted that a closer examination of the justifications usually invoked for examining medical pre-requisites is necessary, taking into account all relevant considerations. Notably, the Court has not explained the crucial distinction made between trans persons who underwent genital surgery and other trans persons in relation to legal gender recognition. In *Christine Goodwin v. United Kingdom*, the Court referred in abstract to “the inconvenience” to the state resulting from gender reassignment, but did not explain how precisely these repercussions operated in practice taking into consideration different transgender identities.⁴⁰ The Court did not provide any additional reasons for this distinction, and only referred instead to debates on-going at the time in the United Kingdom.⁴¹ The Court has repeatedly suggested in its jurisprudence that the “manifest determination” of individuals who had undertaken genital surgery is a factor that should be taken into account in their favour.⁴² However, it is unclear why genital surgery should take on such decisive significance as opposed to, for example, seeking to live permanently in accordance with one’s gender identity. Set forth below, is a critique of current justifications used to attach requisite medical procedures to legal gender recognition.

a) Genital surgery as the culmination of the transition process

16. Medical professionals have widely rejected the view that genital surgery is the inevitable and necessary culmination of the process of transitioning, emphasizing instead social transition as medically relevant. The WPATH recommended in its Standards of Care,⁴³ described as “flexible clinical guidelines,” that treatment should be individualized, and suggested that changes in gender role alone may be sufficient treatment for some transgender people.⁴⁴ In 2010, the WPATH issued a statement making it clear that gender recognition should not be premised on surgery or sterilization, but on the person’s “lived gender, regardless of reproductive capacity,” and urged all stakeholders to make the necessary changes in their procedures.⁴⁵ In 2015, the WPATH additionally highlighted the fact that “no particular...mental health treatment or diagnosis is an adequate marker for anyone’s gender identity, so these should not be requirements for legal gender change.”⁴⁶

17. The German Constitutional Court acknowledged that “the permanence and irreversibility of the felt gender of a transsexual cannot be measured by the degree of adaptation of [the claimant’s] exterior sexual characteristics to the felt gender by means of surgical interventions, but has to be determined based on how [the claimant]

⁴⁰ *Idem*, §91.

⁴¹ *Idem*, §86-91.

⁴² See for example *B v France*, cited above, §55 and *Van Kuck v. Germany*, cited above, §77.

⁴³ See above, fn. 27.

⁴⁴ See for example *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §§71-93, ECHR 2002-VI;

⁴⁵ *WPATH Identity Recognition Statement*, 16 June 2010, http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%206-10%20on%20letterhead.pdf.

⁴⁶ See above, fn. 29.

lives in his felt gender and perceives himself,” in line with medical advice that it accepted as evidence.⁴⁷ In Australia, the High Court made a similar point in its landmark 2011 judgment *AH & AB v. the State of Western Australia*, concerning two trans men seeking legal gender recognition, while retaining their reproductive organs. The High Court determined that it was necessary to interpret the applicable legislation based on a “social perspective,” by reference to their lifestyle, appearance and behavior among other factors.⁴⁸ In this respect, the claimants’ “bodily state or remnant sexual organs”, the “potential adverse consequences,” “the community standards and expectations” were immaterial considerations. Consequently, surgery to construct and remove a person’s genitals and reproductive organs was held not to be required for legal gender recognition.

18. The Court has focused almost exclusively on the situation of trans persons who had undergone genital surgery in its jurisprudence to date. However, the trans community is much more diverse, comprising those who seek and those who already underwent genital surgery, but also persons who choose not to undergo genital surgery or hormonal therapy, cross-dressers, transvestites, a sizable group of people who do not identify with either of the two gender categories, and others.⁴⁹ For example, the above-mentioned FRA survey found that 73% of trans respondents did not identify within the gender binary.⁵⁰ Indeed, in the context of protection from discrimination, the Court has already implicitly recognised the existence of this wider community by acknowledging that Article 14 covers not just discrimination based on transsexuality,⁵¹ but discrimination based on the all-inclusive term, gender identity.⁵²

19. People who do not undergo GRT are motivated by a variety of reasons⁵³ that are equally cogent, and consequently should benefit from equal protection under the law:

- many cannot afford expensive GRT, which is sometimes not covered by national health insurance plans;
- being elderly and/or having medical conditions that render surgery risky or contraindicated;
- many fear complications resulting from surgery or doubt that it would provide the desired physical or aesthetic result;⁵⁴

⁴⁷ Federal Constitutional Court, 11 January 2011, §66, cited below fn. 82.

