



**2nd
Revised
Version**

TOOLKIT

Legal Gender Recognition

IN EUROPE

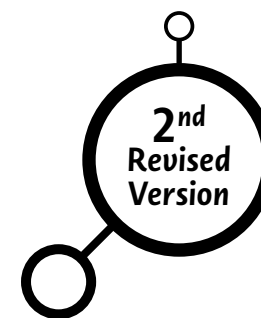
Richard Köhler • Julia Ehrh
With a jurisprudence section compiled
by Constantin Cojocariu
November 2016

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IMPRINT

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The present document has been created with the greatest care, but it cannot claim to be complete. Please send feedback and suggestions for amendments to tgeu@tgeu.org

While the toolkit aims to provide information and inspiration regarding legal questions pertaining to legal gender recognition, it is strongly recommended that you seek professional counsel before taking legal action in concrete cases.



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INTRODUCTION

TO THE SECOND REVISED EDITION

The European legal gender recognition landscape has changed dramatically since the first edition of the toolkit “Legal Gender Recognition in Europe”. Since 2013, eight more states now have procedures in place enabling a person to adapt their official records and documents, with four out of the 41 states which have such provisions basing their procedures on self-determination. In 2015, the Parliamentary Assembly of the Council of Europe welcomed the emergence of a right to gender identity, which gives every individual the right to recognition of their gender identity. We have witnessed a paradigm shift from medicalised procedures to a generation of laws with human rights as major yardstick.

Gender recognition procedures are important non-discrimination measures, giving legal and social recognition to a trans person’s gender identity. Europe now has a first generation of laws – informed by trans community organisations – that are built on individual self-determination and are thus breaking with a tradition of gatekeeping and patronising. Malta, Ireland, Denmark and Norway set the path when they listened to trans people and established quick, transparent and accessible procedures based on self-determination. We are proud that the first edition of this toolkit assisted Maltese and other policy makers across the continent to shape progressive legislation. The changed legal situation as well as the manifold practical applications of the toolkit called for an overhaul of the publication – to reflect recent experience in the field.

We also wanted to put more emphasis on community members who might be facing extra challenges, such as minors, detainees, refugees and migrants, persons with disabilities, or those with a non-binary gender identity.

The first part discusses the basic aspects of gender recognition legislation as flowing from international and European human rights obligations, including updates from recent developments in legislation and jurisprudence. The new section on implementation discusses further aspects flowing out of accessible legal gender recognition. The completely reworked and updated section on jurisprudence presents European and a selection of national level case law. In addition to the Argentinian framework, the Maltese gender recognition legislation is discussed in detail as good practice. The

refined Checklist on Legal Gender Recognition continues to be a hands-on tool assisting in assessing any legislation or draft legislation with basic human rights requirements. The section on mythbusters has been extended and reworked. Finally, the full texts of the Maltese and Norwegian Gender Recognition laws are available in English in the Annex.

Chapters are written in self-contained manner, so that they can be read independently from each other. This might lead to some overlap.

We hope that this toolkit will support and inspire trans rights activists and others working professionally on the topic to strive for even better laws, to the benefit of trans people across the continent and beyond.

FACT SHEET LEGAL GENDER RECOGNITION

WHY LEGAL GENDER RECOGNITION?

Identification documents reflecting one's genuine self are elementary for everyone. Without a set of matching documents such as a passport, ID-card, social security number or bank card, basic transactions and participation in society become very difficult. For many trans people, the gendered information in these documents, including name, gender marker or a gendered digital code, is a constant source of discomfort and trouble, and triggers discrimination and sometimes violence. Whenever an individual has to show ID, presenting these documents means having to come out as transgender, even in very inappropriate situations, which can spark humiliation, discrimination and violence. Of particular concern is that placement in hospitals, asylum facilities or detention depends in most countries on the gender marker. The consequences of being placed in the wrong ward can reach from discrimination in access to care, to threats to the life and safety of the individual concerned. Additionally, trans people are often suspected of fraud and using falsified documents.

A person's gender identity is "one of the most intimate areas of a person's private life", says the European Court for Human Rights (ECtHR).¹ For many trans people, not having matching ID documents means having their gender identity constantly dragged into the public sphere. Can you imagine being harassed every time you try to travel, open a bank account, start a new job or file a complaint?

"Not having a correct birth certificate highlights the total lack of respect, human dignity and inequality evident among the transgender community in Ireland. The constant fear of being outed on official documentation is horrendous. To have to explain something so private and personal and intimate is very upsetting, unnecessary and almost inhumane. I am not looking for special treatment, I am looking for equal treatment." (Trans person, Ireland)²

73% of trans respondents to an EU-wide survey expressed the belief that easier gender recognition procedures would allow them to live more comfortably as transgender people.³ Fortunately, public

approval is increasing: 63% of respondents to a representative EU-wide survey thought that trans people should be able to change their civil documents to match their gender identity.⁴

WHAT IS LEGAL GENDER RECOGNITION?

Legal Gender Recognition is the official recognition of a person's gender identity, including gender marker and name(s) in public registries and key documents. The European Court of Human Rights has repeatedly ruled on gender-identity recognition and its conditions, strengthening the human rights of trans people, namely privacy, the right to a fair trial and the right not to be discriminated against.

Transgender or trans people have a gender identity that is different from the gender assigned at birth. This includes people who might or might not undergo gender reassignment, as well as those who prefer or choose to present themselves differently from the expectations of the gender assigned to them at birth.

Gender identity refers to 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 cho-

sen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. (Yogyakarta Principles)

Cisgender or cis people have a gender identity that corresponds with the gender assigned at birth.

OVERVIEW LEGAL GENDER RECOGNITION IN EUROPE

"Quick, transparent and accessible" procedures⁵ "based on self-determination"⁶ are European standards as established by the Council of Europe and must be implemented by member states. At the time of writing, it is possible to adapt one's identity documents in 41 states in Europe, but only 30 states have robust legal procedures in place. Out of these, 21 states require sterilisation; 22 states require a married person to divorce; 34 states have age restrictions in place limiting minors' access to these laws. Only 4 states do not request a 'Gender Identity Disorder' diagnosis or psychological opinion (Malta, Denmark, Ireland, Norway). Trans people's existence is de facto not recognised in 8 states, as these do not provide for any recognition procedure.⁷

At the moment, however, other requirements may include a mandatory diagnosis of mental disorder, medical treatment and invasive surgery, assessment of time lived in the person's gender identity, being single (that means having to divorce if married) and having reached a minimum age. TGEU believes that all these requirements are unnecessary and violate human rights such as the right to dignity, physical integrity, the right to form a family and to be free from degrading and inhumane treatment, and from discrimi-

nation, of trans persons in Europe. Ideally the declared self-determined gender identity of the person would be enough for a change of all official documents including the birth certificate.

“Transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation.” (Council of Europe Commissioner for Human Rights Thomas Hammarberg 2009⁸)



BASIC STANDARDS IN LEGAL GENDER RECOGNITION

The European Court of Human Rights established unequivocally a positive obligation for European states to provide for legal gender recognition (ECtHR)⁹. However, in regard to the practical implementation of this obligation, it is necessary to carefully assess procedures to ensure that they are compatible with human rights. This section assists decision makers, practitioners and activists alike in reforming or introducing gender recognition legislation by

- explaining guiding principles for the design of procedures, requirements or effects of a law,
- providing information on established case law and the relevant human rights framework,
- and flagging commonly known issues.

POSITIVE OBLIGATION

Without name and gender recognition, trans people are revealed as trans in all aspects of life. This is particularly true if official documents such as ID cards, passports, social security cards or driving licenses do not match the (gendered) appearance of an individual. But also other certificates or documents such as school and university degrees, job refer-

ences, health insurance-, credit- and bank cards, student ids etc. can also become a source of daily trouble. Incongruent papers are a recurring problem for trans people trying to find a job. For instance, if Mr. Ben Smith's diploma still refers to Sarah Smith, Mr. Smith might have to explain the discrepancy to a future employer instead of debating skills and qualifications. Equally, boarding a plane, crossing borders or a personalised reduction card or public transport pass can become a source of ridicule and discrimination, and may sometimes even lead to violence. 30% of trans people report discrimination in situations where they had to present official ID.¹⁰ Students and parents of young trans persons often report that universities, schools and kindergartens refuse to respect a student's gender identity without officially changed documents. As a result teachers might deadname the person, that is, use the old name and gender of the person intentionally, and thus harm the student's sense of self-agency and potentially support harassment and bullying by peers.

School or university records and diplomas displaying the old name potentially impact negatively on future careers.

Stigmatisation is engrained in every aspect of life, often resulting in the trans person's exclusion from meaningful participation in social and economic life.

The aim of gender recognition legislation must therefore be to protect individuals' right to private life as guaranteed by the "Right to Private and Family Life" of the European Convention on Human Rights, (ECHR) Article 8. ECtHR ruled that Council of Europe Member States must provide for the possibility of legal gender recognition.¹¹ The court held as well that regulations in place need to respect the right to a fair trial, i.e. it must be possible to fulfil any set requirements in the given country. General regulations lacking concrete implementation rules resulting in dysfunctional processes are therefore unacceptable.

Two important Council of Europe documents need to be mentioned that have strengthened the positive obligation for LGR as well as a review of requirements in national implementation:

- the Parliamentary Assembly of the Council of Europe resolution 2018 (2015) "Discrimination against transgender people in Europe"¹² and the Committee of Ministers Recommendations (2010) on measures to combat discrimination on grounds of sexual orientation and gender identity.¹³

- The PACE resolution 2048 was adopted in April 2015. The parliamentarians expressed their concern about the "violations of fundamental rights, notably the right to private life and to physical integrity" in regard to gender recognition. Condemning medical preconditions, administrative burdens and additional requirements, the resolution hails recent reforms in states introducing self-determination and "welcomes, in this context, the emergence of a right to gender identity, first enshrined in the legislation of Malta, which gives every individual the right to recognition of their gender identity and the right to be treated and identified according to this identity." The Assembly consequently sets out the standards for legal gender recognition in Europe calling upon member states to:

"6.2.1. develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents; make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record;

6.2.2. abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognise a person's gender identity in laws regulating the procedure for changing a name and registered gender;

6.2.3. remove any restrictions on the right of transgender people to remain in an existing marriage upon recognition of their gender; ensure that spouses or children do not lose certain rights;

6.2.4. consider including a third gender option in identity documents for those who seek it;

6.2.5. ensure that the best interests of the child are a primary consideration in all decisions concerning children;"

The Committee of Ministers Recommendations (the Recommendations) from 2010 are based on case law of the European Court of Human Rights at that time, interpreting the European Human Rights Convention *inter alia* on gender recognition procedures. The standards defined within are hence binding for all Council of Europe member states. The Recommendations have been supported by all Council of Europe member states at the time of adoption.

Paragraphs 20–22 of the Recommendations' Annex specify minimum standards regarding gender recognition legislation:

- "20. Prior requirements, including changes of a physical nature, for legal recognition of gender reassignment, should be regularly reviewed in order to remove abusive requirements.
- Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.
- Member states should take all necessary measures to ensure that, once gender reassignment has been completed and legally recognised in accordance with paragraphs 20 and 21 above, the right of transgender persons to marry a person of the sex opposite to their reassigned sex is effectively guaranteed."

PROCEDURE

According to the Council of Europe, gender recognition procedures should be “quick, transparent and accessible” (Paragraph 21 LGBT Recommendations CM 2010(5) and “based on self-determination” (PACE 2048(2015) 6.2.1.)). Both the procedures for and effects of the gender recognition process must respect the right to a fair trial and the right to privacy. It is of less importance which form the law takes, as long as it serves the purpose of establishing a practically accessible legal right. The ECtHR requires that the rights of trans people are upheld effectively, such that the “Convention[ECHR] is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory”.¹⁴

Quick: The time span between applying for and being granted recognition should be as short as feasible. The time component is often highly relevant for the applicant. Extending the period unnecessarily is cruel, as the trans person’s right to privacy keeps on being violated for the duration of the proceedings. The right to a fair trial is not respected if the length of the pending case is excessive, e.g. if a decision has still not been made four years after the case began.¹⁵

Requirements might in themselves trigger lengthy procedures. Some countries require a minimum time span of two years of psychological supervision before a mandatory mental health diagnosis can be established, and thus violate the rights to privacy and a fair trial. The ECtHR ruled against rigid rules and in favour of individual assessments.¹⁶ Such pre-phases need to be included in a time analysis of the overall process.

For instance the Portuguese law¹⁷ establishes that a decision has to be given within 8 days after the application. However, since a mental health diagnosis is necessary the actual waiting time is considerably longer. According to the Maltese Gender Identity, Gender Expression and Sex Characteristics Act [GIGESC Act] the process may take not longer than 30 days from application (notary letter) to the change in the registry. No further medical pre-conditions have to be fulfilled.

Transparent: The legal provision needs to prescribe a clear procedure on how to change the name and recorded sex. This includes clarification on how the law should be implemented and which bodies are responsible, e.g. to which institution an

application needs to be addressed. Clarity in language is important as it avoids legal uncertainty for applicant and authorities dealing with gender recognition.

Costs and requirements for the individual and appeal procedures must be clear from the text in order to avoid legal uncertainty.

Accessible: It is important to pay attention to practical aspects and ensure that no barriers are in place that might render a procedure inaccessible. Accessibility needs to be ensured for all trans people who seek it, independent of gender identity or a non-binary identity, the person’s medical, age or other status (e.g. disability). Also, if a trans person cannot fulfil certain requirements for age, religious, health or other reasons, they shall not be barred from having their gender identity recognised.

Accessibility criteria also apply to prerequisites and other indirect aspects, which might not be visible in the texts. For instance, costly court or administrative procedures may pose significant economic barriers to gender recognition. For a positive example, the complete process in Ireland takes less than two weeks and generally costs less than €50. In Argentina, gender recognition is free.

Accessibility also extends to repeated requests for gender recognition and should not pose additional barriers to a person’s free development of their gender identity.

Furthermore, no degrading procedure may be implicitly or explicitly required. For example, an implicit degrading procedure could be where the legal text refers merely to a medical opinion, but this opinion is only available after a mandatory institutionalisation in a psychiatric ward. Mandatory, non-therapeutic institutionalisation to satisfy an administrative rule can be seen as degrading treatment. Resolution 2048(2015) calls upon member States to “abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis” (6.2.2) in legal gender recognition, and the Committee of Ministers call for a review of laws to remove “abusive requirements” (Rec CM 2010(5)). For more details on requirements, see the next chapter.

PRIVACY PROTECTION

The essential function of a gender recognition procedure is to protect the individual’s right to privacy. This protection relates to outcomes and effects (changed documents and registries) as well as to the procedure itself. To this end, it shall

be foreseen that a person who has acquired information about an individual's gender recognition in an official capacity must not disclose the information. (See for instance data protection provisions in Article 12 of the Maltese GIGESC Act). This applies irrespective of whether this person acquires the information as a holder of a public office or in connection with the functions of a local or public authority or a voluntary organisation, an employer or prospective employer, or otherwise in connection with, the conduct of business or the professional supply of goods or services. The UK Gender Recognition Act 2004 is very detailed in this regard. Deliberately breaching a person's privacy in relation to the Maltese GIGESC Act is an offence, punishable with a fine of 1,000€ – 5,000€ (GIGESC Act Art 11.1).

It is useful to introduce automatic and full protection against disclosure in the law so that no third party may find out that a person is in the process of obtaining, or has obtained, legal gender recognition. This should relate to all decisions, registries and documentation of the procedure. Introducing an automatic mechanism is sensible, as the individual might not be aware of all places where gendered information is registered. Access to registries needs to be limited to those with a legitimate legal interest.

FAIR TRIAL

Applicants have a right to a fair trial (Article 6 European Convention on Human Rights), no matter whether procedures are handled by an administrative body or a court. This extends to the right to be heard¹⁸ by a competent, independent and impartial tribunal, the right to a public hearing,¹⁹ the right to be heard within a reasonable time, the right to counsel and the right to (language) interpretation.

Equality before the law also needs to be ensured for those with limited economic costs by providing legal aid and making this information widely available. Policy makers opting for a court procedure need to ensure that legal gender recognition cases are eligible for legal aid. Legal aid needs to include cost coverage for legal representation, any mandatory medical procedures and statements, travel costs and compensation for time off work etc. if necessitated by the legal procedure. Rates must be sufficient to ensure quality legal representation and medical expertise.

The right to a fair trial also includes the right for persons in detention to access gender recognition procedures and information about them.

The applicant cannot be requested to prove that they did not "cause" being

trans- gender themselves, e.g. through unsupervised hormonal treatment.²⁰ The ECtHR stated that to date no reliable information is available on what causes being transgender.²¹ In decisions on gender recognition, this also means that experts' opinions, e.g. from medical professionals, may not be ignored or dismissed and replaced by ex officio judicial opinions, or opinions based on stereotypes.

The right to a fair trial also includes applicants' right to have their cases handled swiftly and to challenge excessive procedural delays. It includes the right to appeal, that is, to have a higher court review the decision.

Self-determination and self-declaration

A person's declaration of their gender identity, for the purpose of obtaining gender recognition, should not require validation by a medical expert, judge or other third party. It is legitimate to require proof of the originality of the statement, but not of its contents.

CHANGE OF NAME

While the European courts did not yet rule on trans-related name change procedures, the ECtHR dealt with national rules on how a person's name is recorded in civil status documents in Garcia Avello (C-148/02); Grunkin and Paul (C-353/06), and Sayn-Wittgenstein (C208/09). After all, "a person's name is a constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the Charter [...] and in Article 8 of the [ECHR]".²²

Change of name, including gendered family names, should be possible separate from change of legal gender in order to better accommodate the wide range of gender identities. Some trans people might not need a name change as they identify with the names they have, or they have been given androgynous names. Those trans people who do not seek gender marker changes should not be excluded from having their names recognised. Generic non-trans-specific name change procedures are acceptable alternatives if they

- ensure privacy protection (no one can find out a previously used name),
- allow for the use of gender neutral names and names that might signal a different gender from the gender marker and
- are quick, transparent and accessible.

CITIZENS LIVING ABROAD AND RECOGNITION OF FOREIGN PROCEDURES

For citizens living abroad, it is essential to ensure that access to the procedure does not require physical presence in the state of origin. The official change or provision of new documents to citizens shall be accessible either through application by (electronic or analogue mail) or through the country of origin's embassy in the state of residence. In times of increased mobility and globalisation, international compatibility of gender recognition legislation is gaining in importance and foreign decisions should be recognised in a non-bureaucratic manner. In particular, EU member states need to have provisions in place ensuring that their citizens and residents are not impeded in accessing their EU right to free movement because a gender recognition decision is not recognised in another member state.

FOREIGN RESIDENTS, MIGRANTS, ASYLUM SEEKERS AND REFUGEES

Procedures need to be accessible for people residing in a state as well as for migrants, asylum seekers and refugees. This is of particular relevance for persons who originate from states, which do not provide for legal gender recognition or in which it is impossible or very impractical to seek legal gender recognition.

If legal gender recognition procedures are limited to citizens of a country, trans asylum seekers and refugees are often left in a limbo where they are not recognised for who they are where they live and are not able to obtain gender recognition in their home country. Trans migrants are particularly vulnerable to becoming targets for transphobic offences and violence.²³ ID documents in the state of their current residence reflecting their gender identity are key for social integration, for access to the job market, for settling down and, if need be, for turning to law enforcement in case they are targeted because of their gender identity. Besides these practical aspects, protection of private and family life as established by the European Convention on Human Rights extends to all persons living on the Convention's territory and should not be interpreted as excluding those seeking international protection.

