

**Gender Recognition and the Legal Rights of Transgender People in
International and European Human Rights Law**

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Declaration

I declare that this dissertation has been composed solely by myself. Except where states otherwise by reference or acknowledgement, the work presented is entirely my own.

Signature

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Date: 30/11/2022

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List of Abbreviations

CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
LGR	Legal Gender Recognition
OHCHR	UN Office of the High Commissioner for Human Rights
TGEU	Transgender Europe

Abstract

This dissertation aims to provide information about the latest developments in International Human Rights Law regarding the legal rights of transgenders. As the dissertation demonstrates, transgender people face numerous difficulties in everyday life because of the incomplete or the absence of legal gender recognition procedures and it is necessary to in international and national level to regulate the above issue, so that they can live freely in a society that respects their fundamental rights and freedoms.

Introduction

Due to society's tendency to define gender roles by placing titles and labels on behaviors and activities, prejudices and stereotypes have been created around gender identity. Recently several positive steps have been taken both internationally and nationally for the legal recognition of gender identity and it seems that even the most "traditional" states understand the need to regulate this issue.

As we will see in this analysis, because there are no binding international texts, which would define the procedures and criteria for the legal recognition of gender identity, states adopt various practices and approaches, which unfortunately most of the time do not practically solve the problem and make the situation difficult for trans people. A classic example are the medical and psychological criteria, sterilisation, divorce filing etc. that exist in gender identity recognition procedures, which will be analyzed below.

It is worth noting that this analysis refers to the self-determination procedures adopted by some states, which according to international and European human rights organizations are the best way to deal with the issue, since it respects the rights of transgender people and does not violate fundamental basic human rights.

An important role in the formulation of policy is the jurisprudence of the ECtHR, which although initially took a more cautious stance, in recent years has not been afraid to face issues concerning the legal recognition of gender identity.

This article discusses the impact of not having legal gender recognition procedures on the enjoyment of human rights for transgenders as well as the legal measures that have been taken to finally include those procedures in national and international level. The first part of this article discusses the political and legal challenges around gender identity and gives important definitions, while the second and third parts discuss the criteria and procedures for legal gender recognition across the board and gives information about ECHR case-law and international and Europeans' law perspective and practices about this topic. Finally, the third part summarizes the best practices regarding LGR and provides recommendation to better deal with the issue, always with a view to protecting the human rights of transgender people.

1. Gender Identity Issues

1.1. Definitions

There are widespread misconceptions regarding gender and sexual orientation issues in our society as a result of a lack of education and awareness. As we move through this section, we will clarify precisely what we mean by gender identity so that we can identify which population we are addressing and the challenges they face.

Across the board, national and international laws have progressively recognized gender identity in recent years. It is important to note that in terms of international law, the Yogyakarta Principles offer a set of principles relating to how international human rights law should be applied to sexual orientation and gender identity. Although they are not legally binding, they serve as a valuable guide for states.¹

According to the above Principles:

“Gender identity is understood to refer 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 chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”²

Also, according to the Ontario Human Rights Commission’s Code:

gender identity is each person’s internal and individual experience of gender. It is a person’s sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person’s gender identity may be the same as or different from their birth-assigned sex.³

There is a fundamental difference between the gender identity of an individual and their sexual orientation that must be acknowledged. The sense of gender an individual has is solely determined by their self-identification with a particular gender.

¹ The Yogyakarta Principles were adopted in 2006 and since then they have developed into an authoritative statement of the human rights of persons of ‘diverse sexual orientations and gender identities’.

Available at: http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

² *ibid.*

³ Ontario Human Rights Commission (2014). Policy on preventing discrimination because of gender identity and gender expression. Available at: <https://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression/3-gender-identity-and-gender-expression>

In an effort to enhance understanding of terms commonly used within the LGBTQ+ community, the Center of Excellence on LGBTQ+ Behavioral Health Equity (CoE LGBTQ+ BHE) has developed a glossary of terms regarding sexual orientation, gender identity, and expression (SOGIE). According to the glossary above, the following definitions are provided:⁴

Gender expression: The ways in which an individual communicates their gender to others through behavior, clothing, hairstyle, voice, etc.; not an indication of gender identity or sexual orientation;

Gender identity: One’s internal, personal sense of their gender. Gender identity is best represented as a spectrum and an individual may move around this spectrum. Some terms that are associated with this spectrum are man, woman, gender fluid, genderqueer, trans, transgender, and two-spirit, although these are not the only terms. Some individuals may identify as both man and woman, neither man nor woman, or nonbinary;

Intersex: An umbrella term constructed to describe variations of sex characteristics. This could include mixed chromosomes, elements of both male and female reproductive systems, or genitalia that do not appear clearly male or clearly female at birth. For example, a baby born with a vagina and testes;

Sex assigned at birth: The sex assigned at birth by a doctor; based on physical anatomy and hormones. Designations include male, female, or intersex and is also referred to as “assigned sex at birth”;

Transgender: An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe their gender identity using one or more of a wide variety of terms – including but not limited to transgender. The term “trans” is often used as shorthand;

Transition: A term used to describe the process of moving from one sex/gender to another. Transition can include personal, medical, and legal steps like telling one's

⁴ The Center of Excellence on LGBTQ+ Behavioral Health Equity (CoE LGBTQ+ BHE) has created this glossary of terms related to sexual orientation, gender identity, and expression (SOGIE) as a resource for behavioral health practitioners to better understand language commonly used in LGBTQ+ communities. The glossary is available at <https://lgbtequity.org/wp-content/uploads/2021/04/SOGIE-Glossary.pdf>

family, friends, and co-workers; using a different name and new pronouns; dressing differently; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) one or more types of surgery. The exact steps involved in transition are up to the person transitioning.

Also, it is important to define and understand the difference between the term “sex” and “gender”. The European Commission gives the following definitions:

Sex: As both a legal and medical category, sex is a classification of people as at birth, based on the appearance of their external anatomy. However, a person’s sex is a combination of bodily characteristics including chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics. Persons whose sex cannot be clearly classified as either male or female are classified as intersex;⁵

Gender: Gender refers to the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.

Based on the definitions above, transgender individuals have a different gender identity from the one assigned to them at birth. Biologically, our gender is determined by our physical characteristics, which may not coincide with our gender identity.⁶ Therefore, the gender identity and expression that accurately defines the trans status is an internal and sourced sense of gender. Transgender people are not defined by their transition procedures (pharmacological or surgical), but by their way of perceiving gender.

⁵ Directorate-General for Justice and Consumers (European Commission), ICF. (2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>

⁶ Castro-Peraza, María Elisa, Jesús Manuel García-Acosta, Naira Delgado, Ana María Perdomo-Hernández, María Inmaculada Sosa-Alvarez, Rosa Llabrés-Solé, and Nieves Doria Lorenzo-Rocha. “*Gender Identity: The Human Right of Depathologization*” (2019) *International Journal of Environmental Research and Public Health* 16(6): 978.

1.2. Obstacles and negative consequences in everyday life of a transgender person

Based on FRA's 2019 LGBTI survey, the majority of transgender people discover that their gender does not correspond to their assigned sex at birth before they reach the age of 18. There is a possibility that parental, educational, and societal influences can influence a child's gender expression during this period. Also, participants in the study reported that coming out can be a lengthy and complex process, involving many phases.

It is not uncommon for transgender individuals to experience frustration or failure after becoming aware of their identity in their early childhood due to the fact that they failed to meet societal expectations of their assigned gender. Some of these incidents occurred among participants in this study as a result of their interaction with toys that were stereotypically associated with other genders, internalizing comments from adults about what was 'appropriate' behavior or being excluded from gender-specific activities, such as team sports.⁷

In addition, it is important to keep in mind that there can be a gap between the time when an individual becomes aware of their gender identity and the time when they tell someone for the first time about it. Even though many trans respondents became aware of their gender identity at an early age (ages 0-5, 6-9, and 10-14), it is not until they reach their early 20s that they come out to others (FRA's 2019 LGBTI survey). Due to their strong fear of familial rejection or losing their jobs, some participants in the above study had repressed their feelings about their gender identity for decades.⁸

Additionally, transgender individuals face challenges in the areas of employment and economic development. Based on available statistics, transgender individuals are more likely than the general population to have low employment rates, to be inactive economically, and to be unemployed. FRA survey (2019) showed that 51% of transgenders who participated in the research were in paid work or self-employed, compared to 69.3% of the general population (aged 15-64). As compared to the general unemployment rate, the unemployment rate for transgender women was nearly three times higher. The lowest employment rate in the trans community is reported to be

⁷ Directorate-General for Justice and Consumers (European Commission), ICF. (2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>

⁸ *ibid.*

among trans men (38.9%), which may be partly explained by the large percentage of trans men who are still in school due to their age (40.6%).⁹

Moreover, transitioning can be a lengthy and complicated process, intertwined with experiences of coming out. Both medical and non-medical issues may be associated with this process. Participants in the study discussed a variety of issues related to medical transition, including difficulties in obtaining hormone therapy, a lack of support from healthcare professionals, and negative reactions from others.