⁴⁸ *AB & AH v Western Australia* [2011] HCA 42 6 October 2011 P15/2011 & P16/2011, §§35-38.

⁴⁹ See for example Council of Europe Commissioner for Human Rights, *Human Rights and Gender Identity*, CommDH/Issue Paper (2009)2, p. 3.

⁵⁰ The FRA Survey, p. 104, see above fn. 26.

⁵¹ *P.V. v. Spain*, no. 35159/09, § 30, 30 November 2010.

⁵² *Identoba and Others v. Georgia*, no. 73235/12, §96, 12 May 2015; gender identity and expression is also included as a protected ground in the anti-discrimination clause of the Convention on Preventing and Combating Violence against Women and Domestic Violence (*the Istanbul Convention*), Art. 4§3.

⁵³ See Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 Mich. J. Gender & L. 373 (2013), pp. 408-409 and the sources cited therein.

⁵⁴ For example, according to Nicole Metzger, *Influencing factors on the decision process of the transition objective of transmen: An exploratory study of transmen in Germany and Switzerland*, 2014, many transmen do without the phalloplasty surgery because of the high complication rate.

- some have to take into account practical considerations such as being unable to take time from work/school,⁵⁵ caregiving responsibilities towards family members or lacking caregivers for themselves following surgery;
- some hold sincere religious/personal beliefs against surgical bodily modifications;
- loved ones may oppose GRT;
- some may want to maintain their reproductive capacity;
- some may be denied authorization to undergo GRT because they do not correspond to normative/stereotypical views of what a trans person should behave/look like;
- some feel that surgery is not necessary for them to feel comfortable living in their self-identified gender identity, particularly when they have for example already made alterations to their gendered appearance, names and pronouns.

b) Concerns related to retention of reproductive abilities

20. Relinquishing one's reproductive capacity is no small matter. Transgender people can form kinship relationships with children in a variety of ways, which are not cancelled or prevented by the fact of legal gender recognition. Thus, transgender people often have children before they transition, with that relationship unimpeded by legal gender recognition. Similarly, post-transition, transgender people may become parents because they retained their reproductive capacity according to the gender assigned at birth, but also through assisted reproductive technology or adoption.⁵⁶ A number of cases of men giving birth have been reported over the past several years in Europe and beyond.⁵⁷ While it is true that such cases challenge naturalised conceptions of parenthood as defined by biology, experience in certain countries demonstrate that the assorted difficulties are far from insurmountable.⁵⁸

21. Although, there have not been many studies done in Europe regarding the phenomenon of transgender parenthood, the FRA found that 16% of trans respondents live with at least one child under the age of 18 in their household.⁵⁹ A review of

⁵⁵ See for example the situation of the claimant in the case decided by the Austrian High Administrative Court on 27 February 2009, cited below fn. 83.

⁵⁶ According to a large study on the social and legal situation of trans people in Belgium, an average of 42,4% of the respondents to the survey wanted to have children, Joz Motmans, *Being Transgender in Belgium*, 2010, p.93. Also see Light et al., *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning in Obstetrics & Gynecology*, 2014 <http://www.ncbi.nlm.nih.gov/pubmed/25415163>

⁵⁷ See for example the case of Thomas Beatie, a trans man who gave birth to three children, which ended up before the Arizona Court of Appeal (*Beatie v. Beatie*, 2014 Ariz. App. LEXIS 156, 2014 WL 3953199 Arizona Court of Appeals, August 13, 2014); or the case currently heard by the German High Court of Justice on the refusal of a Berlin civil registry to enter a trans man who gave birth in 2010 as father and with his male name in his child's birth certificate. (Superior Court of Justice of Berlin, decision from 30 Oct 2014 - 1 W 48/14).