For refugees, it is often not possible to obtain LGR in their home country, as similar proceedings might not exist, being trans might be prosecuted, requirements are not human rights compatible, or the trans person cannot return and complete the procedure.

Recognising the gender identity of asylum seekers and refugees early on can

help reduce transphobic violence and discrimination that might be directed at them by staff or other refugees in asylum facilities. It is psychologically stabilising to recognise and respect a person's gender identity, when that person has been traumatised in their home country or during their journey to Europe because of their gender identity or gender expression.

TGEU suggests enabling trans asylum seekers to have identity documents from early on, reflecting name and gender marker in line with their gender identity. This recognition should be intermediary and be based on the declaration of the asylum seeker (affidavit), lasting at least for the duration of the asylum procedure. If the asylum claim is granted, national gender recognition procedures should be accessible to the refugee. If the claim is denied, related documents should be issued in such a way that they would not out their carrier to authorities in their country of origin etc. In no case should a trans person's refusal to have their documents adapted be taken as a reason to refuse asylum or question their trans identity, as this might be due to security concerns. Such immediate yet time limited recognition would contribute to the privacy and security of asylum seekers and refugees, and contribute to their arrival and social integration. On the long run, it is impor-

tant that national LGR procedures are accessible for refugees as for any other long-term residents. Requirements such as having to produce a birth certificate or a proof of single civil status, should be handled flexibly, taking into account that issuing authorities in their country of origin might be hostile or inaccessible due to crisis, war or distance. In the Netherlands, applicants who do not have a Dutch birth certificate but have lived there legally for at least one year have to follow this procedure via the civil registry of The Hague where foreign birth documents can be signed into the Dutch Key Register with a substitute document.²⁴ Such a procedure should also be made available to migrants and residents of foreign descent.

BENEFITS OF CLEAR LEGISLATION

The transparency and accessibility of a law also depend on its readability. Policy makers should thus strive for easy-to-understand, non-ambiguous language.

In countries without explicit laws but with established practice or case law, hesitation about initiating legislative change may arise. There are several drawbacks to not encoding gender recognition procedures, however. Most importantly, the applicant has no "right"

Legal Gender Recognition Cases (1990 – 2015)

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to claim gender recognition. In the case of delays or negative decisions, the legal basis for an appeal is lacking. The right to a fair trial also includes the need to outline the possibility of appeal. Further consequences of inadequate legislation might be increased length and thus cost of a procedure, which strains both the individual and the public authorities. Vague requirements or regulations whose implementation is unclear open the possibility of abuse. Extensive legal actions might be necessary as a result, in order to clarify the matter. For political reasons, however, it might not be advisable to advocate for a law. In Switzer-

land, for instance, a public vote would be necessary to pass such a law, potentially exposing the trans community to hostile debates around the matter.

The positive effects of clear legislation are well documented. More than twice as many gender recognition cases (45) were registered in the first year of the Maltese GIGESC Act than in the eleven years before (21 cases).²⁶ 15 times more people had their gender identity recognised in the first three years of the Spanish law.²⁷ Between 2007-2013 61 gender recognition decisions were handed out by Danish authorities (upon

proof of castration), whereas 263 cases had been decided in the 12 months after the enactment of the new law (2014).⁸ Nearly 1.500 individuals changed ID in the first year of the Argentinian Gender Identity Act.²⁹

PROCEDURE – CONCLUSIONS

European states have a positive obligation to provide legal gender recognition. In order to comply with European standards on gender recognition legislation, policy makers need to ensure procedures are quick, transparent and accessible and based on self-determination. While the form of the procedure might be secondary, it has to deliver practical and effective results that protect the trans person's right to privacy. Ideally, the procedure is a simple, administrative and non-medical procedure enabling a person to change their records and documents as quickly as possible.



REQUIREMENTS

PRINCIPLE OF NO CONFLICT

It is essential that a legal procedure does not create a conflict between the individual's human right to legal gender recognition (protection of private life) and other fundamental rights (e.g. human dignity, physical integrity, being free from torture, a fair trial, etc.). European states define, in their legislation or through practice, the criteria an individual has to meet before being able to change their name or registered gender. Often these requirements run counter to a person's human rights, in that person's private life, self-determination or health-care choices. The ECtHR ruled in this respect that states have a margin of appreciation on what they can require, but also that the requirements should take into account "scientific and societal developments" (Goodwin & I v. UK). In 2015 the Court reiterated the "uncontested evidence of a continuing international trend in favour of increased social acceptance" of trans people and legal gender recognition.³⁰ For the Council of Europe "Irreversible sterilisation, hormonal treatment, preliminary surgical procedures and sometimes also proof of the person's ability to live for a long period of time in the new gender (the so called 'real life experience')"³¹ are seen

as abusive requirements. Domestic laws "should be regularly reviewed in order to remove abusive requirements".³² The European Parliament repeatedly requested procedures "for changing identity to be simplified"³³, encouraging states "to introduce quick, transparent and accessible legal gender recognition procedures that are based on the person's self-determination ... Sterilisation requirements should be treated and persecuted as a breach of the right to bodily integrity and of sexual and reproductive health and rights."³⁴ For the time being, the Standards of Care (SoC) Version 7,³⁵ developed and published by the World Professional Association for Transgender Health (WPATH) outline the actual state-of-the-art treatment for trans people. WPATH emphasises that transgender identities and expressions are not pathological or negative, and warns against legal barriers that would harm social transition and "even contribute to trans people's vulnerability to discrimination and violence".³⁶ Policy makers should pay attention to these SoC and strive for procedures that are based on the individual's self-determination, omitting additional proofs and assessments by third parties, e.g. medical or court-ordered experts. Legal aspects of

transitioning and trans-related health-care should be clearly disassociated. Third parties, such as parents (if the applicant is of age before the law), guardians, children, spouses/ partners or work colleagues, should also be excluded.

Further, the Court held that it must be possible for an individual to fulfil the set requirements within the respective state.³⁷ For instance, requesting a proof of gender reassignment surgery without making such treatment available in the country is not legitimate.

In addition to this, delays in the gender recognition process, which might be caused by standardised waiting periods, e.g. when accessing gender reassignment surgery, are not lawful, as ruled in *Schlumpf v. Switzerland* (see as well above). Applying a bureaucratic rule in a rigid manner without regard for the individual's medical needs violates the right to a fair trial. The Court also lambasted the judiciary for substituting its own views for those of a medical expert.

DIAGNOSIS/ MEDICAL OPINION

To date, the majority of official procedures in Europe still require – explicitly or implicitly – a mental health diagnosis. The requirement of a "transsexualism"

or equivalent "diagnosis is either explicitly stated under statutory law, created by interpretation of law, produced by court precedent, or implied, as the diagnosis is a condition for sterilisation or gender reassignment surgeries that are mandatory for legal gender recognition. A psychotherapeutic therapy is rarely explicitly required but is usually needed to undergo mandatory sterilisation or treatments that have the diagnosis confirmed or as a follow-up on the diagnosis."³⁸ As a consequence, many transgender persons who seek gender recognition are unable to obtain it. In particular, this might exclude people with non-binary gender identities.

It is particularly problematic that a person's self-determination is limited by depending on a third party's opinion. 63% of trans respondents in a German study felt that the mental health diagnosis "Gender Identity Disorder" required for gender recognition is a source of significant distress for them.³⁹ "Psychiatric requirements within legal gender recognition proceedings [...] impact [trans people's] lives and violate their human rights: The right to private life (Article 8 of the European Convention on Human Rights ECHR) is infringed through forced medical treatment, through pathologisation and resultant stigmatisation, dependence and heteronomy; the

right to non-discrimination (Article 14 ECHR), and possibly, the prohibition of torture and inhuman and degrading treatment or punishment (Article 3 ECHR).⁴⁰

Transgender and human rights activists in Europe and around the globe advocate that having a transgender identity is not a disease or a marker of ill-health. “The criticism corresponds with the lack of evidence base, the impossibility of extraneous observation of gender identity [...] and the paradoxical double role of psychiatry that evolves from the dependency on receiving a diagnosis to access treatments of legal gender recognition on the one hand and the necessary bond of trust for effective psychotherapy on the other.”⁴¹ A “transsexuality” diagnosis is also built on a gender-binary narrative. This excludes those who do not identify as either gender or who identify as both, but who would still seek to adapt their documents to a gender closer than the one recorded. The World Professional Association for Transgender Health (WPATH) maintains 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”.⁴²

In its beta version of the 11th International Classification of Diseases, the World Health Organization proposes to remove all trans-related diagnoses from the mental health chapter. Instead it suggests a new separate chapter (conditions related to sexual health) that would only include the diagnoses “gender incongruence in adolescence/adulthood” and “gender incongruence in childhood.”³

Involvement of medical personal such as mental health professionals to testify or provide “expert opinions” should be omitted from procedures to increase their accessibility. This has been implemented successfully in new gender recognition legislation in Malta, Denmark, Norway, and in Ireland (for adults). Further, referring to an explicit diagnosis might render the law inapplicable, once ICD11 has been released and applied at national level.

Wherever a diagnosis is required, it is not within a state’s remit to define or assess a person’s gender identity. In this regard, the ECtHR ruled that a medical expert opinion couldn’t be substituted by juridical opinion.⁴⁴ Further, the court held that an applicant couldn’t be requested to prove that they had not caused their trans identity, e.g. by administering hormonal treatment without medical supervision.

Related costs for a medical or third-party opinion must equally be met through legal aid or other financial support. A diagnosis may not be delayed considerably through, e.g. a mandatory period of therapy or period of long waiting times due to a lack of recognised specialists.

Often diagnosis or psychotherapy are said to provide applicants with the chance to reflect upon the consequences of legal gender recognition. To this end, voluntary peer-to-peer psychosocial counselling is preferable to mandatory medical or psychological therapy/counselling. Policymakers should ensure sufficient resources are available for peer-support structures.

REAL-LIFE EXPERIENCE AND PHYSICAL EXAMINATIONS

“Real-life tests” or “real life experience” request that a person present and live over a longer period of time in line with their gender identity, without official documents to support that identity. Such requirements lead to exposure and the risk of discrimination and violence. Also, a person might be required to undergo certain physical examinations to obtain gender recognition. Requiring real life experience and physical examinations as prerequisites for gender recognition is not state of the medical art according

to WPATH’s Standards of Care Version 7, and should be abolished. It is the obligation of member states to respect societal and medical developments as ruled by ECtHR (see above). Again, the principle established in *Schlumpf v. Switzerland* has to be followed: instead of applying a mandatory rule in a rigid manner, consideration has to be given to the individual situation. This is particularly true for persons with a non-binary gender identity, who should not be obliged to “act out” a gender identity that is not theirs in order to fit the assessment of a binary real-life experience.

COMPULSORY MEDICAL INTERVENTION

21 states in Europe require sterilisation as a precondition for a gender recognition procedure.⁴⁵ Coercive sterilisation amounts to a violation of the UN Human Rights Convention’s Article 3, which protects the principles of dignity, individual autonomy and non-discrimination. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment called upon all states to “outlaw forced or coerced sterilisation in all circumstances and provide special protection to individuals belonging to marginalised groups”,⁴⁶ with explicit reference to transgender people. In its concluding observations on Finland,

the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) expressed concern “about the obligation on transgender persons to prove infertility or undergo sterilisation for the legal recognition of their gender” and recommends Finland to “expeditiously amend the Law on Legal Recognition of the Gender of Transsexuals to ensure that gender recognition is carried out without requiring transgender persons to conform to stereotypical ideas of masculine or feminine appearance or behaviour and that it does not require individuals to consent to sterilisation”.⁴⁷ OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO spoke out against forced sterilisation of trans people⁴⁸ as did the World Medical Association.⁴⁹ Demanding endocrinologic or surgical medical intervention (such as hormones, surgery, and sterilisation) “clearly run[s] counter to the respect for the physical integrity of the person”, according to the Council of Europe Human Rights Commissioner.⁵⁰ In a specific report on coercive sterilisation to the Parliamentary Assembly of the Council of Europe (PACE) Rapporteur Pasquier clarifies “even where consent is ostensibly given – also in written form – it can be invalid if the victim has been misinformed, intimidated, or manipulated with financial or other incentives.” In regard to gender recognition

procedures for trans people, the report maintains: “neither forced nor coerced sterilisations or castrations can be legitimated in any way in the 21st century – they must stop.”⁵¹ PACE in 2015 called on member states to “abolish sterilisation and other compulsory medical treatment” in legal gender recognition. xxiii The World Professional Association for Transgender Health Care – WPATH states: “No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person’s lived gender, regardless of reproductive capacity.”⁵³

But also other rights might be affected, such as the right to form a family. “States which impose intrusive physical procedures on transgender persons effectively undermine their right to found a family.”⁵⁴

Requiring medical intervention remains a human rights violation irrespective of whether the individual would want to undergo these procedures voluntarily. These are questions of the individual’s health care, which should not impinge on their ability to update their legal information. Compulsory treatment is also contrary to a person’s free will. An applicant would be forced to choose between the right to physical integrity and the right to

private life. Hence, there is no free will as required by Art. 5 of the Convention on Human Rights and Biomedicine, 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.”⁵⁵ The Council of Europe Commissioner for Human Rights recommended that member states “abolish sterilization and other compulsory medical treatment as a necessary legal requirement to recognize a person’s gender identity in laws”.

In *YY v Turkey*⁵⁶, the ECtHR decided that sterilisation cannot be made a prerequisite for access to gender reassignment surgery. The Court did not yet rule on sterilisation required in gender recognition, a question, which is addressed in three pending cases against France.⁵⁷

The Committee of the European Social Charter is, at time of writing, deciding on a collective complaint that challenges the requirement for sterilisation in the Czech gender recognition procedure as in breach of the right to Health (Article 11).⁵⁸

Currently, 20 countries in Europe have laws or procedures in place not demanding forced sterilisation: Austria, Belarus, Croatia, Denmark, Estonia, France, Germany, Hungary, Iceland, Ireland, Italy, Malta, Moldova, Poland,⁵⁹ Portugal,

the Netherlands, Norway, Spain, Sweden and the United Kingdom. Courts in Austria, Germany, Italy, Moldova, Sweden and the Civil Court of Athens declared the sterilisation requirement to be unconstitutional or to be in breach of the European Convention on Human Rights;⁶⁰ remaining countries have adopted regulations which did not involve sterilisation. Recent years have seen more and more case law, such as in Switzerland or France, where courts have not insisted on demanding sterilisation⁶¹ (see also the section on Compilation of Jurisprudence on Legal Gender Recognition).

FORCED DIVORCE

In countries without equal marriage a married trans person might be asked to divorce prior to legal gender recognition. As with a diagnostic requirement, such a demand can be explicit or implicit, e.g. when a mental health professional only issues a mandatory positive statement once a person gets divorced. 34 countries in Europe require a divorce before fully recognising a trans person’s gender identity.

However, the state obligation to protect existing marital unions has to be taken into account. This is particularly the case in countries where there is no equivalent

to marriage for same sex couples. In any case, gender recognition procedures must not infringe on the rights of a trans person's children and partner. Divorce, dissolution or transferal into a registered partnership (where available) means a loss of acquired rights for family members as well, a situation that must be avoided. The Commissioner for Human Rights demanded that "any restriction on the right of transgender persons to remain in an existing marriage following a recognised change of gender" be removed.

The ECtHR recognised that the divorce requirement leads to "daily situations in which" a trans person "faces inconveniences". However, where an alternative to marriage exists with "almost identical (...) legal protection" and only "minor differences," such as in Finnish registered partnership for same-gender couples, the divorce requirement is not disproportionate.⁶² However, the Court might decide differently if a case related to a country without such an option.

Often, the question of divorce requirement is wrongly conflated with discussions about marriage equality for same-sex couples. In the case of gender-recognition requirements the rights of an already lawfully married couple are at stake.

No forced divorce is required in 19 European countries: Austria, Belgium, Croatia, Denmark, Estonia, France, Georgia, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Romania, Spain, Sweden and Switzerland. German and Austrian Courts⁶³ found the requirement to divorce prior to gender identity recognition to be incompatible with the rights of rightfully married spouses, irrespective of the fact that in both countries marriage is defined as a different-sex union.⁶⁴

The Italian Supreme Court found forced divorce as a consequence of legal gender recognition of one of the partners to be unconstitutional as long as there is no equivalent institution to a marriage guaranteeing substantially the same rights to the spouses.⁶⁵

AGE RESTRICTIONS

The Council of Europe asks member states dealing with minors' gender recognition procedures to "ensure that the best interests of the child are a primary consideration in all decisions concerning children".⁶⁶ Explicit or implicit age restrictions may obstruct this best-interest-principle for young as well as elderly trans people. Such restrictions violate non-discrimination provisions in the Convention on the Rights of the Child

(Art 3.1; Art 8.1; Art 12.1; Art 24 and Art 6.2),⁶⁷ the Yogyakarta Principles,⁶⁸ the European Convention on Human Rights,⁶⁹ case law of the European Court of Human Rights on "Age",⁷⁰ the European Social Charter (ETS No. 35) (Article 23 - the right of elderly persons to social protection) and the EU Fundamental Rights Charter (Art. 21). A life of dignity and autonomy, the right to privacy and the right to be heard and to take an active role in all administrative and judicial procedures that concern them must be provided for minors as well as for persons of age. In the case of minors, their evolving capacities must be taken into account. Thus, a young trans person might not be automatically denied gender recognition on grounds that they are too young. Similar, restricting a person's access for the sole reason that they are above a certain age (e.g. 65 years) should be omitted. This also includes implicit requirements, such as certain medical interventions, which might be available only at the age of majority or only until a certain age. Thus, in the case of a 65-year old trans woman the European Court for Human Rights ruled that applying a two-year waiting time rule overtly strictly failed to take into account the applicant's individual circumstances, namely her advanced age (i.e. 67 years old). The German Constitutional Court followed the argumentation of a trans woman of age that she could

not fulfil the surgery requirement for legal gender recognition due to her age.⁷¹

Lack of consent from parents or guardians should not limit a young person's right to access gender recognition procedures. Maltese and Norwegian legislation⁷² highlight that the best interest of the child is paramount in proceedings concerning children.