In comparison to the general population, transgender individuals have a significantly lower employment rate, a higher economic inactivity rate, and a higher unemployment rate. Aside from having trouble completing the application process, transgender individuals may also face difficulty accessing employment because their documentation does not reflect their gender identity.

Also, for transgender individuals, revealing their gender identity at work can pose several risks. First of all, the workplace can be a hostile environment for transgender employees. The FRA survey revealed that respondents experienced discrimination, prejudice, and harassment at their jobs, as well as being fired as a consequence of openly expressing their gender identity. In response to changes in duties and working hours, transgender individuals have found it increasingly difficult to find employment and have had fewer opportunities for advancement. There is also evidence that sexism affects the careers of transgender individuals.¹⁰

One of the primary obstacles preventing the recognition of gender identity is the stereotypes associated with it. While the Treaties contain solemn and promising language, surveys show that, more than half of transgender people in the EU face discrimination (FRA Transgender Survey 2014, 21; FRA LGBTI Survey 2020, 22).¹¹

As outlined by the Office of the High Commissioner for Human Rights, mental health diagnoses have been misused for a long period of time to pathologize identities and

⁹ *ibid.*; FRA's study sample may have been affected by a similar issue to that in this study: namely, that young people were more likely to be participate. The FRA data in this report is weighted to increase its representativeness, although not specifically for age.

¹⁰ Directorate-General for Justice and Consumers (European Commission), ICF. (2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>

¹¹ Lashyn Serhii "Transgender EU Citizens and the Limited Form of Union Citizenship available to them." (2022) Feminist Legal Studies 30, 201–218.

other forms of diversity. In 2017, the UN Special Rapporteur on the right to health stated that reducing trans identities to diseases aggravated stigma and discrimination.

Also, in 2019, the World Health Assembly adopted the eleventh revision of the International Classification of Diseases (ICD-11), which removed trans-related categories from the chapter on mental and behavioural disorders. The revision depathologizes trans identities and is considered an important step forward to ensure trans persons can live free from violence and discrimination.

It is important to note that for a long time, pathologization has had a deep impact on public policy, legislation and jurisprudence, thus permeating in all realms of State action around the world and the collective conscience. Eradicating the conception of some forms of gender as a pathology from everyday life will be a longer process that will require further measures to that end.¹²

According to a study commissioned by the EU Commission many trans people living in the EU today experience direct and indirect discrimination based on their gender identity. This discrimination exists in the labour market, in access to health and social services, in schools and universities (FRA, 2014; FRA, 2019). It prevents the full and equal social and economic participation of trans people and impedes them from enjoying full rights. In addition, trans people may face day-to-day transphobia, harassment, and abuse. The gender identity of trans individuals is not always reflected in their legal and administrative documents, nor respected by the wider public.¹³

¹² Office of the High Commissioner for Human Rights (2019). Independent Expert on Sexual Orientation and Gender Identity. Available at: <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons>

¹³TGEU (2021). New factsheets on Legal Gender Recognition in the EU. Available at: <https://tgeu.org/factsheets-on-lgr-in-the-eu/>

1.3. Political and Legal Challenges

As we will see in the Second Chapter, many states include certain criteria on their legal gender recognition procedures, that individuals have to meet before being able to change their registered gender.

Identity verification is an essential component of one's daily life. Showing an ID is necessary to access healthcare, book a hotel room, purchase an event ticket, and, very recently, prove one's COVID-19 vaccination status before entering virtually any indoor public space.¹⁴ Despite their omnipresent inclusion in identity documents, Holning Lau rightfully describes gender markers as a "crude tool" for the purposes of verifying one's identity. Apart from the important role identity documents play in daily life, they are also a fundamental element of the freedom of movement in the EU. Identity documents are, in fact, the gatekeepers of cross-border mobility for EU citizens.¹⁵

The most obvious problem is the difficulties that transgender people face when trying to obtain identity documents that display their gender correctly. The conditions for the legal recognition of one's gender vary significantly across the Union.

Only a handful of EU Member States allows gender recognition by means of simple self-declaration¹⁶ which is considered to be the most appropriate option among others. This is confirmed by Principle 3 of Yogyakarta Principles (Yogyakarta Principles 2007) despite some criticism¹⁷ and the fact that Yogyakarta Principles are, of course, neither a binding document nor part of EU law. The so-called depathologisation of transgender individuals has been recognized as the prevailing trend in the direction of a more humane approach to the issue.¹⁸ Despite this, the majority of EU countries still require transgender individuals to go through invasive procedures, such as surgery, hormone therapy, and even sterilization.¹⁹ Some States do not have a set of clear rules at all, thus throwing trans persons into the limbo of uncertainty and administrative arbitrariness.

¹⁴ Lashyn Serhii "Transgender EU Citizens and the Limited Form of Union Citizenship available to them." (2022) *Feminist Legal Studies* 30, 201–218.

¹⁵ *Ibid.*

¹⁶ European Commission: Directorate-General for Justice and Consumers. 2020. *Legal Gender Recognition in the EU: The Journeys of Trans People Towards Full Equality.*; European Union Agency for Fundamental Rights (EU FRA). 2020. *A Long Way to Go For LGBTI Equality.* 2020.; Lau, Holning. 2020. *Gender Recognition as a Human Right.* In *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, ed. Andreas von Arnald, Kerstin von der Decken, and Mart Susi, 193–206. Cambridge: Cambridge University Press.

¹⁷ Nirta Caterina "A Critique of the Model of Gender Recognition and the Limits of Self-Declaration for Non-Binary Trans Individuals." (2021) *Law and Critique* 32: 217–233.

¹⁸ Cannoot Pieter "The Pathologisation of Trans* Persons in the ECtHR's Case Law on Legal Gender Recognition." (2019) *Netherlands Quarterly of Human Rights* 37 (1): 14–35.

¹⁹ Dunne Peter "Transgender Sterilisation Requirements in Europe." (2017) *Medical Law Review* 25 (4): 554–581.

Apart from getting the right documents and managing legal gender recognition in the cross-border context, another problem for transgender EU citizens is going through checks and presenting the documents that they already have. Unable to obtain the documents which display their gender correctly, trans individuals face uncomfortable situations when their appearance does not match the gender marker on their passport or ID card according to the view of the border guard officer.²⁰ Gender stereotyping and non-conformity becomes an additional hurdle on the way of transgender EU citizens while travelling. All across the EU, even in the countries with progressive policies, transgender individuals feel discriminated against and embarrassed whenever they find themselves in situations where presenting their identity documents is necessary and those documents do not reflect their gender correctly.²¹ This certainly becomes a factor that discourages transgender EU citizens from enjoying freedom of movement in the EU.

States have to endure that a fair balance is struck between competing interests of the individual and the community.²² Member states have to take into account not only the individuals' right to respect for private life, but also other individual human rights at stake, such as the respect of human dignity and physical integrity.

As we will see below, states are called upon to resolve issues related to medical requirements, civil status, age, the right to quick transparent and accessible procedures, the right to full legal recognition in all areas of life, the right to marry. In addition, aspects to be regulated are free movement as well as the right to marry.

Undoubtedly, the legal recognition of gender identity is considered necessary, but the states, due to the complexity of the issue, seem to have difficulty developing a legal framework, which will not affect the rights of the transgender person and, on the other hand, will also respect the rights of total.

For example, issues seem to arise regarding marriage. In a relatively large number of Council of Europe member States, a divorce requirement conditions access to LGR, raising issues of compatibility with international human rights law, notably on the right

²⁰ Karsay, Dodo "Stuck on the swing: Experiences of trans parents with freedom of movement in the EU" (2022) TGEU Report.

²¹ European Union Agency for Fundamental Rights (2014) Being Trans in the European Union: Comparative Analysis of EU LGBT Survey Data. Available at: <https://fra.europa.eu/en/publication/2014/being-trans-eu-comparative-analysis-eu-lgbt-survey-data>

²² Hämäläinen v. Finland [2014] European Court of Human Rights Application no. 37359/09.

to the protection of private life and non-discrimination. When it comes to a civil marriage or even a cohabitation agreement, the dissolution of the marriage in case the person changes their gender identity can easily be resolved by the states. On the contrary, when it comes to religious marriage, things become more complicated, since several religions do not recognize the performance of religious marriage, between persons of the same sex.