⁵⁸ For example, Denmark amended the Health Act and the Act on assisted reproduction, exchanging the word "woman" (where relevant) with "pregnant" and "the pregnant person", upon removing sterility as a criteria for legal gender recognition: <http://www.ft.dk/samling/20131/lovforslag/1189/index.htm>. Also see Anna Śledzińska-Simon, *Transgender Rights on the Move: Towards Recognition and Gender-Neutral Definition of Parenthood*, in Schuster, Casonato (eds.) *Rights on the Move: Rainbow Families in Europe – conference proceedings*, 2014, p. 311-326.

⁵⁹ The FRA Survey, p.127.

existing research published in the USA in 2014 found that between one quarter and one half of transgender people reported being parents.⁶⁰ In studies that asked transgender parents about their relationships with their children, the vast majority reported that their relationships are good or positive generally, including after “coming out” as transgender or transitioning. Finally, studies on the outcomes for children with transgender parents have found no evidence that having a transgender parent has an impact on any developmental milestones.⁶¹

c) Irreversibility and appearance

22. In addition to linking legal gender recognition to certain medical requirements, French courts require claimants seeking legal gender recognition to prove that bodily changes occurring as a result of medical treatment (including surgery) are irreversible and/or achieved the appearance of the gender they seek to live in accordance with. The requirement of irreversibility is predicated on an assumption of harm should a person switch between genders more than once, that however has never been properly explained. Population registrars should primarily be concerned with keeping accurate records, including by recording changes with respect to names and gender markers, which reflect, lived reality.⁶² Research demonstrates changes of mind are very unlikely, and are usually the result of societal discrimination, especially of non-binary gender identities.⁶³ Furthermore, fluctuations in a person’s gender identity may happen anyway, regardless of whether they have had surgery or not. The irreversibility requirement is sometimes justified by a concern that a feigned trans identity may be misused for criminal purposes. However, this assumed risk has also never been properly substantiated.

23. To the extent that the concern with the gendered appearance of the person is linked to surgical requirements, it lacks any conceivable public interest justification as the body parts that change as a result (genitalia, breasts) are in any event hidden from the public. Appearance is sometimes related to the concern that surgery results in genitalia that are functional (*i.e.* a vagina that can be penetrated). This too is an impermissible interference of the state with intimacy, and stands in contrast with the fact that marriage for instance is not premised on consummation.⁶⁴

VI. The proportionality test applied in legal gender recognition cases

24. In its landmark *Christine Goodwin* judgment, the Court restricted access to legal gender recognition to “post-operative transsexuals” and granted State Parties a seemingly all-encompassing margin of appreciation to regulate the applicable procedure. It is respectfully submitted that the Court should revisit this approach in

⁶⁰ Rebecca L. Stotzer, Jody L. Herman, Amira Hasenbush, *Transgender Parenting: A Review of Existing Research*, The Williams Institute, 2014: <http://williamsinstitute.law.ucla.edu/research/parenting/transgender-parenting-oct-2014/>.

⁶¹ *Idem*.

⁶² See Mottet, *Modernizing State Vital Statistics...*, cited above fn. 52, p. 413-417.

⁶³ Landén M, Wålinder J, Lambert G, Lundström B., *Factors predictive of regret in sex reassignment*, *Acta Psychiatr Scand.* 1998 Apr; 97(4): 284-9.

⁶⁴ See Harper Jean Tobin, *Against the Surgical Requirement for Change of Legal Sex*, *Case W. Res. J. Int’l L* Vol. 38:2 pp. 417-418, and sources cited therein.

light of subsequent developments and of fundamental inconsistencies that may not have been apparent at the time when *Goodwin* was decided.

25. Sterilization and forced medical treatment constitute drastic interferences with bodily integrity and reproductive rights amounting to a breach of the prohibition of inhuman and degrading treatment under Article 3 of the Convention, among other rights.⁶⁵ In this case, there would be no room for applying the margin of appreciation doctrine, as the right in question is absolute, and does not allow for any exceptions. To the extent that these claims are analyzed under Article 8, the margin of appreciation should be narrow considering among others, the fact that the Court has described the rights at stake as fundamental.⁶⁶ Additionally, the Court has rightly analyzed medical treatment without informed consent as an interference with negative obligations derived from the right to respect for private life under Article 8.⁶⁷ The present cases should be analyzed in the same manner.