Making gender recognition accessible independent of age is becoming more pressing as Europe gets older demographically and as more young trans persons come out at an earlier age. The World Professional Association for Transgender Healthcare – WPATH – confirms that "increasing numbers of adolescents have already started living according to their gender identity upon entering high school"⁷³ and highlights the large number of transgender adolescents showing gender identity continuity throughout adulthood. 88% of young trans respondents (18 – 24 years)⁷⁴ and 83% of elderly trans respondents (55+) in the EU expressed a desire for easier legal gender recognition procedures, as these would allow them to be more comfortable living as transgender people.⁷⁵ The Council of Europe asks member states to provide students with the necessary information, protection and support to enable them to live in accord-

ance with their gender identity⁷⁶ and specifically demands “facilitating the changing of the entry as to first name or gender in school documents” to adequately meet the special needs of transgender students in their school life.⁷⁷

An increasing number of European states open gender recognition procedures for those below age of majority. To date, legal procedures in Malta, Austria, Germany, Croatia, Switzerland and Moldova have no age restrictions in place and are open for minors. In the Netherlands and Ireland 16 year olds can apply for legal gender recognition. In Norway LGR is accessible from age six; between 6 – 16 years parents make the application on behalf of the child; from age sixteen the young person can apply in their own capacity. Norway is the only country where minors access the same procedure as adults in a procedure based on self-determination. The law details the procedure through which, in case of discordant parents or guardians, the request of a minor should be assessed.⁷⁸ Maltese minors from age 16 can use the notarial procedure just as adults. Younger children need to seek LGR through a specific court procedure. In remaining European countries young trans people do not have the right to change their name or gender marker.⁷⁹

PEOPLE WITH A NON-BINARY GENDER IDENTITY

Persons with a non-binary identity often only have the choice either to lie about their (non-binary) gender identity in order to fulfil diagnostic criteria, real-life tests and other requirements, or to be excluded from legal gender recognition. A person with a non-binary identity might still have a legitimate interest in obtaining a certain gender marker, as it would be closer to their gender identity – particularly if there is only a limited choice of male or female – or, for instance, to signal their non-binary identity through a differently gendered name and gender marker. A non-binary gender identity is a gender identity of its own and should not be seen as a phase, confusion or marker of ill-health. According to the LGBT Survey by the Fundamental Rights Agency, 73% of trans respondents did not identify within the gender binary.

Procedures should be set up in such a way that it is not necessary to declare to which gender (identity) said person belongs. Rather, it should be sufficient to state that there is an inconsistency between currently recorded gendered information and the person’s gender identity. Ideally, the procedure also enables the choice of a gender marker different from male or female.

PEOPLE WITH DISABILITIES

Many gender recognition laws have no provisions securing the right of people under guardianship to have their gender legally recognised. Guardianship can become an extra hurdle, as the guardian has to make the effort to ensure LGR for their ward. This can be particularly difficult if the guardian is unhelpful or, if supportive, is constrained in the time and resources needed to support the claim. It is therefore important that a gender recognition law enables access for persons under guardianship to the procedure, having the best interest of the person in mind.

Many trans people might experience mental health issues that are used to obstruct their access to legal gender recognition. A required psychiatric assessment usually expects that people must be free from serious mental health issues before being allowed to access gender recognition. This ignores the fact that many trans people develop mental health problems as reactions to an unsupportive environment. Also, people with disabilities might be disadvantaged by procedures requiring personal appearance before courts, expert committees or regular visits to a medical specialist demanding extra travel. Having to be in full-time work or studies before being able to access the proce-

cedure might also be an obstacle. Since in most countries it is rather difficult to find information about the practical aspects of LGR, with strong research and verbal skills required, people with learning difficulties might be particularly challenged by opaque and complicated procedures. These barriers can already occur in a required medical or diagnostic assessment, hindering the person even when it comes to collecting the necessary documentation to start the administrative gender recognition process.

As a rule of thumb, the more vulnerable the person, the easier and faster procedures should be to protect and support that person’s gender identity and avoid any unnecessary distress.

REQUIREMENTS - CONCLUSIONS

European states can establish requirements for access to gender recognition procedures, however such requirements must not force individuals to trade one human right for another, i.e. create legal dilemma. An individual cannot be hindered in having their gender identity recognised because they lack a mental health diagnosis, have a non-binary gender identity, are married or too young/ too old, or because of another innate personal characteristic.

EFFECTS

When it comes to the scope and effects of gender recognition legislation and its effects, legislation has to make the rights under the European Convention “practical and effective, not theoretical and illusory” (Goodwin & I v. UK). Thus legislation needs to be designed in a way that ensures full legal capacity in “all areas of life”, as requested by the Council of Europe.⁸⁰ Legislation enabling a trans woman to adapt her documents would not be sufficient if said woman was not able to enter – as any other woman – into a marriage.

The Maltese GIGESC Act, for example, specifies that no norm or regulation may limit the right to gender identity and that all norms must always be interpreted in a manner that favours access to this right.⁸¹

Furthermore, legal text cannot be perfect if practical application does not follow the same spirit. To this end, it is necessary to ensure that contradictory legislation is brought in line, or to make provisions for flexible interpretation and/or adaptation of regulations ensuring legal gender recognition can take its fullest effect.

PROTECTION OF PRIVACY

The law and its implementation guidelines must be clear in protecting the privacy of an individual. This privacy requirement relates to the gender recognition procedure itself⁸² as well as to the effects of the law. For instance, whether or not it is possible to rectify a person’s birth certificate. The obligation to rectify birth certificates was established by the European Court of Human Rights in Goodwin & I v. UK. Content and authority of the law need to suffice to make “possible the change of name and gender in official documents” and to ensure “corresponding recognition and changes by non-state actors with respect to key documents”.

This obligation is not limited to states, but also includes non-state actors and also extends to educational and employment certificates, credit cards and other documents. No other law, e.g. freedom of information requests, may be invoked to trump measures for privacy protection without establishing the legitimate interest of such a request.

Registries and documents are to be changed without a trace, linking the change back to gender recognition. Scratching out a previous name on a document and marking a new name on top is not acceptable, as it would constantly reveal the person’s trans background, i.e. violating their privacy. The UK Gender Recognition Act⁸³ is very detailed to this end. The German “Transsexual Law” postulates a specific disclosure ban.⁸⁴ A previous supplier of a document, e.g. an employer,⁸⁵ has to issue a new employment certificate, even if doing so entails additional efforts for the institution. Such reissuance should not make any reference to the fact that the person had their gender recognised.

FULL LEGAL CAPACITY

A recognition procedure has to ensure full legal capacity so that the person can access all rights associated with the confirmed gender. This includes the right to marry according to the legal gender as ruled by the ECtHR⁸⁶ and confirmed by the Committee of Ministers.⁸⁷ Thus, for example, upon being officially recognised as “female” a trans woman should be able to marry a partner who is registered as “male” under the country’s rules for different-gender couples. Also, treating a trans person differently in regard to pension and similar employment-related

rights after LGR may amount to discrimination.⁸⁸ Thus, a trans woman must not be denied access to her pension at the same age as other women, if an age difference exists between women and men. Nonetheless, gender-specific rights and duties should allow for exceptions (equity provisions) where they have the potential to harm trans people, e.g. army conscription for a trans man or where the legally registered gender is not important; or medical check-ups for prostate cancer, which should also be available for trans women with a female gender marker. Also, placement in gendered wards in prison or hospital should take into account a person’s gender identity and not be based on a person’s genitals.

PARENT-CHILD RELATIONSHIPS

Gender recognition legislation may not affect a trans person’s kinship status.⁸⁹ Barring a (legal) relationship or guardian or visiting rights because of a parent’s gender identity amounts to discrimination.⁹⁰ The right of a child to have contact with their parents may not be lawfully limited due to a parent’s gender identity. A child has the right to be cared for by both their parents according to the UN Convention on the Rights of the Child – UNCRC Article 7 (1) and not be separated from them against their will (Arti-

cle 9 UN CRC). Article 18 foresees common responsibilities of both parents for the upbringing and development of the child, while Article 2 guarantees a child the right to non-discrimination.

Legislation needs to ensure that a trans parent who has received LGR is registered on their child's birth certificate in line with their gender identity, independently of whether the child was born before or after the LGR.⁹¹ This means that a trans man should be registered as "father" and a trans woman as "mother". Automatic decisions annulling a trans person's legally recognised name and gender because they biologically reproduced is a breach of their right to privacy, may amount to discrimination on grounds of pregnancy, and can pose threats to the safety of the

family and thus be against the best interest of the child.

Where sterilisation requirements have been removed from gender recognition laws, existing legal provisions should be interpreted in a flexible way to ensure best-possible protection of privacy for the families of trans persons, respecting their gender identity.

EFFECTS - CONCLUSION

Process and outcomes of gender recognition procedures must be set up or interpreted in such a way that they effectively ensure full legal capacity in accordance with the person's recognised gender and protect the private life of the individual.

IMPLEMENTATION

Progressive gender recognition legislation might require changes to other legal fields and stipulate additional policies and regulations adapting other areas, such as hospitals, prisons, schools, statistics or data-collection systems.⁹²

Placement in hospitals, prisons or schools should always respect the person's gender identity⁹³ and not be based on genitals or sex assigned at birth. It is key that staff coming into direct contact with trans people, and staff in administration, are trained in such a way that they treat trans persons respectfully, ensuring their dignity, privacy, and safety. The comprehensive Scottish Gender Identity and Gender Reassignment Policy⁹⁴ focuses on the involvement of a case management conference involving a detained individual and staff training.

Schools and institutions dealing with minors should be prepared to make accommodations for very young trans people. Policies should be in place for recognising a young trans person's name and gender identity without requesting a full gender recognition process, e.g. in class rolls, access to changing rooms and other gendered facilities. Non-bureaucratic recognition procedures can help the young person to safely explore their gender identity, constrain bullying and

harassment, and give staff guidance on how to create a respectful and safe environment for the child.⁹⁵

With less abusive LGR requirements, administrative and information systems might need to be adapted to accommodate married same-gender couples, pregnant men and underage trans people. Thus, even if there are no provisions for same-sex couples to marry, forms and norms need to be adjusted so that married same-gender spouses can file their taxes together or fill in any other forms without discrimination.

Birth registries and birth certificate forms need to be customised so they can register legally recognised men giving birth as father, or reciprocally recognise a person with a female gender marker begetting a child as mother.

Schools need to have procedures in place to issue a school leaving certificate for John Clay, even if school history might list John and previously Joanna Clay. In short, administration should be considerate of the needs of individuals and not the other way around. Computer says no is not a sufficient answer when the privacy of individuals is at stake.



Data systems should be adapted in such a way that they ensure consistency in a person prior to and after legal gender recognition. For example, a person should be able to retract information on their credit/ debt history or real estate without the document produced revealing a previously used name. Software should be set up in such a way as to ensure that no-one without an explicit legal interest can find out that a person obtained legal gender recognition. In regard to **data collection**, it is advisable to scrutinise the occasions where gendered data is collected, stored and processed, and reduce them to an absolute minimum. Gender identity related information should be treated here as candidly as other inti-

mate personal information, such as religion or faith.⁹⁶ When collecting data on kinship, family relations and members of a household, administrations increasingly adapt intake forms, e.g. to better recognise trans families with same-gendered partners or a male person giving birth etcetera. Where ever possible, it is advisable to make gendered data provision voluntarily with the option of “prefer not to say” and/or “other”. Thus, censuses and large-scale data collection should foresee “other” as an option, besides “male” and “female” standards, with the accommodating possibility of entering further information, e.g. in a free text field.⁹⁷



JURISPRUDENCE

(compiled by Constantin Cojocariu)

This section comprehensively presents important case law and its reasoning in key areas relating to gender identity recognition from the European level and a selection of national jurisprudence.

I. RIGHT TO LEGAL GENDER RECOGNITION

European Court of Human Rights, B. v. France, 25 March 1992 (Application no. 57/1990/248/319)

The lack of any legal recognition of the gender identity of a trans woman who had undergone genital surgery violated her right to respect for private life (Art. 8 of the European Convention of Human Rights/ECHR).

The applicant was a trans woman and a French citizen, born in 1935. She underwent genital surgery in Morocco, in 1972. At the time of the judgment, the applicant had been living fully as a woman for a long time and was involved in a heterosexual relationship. In 1978 the applicant filed a request with domestic courts asking that her documents be changed to reflect her female identity, including with respect to her first name and gender marker, as she wanted to

marry her partner. Domestic courts denied the applicant’s requests because, among other things, by undertaking genital surgery abroad, she had not followed the correct procedures as prescribed in France, and because she continued to “show the characteristics of a person of male sex”.

The applicant complained to the Court that the authorities’ refusal to recognise her gender identity was in breach of Art. 8. She argued that her circumstances were different from those of British applicants in cases previously examined and rejected by the Court (in particular *Rees v. United Kingdom* and *Cossey v. United Kingdom*). The Court noted that in France it was possible to update birth certificates throughout the life of the person concerned and that indeed numerous courts ordered the relevant authorities to change the information pertaining to a person’s gender identity in their records, as opposed to the United Kingdom, where the information contained in a birth certificate was held to constitute a historical record that could supposedly never be modified. While the applicant had indeed undergone genital surgery abroad without

the ‘benefit’ of ‘medical and psychological safeguards’ that normally applied in France, the operation nevertheless involved “the irreversible abandonment of [her] original sex”. The Court noted that the applicant’s “manifest determination” was a significant factor that had to be taken into account. Unlike in the United Kingdom, the applicant could not change her forename freely. The Court also attached importance to the fact that numerous official documents including information pertaining to the applicant’s gender identity were required in the course of daily life.

In view of all these considerations, the Court held that the applicant “found herself daily in a situation which, taken as a whole, was not compatible with the respect due to her private life” amounting to a violation of Art. 8. However, the Court stopped short of implying that Art. 8 required full legal gender recognition, noting that the respondent State had several means at its disposal to remedy the situation, but that it was not its function to indicate which was the most appropriate.

European Court of Human Rights, Christine Goodwin v. United Kingdom, 11 July 2002 (Application no. 35968/97)
Lack of legal gender recognition procedures violates the right to respect for private life (Art. 8) and the right to marry (Art. 12).

Christine Goodwin was a trans woman who complained about the absence of legislation on legal gender recognition in the United Kingdom even for people like her who underwent genital surgery. As a result, she suffered from discrimination and humiliation, including sexual harassment at work, unfair dismissal, disclosure of her trans status by different state agencies, discriminatory pensionable ages and an inability to access various benefits and services that required having to produce a birth certificate. The applicant also complained that as long as she was legally a man, she was not able to marry her male partner.

The Court noted that trans people suffered from “stress and alienation,” and “feelings of vulnerability, humiliation and anxiety” as a result of the authorities’ refusal to recognise their gender identity. British legal and administrative practices were incoherent, as the authorities refused to recognise the implications of genital surgery that was officially permitted and publicly funded. The Court also noted that “transexu-

alism has wide international recognition as a medical condition for which treatment is provided in order to afford relief”. The intrusiveness and extent of procedures involved and the level of personal commitment required suggested the decision taken by a person to undergo gender reassignment treatment was neither capricious nor arbitrary. Notably, the Court stated that although the chromosomal element remained unchanged even after medical treatment, that in itself was not a decisive factor for the purposes of assigning a gender marker. In addition, the Court observed a continuing international trend in favour of increased social acceptance of trans people, including by recognising their gender identity on the basis of genital surgery. The Court was not persuaded that legal gender recognition caused unmanageable or unacceptable detriment to the public interest, as long as it was confined to those trans people who underwent genital surgery. Summing up, the Court concluded that there was a breach of Art. 8, while specifying at the same time that the choice as to the appropriate means necessary for achieving legal recognition came within the State Parties’ margin of appreciation.

Under Art.12, the Court noted that the term ‘men and women’ needed not refer only to a determination of gender by purely biological criteria. There were other relevant factors – the acceptance of gender identity disorder as a medical condition, the provision of genital surgery and the assumption of the social role of the self-identified gender. The option that the applicant had to marry a woman was irrelevant, as long as she only wished to marry a man. Consequently, there was a violation of Art. 12.

European Court of Human Rights, Grant v. United Kingdom, 23 May 2006 (Application No. 32570/03)

Denying a trans woman’s request to retire at 60, the age of retirement for women, violated her right to respect for private life (Art. 8).

The applicant was a trans woman who was registered as female on her National Insurance card, and who paid her pension contributions accordingly. In 1997, at the age of 60, the retirement age for women, the applicant applied for a retirement pension. The authorities denied her request, informing her that she only became eligible for a pension when turning 65, the retirement age for men. Notably, the British authorities persisted in their refusal to provide the applicant with a pension from the age of 60 even after the

European Court Christine Goodwin judgment was handed down on 11 July 2002, and until the enactment of the Gender Recognition Act 2004, which provided individuals in the same position as the applicant with full legal gender recognition including with respect to pensions.

The Court found that as the applicant was in an identical position to the applicant in the *Christine Goodwin* case, there was a violation of Article 8 with respect to the lack of legal recognition of her gender identity. Legal gender recognition applied in all fields where women and men were treated differently, including pensions.

II. FAULTY PROCEDURES FOR LEGAL GENDER RECOGNITION (MEDICAL)

European Court of Human Rights, *Van Kück v. Germany*, 12 June 2003 (Application no. 35968/97)

Burden placed on the applicant to prove the medical necessity of her genital surgery and the genuine nature of her 'transsexualism' during court proceedings related to health insurance coverage of gender reassignment treatment, was unreasonable, amounting to a violation of her rights to fair trial (Art. 6) and to respect for private life (Art. 8).

The applicant was a trans woman who sued her private health insurance company, seeking coverage for her hormone treatment and gender reassignment treatment. A psychiatrist consulted by the regional court acknowledged that genital surgery was not the only possible medical treatment in cases of transsexuality, but nevertheless he recommended it in the applicant's case as it would improve her social situation and help her reach stability. The regional court interpreted the expert report to mean that genital surgery was not a medically necessary treatment, stated that the applicant should have undergone psychotherapy sessions first and rejected her claims. The decision was upheld on appeal, with the court of appeal additionally insinuating that the applicant deliberately caused her condition. Before the Court, the applicant complained about the quality of the proceedings at the national level.

The Court criticised the unreasonable manner in which national courts interpreted the above-mentioned expert report, particularly in light of its findings in the *Christine Goodwin* judgment regarding the nature of transsexualism as a widely recognised medical condition. Consequently, national courts were not entitled to determine the medical necessity of gender reassignment treatment by their curative effects on the person

in question and dismiss the conclusions of an expert report. In addition, since "gender identity is one of the most intimate areas of a person's private life", the burden placed on the applicant to prove the medical necessity of treatment was disproportionate. Along similar lines, the national courts' conclusion to the effect that the applicant caused her own transsexuality was at odds with the lack of any conclusive scientific findings as to the cause of transsexualism. This was particularly so given the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role. These shortcomings rendered the national proceedings as a whole unfair, resulting in a violation of the right to a fair trial under Art. 6§1.

The Court also held that the case concerned "the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination", and not the legitimacy of gender reassignment surgery in general or the entitlement to reimbursement for such treatment. The domestic courts substituted its "views on her most intimate feelings and experiences" for those of the applicant, without any medical competence, based on "general assumptions as to male and female be-

haviour." By requiring the applicant to prove she was trans and questioning the medical necessity of gender reassignment treatment against medical advice, the domestic courts overstepped their margin of appreciation, amounting to a violation of the right to respect for private life under Art. 8.

European Court of Human Rights, *L. v. Lithuania*, 11 September 2007 (Application no. 27527/03)

The authorities' persistent failure to adopt legislation enabling trans persons to undergo gender reassignment surgery, after having recognised this as a right, amounted to a violation of the right to respect for private life (Art. 8).

The applicant is a trans man who received some gender reassignment treatment but was not able to undergo genital surgery due to the absence of suitable legislation. In particular, although the Civil Code, which entered into force in 2003, provided for a right to gender reassignment, the failure to adopt the necessary secondary legislation meant that the procedure was not available in practice. Without genital surgery, the applicant was not able to change his legal gender, which caused significant problems in his daily life. Before the Court, the applicant complained that this state of facts amounted

to a violation of his right to private life (Art. 8) among others.