One might contend that the state has an interest in listing biological sex on IDs to screen people for marriage, ensuring that only different-sex couples legally marry. This contention, however, is flawed. While I believe a proper understanding of human rights requires extending marriage rights to same-sex couples, page limits prohibit me from developing that argument here. Even assuming *arguendo*, however, that the state may define marriage as being between one man and one woman, there is no legitimate reason for defining “man” and “woman” based on biological criteria. It cannot be that “man” and “woman” must be defined biologically to limit marriage to procreative couples. In most if not all parts of the world, infertility has not been a bar to marriage.²³ Thus, it is disingenuous to say that governments can justifiably link IDs to biological sex in order to restrict marriage to procreative couples.²⁴

In addition, a question that comes to the mind of many is what happens when the person who changes his identity, because of a certain capacity (eg profession, participation in events), seems to affect the rights of others. A classic example of the above problem is what happens if a person is an athlete and changes his gender identity? If he changes his identity from male to female, it means that, due to his biological physical characteristics, he will be at a disadvantage compared to the rest. On the contrary, if he changes his identity from male to female, then his participation in competitions would bring him to an advantageous relationship, in relation to the rest of her fellow athletes. In this particular example, the legal systems of states are asked to weigh the human rights of many individuals and decide. Personally, I think that the compensation of two conflicting rights is not a new issue for legal systems since the above practice is done in several cases.

²³ Aaron Xavier Fellmeth “*State Regulation of Sexuality in International Human Rights Law and Theory.*” (2008) 50 William & Mary Law Review 797, 887-890.

²⁴ von Arnould, Andreas, Kerstin von der Decken, and Mart Susi (2020) (eds.) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric.* Cambridge University Press, 2020.; A.P., *Garçon & Nicot v. France*, App. Nos. 79885/12, 52471/13, 52596/13 (ECtHR 2017).

Meanwhile, there are other, more tailored, ways to segregate sports by biological sex. For example, current Olympics rules require transgender women who wish to compete in women's events to demonstrate through testing that they have testosterone levels comparable to those of cisgender women.²⁵

²⁵ Ibid.

2. Legal Gender Recognition in European and International Human Rights Law

As cultural awareness of the fluidity of gender identity, and gender expression progresses, governments around the globe are relaxing and expanding their standards for LGR.²⁶

Legal Gender Recognition (LGR) allows individuals to change their first name and gender marker in their administrative records in order to ensure that official records and their documents, including identity documents, birth certificates, or civil status certificates, match their gender (usually male or female, with only a few countries providing non-binary markers).²⁷

According to the TGEU Trans Rights Map (2022), 39 of 54 countries in Europe and Central Asia currently provide legal recognition of gender identity to transgender people through legal or administrative measures. Among the 39 countries offering legal gender recognition:

- 37 are members of the Council of Europe; 25 are EU Member States.
- 28 require a mental health diagnosis
- 9 demand sterility
- 19 still require divorce
- 16 have LGR procedures for minors. Of these, 10 enable minors to access legal gender recognition without any age limit; 6 have a minimum age requirement
- 9 countries base legal gender recognition procedures on self-determination of the person.
- 3 countries provide full, and 1 provides partial, legal recognition to non-binary people.²⁸

Therefore, it is evident that conditions for changing gender identity differ across countries. The vast majority of member states of the Council of Europe have introduced legislation that allows for the change of gender identity. It is notable that there are very

²⁶ Levasseur M. Dru “*Gender identity defines sex: Updating the law to reflect modern medical science is key to transgender rights.*” (2014) Vermont Law Review., 39, 943.; Wipfler Anna James Neuman “*Identity crisis: the limitations of expanding government recognition of gender identity and the possibility of genderless identity documents*” (2016) Harvard Journal of Law and Gender, 39(2), 491-554.

²⁷ Directorate-General for Justice and Consumers (European Commission), ICF. (2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>

²⁸ TGEU, Trans Rights Index, Europe & Central Asia (2022). Available at: <https://transrightsmap.tgeu.org/>

few countries, as we will see below, that have not developed clear legal procedures for changing one's gender identity.

According to Yogyakarta Principle 31:

“Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.”.

The following two models can be identified on the basis of the criteria set by the Member States for the legal recognition of gender identity:

- (a) a model that tests transgender individuals' commitment/attachment to their desired gender
- (b) a model that recognizes that individuals are better able to determine their own gender identity (self-determination).

According to the European Commission, the legal criteria that follow the procedure are divided into the following categories:

- Self-determination requirements involving self-declaration of one's identity via a written statement, declaration or request with a competent authority;
- Procedural requirements;
- Medical requirements.
- Requirements linked to the relationship and family situation of the applicant;
- Time requirements;
- Age requirements.²⁹

²⁹ Directorate-General for Justice and Consumers (European Commission), ICF. (2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>

2.1. European and International Human Rights Law for Legal Gender Recognition

First, it is critical to acknowledge that there are no specific treaties that address the rights of transgender people under European and International human rights law. Generally, their rights fall within the general framework of human rights protection.

According to the UN Committee on Economic, Social and Cultural Rights, gender identity is a prohibited basis for discrimination under the UN Covenant on Economic, Social and Cultural Rights. Transgender, transsexual, and intersex individuals, for example, frequently suffer severe human rights violations, including harassment at school and in the workplace.³⁰

A number of significant judgments by the European Court of Human Rights have interpreted the European Convention on Human Rights in such a way that states must offer transgender individuals the opportunity to undergo gender reassignment surgery, and that insurance policies must cover this procedure as a "medically necessary" treatment.³¹ Furthermore, the Court has ruled that states are required to recognize changes in sex in identity documents.³²

Besides the EU Directives, there are other instruments that promote equality between men and women, including closed lists where gender identity is not explicitly cited as a cause of discrimination. It should be noted, however, that the European Court of Justice (ECJ) has explicitly ruled in **P v S and Cornwall County Council** that gender reassignment can result in discrimination on the basis of sex. In subsequent case law, the ECJ has confirmed and extended this position.³³

In addition, the UN High Commissioner for Human Rights noted that gender identity is an important indicator of universal protection against discrimination: "Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bisexual, and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma

³⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, Available at: <https://www.refworld.org/docid/4a60961f2.html>

³¹ Van Kück v. Germany [2003] European Court of Human Rights Application no. 35968/97.

³² ECtHR, B. v. France, judgment of 25 March 1992 and Christine Goodwin v. U.K., judgment of 11 July 2002.

³³ ECJ, Case C-13/94, P. v. S. and Cornwall City Council judgment of 30 April 1996, ECR [1996] I-2143, ECJ, Case C-117/01, K.B. v. National Health Service Pensions Agency, Secretary of State for Health, judgment of 7 January 2004.

attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights”.³⁴

Moreover, in 1989 the Parliamentary Assembly of the Council of Europe adopted a Recommendation on the Condition of Transsexuals.³⁵

Throughout its responses to questions from the Parliamentary Assembly, the Committee of Ministers of the Council of Europe emphasized the principle of equal enjoyment of human rights regardless of gender identification. Moreover, the Committee of Ministers decided on 2 July 2008 to intensify its efforts to combat discrimination based on gender identity and sexual orientation. Therefore, an intergovernmental Expert Group was formed with the task of preparing a Recommendation for the 47 member states of the Council of Europe. The European Parliament adopted a Resolution on Discrimination Against Transsexuals in 1989.³⁶ According to the Resolution, EU Member States are encouraged not only to adopt legislation that protects transsexuals, but also to take positive steps to ensure the implementation of their rights. Also in 2006 and 2007, the European Parliament addressed the issue of transgender persons in more general resolutions.³⁷

The Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity were published in 2007 by a group of distinguished experts in international human rights law as part of a large-scale international effort to promote international standards on sexual orientation and gender identity. In spite of the fact that the principles have not been adopted as an international standard, they have already been cited by UN bodies, national courts, and many governments have implemented them as a guide to define their policies regarding this issue. According to the Commissioner for Human Rights, the Yogyakarta Principles

³⁴ Statement of the Office of the UN High Commissioner for Human Rights to the International Conference on LGBT human rights, Montreal 26 July 2006, available at www.unhcr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C?opendocument.

³⁵ Parliamentary Assembly (1989) Recommendation 1117 on the condition of transsexuals. Available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta89/erec1117.htm>

³⁶ Resolution on discrimination against transsexuals. Official Journal of the European Communities, C 256, 09/10/1989: 0033. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A51989IP0016%2802%29>

³⁷ European Parliament resolution on homophobia in Europe (2006), Available at: https://www.europarl.europa.eu/doceo/document/TA-6-2006-0018_EN.html

are a valuable tool for identifying state obligations to respect, protect and fulfill the human rights of all persons, regardless of their gender identity.³⁸

Of particular relevance is Yogyakarta Principle number 3:

*“Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity”.*³⁹

In March 2010, the CoE Committee of Ministers adopted a Recommendation on measures to combat discrimination on grounds of sexual orientation and gender identity.⁴⁰ The Committee address many key issues for LGBT people under various headings, namely: (i) right to life, security and protection from violence ((a)“hate crimes” and other hate-motivated incidents and (b) “hate speech”); (ii) freedom of association; (iii) freedom of expression and peaceful assembly; (iv) right to respect for private and family life; (v) employment; (vi) education; (vii) health; (viii) housing; (ix) sports; (x) right to seek asylum; (xi) national human rights structures and (xii) discrimination on multiple grounds.⁴¹

The Istanbul Convention of the Council of Europe also addresses gender identity in its clause on preventing and combating domestic violence and violence against women, as it states that the implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without

³⁸Council of Europe: Commissioner for Human Rights, Human Rights and Gender Identity (2009), CommDH/IssuePaper(2009). Available at: <https://www.refworld.org/docid/4a7bff742.html>

³⁹ Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, p. 11-12.