26. Furthermore, we note approvingly the continued emphasis by the Court on trends towards greater social recognition and legal protection of trans people's rights, to the detriment of strict adherence to consensus, actual or presumed.⁶⁸ In that respect we note that a relatively large number of states in Europe are in ongoing breach of the Court's *Christine Goodwin* judgment, since they lack any procedures for legal gender recognition. These states should not be taken into consideration for the purpose of defining the consensus applicable in the area of legal gender recognition, should such consensus be deemed relevant.⁶⁹

27. The French approach of leaving courts a wide margin of discretion in deciding the specific medical requirements that trans people have to fulfill in order to achieve legal gender recognition stands in stark contrast with recent reform in many countries across Europe, setting out in a rigorous manner the applicable criteria and procedures, as well as with the Council of Europe-sanctioned standard that legal gender recognition procedures be "quick, transparent and accessible."⁷⁰ Furthermore, the criteria for legal gender recognition applicable in France have proven fundamentally unstable in practice, resulting in a wide discrepancy of treatment in similar cases. For example, whereas courts in some cases have insisted on very strict surgical requirements for approving legal gender recognition requests, in other cases requests have been approved "solely" based on evidence that hormonal treatment had been undertaken.⁷¹ Besides undermining the rationale for medical requirements attached to legal gender recognition, this diverse practice suggests that the interference with the right to private life also fails the "in accordance with the law" test under Article 8§1.

⁶⁵ See for example the Special Rapporteur on Torture report 2013, cited above at fn. 33.

⁶⁶ See above §7.

⁶⁷ *M.A.K. and R.K. v. the United Kingdom*, nos. 45901/05 and 40146/06, § 75, 23 March 2010.

⁶⁸ See for example *Y.Y. v. Turkey*, cited above, §108.

⁶⁹ See per a contrario *Hämäläinen v. Finland* [GC], no. 37359/09, § 73-74, ECHR 2014; also on this aspect, Constantin Cojocariu, *Hämäläinen v. Finland: A Story of Illusory Consensus and Lesser Families*, 6 January 2015 at <http://pedreptvorbind.blogspot.co.uk/2015/01/hamalainen-v-finland-story-of-illusory.html>.

⁷⁰ *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*, 31 March 2010, §21.

⁷¹ Amnesty International, *The state decides who I am. Lack of legal gender recognition for transgender people in Europe*, Chapter on France, pp. 49-57

VII. Relevant developments

28. In Europe there has been a clear trend recently towards simplifying legal gender recognition procedures, including by abandoning sterilization and/or other medical pre-requisites. Significantly, laws adopted in Malta (2015),⁷² Denmark (2014)⁷³ and in Ireland,⁷⁴ are based entirely on a self-determination model, without any medical prerequisites or the need to obtain a diagnosis.⁷⁵ Similar proposals are on the table in Norway,⁷⁶ Finland⁷⁷ and Sweden⁷⁸. Legislation adopted in the Netherlands (2014),⁷⁹ Sweden (2013),⁸⁰ Croatia (2012)⁸¹ and Portugal (2011)⁸² no longer includes any hormonal treatment, surgery or sterilization requirements, although it retains certain medical certification requirements. High courts in Germany,⁸³ Austria,⁸⁴ Sweden,⁸⁵ and, very recently, in Ukraine⁸⁶ and Italy,⁸⁷ delivered landmark judgments disallowing surgical pre-requisites to legal gender recognition. On 22 April 2015, the Parliamentary Assembly adopted a comprehensive resolution calling states to “adopt quick, transparent and accessible legal gender recognition procedures, based

⁷² The Gender Identity, Gender Expression and Sex Characteristics Act 2015, <http://tgeu.org/gender-identity-gender-expression-sex-characteristics-act-malta-2015/>.

⁷³ L 182 Motion to amend the Act on the (Danish) Civil Registration System, http://tgeu.org/Denmark_amendments_to_Civil_Registry_Act (in English)

⁷⁴ The Gender Recognition Bill was adopted on 22 July 2015, see <http://www.teni.ie/news-post.aspx?contentid=1409>.