The Court found that the gap in the relevant legislation in Lithuania made it impossible for the applicant to undergo the requisite gender reassignment surgery, which left him “in a situation of distressing uncertainty.” The delays in adopting the necessary legislation could not be justified on the basis of budgetary restraints considering that four years had elapsed since the relevant provisions in the Civil Code were adopted, and considering the relatively small number of individuals involved. The Court emphasised that in the absence of adequate facilities in Lithuania, it may be possible for the applicant to receive treatment abroad, financed in whole or in part by the State. The Court concluded, in light of these considerations, that there was a violation of the applicant’s right to respect for private life (Art. 8).

European Court of Human Rights, Schlumpf v. Switzerland, 8 January 2009 (Application no. 29002/06)

Inflexible two year waiting time before applicant could undergo health insurance-covered genital surgery violated her rights to fair trial

(Art. 6) and to respect for private life (Art. 8). The applicant, born in 1937, lived as a

male until her wife’s death in 2002, coming out as a trans woman thereafter. In 2003 she started hormonal, psychiatric and endocrine treatment. In 2004, she was diagnosed with gender dysphoria and authorised to undergo gender reassignment treatment. However, her health insurer refused to cover the costs of the procedure based on two Federal Insurance Court rulings from 1988, which conditioned coverage on a waiting period of two years before surgery could take place. During this time, the person in question had to undergo psychiatric and endocrine treatment and the existence of “genuine transsexualism” had to be established. As her challenge in court against the refusal was likewise rejected, the applicant went ahead and underwent the surgery anyway, paying for the costs herself.

The Court held that the manner in which national courts substituted their views for those of experts based on a relatively old abstract rule applied inflexibly was unreasonable, particularly as the applicant’s diagnosis was clear and uncontested. Therefore, there was a violation of the applicant’s right to fair trial under Article 6§1 of the ECHR.

Furthermore, the Court noted that the waiting period was applied in the interest of those undergoing gender reassign-

ment surgery, to ensure their decision was well thought out. Although this objective was legitimate, the criterion of a waiting period could not be applied rigidly, without regard to individual circumstances. In particular, the domestic courts failed to take into consideration the fact that the applicant postponed her transition out of respect for her family. They also failed to take into consideration medical reports that recommended prioritising genital surgery in view of her advanced age. Considering that one of the most intimate aspects of the applicant’s private life was at stake and that accordingly the margin of appreciation available was narrow, the Court decided that there was a violation of the right to respect for private life under Art. 8.

National jurisprudence/Croatia, Constitutional Court, No. U-IIIB-3173/2012, 18 March 2014

Defective gender recognition legislation leading to inordinate delays in proceedings initiated by trans youth is in breach of his human rights.

The petitioner was a trans man born in 1995 who lodged a request for legal gender recognition with the local public registry office on 22 April 2010, accompanied by several supportive opinions by medical professionals with different specialisations. Crucially, however, the

petitioner had not undertaken genital surgery and did not plan to do so either. The public registry office rejected the request, a decision upheld on appeal by the ministry of public administration. However, an administrative court rescinded those administrative decisions as they were procedurally flawed, and ordered the bodies in question to reconsider the petitioner’s request. The same sequence of events was repeated twice, over a period of several years. On 28 May 2012, when the case was pending before administrative courts for the third time, the petitioner lodged a complaint with the Constitutional Court alleging a breach of his right to a fair trial and of his right to respect for private life.

Notably, the delays in the administrative proceedings were mostly due to the obstructive and dilatory attitude of the National Health Council, a consultative expert body working under the authority of the Ministry of Health, charged with providing expert opinions on legal gender recognition requests. Eventually, the National Health Council did provide a negative opinion on the petitioner’s request, based on his failure to undergo genital surgery. In his complaint before the Constitutional Court, the petitioner argued that the National Health Council’s decision lacked a legal basis, as the applicable regulations specified that trans people

seeking a legal gender change had to provide “appropriate medical documentation” without at the same time defining this notion and, in particular, without defining whether or not it had to include proof of genital surgery.

The Constitutional Court ruled in the petitioner’s favour. First, the Court found a violation of the right to a fair trial in the Croatian Constitution, due to the exceeding length of administrative proceedings of almost four years by the time of its decision, taking into consideration, among other things, what was at stake for the petitioner, as well as his young age. In relation to the second claim, the Court noted that the delays were due to some extent to the vagueness of regulations on legal gender recognition. Whereas in 2013 the Croatian Parliament adopted a law designed to address these gaps, by stating in particular that legal gender recognition did not necessarily require genital surgery, the application of that law was hampered by a persistent failure to adopt the necessary secondary regulations. The Court noted that the authorities’ omissions were aggravated by the petitioner’s young age, as well as taking into account “the importance of the proceedings in question for his future mental and physical development and stability and the creation of his personality.” Consequently, the Court also

found a violation of the petitioner’s right to respect for private life in conjunction with the right to a fair trial. In view of its findings, the Court ordered the relevant agencies to take a final decision in the petitioner’s case within three months, as well as pay him damages for the harms suffered as a result.

III. MEDICAL REQUIREMENTS FOR LEGAL GENDER RECOGNITION

- **National jurisprudence/Austria, Administrative Court, (VwGH) 2008/17/0054, 27 February 2009**
- **National jurisprudence/Austria, Constitutional Court (VfGH) Case B 1973/08-13, 3 December 2009**

Proof of gender reassignment surgery not necessary for legal gender recognition.

The petitioner was a trans woman who underwent various gender reassignment procedures to significantly feminise her external appearance, but not genital surgery. She argued that these procedures should be sufficient for the purposes of legal gender recognition, particularly as undergoing genital surgery would lead to disclosure of her status as a trans person and potentially dismissal from her managerial position at an international company. The Court

emphasised the importance of “the psychological component of the feeling of belonging to the other sex”, that was “in all likelihood irreversible” and that was “expressed visibly in a distinct approximation to the external appearance of the other sex.” In that sense, ‘severe’ genital surgery was not indispensable to achieving a distinct approximation to the appearance of the other gender and therefore could not be required for the purposes of establishing a person’s civil status. The Constitutional Court reached similar conclusions, stating that “(genital-altering) surgery” is not a requirement for a change of gender entry in the birth register.

- **National jurisprudence/Germany, Constitutional Court, 1 BVR 3295/07, 11 January 2011**

Genital surgery and sterilisation requirements in breach of German Constitution.

The case concerned a 62-year old trans woman who had changed her first name to that of a female, and who wanted to enter into a same sex registered partnership with her female partner. She was prevented from doing so because she was not permanently infertile, had not undergone gender reassignment surgery and thus did not fulfill the requirements set out in Article 8 of the Transsexuals

Act for a civil status change that would allow her to be recognised as a woman.

The Court reasoned that the petitioner’s right to sexual self-determination and physical integrity outweighed the legislator’s interest to secure the notion of civil status as “permanent and unambiguous”, as well as “avoid a divergence of biological and legal gender affiliation”. The Court emphasised that genital surgery constituted a “massive interference” with physical integrity, involving “considerable risks and side effects,” while at the same time not being indicated in all cases of “transsexuality”. Furthermore, “permanency and irreversibility” of an individual’s gender identity could not be measured based on the shape of their genitals, but rather “against the consistency with which they lived in their perceived gender.” In this respect, the inflexible imposition of genital surgery in all cases, without exception, was excessive. In relation to the infertility requirement, the Court highlighted the “predicament” of trans persons, who were forced to reject surgery and as a consequence forego their legal gender recognition, compelling them to live permanently in contradiction to their legally registered gender, or “to undergo far-reaching surgeries that not only result in physical changes and loss of functionality [...], but also touch upon their human self-understand-

ing.” Regardless of the choice made, the rights of the person in question are undetermined. The Court acknowledged that the infertility requirement pursued the legitimate objective of preventing legally male trans persons from giving birth, or legally female trans persons from procreating children, which would “contradict the concept of sexes,” with far reaching implications for the legal order. However, albeit such concerns were valid, they did not justify such sweeping requirements, considering the relatively small number of persons concerned, and that solutions could be identified which were sufficiently protective of the rights of children born in such circumstances. Consequently, the Constitutional Court declared the genital surgery and infertility requirements to be in breach of the German Constitution.

**National jurisprudence/Switzerland,
Regional Court of Bern-Mittelland, CIV 12
1217 JAC, 12 September 2012**

No mandatory medical interventions in legal gender recognition.

The Court strongly rejected any form of medical intervention – surgical or hormonal – in the case of a trans woman seeking legal gender recognition, as that “always and directly violates the physical integrity of the person concerned and is therefore highly problematic for

legal reasons.” The Court based its reasoning on the consolidated opinion of experts in transsexuality that “the surgical procedure cannot be a necessary prerequisite for a lasting and visible change in a person’s gender identity.” The Court also noted that a requirement for hormonal therapy is, much like a surgery requirement, “an invasion of bodily integrity” and therefore raised similar questions to surgical interventions.

**National jurisprudence/Sweden,
Administrative Court of Appeal,
Case 1968-12, 19 December 2012**

The sterilisation requirement struck down as unlawful.

This was an appeal from a lower court regarding the validity of the sterilisation requirement provided for in the Swedish Gender Recognition Act 1972. The Court noted that the sterilisation requirement had originally been justified by reference to the need to “eliminate the risk of confusion in family relationships that might arise if a transsexual person who obtained a change in his or her registered gender, should have children of their own.” In that respect, the Court reasoned that as long as a medical intervention was “a condition for entitlement to a certain benefit or right, it should be considered a forced medical

intervention.” This applied equally to the provision of sterilisation in the context of legal gender recognition. Furthermore, since sterilisation involved “an extremely invasive and irreversible physical procedure for the individual,” it was difficult to justify based on the need for order in relationships alone. Examining the proportionality of the interference, the Court noted that the Swedish Government had recently announced that the sterilisation requirement would be dropped, planning legislative changes that would secure the legal situation of trans families and clarify any lingering uncertainties. Consequently, the Court held that the sterilisation requirement breached the ban on forced medical procedures in the Swedish Constitution, the right to respect for private life (Art. 8 ECHR), and also the prohibition of discrimination (Art. 14 ECHR), since it targeted trans people only.

National jurisprudence/Sweden, Administrative Court, Case no. 24931-13, 16 May 2014

Physical examination did not comply with procedures set out in gender recognition law

This was an appeal against a decision by the National Board of Health and Welfare (the Legal Council) to deny the request for legal gender recognition lodged by a trans woman, under the

pretext that “no examination had been carried out in accordance with normal practice.” Paragraph 1 of the Gender Recognition Act 1972 provided that “a person can after having made an application of his or her own obtain the recognition that he or she has another gender than the one indicated in the civil registration, provided that he or she: 1) has perceived over a long period of time that he or she belongs to the other gender; 2) has appeared for a while in accordance with this gender identity; 3) must be expected to live in accordance with this gender identity also in the future, and 4) is at least eighteen years of age.” The Court noted that the Gender Recognition Act regulated only the legal component of a change of gender, providing that personal information contained in the public records could be changed based on a positive opinion from the Legal Council. Admittedly, a gender change decision must be based on some form of examination, in accordance with the above mentioned provision of the Gender Recognition Act. Nonetheless, the Legal Council failed to assess the applicant’s request against that provision, referring instead to the “common practice.” Accordingly, the Court overturned the decision and returned the case to the Legal Council for a re-hearing.

**European Court of Human Rights,
Y.Y. v. Turkey, 10 March 2015
(Application no. 14793/08)**

The requirement to be sterile before being able to undergo genital surgery was not justified.

The applicant is a trans man who applied for authorisation to undergo genital surgery. The court of first instance rejected his request on the grounds that he retained his reproductive organs, based on Art. 40 of the Turkish Civil Code. That provision made legal gender recognition contingent on genital surgery. However, in order to obtain authorisation to undergo genital surgery, the person in question had to be sterile. The first instance decision was upheld on appeal. In his complaint to the Court, the applicant argued that it was unreasonable to condition access to genital surgery on already being sterile, which could itself only be achieved through a surgical intervention.

The Court stated that the authorities' decision had repercussions on the applicant's rights to 'sexual identity and personal fulfilment', fundamental aspects of his right to respect for private life. The Court emphasised that at the time when he applied for authorisation to undergo genital surgery, the applicant had already presented as a male for a long time and received psychological counselling. In that respect, the Court recalled that

the decision to undergo genital surgery had to be taken seriously, considering the intrusiveness and extent of procedures involved and the level of personal commitment required. At the same time, the Court emphasised that Turkey was alone among European states in requiring trans people to be sterile before undergoing genital surgery, as well as the trends across Europe in abandoning the sterilisation requirement for the purposes of achieving legal gender recognition. Since the Turkish Government did not provide any valid justifications for this arrangement, there was a violation of Art. 8. Judges Keller and Spano, concurring, stated their preference for a more expansive ruling that held the sterilisation requirement as a prerequisite to legal gender recognition to be in breach of Art. 8. Their opinion was based on a detailed review of recent relevant developments in comparative and international law.

- **National jurisprudence/ Ukraine,
Kiev Administrative Court, 19 June 2015**
- **National jurisprudence/ Ukraine,
Kiev Administrative Court, 10 July 2015**

Gender reassignment treatment requirements devoid of a legal basis.

The first case concerned a trans man who challenged the initial decision by

a 'special commission' operating under the authority of the Ministry of Health to deny his request for legal gender recognition. In proceedings before the administrative court, the commission explained that its decision was based on a letter from the Institute of Urology, according to which the minimal surgical requirements for "biological women" diagnosed with 'transsexualism' included the removal of the reproductive organs and 'mammary glands.' However, the Court ruled that since the Institute of Urology letter was not a relevant legal document, the surgical requirements stated therein and, implicitly, the commission's rejection were unlawful.

The second case concerned a trans woman who applied for legal gender recognition after having undergone an orchiectomy (removal of testicles). The Special Commission on Issues of Change (Correction) of Gender Identification in Kiev initially rejected her request, based among others on an opinion from the Institute of Urology stating that the minimal surgical requirements for trans people seeking legal gender recognition were the removal of reproductive organs and 'mammary glands' for trans men and the "removal of sexual organs (testicles and penis)" for trans women.

The Court allowed the petitioner's appeal, struck down the commission's decision as unlawful, and ordered that the petitioner be provided with the medical certificate that she needed for the purposes of achieving legal gender recognition. In doing so, the Court stated that the gender reassignment treatment requirements lacked a legal basis. Furthermore, the commission's decision led to "a significant violation of the petitioner's rights and interests, particularly the possibility of obtaining any changes in her birth certificate and other identity documents corresponding to her actual gender."

**National jurisprudence/ Italy,
Constitutional Court, Sentenza n.
221/2015, 21 October 2015**

Genital surgery should not form an indispensable condition for legal gender recognition.

The Trento Tribunal referred a question to the Constitutional Court, asking for a determination regarding the validity of a provision in the Law on the rectification of the attribution of sex, providing that legal gender recognition will benefit those who "changed their sexual characteristics." The referring court argued that said provision was in breach of the Italian Constitution and the ECHR in the extent to which it could be interpreted to require genital surgery.

The Constitutional Court clarified that the provision in question allowed courts the leeway to make an individual assessment on a case by case basis of what may constitute a ‘change in the sexual characteristics’, taking into account the psychological, behavioural and physical factors which together form the notion of ‘sex’. Genital surgery was one of several paths that could lead to this change, alongside, for example, hormonal treatment. Through its open wording, the provision in question accommodated a variety of individual situations, thus being respectful of the individual’s gender identity, a fundamental aspect of the right to respect for private life. The Constitutional Court emphasised that it was up to the individual to choose the path towards legal gender recognition that was most suitable to their circumstances. The Constitutional Court therefore held that the provision in question was in line with human rights and rejected the referral.

National jurisprudence/ Sweden, forced sterilisation compensation claims, 2014-2016

After Sweden had dropped from its legislation the requirement that people who wanted to change their legal gender “had to be lacking the ability to procreate” in 2013, approximately 160

individuals who had been forcibly sterilised as a result submitted a claim for compensation to the Swedish Attorney General. The Attorney General initially rejected the claim, on the grounds that the sterilisations had in effect been voluntary, without any element of compulsion. In reaching this conclusion, the Attorney General directly contradicted the Administrative Court of Appeals 2014 ruling to the effect that the sterilisation requirement was in breach of human rights. Confronted with this rejection, the civil society organisations supporting the victims’ claims announced their intention to sue the State for damages, and in parallel continued to engage with the authorities in order to achieve an amicable settlement. On 27 April 2016, the Minister of Public Health announced the Swedish Government’s decision to enact a law making it possible to compensate people who had been forcibly sterilised by July 2018.

European Court of Human Rights, Vivaldo v. Italy (Application no. 55216/08)
Denial of name change request before genital surgery – pending.

The applicant is a trans woman who, after obtaining a judicial authorisation to undergo genital surgery, applied to have her first name changed to reflect

her gender identity. A national court initially rejected her application. The applicant eventually secured a name change after undergoing genital surgery. In her application with the Court, she alleged that her inability to change her first name before undergoing genital surgery breached her right to respect for private life under Art. 8.

- **European Court of Human Rights, A.P. v. France (Application no. 79885/12)**
- **European Court of Human Rights, Stephanie Nicot v. France (Application no. 52596/13)**
- **European Court of Human Rights, Emilie Garçon v. France (Application no. 52471/13)**

Validity of medical pre-requisites to legal gender recognition, including forced sterilisation – pending.

All applicants are trans women. Ms. Nicot, born in 1952, lodged a request with the Nancy Tribunal stating that she was trans and asking that her personal documents be modified accordingly to reflect her gender identity. She contended that she had a right to self-determine her gender identity, which could not be conditioned on any form of medical treatment. She refused to provide any medical evidence of gender reassignment treatment, which, she claimed,

was confidential. National courts at different degrees of jurisdiction rejected her complaint, based on the fact that she failed to undergo ‘irreversible’ genital surgery and therefore that her status as a ‘true’ trans person was in doubt. Furthermore, the information pertaining to civil status belonged to the public order and therefore it could not be left to the discretion of the individual.

Ms. Garçon, born in 1958, lodged a legal gender recognition request before the Créteil Tribunal in 2009, submitting evidence proving that she had publicly assumed the appearance of a woman and that she had undergone hormonal treatment. The national courts rejected her request on the basis that she failed to submit sufficient evidence proving the “existence and persistence of the transsexual syndrome” or that she underwent “irreversible” gender reassignment procedures.

Ms. A.P. had been diagnosed with gender identity disorder, presented publicly as a woman and received hormonal treatment. She reluctantly agreed to undergo genital surgery and other gender reassignment procedures in Thailand, as the only way to achieving legal gender recognition in France. In 2008, the applicant lodged a legal gender recognition request with the Paris Tribunal, submitting evidence of the gender reassign-

ment procedures carried out in Thailand. The Tribunal asked her to submit to a multi-disciplinary examination confirming her current “physiological, biological and psychological state,” and investigating “the persistence of her alleged syndrome in time.” The court appointed a commission formed of a psychiatrist, an endocrinologist and a gynaecologist to carry out the examination, and asked the applicant to pay the expert fees in the amount of 1,524 Euro. However, the applicant refused to submit to the examination arguing that it was too expensive, that it breached her right to physical and psychological integrity, and considering that in any event she had submitted sufficient evidence to establish her legal gender recognition case. In view of her refusal to undergo the examination, the Tribunal rejected her request. On appeal, the Court of Appeal upheld the Tribunal’s decision insofar as it concerned her gender marker, but also admitted her request to substitute her original male first name with a female name, considering among others “the reality of her social life.” The Court of Cassation maintained this decision on 7 June 2012.