⁴⁰ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers’ Deputies). Available at: <https://www.coe.int/en/web/sogi/rec-2010-5>

⁴¹ Ibid.

discrimination on any ground such as sex, gender, [...] gender identity, [...] or other status.⁴²

2.2. Legal Gender Identity – Human Rights

The recognition of gender identity is justified by four longstanding human rights. In particular, these rights are (1) the right to personal autonomy, which includes the right to self-determination, (2) the right to privacy of information, (3) the right to health, and (4) the right to bodily integrity.⁴³

The right to personal autonomy falls under the article 22 of the UDHR, which states that “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”⁴⁴

The former judge Loukis Loucaides of the European Court of Human Rights noted during a discussion of Article 22 of the Universal Declaration of Human Rights (UDHR):

“For man to be able to function freely, in the full sense of the term, he must have the possibility of self-definition and self-determination: the right to be himself. Thus, the achievement of effective protections of freedom of the person requires legal recognition and safeguarding of . . . his personality.”⁴⁵

Regarding the right to privacy, article 17 of the ICCPR states that “no one shall be subjected to arbitrary or unlawful interference with his privacy...” Even though the ICCPR does not define privacy, the UN Human Rights Committee has acknowledged that people are entitled to control information regarding their private lives.⁴⁶

⁴² Council of Europe, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, November 2014, ISBN 978-92-871-7990-6, available at: <https://www.refworld.org/docid/548165c94.html>

⁴³ von Arnould, Andreas, Kerstin von der Decken, and Mart Susi (eds.) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*. Cambridge University Press, 2020.

⁴⁴ Article 22 of the Universal Declaration of Human Rights.

⁴⁵ L.G. Loucaides “*Personality and Privacy Under the European Convention on Human Rights*” (1990) *British Yearbook of International Law* 61(1): 175-197.

⁴⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, available at: <https://www.refworld.org/docid/453883f922.html>, para. 10. For additional recognition that “the protection of personal data represents a special form of respect for the right to privacy, see Report of the Special

Considering that transgender people's status qualifies as personal information, they have a reasonable expectation of privacy regarding it.⁴⁷

A person's right to physical integrity includes their freedom to make decisions about their own bodies. Individuals have a right to bodily integrity that requires the government not to force them to undergo medical treatment they do not desire. The above right is explicitly recognized by a number of human rights instruments.⁴⁸ A number of courts, including the European Court of Human Rights, have held that the right to bodily integrity is derived from the right to privacy.⁴⁹

A key element of gender recognition is to recognize that a person's right should not be limited by their necessity to undergo medical treatment, such as genital surgery. It is the right of every individual, regardless of their gender identity, to decide whether they wish to pursue invasive medical treatment. It is critical to note that gender identity surgery carries many risks, including loss of sexual function. Due to the crucial nature of gender recognition in everyday life, governments coerce individuals into undergoing surgery as a condition of gender recognition. This coercion constitutes a violation of bodily integrity.⁵⁰

Due to the lack of a legal process to change their gender identity, these individuals are subject to systemic and everyday discrimination. Thus, they are unable to enjoy the right to enjoy private life, which includes self-determination, autonomy, and legal recognition of their gender identity. It is recognized by the ECtHR that the term "private life" in Article 8 of the ECHR (Right to respect of private and family life)⁵¹ is a broad concept that cannot be interpreted exhaustively and covers both the physical and psychological integrity of the individual, as well as their gender identity, name, and sexual orientation.⁵² Therefore, although this article does not directly relate to gender

Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue : addendum, UN Doc. A/HRC/17/27 (12 May 2011), para. 58. Available at: <https://digitallibrary.un.org/record/706200>

⁴⁷ Jordan J. Paust "Can You Hear Me Now?: Private Communication, National Security, and the Human Rights Disconnect." (2014) Chicago Journal of International Law 15: 612, 628.

⁴⁸ American Convention on Human Rights (ACHR), Art. 5; CRPD, Art. 17; Charter of Fundamental Rights of the European Union (2010), Art. 3.

⁴⁹ Jill Marshall "Personal Freedom through Human Rights Law? Autonomy, Identity, and Integrity in the European Convention of Human Rights" (2001) 165-201.

⁵⁰ von Arnould, Andreas, Kerstin von der Decken, and Mart Susi (eds.) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*. Cambridge University Press, 2020.; A.P., Garçon & Nicot v. France, App. Nos. 79885/12, 52471/13, 52596/13 (ECtHR 2017).

⁵¹ Article 8 of the European Convention of Human Rights states that "Everyone has the right to respect for his private and family life, his home and his correspondence."

⁵² .P., Garçon and Nicot v. France, Applications nos. 79885/12, 52471/13 and 52596/13.

identity, the ECtHR has interpreted it in a manner implying that a country's failure to recognize gender identity constitutes a violation of the ECHR.

In addition to the rights mentioned above, non-recognition of gender identity by states, as well as adding a divorce requirement to the process of recognition, violate Article 12 of the European Convention on Human Rights. This article guarantees the right to marry and states that “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”.

Also, as mentioned above, the non-recognition of gender identity leads to the continuation of existing discrimination and inequalities. States therefore violate Article 14 of the ECHR when they do not include in their legal systems procedures for the recognition of gender identity. The above article prohibits any form of discrimination, including discrimination based on sex and gender. Finally, another right that requires the legal recognition of gender identity is the right enshrined in Article 10 of the ECHR⁵³, the right to freedom of expression

In addition, in April 2015 the Council of Europe in its resolution emphasized the need to combat discrimination against transgender people. More specific the Assembly expressed concern about the violations of fundamental rights, notably the right to private life and to physical integrity, faced by transgender people when applying for legal gender recognition; relevant procedures often require sterilisation, divorce, a diagnosis of mental illness, surgical interventions and other medical treatments as preconditions.

In the light of the above resolution the Assembly called member states to:

“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; abolish sterilisation and other compulsory medical treatment, as well

Judgment of 6 April 2017, para. 93; Van Kück v. Germany, Application no. 35968/97, Judgment of 12 June 2003, para. 69.

⁵³Article 10 of the ECHR states that “ Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”.

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; 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."⁵⁴

Despite the recommendations of the Council of Europe, as we will see in the next chapter, only 39 countries in Europe and Central Asia have legal or administrative measures for the recognition of gender identity, while many of these recognition procedures including criteria and procedures, the European Commission urges the countries not to throw

In conclusion, I would like to mention that legal recognition of gender identity protects individuals from discrimination, protects their privacy and is the basis for a dignified life.

2.2. Criteria and procedures for legal gender recognition across the board

Even though the Council of Europe requires its member states to provide legal gender recognition to transgender individuals, there are only 30 countries with robust legal procedures in Europe, of which only five do not require sterilization, medical interventions, divorce, or psychological evaluations for transgender individuals. Because of these abusive requirements, or the complete absence of legislation, most trans individuals are stuck with documents that do not correspond to their gender identity.⁵⁵

Most existing gender recognition procedures are also very lengthy and complicated. A medical and legal limbo is inscribed in nearly all existing laws regulating gender recognition. Prerequisites require the individual to give up one or more human rights to gain another: physical integrity, the right to form a family, or being married must be traded for the protection of private life. 20 countries in Europe require that trans people undergo sterilisation before their gender identity is recognised. The Human Rights Commissioner has critically remarked that "*Transgender people appear to be the only*

⁵⁴ Council of Europe, Resolution 2048 (2015) of the Parliamentary Assembly on the 22 of April 2015, "Discrimination against transgender".

⁵⁵ TGEU (2022). Legal Gender Recognition. Available at: <https://tgeu.org/issues/legal-gender-recognition/>

group in Europe subject to legally prescribed, state-enforced sterilisation". Other requirements may include diagnosis of a mental disorder, medical treatment, invasive surgery, assessment of time lived in the new gender identity, and being single or divorced. Such requirements violate a person's dignity, physical integrity, right to form a family, and right to be free from degrading and inhumane treatment.⁵⁶

According to the TGEU trans rights map (2020) 25 of 27 EU Member States provide for legal gender recognition procedures. Out of these:

- 16 require a mental health diagnosis;
- 4 demand sterilisation;
- 9 require a divorce;
- 6 have LGR policies based on self-determination;
- 2 offer non-binary recognition;
- 13 have laws that prohibit hate crimes against trans people;
- 13 offer LGR procedures for minors; 6 without age barriers.⁵⁷

⁵⁶ Ibid.