⁷⁵ For a critique of the psycho-diagnostic and the involvement of psychiatry and psychotherapy in legal gender recognition processes, see Anette-Kathrin Güldenring, *Zur „Psychodiagnostik von Geschlechtsidentität“ im Rahmen des Transsexuellengesetzes*, in *Z Sexualforschung* 2013; 26; pp. 160 – 174.

⁷⁶ See <http://tgeu.org/norwegian-expert-group-publishes-progressive-gender-recognition-recommendations/>.

⁷⁷ The final report of the expert group of the Finnish Social and Health Ministry (in Finnish): *Sosiaali- ja terveystieteiden tutkimuskeskuksen loppuraportti Sukupuolen oikeudellisen vahvistamisen edellytykset*, available at <http://stm.fi/julkaisu?pubid=10024/125997>.

⁷⁸ A Swedish Government inquiry report has been published on January 22, 2015: <http://tgeu.org/?p=3205>.

⁷⁹ See Human Rights Watch, *Europe: Progress for Transgender Rights*, 24 June 2014, <https://www.hrw.org/news/2014/06/24/europe-progress-transgender-rights>.

⁸⁰ See the Act (1972:119) concerning recognition of gender in certain cases, at: <http://tgeu.org/sweden-gender-recognition-act-reformed-2012/> (in English).

⁸¹ State Registries Law, 2013, Article 9a: <http://www.zakon.hr/z/603/Zakon-o-drzavnim-maticama>.

⁸² See Law No. 7/2011 of 15th March 2010, at: <http://tgeu.org/portugal-gender-identity-law/> (in English).

⁸³ Federal Constitutional Court, 1 BvR 3295/07, 11 January 2011, <http://tgeu.org/german-federal-court-verdict-on-forced-sterilisation-2011/>.

⁸⁴ *Verwaltungsgerichtshof* [High Administrative Court], 2008/17/0054, 27 February 2009.

⁸⁵ Stockholm Administrative Court of Appeal, Judgment 2012-12-19, Case no. 1968-12, <http://tgeu.org/administrative-court-of-appeal-in-stockholm-on-sterilisation-requirement-in-gender-recognition-legislation-19-dec-2012/> (in English).

⁸⁶ On 21 July 2015, the Kyiv Administrative Court established that a refusal to undergo genital surgery cannot constitute a lawful reason for withholding legal gender recognition, see <http://www.insight-ukraine.org/vyigrano-ocherednoe-sudebnoe-delo-o-smene-dokumentov-transgendernym-chelovekom/>.

⁸⁷ Supreme Court of Cassation, I civil section, no 15138, 20 July 2015.

on self-determination”, including by “abolishing sterilization and other medical requirements such as a mental health diagnosis.”⁸⁸

29. Similar trends are in evidence outside Europe, too. Over the past couple of years, five Canadian territories and provinces reformed their policy on changing the gender marker in birth certificates, by abandoning any surgical requirements.⁸⁹ At the national level, in 2015 Citizen and Immigration Canada (a governmental agency) also dropped the surgery requirement previously in place for the purposes of changing their gender marker on their citizenship certificate.⁹⁰ In the United States, nine states have recently modernized their birth certificate policies, including by removing surgical requirements.⁹¹ The U.S. Department of State had clarified as early as 2010 that “sexual reassignment surgery is not a prerequisite for passport issuance.”⁹²

⁸⁸ Parliamentary Assembly, *Discrimination against Transgender people in Europe*, Resolution 2048(2015).

⁸⁹ Ontario (2012), British Columbia (2014), Alberta (2015), Manitoba (2015), Nova Scotia (2015). Developments in Ontario (*XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 (CanLII)) and Alberta (*C.F. v. Alberta (Vital Statistics)*, 2014 ABQB 237 (CanLII)) were prompted by court rulings striking down the surgery requirement.

⁹⁰ According to information at <http://www.cic.gc.ca/english/resources/tools/cit/admin/id/gender.asp>.

⁹¹ Wyoming, New York, Washington (2008), California (2011), Oregon, Vermont (2011) Hawaii, Connecticut, Maryland (2015). State-by-state information on birth certificate policies and details of recent reform are available here: <http://transequality.org>.

⁹² See U.S. DEPT ST., 7 FOREIGN AFF. MANUAL 1320 app. M(b) (2011) at <http://www.state.gov/documents/organization/143160.pdf>.