In their complaints with the Court, the applicants alleged that the medical pre-requisites for legal gender recognition applicable in France, in particular sterilisation, breached their right to re-

spect for private life (Art. 8) alone and in conjunction with the prohibition of discrimination (Art. 14). Notably, the applicants argued that they should be able to self-determine their gender identity. In addition, Ms. A.P. argued that the medical examination required during national proceedings was unnecessary and unduly intrusive, breaching her right to respect for private life and her right to fair trial (Art. 6§1).

European Committee of Social Rights, Transgender Europe and ILGA-Europe v. Czech Republic, Collective complaint 117/2015

Sterilisation requirement in breach of the right to protection of health - pending

The complainant organisations alleged that the requirement of sterilisation imposed on trans people wishing to change their personal documents so that they reflect their gender identity, as provided for under Czech law, is in breach of Article 11 of the European Social Charter on the right to protection of health, alone or in conjunction with the non-discrimination principle stated in its Preamble. The complaint has been declared admissible and is currently pending before the European Committee of Social Rights.

IV. FORCED DIVORCE

National jurisprudence/ Switzerland, St. Gallen District Court, SJZ 93/1997, 26 November 1996

Divorce cannot constitute a precondition for the legal gender recognition of a trans spouse.

The petitioner, a married trans woman who underwent genital surgery, in agreement with her wife, requested to be registered as a female without having to divorce. In its judgment, the Court emphasised the importance of having matching documents in order to be able to live without constant interference and forced outing. Weighing the various interests involved in the case, the Court found “that the interest of the married transsexual in having his altered sex recognised and his marriage continued, the interest of his wife, as well as the public interest in protecting a functioning marriage in this constellation clearly prevail”. As for the effects of tolerating a legal same-sex marriage, the court emphasised “that with this solution, a situation was created that had de facto already existed.”

National jurisprudence/ Austria, Constitutional Court, V 4/06-7 (8 June 2006)

Divorce requirement lacked a legal basis.

The case concerned a trans woman who had undergone gender reassignment

surgery and who applied for legal gender recognition. However, her request was denied on the basis that she was already married and did not plan to get a divorce. The Constitutional Court found that the provision requiring those applying for legal gender recognition not to be married lacked a legal basis. Although the Civil Code did indeed reserve marriage for different-sex couples, this was unrelated to the situation whereby one of the spouses applied for a rectification of their gender marker in the public registries. In any event, the Court also held that the ordinance regulating gender recognition did not comply with the legal criteria for the publication of legal acts and therefore declared it void in its entirety.

National jurisprudence/ Germany, Constitutional Court, 1BvL 10/05, 27 May 2008

Divorce requirement in gender recognition is incompatible with the Basic Law

The petitioner, a transgender woman born in 1929 and who had been married since 1952, complained about not being able to achieve legal gender recognition unless she got a divorce from her wife. The Court recalled that the right to sexual self-determination, including with respect to the identification and recognition of gender identity, was protected

under Art. 2§1 (right to protection of personhood) in conjunction with Art. 1§1 (human dignity) of the German Basic Act. Nonetheless, Art. 8§1 of the Transsexuals Act forced trans people to choose between seeking a divorce in order to secure legal gender recognition on the one hand, and preserving their marriage, at the price of living with a gender identity they did not identify with, notwithstanding the fact that they may have already undertaken genital surgery. This forced choice amounted to an interference with the petitioner's constitutional rights and had to be subjected to strict scrutiny.

The Court noted that the forced divorce requirement pursued the legitimate goal of safeguarding traditional marriage as a different-sex relationship, protected under Art. 6§1 (“special protection of marriage”) of the Basic Act. In this respect, the Court remarked that the relationship involving a trans person who adopted the appearance of their self-determined gender identity and who changed their first name accordingly – an option that was available in Germany without having to divorce – already created the impression of a same-sex marriage. Furthermore, the recognition of the gender identity of a married trans spouse would not necessarily open up marriage to same-sex partners. At the same time, Art. 6 of the Basic Act also protected

the petitioner's marriage from state encroachment, which she did not waive by effect of her decision to transition to another gender identity. The Court also highlighted the difficult situation of the cisgender partner, similarly faced with the hard choice between holding on to the marriage and thus preventing the legal gender recognition of their spouse, or agreeing to a divorce, leading to an unwanted separation and a loss of the legal safeguards associated with marriage.

Art. 8§1 of the Transsexual Act created a “deep inner conflict,” as married trans people were “forced to give up something crucial” regardless of the choice made. The burden placed on trans people was unacceptably heavy, particularly as under German law in force at the time it was very difficult to obtain a divorce. Thus, spouses had to demonstrate the intention to separate permanently. In turn, this would force married trans people seeking a divorce to make false statements before courts by feigning their intention to separate from their spouse. Another option was for the spouses to live separately for a period of at least three years, which was presumed to indicate an irreversibly failed marriage. However, the Court held that it was unreasonable to expect couples who wanted to be together to live apart for such a long period of time.

Summing up, the Court emphasised that it had to weigh up the interest of the state, in protecting traditional marriage, against the interest of the petitioner and of her wife in the preservation of their marriage. In that respect, the divorce requirement provided for in Art. 8§1 of the Transsexuals Act drove the petitioner's relationship into an “existential crisis,” undermining its characteristic as “unchanged and irrevocably binding.” In contrast, traditional marriage would be affected only tangentially, considering the small number of trans people who were already married when applying for legal gender recognition, and whose marriage survived this event. The Court therefore held that the prohibition inscribed in Art. 8§1 of the Transsexuals Act represented an unreasonable interference with the rights included in Art. 2§1 in conjunction with Art. 1§1, as well as with Art. 6§1 of the Basic Act.

National jurisprudence/ France, Rennes Court of Appeal, Case No. 11/08743, 1453, 12/00535, 16 October 2012

Divorce requirement not necessary for gender recognition

The two petitioners had been married for thirteen years and had three children. One of them came out as a trans woman during marriage and sought to have her gender

identity officially registered. However, the authorities denied her request as long as she and her wife continued to be married. In its judgment, the Court of Appeal clarified that since “the husband became a woman in a definitive and legitimate way,” denying her official recognition would be in breach of the right to respect for private life (Art. 8 ECHR). Accordingly, the Court ordered that the necessary changes be made in her birth certificate.

On the question of the petitioners' marriage, the Court noted that their decision to continue their life together pertained to their private life, which it had no reason to interfere with. The Court specified that the validity of the marriage had to be measured by reference to the time of its conclusion. As it originally involved a man and a woman, the marriage was valid. At the same time, making a note in the marriage certificate regarding the change of gender by one of the spouses would be contrary to the public order, as that would turn their relationship into a de facto same sex marriage. However, rectifying the marriage certificate was not necessary, as the trans spouse's birth certificate already stated that she was married. The Court also denied the request to adapt the children's birth certificates as “not necessary”, since this would breach the presumptions regarding their filiation to a mother and father respectively.

**National Jurisprudence / Italy,
Corte Costituzionale, sentenza
11/06/2014 n° 170/2014**

Cassazione Civile, sez. I,
sentenza 21/04/2015 n° 8097

Automatic divorce rule unconstitutional in the absence of legally-recognised partnership offering the couple protection that was “substantially equivalent” to marriage

The claimants, spouses in an initially different-sex marriage, challenged the rules on the automatic dissolution of marriage in case one of the spouses changed their legal gender. The Supreme Court initially asked the Constitutional Court to determine the constitutionality of the statutory provisions in question. The Constitutional Court responded in the affirmative, as long as spouses lacked the possibility to turn their marriage into a substantially equivalent legally recognised partnership. However, the Constitutional Court judgment required legislative action providing for such alternatives. Unless and until Parliament took such action, the ban on same-sex marriage prevailed and therefore transgender marriages could not subsist. The Supreme Court clarified that the Constitutional Court solution necessarily meant that marriages involving one transgender spouse who changed their legal gender

had to benefit from some degree of protection until an alternative became available. In that sense, the Supreme Court stated that transgender marriages had to remain valid until Parliament introduced a legally recognized union that was substantially equivalent to marriage.

The two courts were in agreement in that the prohibition in question breached Art. 2 of the Italian Constitution, which guaranteed “the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed.” In that sense, same-sex couples also formed a constitutionally protected “social group” deserving of legal recognition. The divorce requirement did not provide couples involving one transgender spouse with any continuity, transforming a family union characterized by an inviolable core of fundamental rights and duties of moral and material support to an status full of uncertainty, deprived of any legal protections.

**European Court of Human Rights,
Hämäläinen v. Finland, 16 July 2014
(Application no. 37359/09)**

Forced divorce requirement not a violation of the ECHR where the possibility of marriage being converted to a comparable institution (registered partnership) exists.

The applicant was a trans woman, who had married prior to her gender reassignment, and who had a child from that marriage. The local registry office initially rejected her gender recognition request based on legal provisions that required the spouses’ agreement to turn their marriage into a registered partnership, or terminate their marriage. The applicant appealed, arguing that a divorce would be against hers and her wife’s religious convictions and that a registered partnership did not provide the family with the same level of legal security as marriage. Domestic courts rejected her request, among others, on the basis that it was a matter for the legislature to legalise same-sex marriage and that at the same time registered partnership did in fact offer a similar level of protection to marriage.

The Court recalled that the ECHR did not impose an obligation on Contracting States to provide same-sex couples access to marriage. Although the applicant did not advocate for same-sex marriage in general, but merely for the possibility of preserving her marriage, the fact remained that if her claim had been accepted, that would have led to a de facto same-sex marriage. The Court further emphasised the lack of European consensus on the particular issue of marriages involving one trans spouse seeking

legal gender recognition. Accordingly, the states’ margin of appreciation in this area was wide. The Court examined the particular arrangements that were in place in Finland and concluded that they were sufficiently protective of the applicant’s interests. Thus, the applicant had several options to choose from – she could stay married while tolerating the ‘inconvenience’ caused by her male gender marker, she and her wife could opt for turning their marriage seamlessly into a registered partnership, or they could divorce. In relation to the second option, the Court noted that registered partnership offered the applicant and her family a similar level of protection to that afforded by marriage. Consequently, there was no violation of Art. 8.

Judges Sajó, Keller and Lemmens issued a detailed dissenting opinion, arguing that the trends across Europe towards strengthening trans people’s rights, rather than consensus, should hold sway. The dissenters also argued that the applicant lacked a real choice in this matter, emphasising the problematic practice of pitting two human rights against each other, i.e. legal gender recognition versus marriage. They also pointed out that the majority did not sufficiently consider the role of the applicant’s and her wife’s religious convictions preventing them from agreeing to the termination of their

marriage played. While the objective of protecting traditional marriage was a legitimate one, it was not compromised by a small number of married couples including trans individuals who were allowed legal gender recognition. Finally, the dissenters pointed out that the applicant's relationship was a *fait accompli*, whose preservation did not hurt public morals in any way. In addition to finding a violation of Art. 8, the dissenters stated their preference for a more detailed consideration of the applicant's claims under Art. 12 (right to marry) and Art. 14 (prohibition of discrimination), which the majority dismissed summarily.

V. PARENTAL RIGHTS

European Court of Human Rights, P.V. v. Spain, 30 November 2010 (Application no. 35159/09)

Restriction of contact arrangements between a trans woman and her six-year-old son was in the child's best interests and did not constitute a violation of the ECHR.

The applicant was a trans woman. Prior to transitioning, she had been married and had a child together with her wife. When they separated in 2002, the judge approved the amicable agreement they had concluded, which awarded the custody of the child to the mother and parental responsibility to both parents. The agreement also laid down contact arrangements for the applicant, who was to spend every other weekend and half of the school holidays with the child. In May 2004, her former wife applied to have the applicant deprived of parental responsibility and to have the contact arrangements suspended, arguing that she had shown a lack of interest in the child and adding that she was undergoing hormone treatment and usually wore make-up and dressed like a woman. The judge decided to restrict the contact arrangements rather than suspend them entirely, since ordinary contact arrangements could not be made on account of the applicant's lack of emotional stability, as acknowledged

by a psychological report. A gradual arrangement was put in place „until [the applicant] undergoes surgery and fully recovers her physical and psychological capacities". In December 2008, the Constitutional Court dismissed the applicant's appeal, holding that the ground for restricting the contact arrangements had not been her 'transsexualism' but her lack of emotional stability, which had entailed a real and significant risk of disturbing her son's emotional well being and the development of his personality. The Court held that in reaching that decision, the judicial authorities had taken into account the child's best interests, weighed against those of the parents.

In her complaint to the Court, the applicant argued that the restrictions ordered by the judge violated her right to respect for private life (Art. 8), in conjunction with the prohibition of discrimination (Art. 14). The Court agreed that the applicant's gender dysphoria was at the origin of the national courts' decision to impose contact arrangements that were less favorable than those laid down in the separation agreement, 'transsexualism' being covered by the prohibition of discrimination under Art. 14. Nonetheless, the restriction was justified based on the best interest of the child. The measure aimed to ensure that the child would gradually become accustomed to the applicant's gender reassignment

and be protected from her passing emotional instability, duly certified by medical professionals. The Court therefore considered that the restriction of the contact arrangements had not resulted from discrimination on the basis of the applicant's transsexualism and concluded that there had been no violation of the ECHR.

- **National jurisprudence/ Sweden, Göteborg Administrative Court, Case no. 6186-14, 5 October 2015**
- **National jurisprudence/ Sweden, Stockholm Administrative Court, Case no. 3201-14, 9 July 2015**

Trans man who gave birth has to be registered as 'father' in public records.

The petitioner is a trans man who gave birth to a child while he was still formally registered as a woman. He rectified his gender marker twelve years after giving birth. This case concerns his request to be registered as the father to his child. The Tax Agency, acting as defendant, had designated the petitioner as "biological mother," and refused to change its records. The Tax Agency relied on several presumptions instituted by the Parental Code to determine the identity of a child's mother and father respectively, including that according to which the person who gave birth to a child was always

presumed to be their mother. Accordingly, there was no basis under Swedish law for registering the petitioner as father. The Tax Agency also argued that in any event its records were formally correct as at the time when he gave birth to his son, the petitioner was registered as a woman. Finally, maintaining the petitioner's registration as a biological mother ensured the traceability of the system.

In its judgment, the Court recalled the jurisprudence of the European Court of Human Rights instituting the principle that the official recognition of gender identity should apply for all legal purposes, as well as the principle of the "best interests of the child" derived from the Convention on the Rights of the Child. Under Swedish law, "the principle that the acquired gender should control the individual's rights and obligations has profound and fundamental meaning." The Court noted that since the sterilisation requirement under Swedish law had been dropped in 2013, there remained a number of legal implications that were uncertain, including with respect to the relationship between parents and their children. Existing rules are not susceptible to being applied inflexibly to the novel situations created whereby trans parents give birth.

The Court noted that since the Parental Code did not regulate explicitly situa-

tions as the one arising in the case before it, the registration of the relationship between the petitioner and his child should be done in a manner that complies with obligations that derive from Swedish law and international treaties. Registering the petitioner as 'biological mother' contradicts the decision to recognise his gender identity as a man, potentially compromising the principle of confidentiality, and thus breaching his right to respect for private life under Art. 8 ECHR. Although the petitioner had given birth before changing his legal gender, the principle of full legal gender recognition, as well as the need to protect his child's private life, outweighed the public interest in assigning a 'biological mother' to each child. The Court also noted that the principle that all children be assigned 'biological' mothers and fathers was not absolute, and that some exceptions were already permitted. For example, two women in a relationship were able to register as 'mother' and 'parent' respectively, without the need to register a 'biological father.' In light of all of these factors, the Court ordered that the petitioner be designated as 'father' in the defendant's database.

The facts in the Stockholm case were similar, except the petitioner gave birth after legal gender recognition. Nonetheless, the solution reached by the court was analogous, with similar reasoning.

VI. IMMIGRATION

European Court of Human Rights, Guerrero-Castillo v. Italy, 12 June 2007 (Application no. 39432/06)

Legal status of third-country national trans man residing in Italy - no violation of Article 8.

The applicant was a Peruvian trans man residing in Italy. In 2003, an Italian court authorised the applicant's request to undergo genital surgery, which took place in February 2004. During the same year, the same court authorised the applicant's legal gender recognition request and ordered the civil status registry to modify 'all relevant documents' accordingly. The applicant was thus able to obtain a new identity card and fiscal code. However, the Italian authorities refused the request to renew his residence permit, which expired in 2004, on the basis that the details in his Peruvian passport and his Italian ID did not match. In 2005, the applicant's Peruvian passport expired. During the same year, he asked a Peruvian court to authorise the enforcement in that country of the 2004 Italian judgment on legal gender recognition. That request was rejected as inadmissible, as Peru lacked any regulations on legal gender recognition. In his application with the Court, the applicant complained about his de facto statelessness, since without a valid Peruvian passport, he could neither regularise

his stay in Italy nor return to his native Peru. The applicant contended that the Italian authorities were under a positive obligation to ensure that such a scenario did not arise, by providing him with Italian citizenship or permanent residence, and/or that they should have informed him of the consequences of undergoing gender reassignment.

Examining the case from the standpoint of the right for respect for private life (Art. 8), the Court held that Italy could not be held responsible for Peru's refusal to renew the applicant's passport or to authorise the enforcement of an Italian legal gender recognition judgment on its territory. Neither were Italian courts under an obligation to seek information about foreign law prior to delivering a judgment. While State Parties had the right to control the entry of non-nationals into their territory, the Court recalled that at the same time individuals should not be placed in a disadvantageous situation as a result of undergoing gender surgery. Nonetheless, by permitting the applicant's genital surgery and providing him with adequate identity documents, Italy satisfied its obligations under the ECHR. Insofar as his residence permit was concerned, the Court emphasised that the applicant had not yet been subject to expulsion proceedings. In view of these circumstances, the Court rejected the application as inadmissible.

**National jurisprudence/
Romania, Bacău Court of Appeal,
Civil decision no. 618/2016**

Recognition in Romania of Italian judgment authorising legal gender change of Romanian citizen.

The petitioner is a Romanian citizen and trans man, who immigrated to Italy, was granted permission to undergo genital surgery in that country, and, in 2009, obtained a judgment granting his request for legal gender recognition. Consequently, the local authority in Turin, Italy, facilitated the necessary changes in its registers, including with respect to first name and gender marker, and issued him with an ID card containing the new details. At the same time, the petitioner's details in his Romanian identity documents (passport and ID card) remained the same, meaning that his documents now showed a double identity as woman and man at the same time. When his Romanian passport and ID card expired, and taking into consideration that his Italian ID card was only valid on Italian territory, he lacked a valid travelling document, and therefore he was no longer able to leave Italy, including by returning to Romania to visit family and friends.

In 2015, the petitioner lodged a request in Romanian courts seeking the recognition on Romanian territory of the Italian

judgment on legal gender recognition that had been previously rendered in his favour. The first instance court initially rejected his request, on the grounds that under applicable conflict of laws rules, a request for legal gender recognition pertained to the public order, and therefore fell within the exclusive remit of Romanian courts. It followed that Italian courts acted *ultra vires* in granting the applicant's legal gender recognition request, and accordingly the judgment in question was inapplicable on Romanian territory. This judgment was reversed on appeal, with the appeal court holding that since gender identity was a fundamental aspect of the right to private life protected under Art. 8 of the ECHR, the rules of legal gender recognition did not belong to the public order under the Romanian private international law, and consequently the Italian court ruling on the petitioner's request had the requisite jurisdiction to act as it did.