⁵⁷ TGEU (2022). Trans Rights Map (Fast facts). Available at: <https://transrightsmap.tgeu.org/fast-facts>

2.2.1. Trans Rights Index Europe & Central Asia 2022⁵⁸

As can be seen from the table below, the countries in Europe and Central Asia have different practices and criteria when it comes to recognizing gender identity.

	Existence of legal measures	Existence of administrative measures	Self - determination	No psychological diagnosis	No medical intervention	No sterilisation	No compulsory divorce	Procedures for minors
Armenia								
Austria		✓			✓	✓	✓	✓
Azerbaijan								
Belarus	✓	✓			✓	✓		
Belgium	✓	✓	✓	✓	✓	✓	✓	✓
Bosnia & Herzegovina	✓	✓						
Bulgaria								
Croatia	✓	✓				✓		✓
Cyprus		✓						
Czech Republic	✓	✓						
Denmark	✓	✓	✓	✓	✓	✓	✓	
Estonia	✓	✓				✓	✓	✓
Finland	✓	✓					✓	
France	✓	✓		✓	✓	✓	✓	
Georgia								

⁵⁸TGEU (2022). Trans Rights Index Europe & Central Asia 2022. Available at: <https://transrightsmap.tgeu.org/index>

	Existence of legal measures	Existence of administrative measures	Self - determination	No psychological diagnosis	No medical intervention	No sterilisation	No compulsory divorce	Procedures for minors
Germany	✓	✓			✓	✓	✓	✓
Greece	✓	✓		✓	✓	✓		✓
Hungary								
Iceland	✓	✓	✓	✓	✓	✓	✓	✓
Ireland	✓	✓	✓	✓	✓	✓	✓	
Italy	✓	✓				✓		✓
Kazakhstan								
Kosovo		✓						
Kyrgyzstan								
Latvia	✓							
Liechtenstein		✓						
Lithuania		✓				✓		
Luxembourg	✓	✓	✓	✓	✓	✓	✓	✓
Malta	✓	✓	✓	✓	✓	✓	✓	✓
Moldova		✓			✓	✓		
Monaco								
Montenegro	✓	✓						✓
Netherlands	✓	✓			✓	✓	✓	
Norway	✓	✓	✓	✓	✓	✓	✓	✓
Poland	✓	✓				✓		

	Existence of legal measures	Existence of administrative measures	Self - determination	No psychological diagnosis	No medical intervention	No sterilisation	No compulsory divorce	Procedures for minors
Portugal	✓	✓	✓	✓	✓	✓	✓	✓
Romania	✓							
Russia	✓	✓				✓		
Serbia	✓							
Slovakia	✓	✓				✓		
Slovenia		✓				✓	✓	✓
Spain	✓	✓				✓	✓	✓
Sweden	✓	✓				✓	✓	
Switzerland	✓	✓	✓	✓	✓	✓	✓	✓
Turkey	✓							
Ukraine	✓	✓			3/4	✓	✓	
United Kingdom	3/4	3/4				✓	✓	

Based on the table above, Belgium, Iceland, Luxembourg, Malta, Norway, Portugal, and Switzerland are considered to have the most liberal practices (no delays, medical and psychological criteria), based solely on self-determination, including procedures for minors, and do not require marriage dissolution. In addition, Denmark and Ireland offer procedures that are exempt from these criteria only for adults.

Unfortunately, Armenia, Azerbaijan, Bulgaria Georgia, Hungary, Kazakhstan, Kyrgyzstan and Monaco have not yet regulated the issue of legal recognition of gender identity in their national systems.

2.2.2. Procedural requirements

According to European Court of Human Rights (ECtHR) rulings, international human rights standards encourage LGR procedures to be fast, simple, and accessible.⁵⁹ According to European Court of Human Rights rulings, international human rights standards encourage LGR procedures to be fast, simple, and accessible. There are two different types of LGR procedures, namely judicial and administrative. In both cases, procedures may violate human rights standards by being unreasonably long, expensive, and opaque in their decision-making processes.⁶⁰

Unfortunately, some states do not provide a legal process for changing gender identity, while others require a court or administrative authority to oversee the process. In addition to being time-consuming, these processes also depend heavily on the judge himself or the administrative officer who is examining them. Among the countries that follow the above procedures are Bulgaria, Cyprus, Lithuania, Latvia, and Romania. It is also important to note that a bill for legal gender recognition in Cyprus was drafted several years ago and submitted for discussion to the Parliament in November 2022.

There is also the case of Poland, where the requirement that a court decision exist for the amendment of a birth certificate has created a paradoxical situation in which transgender individuals file a lawsuit against their parents. Moreover, if a transgender person has a spouse and/or children, they must also be listed as co-defendants, along with their parents, in the proceeding.

The judicial process for LGR is generally more costly and burdensome than the administrative process, and even if it meets the standards set by the European Court of Human Rights, transgender people may face discrimination as they are transitioning from one gender to another without having their paperwork in place.

Also, in France a legislative framework was adopted in 2016⁶¹ which reformed the access to LGR and eliminated all medical requirements. In spite of the positive changes described above, judicial procedures and court approval are still required for LGR.

⁵⁹ The ECtHR held that rigid and long judicial LGR procedures leave transgender individuals vulnerable and are against the aims of the European Convention on Human Rights (ECHR). ECtHR, *S.V. v. Italy* No. 55216/08, para 72.

⁶⁰ Directorate-General for Justice and Consumers (European Commission), ICF. (2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>

⁶¹ Loi N° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle, JORF n° 0269. Available at: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033418805/>

Generally, international and European organizations encourage states to adopt quick, transparent, and accessible LGR procedures. Several countries have already incorporated such procedures into their legal systems. For example:

In Ireland: Article 8 para.2 of the 2015 Gender Recognition Act foresees that no fee shall be charged by the Minister for examining the application for a gender recognition certificate.⁶²

A recent decision by the United Kingdom (2021) to reduce the cost of changing one's legal gender from £140 to £5 was made with the intention of making gender recognition more accessible to everyone. According to the National LGBT Survey, 34% of transgender respondents indicated that the cost of applying for a certificate prevented them from doing so.⁶³

In Malta, the Gender Identity, Gender Expression and Sex Characteristics Act states that a change in the registry may not take more than 30 days from receipt of the application (notary letter). Additionally, there are no further medical requirements for the applicant.⁶⁴

Furthermore, the Norwegian Gender Recognition Act provides individuals with the right to change their gender on their public registry and passport through a simple procedure before the National Registry Office. The decision of the National Registry Office is appealable.⁶⁵

Moreover, the administrative procedure provided for by Portuguese law for LGR provides that a decision on a change of name and gender must be made within eight days of receiving the application.⁶⁶

Finally in Argentina, once the requirements according to the LGR law are met, the public officer will proceed – without any additional legal or administrative procedure required – to notify the amendment of the sex and the change of first name to the Civil

⁶² Ireland, Gender Recognition Act 2015 (25 of 2015). Available at: <https://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>

⁶³ Women and Equalities Committee (UK Parliament). (2021). Reform of the Gender Recognition Act. Available at: <https://publications.parliament.uk/pa/cm5802/cmselect/cmwomeq/977/report.html>

⁶⁴ Malta, Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (XI of 2015) (Cap. 540). Available at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/101028/121558/F344926174/MLT101028%202016.pdf>

⁶⁵ Legal Gender Amendment Act 2016 (Lovom endring av juridisk kjønn); The Public Registry Act 2016 (Folkeregisterloven). Unofficial translation available at: <https://tgeu.org/wp-content/uploads/2016/07/Prop74LEng.pdf>

⁶⁶ Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI) (2022). Thematic report on legal gender recognition in Europe - First thematic implementation review report on Recommendation CM/Rec(2010)5.

Register corresponding to the jurisdiction where the birth certificate was filed so it will issue a new birth certificate incorporating the said changes, and to issue a new national identity card reflecting the amended sex and the new first name as now recorded. Any reference to the current law in the amended birth certificate and in the new national identity document issued as a result of it is forbidden. The procedures for amending the records as described in the current law are free, personal and do not require the intervention of any agent or lawyer.⁶⁷

2.2.3. Self-determination models

The Parliamentary Assembly of the Council of Europe (PACE) and the Yogyakarta Principles has been advocated countries to based their legal gender recognition procedures on self-determination.

The above approach is the most respectful of transgender people and reflects the highest human rights standards, as well as being the most accessible. Under this type of LGR requirement, applicants may change their legal gender via a written statement, a declaration or request with a competent authority, such as the municipality civil status officer. The procedure does not require mental health diagnosis or any third-party intervention, compulsory medical intervention, surgery or sterilisation, or compulsory divorce.⁶⁸

There are states which apply the model according to which it is recognized that individuals themselves are better able to know the gender with which they identify. . In other words, they utilize self-determination models, which are both recommended by international organizations and by gender experts.