**National jurisprudence/ Poland,
Warsaw District Court, 1 June 2016**

Recognition in Poland of German judgment authorising the legal gender change of Polish citizen.

The petitioner was a trans woman and Polish citizen who changed her legal gender in court proceedings in Germany. In

2015, the petitioner asked the registry office in her hometown in Poland to amend her birth certificate with her new details. However, the registry office turned her down, expressing doubts about the validity of a German gender recognition judgment on Polish territory. The petitioner challenged the decision before a court, which decided in her favour, ordering the registry office to make the necessary changes to her birth certificate.

**National jurisprudence/ Germany,
Constitutional Court, 1 BvL 1/04,
1 BvL 12/04, 18 July 2006**

Rules denying foreigners access to legal gender recognition in Germany are discriminatory. On this occasion, the Constitutional Court examined the validity of the provision in the Transsexuals Act restricting access to legal gender recognition to German citizens or to those foreigners benefiting from some form of protection (refugees, asylum seekers, stateless individuals etc.), with the exclusion of all other categories of foreigners. The reference to the Constitutional Court resulted from the cases of a Thai and an Ethiopian national residing in Germany, who underwent genital surgery, but who could not change their legal gender either in their countries of origin, which lacked any rules in that respect, or in Germany, under the terms of the Transsexuals Act.

The Court reasoned that in defining the personal scope of the Transsexuals Act, the legislature pursued the legitimate objective of reserving the decision on a legal gender change to the state of nationality. However, this arrangement placed at a disadvantage the citizens of those states that did not permit legal gender recognition. The Court held that a departure from the principle that the national law governed the rules on personal status was permissible in cases where the law in question was contrary to fundamental rights, in a manner that was incompatible with German law. Consequently, the Court decided that the impugned restrictions in the Transsexuals Act were contrary to Art. 2§1 (right to protection of personhood) in conjunction with Art. 1§1 (human dignity), and to Art. 3 (equality before the law). The Court specified that the ruling did not benefit those foreigners who were present on German territory temporarily, justified by the concern that the sole purpose of their visit was to apply for legal gender recognition.

VII. AGE LIMITS

- **National jurisprudence/ Germany, Constitutional Court, 1 BuR 938/81, 16 March 1982**
- **National jurisprudence/ Germany, Constitutional Court, 1 BuL 38/92, 40/92 and 43/92, 26 January 1993**

Age limits for eligibility to change one's gender marker and name respectively declared unlawful.

The petitioner in the first case, a 21-year old trans woman who had undertaken gender reassignment surgery, challenged the rule preventing trans people from changing their legal gender before they turned 25. In its judgment, the Constitutional Court struck down the age limit as being in breach of the equality provisions in the Civil Code. The Court noted that since lawmakers had not determined a binding minimum age for undertaking gender reassignment surgery, they had no leeway in determining a minimum age of eligibility for a legal gender change. The Court remarked that “the legislation had the effect that a 25-year-old transsexual person receives the coveted change in [their] civil status, while a transsexual person under 25 is denied it, despite their circumstances otherwise being the same.” At the same time, the court refrained from specifying any alternative rules on age limits.

In the other two cases, two trans men and one trans woman aged between 22 and 24 challenged the age limit of 25 on eligibility for a name change under the Transsexuals Act. In its judgment, the Constitutional Court held that the rule in question breached the provision on equality before the law in the Basic Law (Art. 3§1). The Court reasoned that since the lawmakers allowed trans people to undergo gender reassignment surgery without reference to a lower age limit, their space for regulating access to civil status changes was restricted. The Court refrained from specifying any alternative rules on age limits.

VIII. CHANGING OTHER DOCUMENTS AFTER LEGAL GENDER RECOGNITION

- **National jurisprudence/ Germany, Higher Labor Court Hamm (Westfalen), LAG Hamm Case 4 Sa 1337/98, 17 December 1998**

Former employer obliged to re-issue amended certificate to trans woman.

The petitioner, a trans woman, complained that her previous employer refused to reissue an employment certificate containing her amended name and gender marker. The court ruled in her favour, as re-issuing the certificate was part of the employer's post-contractual

duty of care, deriving from Art. 242 of the Civil Code (principle of good faith) in conjunction with Art. 2§1 of Basic Law (right to protection of personhood) and Art. 5§2 of the Transsexuals Act (disclosure ban). The Court stated that “even if the personnel file of the transsexual person should be destroyed as a result of time lapse, the employer may not refuse to re-issue the certificate, citing forfeiture, as the originally issued certificate is given back, therefore the employer only needs to ‘reformulate’ it, without any substantive verification of details, in respect of the trans person's changed gender and name and the resulting grammatical and spelling modifications.”

The Court specified that this ruling was also applicable to cases where the name change took place prior to the gender marker change, as the legislative aim of the former procedure (at the time the gender marker change, as opposed to the name change, required surgical in-

terventions) was to enable trans people “to appear early-on in the other gender role [...] without having to reveal themselves in everyday life to third parties and authorities.”

- **National jurisprudence/ Netherlands, Equality Opportunities Commission, 30 November 2010**

Discriminatory refusal to issue replacement diploma upon gender recognition.

The petitioner, a trans man, complained to the Equal Opportunities Commission that the University of Amsterdam refused to reissue a graduation diploma with his amended name and gender marker. The university argued that the relevant regulations did not foresee the possibility of replacing a diploma upon legal gender recognition. The Equal Opportunities Commission ruled that the university's decision was discriminatory.



COUNTRY GOOD PRACTICES: ARGENTINA AND MALTA

In this chapter we present two case studies of recently passed Legal Gender Recognition Legislation from Argentina (2012) and Malta (2015). Both are leading in the world as they meet human rights standards and set a context of rights and self-declaration for legal gender recognition. Both laws have been inspiring law makers across the world to create human rights based legal gender recognition provisions.

THE ARGENTINIAN GENDER IDENTITY LAW

The Argentinian “Ley de Identidad de Género” (Gender Identity Law) came into force in July 2012 and constitutes no less than a paradigm shift in Legal Gender Recognition Legislation. Previously, the constitutive approach to LGR was that of gatekeeping. The Argentinian law was the first to legally enshrine an individual right to gender identity that the state had to safeguard. The previous requirements on an individual to fulfil certain criteria had been reverted into the state’s obligation to protect an individual’s gender identity. Following from that, the Argentinian law affirms everyone’s right to have their name and gender identity recognised in a simple declaratory procedure. It safeguards the right to self-determination of every

person and sets the conditions to ensure name and gender in official documents are adapted in a quick and transparent way. In addition to that, the law also affirms the right to the free personal development of every person in regard to their gender identity by way of securing access to trans-related health care, covered in the national health plan (Article 11). In 2015, a subsidiary healthcare policy⁹⁸ and practical guidelines⁹⁹ on trans specific healthcare were put in place to implement trans-specific healthcare in the public healthcare system. Before that, lengthy legal struggles were necessary to realise access to trans-related healthcare in practice.

Minors can change their officially registered gendered information in court, under the same procedures used for adults. The legal representative has to file a request referring to the law and with the “explicit agreement of the minor”. In November 2013, a six-year-old girl was able to change her documents under the Argentinian Gender Identity Law.¹⁰⁰

Privacy during and after the procedure is explicitly protected (Article 9), as is the right to use a name different from the one that is officially recorded (Article 12).¹⁰¹

The “right to identity” as a juridical concept was not created by the Gender Identity Law: it is enshrined in the Argentinian Constitution in Articles 17 (respect for

identity for Indigenous peoples) and Article 19 (protection of cultural identity). While the right to identity was an important concept employed in support of the Argentinian Gender Identity Law, the example of Malta shows that a rights-based approach to LGR can also be formulated within a European context, without requiring a general right to identity.



IMPLEMENTATION OF THE ARGENTINIAN GENDER IDENTITY LAW –

A spotlight interview with Fernando Rodríguez from Hombres Trans Argentinos

How many people have changed their name and gender marker in their ID since the law?

Since the enactment of the Law on May 9, 2012 to date, more than 10,000 people have made use of the rights to change registration throughout the country.¹⁰²

Are there problems (and solutions) registered with the implementation of the law

(eg fraud, minors, detainees, health coverage, new change of name and gender marker, etc)?

We have no data on fraud, arrests, or “regrets” who want to have the previous identity card. There are some drawbacks in terms of implementation on the health part of the law, which generates anxieties among the trans population, especially the younger ones, and that is where doctors (surgeons mostly) have a lucrative business with the access to those rights. Unfortunately, transphobia is not solved with a law, which is why there have been many cases of travesticidios [murders of trans people] in the country.¹⁰³

How has the right of access to health stipulated in the law been implemented?

Access to health is still the crucial part of the law that until this day remains unresolved. There has been some progress, certainly, but very slowly. In addition, the national State took three years to regulate article No. 11 of the law, which grants access to health rights.¹⁰⁴

Is there any other public policy related to the right to gender identity and gender expression since the enactment of the law?

Since the adoption of the law of gender identity in Argentina, there has been a succession of decrees to facilitate administrative procedures, such as social security numbers, regarding pronouns, or the subsequent regulation of the health part.

The presentation of projects concerning labour inclusion of trans people in state departments will take place in several provinces. The provinces that have already enacted these measures are Buenos Aires and Rosario. Other projects await preliminary approval, such as the province of Salta.¹⁰⁵

THE “GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS ACT” OF MALTA

Introduction

The Maltese Gender Identity, Gender Expression and Sex Characteristics Act (“GIGESC Act”) from 2015 took inspiration from the 2012 Argentinian law. Like Argentina, Malta enshrines a right to “recognition of their gender identity” (Article 3, 1 (a)) and thus breaks with the European gatekeeping approach.¹⁰⁶ The law, however, goes further than the Argentinian one, as it also addresses issues pertaining to intersex persons by banning unnecessary sex assigning operations on intersex infants and children. In 2014, Malta was the first European country to enshrine protection from discrimination on grounds of gender identity in its constitution.¹⁰⁷

Structure of the Law

The law consists of 19 articles. The first two concern the name of the law and definitions, among them those for “gender identity and expression” and “sex characteristics”. Articles 3 – 10 detail the procedure, including provisions for minors and refugees. Articles 11 - 13 concern punishment for offences violating the Act and exposing persons who have availed of the provisions of Act, as well as further data protection and non discrimination provisions.

Article 14 declares surgical interventions on intersex children and infants that can be deferred unlawful unless based on informed consent. Articles 15 - 17 deal with healthcare provisions (development of treatment protocols) while Articles 18 and 19 define amendments to the civil code and the Equality between Men and Women Act, extending equality provisions to cover the grounds of “gender expression and sex characteristics”. Gender identity was already covered before.

Procedures for Legal Gender Recognition

Core of the procedure is the right to gender identity defined in Art. 3:

- (1) All persons being citizens of Malta have the right to -
- (a) the recognition of their gender identity;
 - (b) the free development of their person according to their gender identity;
 - (c) be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and
 - (d) bodily integrity and physical autonomy.

All Maltese citizens can avail themselves of this right. Other countries are less restrictive and have LGR provisions that are accessible to all residents (i.e. Germany).

As with the Argentinian law, the subsequent articles safeguard the recognition of such rights in practice. Flowing from that, the change of documents is a simple administrative procedure. It is based on self-declaration (Article 4) that has to be filed through a notary. Upon notification, the Director for the Public registry needs to carry out the relevant changes in the registry within 15 days.

The fact that the application for a change of name and gender cannot be made by the applicant directly to the public registry may seem odd, but stems from Maltese legal traditions. The public registry alone cannot perform changes to documents such as a birth certificate or other deeds.

Provisions for Minors

Provisions for Minors are regulated in Article 7. Parents or tutors can file an application on behalf of a minor to change name and gender. There are no age restrictions.

In the following court proceeding, the court is obliged to hear the minor, give “due weight to the views of the minor” (2.b) and make its decisions “in the best

interest of the child” (2.a). Flowing from Article 3, a minor’s gender identity has to be respected, even if parents are not supportive. Child Protection Services can take action to support the minor in actions aimed beneficial to supporting their gender identity, such as getting gender recognition.

From age 16 a minor can use the notarial deed procedure without needing parental consent.¹⁰⁸

Provisions for Refugees

While the “rights to the recognition of their gender identity” only applies to Maltese citizens, the law provides the same mechanism to change name and gender for persons with refugee status (Article 4 (8)). Citizenship is a rather narrow concept, but considering the number of refugees residing in Malta this is an important addition to the law which other countries should seek inspiration from.

Prisoners

In November 2016, Maltese lawmakers voted to make the GIGESC Act accessible during detention. Prisoners can now access the gender recognition provisions for the duration of their detention. In this way, they can have their gender identity recognised, enabling placement in the ward appropriate for their gender iden-

tity, and correct use of name and gender by staff and other inmates. Based on the non-Maltese inmate’s affidavit and an external assessment, the inmate’s Maltese documents can be changed for the duration of their detention.¹⁰⁹

Intersex issues

Malta’s provisions regarding the “right to bodily integrity and physical autonomy” of intersex persons (Art. 14) are ground-breaking in Europe and globally. Whenever possible, the informed consent of the person concerned is the basis, and not the consent given by parents or guardians.

The said article bans “sex assignment treatment and/or surgical interventions on the sex characteristic of a minor which [...] can be deferred until the person to be treated can provide informed consent.”

Section (2) of the article defines high thresholds for interventions (“exceptional circumstances”) in which informed consent is not possible (agreement of an interdisciplinary team and parental consent).

Privacy and Offences

The law protects privacy of applicants by restricting access to the full birth certificate to the persons themselves (Art (8)), or by a court order. Secondly,

it punishes “knowing exposure” with a minimal fine of €1,000 and a violation of provision of the law by a minimum fine of €500 (Art. 11. (1) & (3)).

Non-discrimination provisions

Article 13 requires not only that “every norm, regulation or procedure shall respect the right to gender identity, [...] nor limit, restrict or annul the exercise” of the right (§13 (1)), but puts a positive duty upon public service to eliminate “unlawful sexual orientation, gender identity, gender expression and sex characteristics discrimination and harassment” and promote equality of opportunity. Article 13 (3) then extends “all provisions of this act” to the public and private sector.

Other changes in legislation following the LGR law

Following the approach of safeguarding the right to gender identity, non-discrimination provisions in the Equality for Men and Women Act Law on grounds of gender identity are extended to “gender identity, gender expression and sex characteristics” (§19).

Implementation

More than 10,000 new ID documents have been issued under the Argentinian law within four years, demonstrating the efficiency of the procedures. In the 12 months after the introduction of the

Maltese GIGESC Act, forty four persons changed their documents, in contrast to twenty one gender recognition court cases in prior years where no gender recognition legislation existed. No cases of fraudulent use are known. This once more demonstrates the success and quality of good legislation.



SUMMARY – GOOD PRACTICE LEGISLATION IN ARGENTINA AND MALTA

The Maltese Gender Identity, Gender Expression and Sex Characteristics Act provides helpful guidance on how to implement European standards on legal gender recognition, since it is in full compliance with the CM Rec 2010(5) LGBT Recommendations as well as the PACE Recommendation 2048(2015). In short, both laws:

- respect the self-determination of trans people
- have no prerequisites such as infertility, gender reassignment surgery, divorce or diagnosis and include measures to prevent misuse by authorities
- protect trans people from disclosure of former name and gender
- are open to anyone, i.e. not only for trans people
- are fast: the administrative procedure takes 2-3 weeks to complete
- in the case of Argentina, guarantees access to trans-related health care on the basis of informed consent and guarantees the coverage of such medical intervention in the national health-care plan
- in the case of Malta, includes bans on the sex assignment of intersex persons that is not based on informed consent, and provides provisions for refugees.

CHECKLIST

LEGAL GENDER RECOGNITION

This checklist aims to assist in assessing the human rights compatibility of legal texts or proposals regulating gender recognition procedures. It lists the minimum standards on commonly known issues in procedures, requirements or effects of gender recognition procedures.

This list does not claim to be complete. Suggestions for amendments can be sent to richard@tgeu.org. It might be necessary to consider additional issues alongside the ones mentioned, depending on the context.

How to use the checklist: go through the three different sections and check whether or not the legal text complies with the criteria given below. If a question cannot be answered positively, review the text and bring it in line. The same should be done if the text does not address the below mentioned criteria or is ill-defined.

Does the proposed text comply?	
Criteria	
Procedures	
Separate procedures are available for change of name and registered gender.	
The applicant is free in the choice of names, including gender neutral names.	
The institution in charge (e.g. administration or court) is clearly evident in the text of the regulation.	
The procedure is quick and the maximum duration clearly and explicitly regulated.	
The procedure is accessible for anyone, irrespective of their economic or other capacity.	
Access of persons with limited legal capacities (minors, persons under guardianship, prisoners) is regulated explicitly.	
Persons with limited legal capacities are involved according to their personal capacities, and their best interests are a primary consideration in all decisions concerning them.	
Access to the procedure for citizens living abroad is regulated explicitly.	
The recognition of foreign decisions is regulated explicitly.	
Access to the procedure for foreign residents, including refugees, is regulated explicitly.	
Asylum seekers and non-citizen detainees have access to immediate temporary provisions for the duration of their asylum procedure or detention.	
Privacy of the applicant is ensured throughout and after the procedure.	
Professionals who disclose private information about the applicant without explicit permission of the person concerned are held accountable.	
The involvement or interference of spouses, children, work colleagues or other third parties in the procedure is barred.	
Grounds for refusal, such as fraudulent intention, are limited and explicitly listed.	
The option for an applicant to appeal the decision is clearly regulated, as is the body to whom the appeal should be addressed.	
Supervision is provided for the enforcement of the legislation, to ensure that it is correctly implemented. A remedy or review mechanism is in place where practice does not correspond.	

Requirements	
The self-determination of the applicant is the sole basis for the gender recognition.	
A person does not need to state association with a certain gender; or alternatives to “male” and “female” are provided.	
No interference or opinion of a third party, either professional (mental health expert et al.) or private (parents, spouse, children, colleagues et al), is requested.	
A request for proof of surgical procedure, hormonal therapy or any other medical or psychological treatment or status is omitted.	
The procedure has no age limits and is fully accessible for young and elderly applicants.	
The best interest of the child and the right of the child to be involved and be heard according to their evolving capacities prevail, also in cases of discordant or reluctant parents or guardians.	
Diagnostic assessment of a child’s gender identity and other forms of testing the child’s identity are explicitly ruled out.	
The procedure is fully accessible for an applicant who is married or in a registered partnership.	
An existing marriage or registered partnership prevails as is. The applicant and their partner can, if freely chosen, transfer their marriage into a registered partnership and vice versa (where available).	
The procedure is fully accessible for an applicant who is a parent or has custody, guardian or visiting rights of children (independent of their age).	
The procedure is fully accessible to an applicant independent of previous or current convictions.	
The applicant is not requested to have lived for a certain time in their gender identity (so called ‘real-life-experience’) or to have used the requested name.	
No other personal characteristic, such as physical appearance, sexual orientation, sex characteristics or intersex status, disability, health, ethnic background or social status may pose a valid ground for refusal or delay.	

Effects	
Upon the decision being made, the applicant is considered a member of the registered gender for all intents and purposes.	
Upon the decision being made, the applicant enjoys all (gendered) rights and duties at par with others of the same registered gender.	
Equity provisions aiming at protecting the applicant on grounds of their gender identity are explicitly regulated. (Example of a criminal code only considering a ‘female’ rape victim as valid, must also allow for the possibility of considering a trans man as a valid victim of rape).	
A change of name and gender marker leads to an automatic (ex officio) change in all registries held, without leaving a trace.	
Once a decision is in force, name(s) and gender marker which were in use prior to such a decision may not be made public or searchable, unless there is an overriding interest or the applicant consents.	
A change of name leads to the right to be addressed for all official purposes as belonging to the corresponding gender.	
State and non-state actors are obliged to rectify gendered information, including gendered letter and number combinations on educational certificates, working references etc. without a trace, also retroactively.	
Where necessary, additional documentation (conscription exempt, army leaving certificates etc), are issued to enable equal access to employment.	
Existing rights and acquired privileges relating to a marriage or registered partnership remain unaffected.	
Acquired pension rights and/ or similar recurring benefits remain unaffected.	
Next-of-kin relationships, especially custody and visiting rights to children, stay unaffected (neither as a requirement).	
Upon gender recognition, a parent can get registered in accordance with the recognised gender as “mother”, “father” or “parent” in birth certificates and documentation of previously born and future children.	

HOW TO WIN THE ARGUMENT –

OVERCOMING MYTHS IN LEGAL GENDER RECOGNITION DISCUSSIONS

When discussing gender recognition procedures and how to reform them, certain stereotypes and fears might reoccur. In the following a number of frequent myths are addressed, with advice on how to respond to them.

SECURITY & SAFETY

After robbing a bank, a bank robber will go directly to the civil registry to change name and gender marker.

The so called “bank-robber question” is out of touch with reality. And even if such cases of abuse did happen, the argument is irrelevant, as the criminal liability of a crime does not depend on a person’s gender marker. Fears that criminals would abuse the procedure to mask their identity to avoid prosecution did not materialise in countries with accessible procedures. It turned out that gender had no relevance to security-political or regulatory policies and was a legally insignificant piece of information in everyday life and legal traffic. Abuse of laws is universal but cannot suffice as reason to deny a population group their human rights. Experience shows that those seeking gender recognition take such a decision after long years of

internal process. Identification of criminals today increasingly involves digital means, such as tax identifiers or digital movements in the internet.

A male convict will seek gender recognition only to be able to transfer to a women’s prison

Across countries, experience shows that trans detainees are at the bottom of a prison hierarchy, making abusive intent rather unlikely. Trans women face a high risk of discrimination and violence in detention, at the hands of other inmates or prison personal. Instead of such hypothetical experiences, we should be concerned that women in detention are safe and secure, whether trans or not.

Sex offenders will have an easier time accessing women’s bathrooms

Evidence shows that transgender persons face violence when forced to use bathrooms that do not correspond to their gender identity. This may cause feelings of intimidation and fear of being unsafe. Furthermore, thinking that transgender persons are criminals per se is transphobic. The dignity and safety of every person, including transgender persons, should be our priority.

Experience from countries with procedures based on self-determination show that these kinds of abuse are exaggerated, unrealistic and fantastic. Such abuse scenarios are often fed by a psychological fear that an outdated societal system would be shaken by a group of “odd-balls”. In particular, men are afraid that patriarchal structures and male privilege become obvious and thus vulnerable.

SOCIETY

“Women” and “men” will disappear and social functioning will suffer

Challenging the notions of “man” and “woman” is not inherently negative and is an unavoidable part of societal progress. Challenging these notions is not associated with the abolishment of invasive medical requirements, but rather with the de-

velopment of human rights and respect for diversity and equality. Also, the world did not end in countries with accessible LGR procedures and the majority of people still identify as men or women.

A free choice of gender markers for everyone is the end to equality measures for women

Classic measures to support women/work-life balance are not affected by lifting restrictive gender recognition procedures. Civil status law and affirmative actions e.g. for single mothers, women in low-income sectors etc., can continue to exist in a similar way to non-discrimination measures for people with a migrant background or People of Colour, without the mandatory registration of gender in public registries.

We need clear allocations of gender for statistical reasons

The mandatory registration of a person’s gender is not necessary for statistical reasons. Furthermore, other criteria for positive measures (such as disability, ethnic background, religion, poverty) can be sociologically registered based on self-declaration. Gender is the exception amongst other discrimination grounds, which are all based on the self-declaration of the individual.

There are too few trans people and having special regulations for them is excessive

This argument does not hold as members of a minority still have the right to have their rights protected. National and European case law has repeatedly confirmed that gender identity is one of the most intimate areas of a person's private life and thus protected by the right to protection of privacy and family life.

Such legislation would let numbers of trans people skyrocket

After the introduction of a self-determined gender marker entry the numbers in Malta increased - other countries report something similar - from 21 cases in 15 years to 60 cases in the first year of the law. This might appear as a high percentage; however, overall it accords with the average proportion of trans people in a given population. An increase - after removal of bureaucratic barriers - is short term and levels off at an average level. In the overall view, the numbers are still small.

Often in discussions, opponents, who do not want to see the human rights aspect, project very strong unreal fears, but dismiss the affected groups as "lifestyle nutcases". This argument is not consistent if the figures would rise rapidly if restrictions were removed, when on the other hand, it is emphasised time

and again that the effort for such a small group would not be worth it.

Society is not ready for progressive gender recognition laws

After the introduction of the LGR procedures, understanding and support of gender identity equality in the Maltese population soared to 85 per cent, the second highest overall in the EU; and at 17 per cent, the fastest growth in any EU member state in the period of two years since the last survey.¹⁰⁰ For Maltese campaigners and policy makers these changes in attitudes clearly correlate with the new law. This is a very likely hypothesis as the Fundamental Rights Agency shows that LGBTI-friendly public measures lead to an improved living situation for LGBT people.¹¹¹

Additionally, less bureaucracy in this area hurts no-one and it actually makes a difference for one group in the population in otherwise difficult circumstances. It is a state signal for the acceptance of human rights. Costs for bureaucracy also decrease as more complex procedures, e.g. expert statements are often very expensive.

Young men will abuse gender recognition procedures to avoid army conscription

The fear that young men will use accessible gender recognition procedures to

evade military draft are not substantiated by evidence. Young men seeking to be exempted from military service will, rather, continue to use conscientious reasons or medical statements, as a change in legal gender prompts many social changes as well as requiring considerable effort to adapt all ID documents etcetera. In case of fraudulent use it would certainly be possible to revoke the decision of an administrative gender recognition procedure through general administrative rules.

MARRIAGE

Allowing a trans person to stay married leads to same-sex marriages

When concluding the marriage, the spouses were of legally of different gender and thus fulfilled the conditions for marriage. It is an obligation of the state to protect the rights of a lawfully married couple, irrespective of whether or not a spouse seeks to have their gender marker rectified at a later point in time. Protection of an existing marriage is however not the same as enabling the marriage of a same gender couple. Moreover, this question loses significance in view of an international trend in jurisprudence and development of law towards giving equal recognition to same-gender partnerships.

REPRODUCTION

Removing the sterilisation requirement will lead to pregnant men and women begetting children.

In the past, some societies impaired the reproduction of certain groups (e. g. Roma, people with disabilities, people with mental disorders ...) which we, as a society, condemn. Reproductive rights do not depend on a person's gender identity; they are individual human rights and should be protected as such. Trans men have been giving birth for a long time, albeit without legal protection and recognition of their identity, which contributes to a realistic risk of transphobic discrimination which might also affect the child.

Sterilisation is not forced if the person agrees to gender reassignment surgery and that is inevitably the outcome of it

It is irrelevant whether or not an individual finds it acceptable to give up reproductive rights in exchange for the right to identity recognition. The UN Declaration on Bioethics and Human Rights¹¹² states that medical interventions are only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. If withdrawing consent could lead to disadvantages, e.g. inaccessibility of legal gender recognition, consent is not given freely and is thus void.

MENTAL HEALTH DIAGNOSIS

We need a diagnosis to prevent those who are really mentally ill from accessing LGR

If we are concerned about people's mental health, we should invest more into education on and support for questions related to gender identity. Trans people often show worse mental health as a reaction to a transphobic environment. Mandatory psychiatric involvement in legal gender recognition contributes to distress and many people choose to remain silent about their mental health issues, out of fear of being denied the option of transitioning legally. Peer-to-peer support, counselling outside of clinical settings and an accepting environment are much better aides to people with mental health issues. Rigid assessment procedures, on the other hand, make it difficult to have an open dialogue between individual and care provider.

Diagnosis is needed to ensure trans-specific healthcare and cost coverage for it remains

Experience from Malta and Sweden shows that pathologisation is not necessary for the provision of trans-specific healthcare. Healthcare should always flow from an individual's medical needs, not from an administrative requirement or legal status. Also, pregnant people and children have medical needs without being declared sick. In most coun-

tries, cost coverage depends on political will, thus requiring a political discussion on the matter.

Only a doctor / expert can tell if a person is really transgender

There is no objective procedure available to assess a person's gender identity. Evidence shows that requiring a transsexual, gender identity disorder diagnosis or similar is neither purposeful nor appropriate in legal gender recognition. In fact, applicants often adapt their personal stories to meet the expert's expectations in order to obtain the diagnosis and thus qualify for legal gender recognition. Medical state-of-the art is to respect a person's self-determined gender identity.

A mental health diagnosis/ expert assessment prevents "regretters"

Opponents persistently bring up discussion of so called "regretters", trans people who after transitioning decide to live again according to their sex as assigned at birth. It is argued that self-determination in legal gender recognition leads to an overburdening of the administration with people who will continuously switch back and forth. Again, no practical experience supports this argument. In the few known cases where trans people have decided to de-transition, loneliness, social and family pressure, and distress resulting from transphobia

have been decisive factors. British tabloid newspapers have been tirelessly searching for de-transitioning persons and have found only a one-digit number throughout the years.

A confused person, who is not transgender, will be manipulated to obtain legal gender recognition.

The option of accessing legal gender recognition does not manipulate or ensnare anyone. As with marriage for same-sex couples, if you don't like it, you do not need to marry a person of the same gender. Also, every person has the right to make decisions that concern that person. This is particularly true for an area as intimate as gender identity. It is actually an argument for easy procedures without irreversible requirements so that people can explore their gender identity more freely. Furthermore, legal gender recognition does not create entitlement to trans-specific medical treatment, as some people might fear.

People will switch identities back and forth

Experience from countries with easily accessible procedures does not support this argument. The law does not get used "just for fun" or for immoral reasons. The effort and personal impact involved are simply too high. Those taking practical steps toward gender recognition have

often gone through a long period of inner reflection on the matter. The underlying motivation cannot be assumed to be light-hearted.

The effort involved in a gender recognition procedure should not be underestimated. It is not realistic to expect that a person would take upon themselves the bureaucratic procedures plus related costs for a change of documents, rectification of educational certificates etc., multiple times. Additionally, over-burdening of the administration is not a valid argument in cases of repetitive re-entry into a confessional group or multiple divorces. Incidentally, administrative fees are set to cover the costs for general bureaucratic administrative efforts.

CHILDREN

Children's wellbeing will suffer and/ or they will be influenced to be(come) transgender

If we asked trans youth or adults what they would have needed when they were younger and at which age they would have liked legal gender recognition, the answers will most likely favour no age limits in gender recognition laws. Trans kids, their parents, and trans adults who speak out about childhood discrimination experiences give painful insight into a reality without legal protection,

and a powerful argument for regulations that are accessible irrespective of age. In this respect, the provision of comprehensive support and counselling services for parents and children within general family and social support services are much more important for the well-being of trans children and youth. Also, this argument reveals the underlying belief that being trans is inherently bad and undesirable, an attitude which is not compatible with the principle of equality.

Children are too young to make such a decision

Children are certain about their gender identity, whether we like it or not. Many parents of trans children report that their trans child made very decisive statements from the age they were able to express themselves. The only remaining task is to ensure these children can grow up safely and feel confident however their gender identity develops. Official change of name and gender marker helps trans children to explore their gender identity and gives them the support they need in an often transphobic environment. This does not require medical interventions or psychiatric involvement. No harm is done on an individual or societal level if a child has the option of exploring their gender identity from early on, even if such a development might not be consistent. Trans chil-

dren who are supported in their gender identity and able to live accordingly do not show levels of anxiety elevated beyond those of their non-trans peers.¹¹³ Asking trans children to “wait” until they can live their gender identity, however, pushes them into isolation, distress, depression and suicide.¹¹⁴ Research overwhelmingly shows the harm done to a child’s personality, including the potential emergence of suicidal tendencies, if the development of their gender identity and their opportunity to explore it in an open and accepting environment is significantly impeded.

A childhood diagnosis can help negotiate problems with kindergartens and schools

If the diagnostic assessment is not helpful for adults, why should it be appropriate for minors? Educational and administrative staff should seek guidance on how to work with trans and gender diverse children and how to address transphobic bullying. Education and guidance from professionals working with trans children are more effective on the long run, helping to establish a welcoming and safe educational environment. To address insecurities in the pedagogical or family environment, it is sensible to implement education and counselling services for the educational sector and for those professionals working with families on a broad basis.

Allowing a child to live out their trans identity will confuse other children about their gender identity

Growing up in a society where diversity is respected teaches children solidarity and empathy. If we decide to limit children’s experience of diversity, we are teaching them that exclusion is a valid practice. And children will eventually grow up, having school-mates, family members, colleagues or neighbours who are trans. Children are confronted with a wealth of information, input and

ideas about different forms of living, not least through the internet. They can and need to learn to find their own path. Also, this argument resonates with the unrealistic fear that decriminalisation of homosexuality would lead to more gays and lesbians. On the other hand, accepting and accommodating difference in others signals to a child that its own individuality is accepted and loved.



ANNEX 1

MALTA GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS ACT (2015)

I assent.

(L.S.) MARIE LOUISE COLEIRO PRECA

President

14th April, 2015

ACT No. XI of 2015

AN ACT for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person.

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same as follows:-

1. The short title of this Act is the Gender Identity, Gender Expression and Sex Characteristics Act, 2015.

Interpretation.

2. In this Act, unless the context otherwise requires:

“Director” means the Director for Public Registry;

“gender expression” refers to each person’s manifestation of their gender identity, and/or the one that is perceived by others;

“gender identity” refers to each person’s 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 and/or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerisms;

“gender marker” refers to the identifier which classifies persons within a particular sex category;

“interdisciplinary team” refers to the team established by article 14;

“Minister” means the Minister responsible for equality;

“minor” means a person who has not as yet attained the age of eighteen years;

“Notary” means a person holding a warrant to practise as a Notary Public in Malta in accordance with the Notarial Profession and Notarial Archives Act; and

“sex characteristics” refers to the chromosomal, gonadal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia and/or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure.

3.

- (1) All persons being citizens of Malta have the right to-
 - (a) the recognition of their gender identity;
 - (b) the free development of their person according to their gender identity;
 - (c) be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and
 - (d) bodily integrity and physical autonomy.
- (2) Without prejudice to any provision of this Act -
 - (a) a person’s rights, relationship and obligations arising out of parenthood or marriage shall in no way be affected; and
 - (b) the person’s rights arising out of succession, including but not limited to any testamentary dispositions made in one’s favour, and any obligations and, or rights subjected to or acquired prior to the date of change of gender identity shall in no way be affected.
 - (c) any personal or real right already acquired by third parties or any privilege or hypothecary right of a creditor acquired before the change in the gender identity of the person shall in no way be affected.

(3) The gender identity of the individual shall be respected at all times.

(4) The person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity.

Change of gender identity.

4.

(1) It shall be the right of every person who is a Maltese citizen to request the Director to change the recorded gender and, or first name and, first name, if the person so wishes to change the first name, in order to reflect that person's self-determined gender identity.

(2) The request shall be made by means of a note of enrolment in accordance with article 5(2).

(3) The Director shall not require any other evidence other than the declaratory public deed published in accordance with article 5.

(4) The Director shall within fifteen days from the filing of the note of enrolment by the Notary at the public registry, enter a note in the act of birth of the applicant

(5) The provisions of article 249 of the Civil Code shall *mutatis mutandis* apply.

(6) (a) The person who made a request in accordance with sub-article (1) shall also be entitled to demand that a full certificate of the act of birth showing the particulars resulting from the annotations be issued to them so however that there shall be indicated on such certificates the annotations that have been made upon it by virtue of a decree of a court or in terms of the procedure established under this Act without the details of the said annotations being specified.

(b) A person whose request to the Court of Revision of Notarial Acts, for a correction in the name and gender assigned to them in their act of birth, shall be entitled to demand that a full certificate of their act of birth showing the particulars resulting from the annotations be issued to them so however that there shall be indicated on such certificate that annotations have been made upon it by virtue of a decree of a court without the details of the said annotations being specified.

(c) Within seven days from receipt of a request made for the issue of a birth certificate drawn up in accordance with this article, the Director shall not give any information contained in the register indicating the original act of birth except insofar as provided in this article.

(7) The said information or copy of the original act of birth may be given:

(a) with the consent of the person to whom the certificate refers; or

(b) when there is no such consent, upon an order of the Court (Voluntary Jurisdiction Section) or of another Court taking cognizance of a cause where the necessity of the presentation of that certificate or information arises, where the Court is satisfied that the issuing of the said certificate or information is necessary to defend or safeguard a right or a legitimate interest of the person making the demand which, after taking into consideration all relevant circumstances, the court's considerations should prevail over the right to privacy of the person to whom the certificate refers.

(8) A person who was granted international protection in terms of the Refugees Act, and in terms of any other subsidiary legislation issued under the Refugees Act, and who wants to change the recorded gender and first name, if the person so wishes to change the first name, shall make a declaration confirmed on oath before the Commissioner for Refugees declaring the person's self-determined gender and first name. The Commissioner for Refugees shall record such amendment in their asylum application form and protection certificate within fifteen days

5.

(1) The drawing up of the declaratory public deed shall contain the following elements:

(a) a copy of the act of birth of the applicant;

(b) a clear, unequivocal and informed declaration by the applicant that one's gender identity does not correspond to the assigned sex in the act of birth;

(c) a specification of the gender particulars;

(d) the first name with which the applicant wants to be registered; and

(e) all the prescribed elements required in accordance with the Notarial Profession and Notarial Archives Act.

(2) The Notary shall not request any psychiatric, psychological or medical documents for the drawing up of the declaratory public deed.

(3) Every Notary receiving such an act must deliver to the Director a note in accordance with article 50 of the Notarial Profession and Notarial Archives Act.

6.

The date of entry of the note by the Director in accordance with sub-article (4) of article 4 shall be considered, for all purposes of the law, as the effective date from when the person is considered to belong to the gender indicated in the note.

7.

(1) The persons exercising parental authority over the minor or the tutor of the minor may file an application in the registry of the Civil Court (Voluntary Jurisdiction Section) requesting the Court to change the recorded gender and first name of the minor in order to reflect the minor's gender identity.

(2) When an application under sub-article (1) is made on behalf of a minor, the Court shall:

- (a) ensure that the best interests of the child as expressed in the Convention on the Rights of the Child be the paramount consideration; and
- (b) give due weight to the views of the minor having regard to the minor's age and maturity.