According to these models, the legal process of gender identity recognition does not require any procedural criteria, but only a written statement or a written request by the individual to the competent authority. In 2012, Argentina became the first country to adopt a procedure for legal gender recognition based on self-determination.

⁶⁷ Argentina : Gender Identity Law, article 6. Available at: <https://tgeu.org/argentina-gender-identity-law/>

⁶⁸ Directorate-General for Justice and Consumers (European Commission), ICF. (2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>

According to Argentina's "Gender Identity Law" (Law No.26,743)⁶⁹, every person has the right to the recognition of their gender identity, to develop their gender identity freely and to be treated according to their gender identity. The gender change procedure is an administrative proceeding, which is simple, free of charge and requires only a few steps. The requirements may differ depending on whether the person is an Argentine-born citizen or not.⁷⁰

For Argentine-born citizens, the requirements to request gender marker change and change of name and associated image are the following:

- (1) To provide evidence of being at least 18 years old;
- (2) To file a request (using a preset form) with the National Registry of Persons or its appointed offices requesting the change of gender marker in their birth certificate and the issuance of a new Argentine ID;
- (3) To provide the new chosen name with which the person wishes to be registered;
- (4) To demonstrate that the person's birth was duly registered (if the person's birth was not duly registered, they will have to register their birth first); and
- (5) To surrender their Argentine ID.⁷¹

Following the fulfillment of the above-mentioned requirements, the relevant public official will notify the Civil Registry of the jurisdiction where the person was born of the change of gender marker and name (without further judicial or administrative action) and issue a revised Argentine identification reflecting the individual's self-perception. It is important to note that the legal effects of these changes are effective for third parties as soon as the changes are registered with the corresponding Registry.⁷²

⁶⁹ Argentina: Gender Identity Law (2012) (Law No.26,743). Available at: <https://tgeu.org/argentina-gender-identity-law/>

⁷⁰ Ibid.

⁷¹ Requirements (4) and (5) are provided in Article 3 of Decree No. 1007/2002.

⁷² Articles 6 and 7 of Law No. 26,743.

According to the TGEU trans right map (2022), 9 countries have self-determination laws: Belgium⁷³, Denmark⁷⁴, Iceland⁷⁵, Ireland⁷⁶, Luxembourg⁷⁷, Malta⁷⁸, Norway⁷⁹, Portugal⁸⁰, and Switzerland⁸¹. Denmark was the first EU country to implement this procedure in 2014.

In addition, Germany is introducing legislation that will allow transgender and non-binary individuals to change their legal names and gender identities through self-identification. Trans and non-binary individuals in Germany will no longer be required to undergo gender-affirming surgeries, hormone therapy, or psychological consultation to legally change their names and genders if the legislation passes later this year. The Self-Determination Act, which was recently introduced, will allow transgender people over the age of 14 to legally change their gender and name. In order to change their personal information, transgender and non-binary individuals do not need a court order, medical records, or permission from their parents. For children younger than 14, their parents or guardians must apply to the registry office on their behalf. The proposed law will replace the previous 1981 Transsexuellengesetz (TSG), or trans legislation, which required two gender experts' assessments and court orders in order to change trans people's names and genders on official documents.⁸²

Legal recognition of gender identity in Hungary was previously permitted on the basis of a psychiatric diagnosis, but this procedure was banned in 2020 because it was considered to violate international human rights standards. It is worth noting that in

⁷³Belgium (2018): Legal Gender Recognition Act, https://www.ejustice.fgov.be/img_1/pdf/2017/06/25/2017012964_F.pdf

⁷⁴Denmark (2014): Act on the Central Register of Persons, 2014. https://www.ft.dk/R1pdf/samling/20131/lovforslag/L182/20131_L182_som_vedtaget.pdf (in Danish).

⁷⁵ Iceland (2019): Act on Gender Autonomy, 2019 https://www.government.is/library/04-Legislation/Act%20on%20Gender%20Autonomy%20No%2080_2019.pdf

⁷⁶ Ireland (2015): Gender Recognition Act, 2015 <https://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>.

⁷⁷ Luxembourg (2018): Law relating to the modification of the indication of sex and first name (s) in the civil status and amending the Civil Code <https://legilux.public.lu/eli/etat/leg/loi/2018/08/10/a797/jo>.

⁷⁸ Malta (2015): Gender Identity, Expression and Sex Characteristics Act, 2015 <https://legislation.mt/eli/act/2015/11/eng/pdf>.

⁷⁹ Norway (2016): Legal Gender Amendment Act, 2016 <https://lovdata.no/dokument/NL/lov/2016-06-17-46> (in Norwegian).

⁸⁰ Portugal (2018): Law on the right to self-determination of gender identity and gender expression and to protection of each person's sex characteristics, 2018 https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2926&tabela=leis&ficha=1&pagina=1&so_miolo (in Portuguese).

⁸¹ Switzerland (2021): Law modifying the Civil Code and Ordinance on Civil Status See link to the ordinance adopted on 27 October 2021 which entered into force on 1st January 2022: <https://www.bj.admin.ch/bj/fr/home/aktuell/mm.msg-id-85588.html>.

⁸²Giulia Castagnaro "Self-ID: Germany Introduces A Law That Will Enable Trans People to Self-Identify" (2022) GenderGP (online). Available at: <https://www.gendergp.com/germany-introduces-a-law-which-allows-trans-people-to-self-identify/>

2020, Hungary made it de facto impossible to change gender identity, by legislatively replacing the term "gender" with the term "sex at birth".⁸³ According to the Human Rights Commissioner of the Council of Europe, this legislation violates human rights standards and ECtHR precedents. Hungary was also convicted of violating Article 8 of the ECHR (right to respect for private life) in **Rana v. Hungary** (2020)⁸⁴, for not allowing an Iranian asylum seeker to change his name.

In September 2022, Finland submitted a proposal to introduce self-determination in gender recognition procedures. LGR procedures would no longer include medical examinations and treatments, and the infertility requirement would be removed. According to newly introduced legislation, the application for legal gender recognition will be based on the person's own experience of gender. The person would submit a written application to the Digital and Population Data Services Agency, which would then inform them of the application process and the legal consequences of gender recognition. As soon as the applicant receives the requested information, he or she needs to confirm their application; however, this should not be done earlier than 30 days after the application was filed. This application procedure is designed to ensure that the applicant has carefully considered their application and is making an informed choice. In spite of this, the above procedure will only be available to adults and citizens of Finland.⁸⁵

Also, Argentina⁸⁶, Brazil, Chile⁸⁷, Colombia and Pakistan⁸⁸ have reformed their laws to allow adults to select male or female gender markers on all government IDs, based entirely on self-determination.⁸⁹ Among these countries, Pakistan also allows individuals to select a third gender option while Denmark⁹⁰ and Malta⁹¹ provide a third

⁸³ TGEU (2022). Council of Europe concerned over Hungary's failure to introduce LGR for refugees. Available at: <https://tgeu.org/council-of-europe-concerned-over-hungarys-failure-to-introduce-legal-gender-recognition-for-refugees/>

⁸⁴ Rana v. Hungary [2020] European Court of Human Rights Application no. 40888/17.

⁸⁵ Ministry of Social Affairs and Health (Finish Government). (2022). Press Release: Act on legal recognition of gender to be submitted to Parliament. Available at: <https://valtioneuvosto.fi/en/-/1271139/act-on-legal-recognition-of-gender-to-be-submitted-to-parliament>

⁸⁶ Argentina: Gender Identity Law (2012) (Law No.26,743). Available at: <https://tgeu.org/argentina-gender-identity-law/>

⁸⁷ Law 21.120 which recognizes and protects the right to gender identity. Library of the National Congress, Republic of Chile.

⁸⁸ Pakistan: Transgender Persons (Protection of Rights) Act, 2018. Available at: https://na.gov.pk/uploads/documents/1526547582_234.pdf

⁸⁹ von Arnault, Andreas, Kerstin von der Decken, and Mart Susi, eds. *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*. Cambridge University Press, 2020.

⁹⁰ Denmark (2014): Act on the Central Register of Persons, 2014. https://www.ft.dk/R1pdf/samling/20131/lovforslag/L182/20131_L182_som_vedtaget.pdf

⁹¹ Malta (2015): Gender Identity, Expression and Sex Characteristics Act,

gender option for certain forms of ID.⁹² In a landmark 2014 case, the Supreme Court of India held that individuals have the right to declare their gender on IDs—as male, female, or a third gender—based on self-determination.⁹³ However, implementation of this judicial order has been lacking.⁹⁴

In Costa Rica, the Presidential Decree (2018) refers to the “the right of every person to autonomously define their sexual and gender identity, and that the data contained in the State records, as well as in identity documents, are consistent or correspond to the definition they have of themselves.”⁹⁵

Moreover, in India the Transgender Persons (Protection of Rights) Act (2019) states in article 4(2) “A person recognised as transgender under sub-section (1) shall have a right to self-perceived gender identity.”⁹⁶

Finally in New Zealand applicants “have an option to have their gender in their passport marked as male (M), female (F) or as a third (X) category, based solely on self-determined identity.”⁹⁷

2.2.4. Medical and psychiatric Requirements – Moving away from pathologisation

As we will see in the next chapter, the European Court of Human Rights (ECtHR) has established some standards related to LGR in applying Article 8 of the European Convention on Human Rights (ECHR). The ECtHR holds that Council of Europe (CoE) Member States are obliged to legally recognise the gender of transgender persons who have gone through medical gender affirming reassignment. The ECtHR also found that

2015 <https://legislation.mt/eli/act/2015/11/eng/pdf>.

⁹² Lena Holzer (2018). Non-Binary Gender Registration Models in Europe (Report on third gender marker or no gender marker options). ILGA-Europe. Available at: <https://ilga-europe.org/files/uploads/2022/04/non-binary-gender-registration-models-europe.pdf>

⁹³ National Legal Services Authority (NALSA) v. Union of India, 5 S.C.C. 438 (India 2014). NALSA upheld “[t]ransgender persons’ right to decide their self-identified gender . . . such as male, female or as third gender” (para. 129), and the main opinion in NALSA, written by Justice Radhakrishnan, generally supports self-determination; however, certain parts of the judgment have been rightly criticized for being inconsistent with the principle of self-determination. See Aniruddha Dutta, “Contradictory Tendencies: The Supreme Court’s NALSA Judgment on Transgender Recognition and Rights,” 5 Journal of Indian Law and Society 225 (2014).

⁹⁴ Dhruvo Jyoti “*Cut the Red Tape: Why the New Transgender Rights Bill Might Harm the Community*” (2017) Hindustan Times (online). Available at: <https://www.hindustantimes.com/opinion/cut-the-red-tape-why-the-new-transgender-rights-bill-might-harm-the-community/story-p0EhuP3iQsoVjnoseSsLFJ.html>

⁹⁵ Costa Rica (2018) Executive Decree N° 41173-MP: <https://www.mep.go.cr/sites/default/files/ID24-decreto-41173-MP.pdf>

⁹⁶ India Transgender Persons (Protection of Rights) Act, 2019 available at <https://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf>

⁹⁷ New Zealand: See <https://www.passports.govt.nz/change-your-name-or-gender/change-your-gender-in-your-passport/>

requirements of irreversible changes in the individual's metabolism, such as sterilisation, in order to access LGR are a violation of the right to physical integrity and the right to private life.⁹⁸

Although the ECtHR leaves broad discretion to the member states of the Council of Europe in determining the conditions for accessing LGR, The ECtHR, for example, ruled that the requirement to prove you have a gender identity disorder and get a medical exam doesn't violate the Convention's rights.⁹⁹ Soft law human rights standards set by the Yogyakarta Principle have moved away from the medical approach in LGR procedures, considering that 'no one shall be forced to undergo medical procedures as a requirement for legal recognition of their gender identity'.¹⁰⁰ A medicalisation of procedures has been harshly criticized because it undermines the right of transgender people to maintain their bodily integrity and self-determination.

Unfortunately, there are states that, despite the recommendations of international and European organizations and courts, still include medical criteria in their procedures. These medical criteria include: Gender-affirming surgery, sterilization, medical test, often intended to demonstrate that the gender identity is irreversible, or confinement to a medical facility, hormonal treatment, mandatory diagnosis of mental disorder by a psychologist, a general practitioner, a specialist in gender topics, or another medical professional, who must confirm a diagnosis of gender dysphoria, gender identity disorder, or transsexualism.¹⁰¹

The Court has found that requiring sterilisation or irreversible changes of identity through an operation in national law violates international human rights standards, including Article 8 of the ECHR. There is a downward trend in the number of countries requiring sterilisation, as more and more countries are moving toward removing this requirement.

As part of its efforts to acknowledge gender diversity and depathologize it, the World Health Organization (WHO) decided to remove transgender-related categories from the

⁹⁸ ECtHR, AP, *Garçon and Nicot v. France* No. 79885/12, 52471/13 and 52596/13 of 6 April 2017, para 126-128.

⁹⁹ ECtHR, AP, *Garçon and Nicot v. France* No. 79885/12, 52471/13 and 52596/13 of 6 April 2017, para 126-128.

¹⁰⁰ UN Yogyakarta Principle No 3.

¹⁰¹ Directorate-General for Justice and Consumers (European Commission), ICF. (2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>

Chapter on Mental and Behavioural Disorders (see the 72nd World Health Assembly (WHA) in 2019).¹⁰²

According to the TGEU trans rights map (2020) nine (9) countries still demand sterilization despite the European Court of Human Rights condemning such requirements: Bosnia & Herzegovina, Czech Republic, Finland, Kosovo, Latvia, Montenegro, Romania, Serbia, and Turkey. Also, mental health diagnosis is still required in the majority of countries (16 of them are in the EU): Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Italy, Latvia, Lithuania, Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, and Sweden.

As mentioned above there are states that require a psychiatric diagnosis of gender dysphoria and/or the testimony or opinion of a psychiatrist, psychologist or other medical specialists.

In addition, in Greece and France, although the legal recognition of gender identity does not require medical criteria, it nevertheless involves specific judicial or administrative procedures, under specific judicial or administrative criteria.

On 29 July 2022, the Swedish government proposed reforms to the country's legal procedures for gender recognition. In spite of the fact that the proposed law represents an improvement over the current process for changing one's name and legal gender marker, it still falls short of the gold standard of self-determination. As part of the new Swedish proposal, the requirement for changing one's legal gender marker in identification documents will be separated from that for accessing gender affirming surgery, which is a welcome development. There is, however, still a requirement that trans people be medically examined and a decision made by the National Board of Health and Welfare regarding whether the person is eligible for the change. This continues to pathologize trans people as medically ill, which violates their human rights. Additionally, the proposal lowers the age limit from 18 years old to 16 years old, in contrast to previous proposals of 12 years old with a guardian's permission.¹⁰³

¹⁰² Explanatory Memorandum to paras. 35-36 of Recommendation CM/Rec(2010)5 with references to the Court's case-law.

¹⁰³ TGEU (2022). Sweden proposes LGR reform without self-determination. Available at: <https://tgeu.org/sweden-proposes-lgr-reform-without-self-determination/>

Trifa Shakely, chair of Swedish LGBTI organisation RFSL, stated that, “it is welcomed that the government is finally acting, but trans people will still have to go to healthcare to get permission to change their legal gender, which is a big disappointment.”¹⁰⁴

Moreover, Denmark and Norway both have legal gender recognition procedures based on self-determination, and Finland is working on reforming their outdated law as well. Seven other countries in Europe already have legal gender recognition based on self-determination.¹⁰⁵

Also, the Czech Constitutional Court dismissed a complaint filed by a transgender individual seeking legal gender recognition (LGR) without undergoing surgery on 31 March 2022. In 2018, the European Committee of Social Rights found that the Czech Republic violated the right to health guaranteed in the European Social Charter by requiring sterilisation in LGR. As of this date, the Czech Republic has not implemented the decision. In spite of these findings, Czechia has failed to eliminate the requirement that transgender people undergo sterilisation in order to have their gender legally recognized. As a result, it remains one of the few countries in Europe with such a sterilisation requirement.¹⁰⁶

2.2.5. Requirements linked to the applicant's family situation

Requirements linked to the applicant's family situation LGR national requirements can include conditions affecting the applicant's family and civil status, such as divorce. While the ECtHR has refused to consider it a violation of the Convention where the conversion of the marriage of a transgender woman into a registered partnership is a precondition of LGR¹⁰⁷, the UN Human Rights Committee has condemned the divorce requirement as incompatible with the International Covenant on Civil and Political Rights (ICCPR).¹⁰⁸

¹⁰⁴ The statement is available at: <https://www.rfsl.se/aktuellt/stora-brister-i-forslag-till-ny-konstillhorighetslag/>

¹⁰⁵ TGEU (2022). Sweden proposes LGR reform without self-determination. Available at: <https://tgeu.org/sweden-proposes-lgr-reform-without-self-determination/>

¹⁰⁶ TGEU (2022). Czech Court maintains mandatory sterilisation for LGR. Available at: <https://tgeu.org/czech-court-maintains-mandatory-sterilisation-for-lgr/>

¹⁰⁷ ECtHR, *Hämäläinen v. Finland* No. 37359/09 (2014); See also *Parry v. the United Kingdom* No. 42971/05 and *R. and F. v. the United Kingdom* No. 35748/05.

¹⁰⁸ *G v Australia* (CCPR/C/119/D/2172/2012).