(3) If the Court accedes to the request made in accordance with sub-article (1), the Court shall order the Director to change the recorded gender and first name of the minor in the act of birth of the minor.

(4) The persons exercising parental authority over the minor or the tutor of the minor whose gender has not been declared at birth, shall before the minor attains the age of eighteen, file an application in the registry of the Civil Court (Voluntary Jurisdiction Section) in order to declare the gender and the first name of the minor, if the minor wants to change the first name, and following the express consent of the minor, taking into consideration the evolving capacities and the best interests of the minor. The Civil Court (Voluntary Jurisdiction Section) shall order the Director to record the gender and first name of the minor in the act of birth of the minor.

8.

(1) Accessibility to the full act of birth shall be limited solely and exclusively to the person who has attained the age of eighteen years and to whom that act of birth relates or by a court order.

(2) An amendment to the act of birth made in terms of this Act by a person who is not at the time a minor, once completed, can only be modified again by a court order.

Foreign decisions.

9.

(1) A final decision about a person's gender identity, which has been determined by a competent foreign court or responsible authority acting in accordance with the law of that country, shall be recognized in Malta.

(2) A gender marker other than male or female, or the absence thereof, recognised by a competent foreign court or responsible authority acting in accordance with the law of that country is recognised in Malta.

Amendments in other official documents.

10.

(1) A person shall, not later than one month from the publication of the declaratory deed, indicate to the Director the acts of civil status, other than the act of birth, which need to be amended.

(2) A person, in respect of whom an amendment to the act of birth has been made in accordance with the provisions of this Act shall, within fifteen days from the date specified in article 6, request the authorised officers in terms of the Identity Card and other Identity Documents Act to amend the identity card and other identification documents of the person and to issue a new identity card and other identification documents indicating the gender and the first name of the person reflecting the amendment made in the act of birth of the person.

(3) A person may also, on the payment of such fee as may be prescribed, request any other competent authority, department, employer, educational or other institution to issue any official document or certificate relative to them indicating the change in gender and first name of the person.

11.

(1) Whosoever shall knowingly expose any person who has availed of the provisions of this Act, or shall insult or revile a person, shall upon conviction be liable to a fine (multa) of not less than one thousand euro (€1,000) and not exceeding five thousand euro (€5,000). Cap. 9

(2) Saving the provisions of article 83B of the Criminal Code, when an offence is motivated by gender expression and sex characteristics, the punishment shall be that laid down in the said article.

(3) Whosoever knowingly violates any of the provisions of this Act, shall upon conviction be liable to a fine (multa) of not less than five hundred euro (€500) and not exceeding one thousand euro (€1,000).

12.

A person who in the course of the discharge of official duties was involved with a matter relating to this Act, shall not disclose such matter in accordance with the Professional Secrecy Act and the Data Protection Act:

Provided that the copies of the public deed referred to in article 5 published in terms of the Notarial Profession and Notarial Archives Act shall not be deemed to have been issued in violation of this article.

Anti-discrimination and promotion of equality.

13.

(1) Every norm, regulation or procedure shall respect the right to gender identity. No norm or regulation or procedure may limit, restrict, or annul the exercise of the right to gender identity, and all norms must always be interpreted and enforced in a manner that favours access to this right.

(2) The public service has the duty to ensure that unlawful sexual orientation, gender identity, gender expression and sex characteristics discrimination and harassment are eliminated, whilst its services must promote equality of opportunity to all, irrespective of sexual orientation, gender identity, gender expression and sex characteristics.

(3) The provisions of this Act shall apply to the private sector, all public sector and public service departments, agencies and all competent authorities that maintain personal records and, or collect gender information. Such forms, records and or information shall be assessed and modified to reflect the new standards established by this Act within a maximum of three years from the date of entry into force of this Act.

Right to bodily integrity and physical autonomy.

14.

(1) It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor which treatment and/or intervention can be deferred until the person to be treated can provide informed consent: Provided that such sex assignment treatment and/or surgical intervention on the sex characteristics of the minor shall be conducted if the minor gives informed consent through the person exercising parental authority or the tutor of the minor.

(2) In exceptional circumstances treatment may be effected once agreement is reached between the interdisciplinary team and the persons exercising parental authority or tutor of the minor who is still unable to provide consent: Provided that medical intervention which is driven by social factors without the consent of the minor, will be in violation of this Act.

(3) The interdisciplinary team shall be appointed by the Minister for a period of three years which period may be renewed for another period of three years.

(4) The interdisciplinary team shall be composed of those professionals whom the Minister considers as appropriate.

(5) When the decision for treatment is being expressed by a minor with the consent of the persons exercising parental authority or the tutor of the minor, the medical professionals shall:

- (a) ensure that the best interests of the child as expressed in the Convention on the Rights of the Child be the paramount consideration; and
- (b) give weight to the views of the minor having regard to the minor's age and maturity.

Health services.

15.

All persons seeking psychosocial counselling, support and medical interventions relating to sex or gender should be given expert sensitive and individually tailored support by psychologists and medical practitioners or peer counselling. Such support should extend from the date of diagnosis or self-referral for as long as necessary.

Treatment protocol.

16.

(1) The Minister, after consulting the Minister responsible for health, shall appoint a working group.

(2) The working group shall consist of a Chairperson and nine members.

(3) The Chairperson shall be a medical doctor with at least twelve years experience.

(4) The members shall be three experts in human rights issues, three psychosocial professionals and three medical experts.

(5) The Minister shall appoint the working group within three months of the entry into force of this Act.

(6) The members of the working group shall review the current medical treatment protocols in line with current medical best practices and human rights standards and shall, within one year from the date of their appointment, issue a report with recommendations for revision of the current medical treatment protocols.

Power to make regulations.

17.

The Minister may make regulations to give better effect to any of the provisions of this Act and generally to regulate gender identity in conformity with the provisions of this Act.

18.

The Civil Code shall be amended as follows:

(a) immediately after sub-article (11) of article 4 thereof, there shall be added the following new sub-article: “(12) When applying for the registration of a marriage contracted abroad between partners of the same sex, the partners to the marriage may elect to:

(a) adopt for both of them the surname of one of the partners to the marriage or the surnames of both in the order they choose for both; or

(b) retain their own surname: Provided that if no choice is expressed in accordance with this sub-article the partners to the marriage shall retain their own surnames.”;

(b) articles 257A to 257D thereof, both inclusive, shall be deleted;

(c) in paragraph (c) of article 278 thereof for the words “sex of the child;” there shall be substituted the words “the sex of the child:” and immediately thereafter there shall be added the following new proviso:

“Provided that the identification of the sex of the minor may not be included until the gender identity of the minor is determined.”

19.

Article 2 of the Equality for Men and Women Act shall be amended as follows:

(a) in sub-article (1) thereof, in the definition of the term “discrimination”, the words “gender identity and includes the treatment of a person in a less favourable manner than another person is, has been or would be treated on these grounds and “discriminate” shall be construed accordingly;” shall be substituted by the words “gender identity, gender expression or sex characteristics and includes the treatment of a person in a less favourable manner than another person is, has been or would be treated on these grounds and “discriminate” shall be construed accordingly;”;

(b) in sub-article (3) thereof, the words “or gender identity is:” shall be substituted by the words “or gender identity, gender expression or sex characteristics is:”;

(c) in paragraph (a) of sub-article (3) thereof, the words “or gender identity;” shall be substituted by the words “or gender identity, gender expression or sex characteristics;”;

(d) in paragraph (c) of sub-article (3) thereof, the words “or gender identity;” shall be substituted by the words “or gender identity, gender expression or sex characteristics;”;

(e) in paragraph (d) of sub-article (3) thereof, the words “gender identity, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.” shall be substituted by the words “gender identity, gender expression or sex characteristics unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.” .

Passed by the House of Representatives at Sitting No. 256 of the 1st April, 2015.

ĀENSU GALEA

Deputy Speaker

RAYMOND SCICLUNA

Clerk of the House of Representatives

ANNEX 2

NORWAY LEGAL GENDER AMENDMENT ACT (2016)

Excerpt from:

Prop 74 L (2015-2016)

Proposition to the Storting (proposal for a legislative decision)

The Legal Gender Amendment Act^{115 116}

Recommendation of the Ministry of Health and Care Services March 18th 2016, approved by the Norwegian Council of State on the same day. (The Solberg Government)

11 Notes on the individual provisions

On § 1

The provision defines what is meant by legal gender in this law. Legal gender is the gender a person is registered with in the National Registry. The legal gender is recorded on the basis of the information contained in the birth notice that healthcare workers submit to the National Registry when a child is born. A person's national identity number holds information about their gender. The ninth digit of the birth number is even for women and odd for men, cf. National Registry Regulations § 2-2. See further details under Section 4.1.

On § 2

In this provision the right to change legal gender is established. The condition is that the person feel they belong to the opposite gender than the gender he or she is registered with in the National Registry. Under the proposal, the amendment will be based on a self-declaration. See further details under Section 8.1.

The applicant will contact the Tax Office (the National Registry Authority) and receive information regarding the effects of amending legal gender and a reply slip to be returned as confirmation that the application is maintained. See also section 8.4.4. The amendment means that the person will be registered with their new legal gender in the National Registry and assigned a new national identity number, and that they have lawfully changed gender where this has judicial significance.

The right to amend legal gender also applies if someone wants to change back to their previous legal gender. There is no set limit on the number of times one can change legal gender. Neither is there a proposed requirement of a latency period before one can revert back to the previous gender. A person who has changed their gender and then changes back to their original gender will not be able to use their original national identity number.

The right to amend legal gender applies to persons residing in Norway. Those who are considered residents according to the National Registry Law and the associated regulations, are the ones who in this provision will be regarded as residents of Norway. Who should be considered as a resident under the National Registry Law is currently established in the National Registry Regulations §§ 4-1 to 4-7. According to the main rule § 4-1, persons residing in Norwegian municipalities for a period of at least 6 months will be regarded as residents of Norway.

The Ministry may issue regulations that also make this law applicable to Norwegian citizens living abroad.

On § 3

People who are put under guardianship will themselves apply for an amendment to their legal gender. This is also pursuant to the Guardianship Act § 21, fourth paragraph. Amending one's legal gender will be a "particularly personal matter" not covered by the guardianship without specific statutory authority.

On § 4

The provision regulates the amendment of legal gender for children. Pursuant to the first paragraph, once a person has reached the age of 16 they are themselves able to apply for a legal gender amendment. Consent of the person or persons with custody is not required.

The second paragraph regulates amendments to the legal gender of children between the ages of 6 and 16. They may also apply to have their legal gender changed. However, the application must be submitted by the person or persons who have custody.

If two people have joint custody of the child, both are required to submit the child's application.

If the parents have joint custody and one parent does not wish to apply with the child, the legal gender may still be amended if this is what is best for the child. This also applies where people other than the parents have custody.

Cases lacking involvement from one of the two with custody will be processed by the County Governor of Oslo and Akershus, ref. Draft law § 4, second paragraph, second sentence and § 5 second paragraph. The County Governor will in such cases assess what is in the best interest of the child. Significant factors in this review may be the child's age and maturity, what gender expression the child has practised, in what way and for how long and how consistently the child has expressed their gender identity, the reasons why one parent does not consent to amending the legal gender, the relationships between the child and the two parents and which of these must be presumed to know the child best.

The third paragraph regulates the situation for children under the age of 6. Children under 6 may only amend their legal gender if they have a congenital somatic sex development uncertainty. In such cases, the person or persons who have custody may apply on behalf of the child. The congenital somatic sex development uncertainty must be documented by a healthcare professional. Both healthcare professionals and the parents must ensure that the child is allowed to express their views to the extent that they are able to do so based on age and maturity. The Tax Office may normally assume that statements from the parents that the child has been informed

and been given the opportunity to comment, or that the child is not sufficiently mature to comment, are accurate.

See further details under Section 8.3.

On § 5

The provision states that applications for a legal gender amendment will first be processed by the Tax Office (National Registry Authority). A person wanting to amend their legal gender will submit a self-declaration that they regard themselves as belonging to the other gender than the one under which they are registered with the National Registry; see also the note on § 2. A decision to accept or deny an application for a legal gender amendment is an individual decision as defined by the Public Administration Act § 2. The decision is the determinant for a person's right to amend their legal gender. The decision may therefore be appealed in accordance with the Public Administration Act chapter 6. Appeals in such cases should be made to the County Governor of Oslo and Akershus.

Applications for amending legal gender submitted by a child with the support of only one of the two with custody, cf. § 4, second paragraph second sentence, will be processed by the County Governor of Oslo and Akershus. Appeals in such cases are processed by the National Appeals Body for the Health Services.

See further details under Section 8.4.

On § 6

The legal gender should be assumed in the application of other laws and regulations.

Pursuant to § 2 of the proposal there is no longer a requirement that a person has undergone a complete sex change and sterilisation, for their legal gender to be amended. This means, among other things, that someone who is legally male may be able to bear children.

Pursuant to the provision in § 6, first paragraph, the general rule is that the legal gender will be assumed in the application of rules in other laws and regulations where gender is of importance.

For example the rules on gender quotas, such as the Courts of Justice Act § 27, which stipulates that among the members and deputy members in the Conciliation Board there will be both men and women, the Courts of Justice Act §§ 64 and 65 demanding that there should be a selection of lay judges for women and one for men, the rules of the Gender Equality Act § 13 regarding gender balance in public committees, boards and councils and the requirement of 40 per cent women on the boards of corporations, etc. Another example is the Biotechnology Law, which in several provisions uses the terms “woman” and “man.”

Birth gender is still assumed where it is necessary to establish parenthood and custody under the rules of the Children Act. This will be the case if a legal male gives birth. Parenthood will then be established in accordance with the rules of motherhood in the Children Act § 2. Paternity will be established by the usual rules, possibly with the assistance of public authorities pursuant to the Children Act § 5.

If a person changes their legal gender to woman and has children with a female spouse or live-in partner using assisted reproduction, parenthood may be determined by the Children Act’s rules on co-maternity. In such cases it will not be necessary to establish parenthood from the birth gender.

If a couple produces children without the help of assisted reproduction, the conditions for establishing parenthood under the rules on co-maternity will not be met. In such cases it will be necessary to establish parenthood on the basis of the birth gender of the person who has changed their legal gender. Parenthood will in such cases be established under the rules of paternity in the Children Act. If the couple is married, the main rule is determination of paternity by the pater est rule in § 3 first paragraph. For those who are not married, paternity is normally determined by a declaration under the Children Act § 4.

See also the Ministry’s assessments in Section 8.5.3.

Pursuant to § 6, second paragraph, the rules regarding women who give birth apply equally to a person giving birth after having amended their legal gender. These include rights under the National Insurance Act chapter 14 on benefits during pregnancy, childbirth and adoption allowance in accordance with § 14- 4, which are given to an employee who must stop working “because she is pregnant.” This will apply equally to male workers. After § 14-17 a lump sum is granted to “a woman who gives birth to children ...”. The rules will apply equally to men who give birth.

The National Insurance Act chapter 14 also contain some rights provisions distinguishing between the father and the mother. These are, in particular, the rules on parental benefits in §§ 14-5 to 14-16, but also the provision in § 14-17 regarding the lump sum grant. If parenthood is established on the basis of birth gender in accordance with § 6, first paragraph, second sentence, this must be also be assumed in the application of these provisions.

On § 7

The Ministry may issue regulations regarding supplementation and implementation of the provisions of the Act.

On § 8

The Act takes effect from the date decided by the King. The King has the legal authority to implement the individual provisions at different times.

On § 9

Pursuant to the proposed amendments to the Personal Names Act, the age limit for adopting, changing or removing a name or surname changes from 18 to 16 years. In cases where a child has amended their legal gender by approval of the County Governor of Oslo and Akershus and with the consent of one of their parents or others with custody, a notice of the name change will also be approved with the consent of only one parent or another person who has custody.

The Ministry of Health and Care Services

recommends:

That Your Majesty approves and signs the submitted proposal for a bill to the Storting regarding the Legal Gender Amendment Act.

We HARALD, King of Norway,

affirm:

The Storting will be asked to make a decisions regarding the Legal Gender Amendment Act in accordance with the attached proposal.

Proposal for a Legal Gender Amendment Act

§ 1 Definition

Legal gender is the gender a person is registered with in the National Registry.

§ 2 The right to amend legal gender

Persons who are residents of Norway and who regard themselves as belonging to the other gender than the one they are registered with in the National Registry, have the right to amend their legal gender. The Ministry may issue regulations making this law applicable to Norwegian citizens living abroad.

§ 3 Amending the legal gender of persons placed under guardianship

A person who is placed under guardianship by the Guardianship Act will apply for the amendment of legal gender themselves.

§ 4 Amending the legal gender of children

From the age of 16 children may apply for an amendment to their legal gender by themselves.

Children aged between 6 and 16 must apply for an amendment to their legal gender in concert with the person or persons who have custody of the child. If the parents have joint custody, but the application is submitted with the support of only one of them, the legal gender may still be changed if this is what is best for the child.

An application to amend the legal gender of children under 6 years of age will be submitted by the person or persons who have custody of the child. Children who are capable of forming their own views on the matter should be informed and given an opportunity to express their views before the application is submitted. A legal gender amendment can then be made for the child provided that the child has a congenital somatic sex development uncertainty. The applicant must submit documentation of this health condition from a healthcare professional.

§ 5 The processing of applications for a legal gender amendment

Applications for legal gender amendments are processed by the Tax Office (National Registry Authority). The Tax Office's decisions in legal gender amendment cases may be appealed to the County Governor of Oslo and Akershus.

Applications from children between 6 and 16 years of age in accordance with § 4, second paragraph, second sentence, submitted in concert with just one of those with custody, will be processed by the County Governor of Oslo and Akershus. The County Governor's decision may be appealed to the National Appeals Body for the Health Services.

§ 6 Judicial consequences of amending the legal gender

The legal gender should be assumed in the application of other laws and regulations. The birth gender should still be assumed if it is necessary for establishing parenthood and custody under the Children Act. A person who amends their legal gender retains the rights and obligations of fatherhood, motherhood or co-maternity.

The rules that apply to a woman who gives birth to children, apply equally to a person giving birth after a legal gender amendment.

§ 7 Regulations

The Ministry may issue regulations regarding supplementation and implementation of the provisions of the Act.

§ 8 Commencement

The Act takes effect from the date decided by the King. The King may implement the individual provisions at different times

§ 9 Amendments to other Acts

From the time the Act takes effect, the following amendments will be made to the Act of June 7th 2002 No.19 regarding personal names:

§ 10, second paragraph, first sentence should read:

Persons over the age of 16 may not adopt, change or remove a first or last name more than once every ten years.

§ 12 should read:

§ 12 Notice regarding the names of children

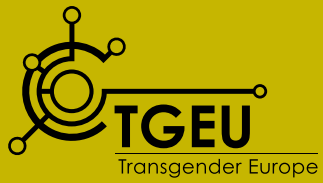
A notice to adopt, change or remove a name for someone who has not yet reached the age of 16 will be submitted by the person or persons who have custody, or they must have consented to the notice. If the notice concerns a child over the age of 12, the child must also have agreed. Where there is no consent by the first or second sentence, the notice may still be accepted if there are special reasons for doing so. If the notice concerns a person who has changed their legal gender under the Legal Gender Amendment Act § 4, second paragraph, second sentence, the consent of one of those with custody is sufficient.

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The following text represents an unofficial translation of the law from Norwegian.
It might include terms that some readers might find offensive.
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