At present, 14 EU Member States do not recognise same-sex marriage, which creates an important legal issue for married applicants for LGR (Bulgaria, Cyprus, Czechia, Estonia, Greece, Croatia, Hungary, Italy, Lithuania, Latvia, Poland, Romania, Slovenia, Slovakia). Various options have been implemented in these countries to address this legal inconsistency. In the best case, the divorce requirement is mitigated by the possibility to change marital status to a legal partnership that safeguards some rights of the spouses and their children. In other cases, divorce is explicitly stated as a precondition to LGR (Greece¹⁰⁹, Estonia) or administrative practice (Hungary, Slovakia). Finally, nine countries have a legal void with respect to the marital status of LGR applicants.

It is unclear whether divorce is required by the legislation, but the prohibition of same-sex marriage in these countries makes some unions legally void or leaves them in an unclear legal situation once the gender change is legally recognised. Another important impact of LGR on a transgender person's family situation is the recognition of their gender on their parental status. Only three Member States (Belgium, Netherlands, Sweden) allow transgender individuals to be recognised as ‘(co)mother’, ‘(co)father’ or ‘parent’. In Malta, the law now designates individuals as ‘Parent 1’ and ‘Parent 2’ (rather than mother and father). Italy allowed a trans woman, who had been registered as the ‘father’, to re-register as ‘mother’.¹¹⁰

Denmark, Germany and Greece have officially rejected the recognition of an individual's gender in their parental status, while other Member States have not yet ruled on the topic. Finally, Poland has the relatively unique requirement that LGR applicants must file a case against their parents.

According to the TGEU trans-right map 5 countries recognise the gender identity of trans parents within binary options. Malta and Iceland recognise non-binary parents as well.

¹⁰⁹ Greece (2017) Νόμος 4491/2017- Νομική αναγνώριση της ταυτότητας φύλου- Εθνικός Μηχανισμός Εκπόνησης, Παρακολούθησης και Αξιολόγησης των Σχεδίων Δράσης για τα Δικαιώματα του Παιδιού και άλλες διατάξεις. Available at: <https://www.taxheaven.gr/law/4491/2017>

¹¹⁰ Directorate-General for Justice and Consumers (European Commission), ICF. (2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>

2.2.6. Time requirement

Several Member States have imposed time limits on individuals who wish to access LGR. Time requirements are implemented at various stages of the process. Sometimes, applicants must demonstrate that they have lived publicly according to their gender identity for a certain period of time. A person undergoing the 'real-life experience' (RLE) must live for a period of time according to their gender identity without official documents supporting that identity. In particular, transgender individuals face this burdensome challenge, as they must maintain their gender identities without legal recognition, as well as those whose gender identity is not binary, who must 'act' a gender identity not their own for the purposes of fitting into the binary 'real-life experience' assessment.¹¹¹

In terms of time requirements, Austria, Bulgaria, Cyprus, Czech Republic, Germany, Estonia, Spain, Italy, Lithuania, Latvia, Poland, Sweden, Slovakia and the United Kingdom impose time frames on people before changing gender identity, requiring for example, the previous "real life experience" in which the applicant must live for a certain period of time according to their desired gender, before officially changing their official documents.

The Parliament of Andorra has adopted its first law to regulate legal gender recognition. According to a news report, adults, emancipated minors, and children from age with consent of their legal guardians can access a court procedure. Applicants have to prove that they have lived according to their gender identity publicly and socially for at least two years.¹¹²

The mandatory 2-year waiting period and the envisioned court procedure are not meeting European standards on legal gender recognition. Richard Köhler, TGEU Advocacy Director commented that¹¹³:

We call upon Andorra to ensure that its new procedure is quick, transparent, and accessible, and based on self-determination as requested by the Council of Europe.

¹¹¹ Ibid.

¹¹² TGEU (2022). Andorra adopts first gender recognition law. Available at: <https://tgeu.org/andorra-adopts-first-gender-recognition-law/>

¹¹³ Ibid.

2.2.7. Age requirement

Accessibility of LGR for minors varies between Member States. In 2019, most countries (17) explicitly prohibited LGR for children under 18 years old.

Countries allowing minors to apply for LGR include additional requirements, such as medical and psychological tests or attestations, parental approval, or burdensome procedural requirements. It is important to be aware that the existence of age restrictions regulating access to LGR are debated within the trans community.¹¹⁴

In addition, in several countries, legal recognition of gender identity is expressly prohibited to persons under the age of 18. These countries are Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Spain, Finland, France, Lithuania, Latvia, Poland, Romania, Sweden, Slovenia, Slovakia and United Kingdom.

Some countries allow legal recognition of gender identity for people under the age of 18, but set additional conditions, such as medical and psychiatric examinations or testimonies or parental consent or other procedural steps. These states are Austria, Belgium, Germany, Greece, Croatia, Ireland, Italy, Luxembourg, Malta, Netherlands, Portugal.

Luxembourg where the legal framework on LGR is without an age limit. Emphasis is placed on the maturity and development of the child. Court procedures for those below age 16 (Malta) and for those below age 5 (Luxembourg) follow specific procedural safeguards: In Luxembourg, the law foresees that in the event of disagreement between the parents of a child aged five years, the most diligent parent applies to the competent authority which rules in the interests of the child.¹¹⁵

In Malta¹¹⁶, the child must have parental consent or the consent of the persons exercising parental authority or the tutor in order to initiate the request.

The person exercising parental authority, or the legal guardian, must file an application in the registry of the Civil Court requesting the Court to change the recorded sex and the first name of the child with the express consent of the child. When the application

¹¹⁴ Directorate-General for Justice and Consumers (European Commission), ICF. (2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>

¹¹⁵ See : Loi du 10 août 2018 relative à la modification de la mention du sexe et du ou des prénoms à l'état civil et portant modification du Code civil, N° 797 du 12 septembre 2018, 2018, paragraph 99.1.

¹¹⁶ Gender Identity, Gender Expression and Sex Characteristics Act (2015), XI of 2015, 14 April 2014, paragraph 7.

is made on behalf of a child, the Court must: (a) ensure that the best interests of the child as expressed in the Convention on the Rights of the Child are the paramount consideration; and (b) give a due weight to the views of the child having regard to the child's age and maturity.¹¹⁷

Others have included children while keeping some age limits. Legislation in Norway¹¹⁸ for example provides that LGR is possible at any age but imposes certain conditions according to age groups. Children between 6 and 16 must apply together with the person or the persons who have parental responsibility of the child. For children under the age of 6, the application must be filed by the person who has the parental responsibility for the child. If the parents have shared custody, but the application is only filled by one of them, the legal gender may nevertheless be changed if this is in the child's best interest.

More specific the above legislation on paragraph 4 underlines that:

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.

Also, paragraph 5 deals with 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

¹¹⁷ Ibid.

¹¹⁸ Legal Gender Amendment Act 2016 (Lovom endring av juridisk kjønn); The Public Registry Act 2016 (Folkeregisterloven). Unofficial translation available at: <https://tgeu.org/wp-content/uploads/2016/07/Prop74LEng.pdf>

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.

Finally in Argentina's Gender Identity Law, minors (younger than 18 years old), may change their gender identity. The application process must be made through their legal representatives and with explicit agreement by the minor, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Right of the Child and in Law 26061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents. Likewise, the minor must be assisted by a children's lawyer as prescribed by Article 27 of Law 26061.

When the consent of any of the minor's legal representatives is denied or impossible to be obtained, it will be possible to resort to summary proceedings so the corresponding judges will decide, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Right of the Child and in Law 26061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents.¹¹⁹

¹¹⁹ Argentina "Gender Identity Law", article 5. Available at: <https://tgeu.org/argentina-gender-identity-law/>

3. Gender identity issues in European Court of Human Rights' case-law

Since 1992, the European Court of Human Rights has ruled positively on a series of cases brought forward by transsexual people. These decisions concern:

- the right to gender recognition of post-operative transsexuals (**B v France**);¹²⁰
- the right to marry in accordance with the acquired gender (**Goodwin and I. v UK**)¹²¹;
- the right to fair and proportionate requirements related to gender reassignment (**van Kück v Germany**);¹²²
- the right to a pension in accordance with the acquired gender (**Grant v United Kingdom**);¹²³ and
- the right to adequate and clear gender recognition procedure for change of name and legal gender (**L v Lithuania**).¹²⁴

The legal recognition of gender identity is now considered an obligation imposed mainly by European human rights law and therefore the need to regulate the issue is considered essential. In fact, in the case of Bulgaria, which does not provide legally protected procedures for changing gender identity, the ECtHR considered that the refusal of the Bulgarian courts to allow the change of gender identity of the applicant, without offering a relevant and sufficient justification and without explaining the reasons why the change of gender identity was allowed in other cases constituted an unjustified interference with the applicant's right to private life.¹²⁵

¹²⁰ B v France, Application no. 13343/87, judgement of 25 March 1992

¹²¹ Christine Goodwin & I v United Kingdom, Applications no. 28957/95 and 25680/94, judgement of 11 July 2002 (Grand Chamber)

¹²² van Kück v Germany, Application no. 35968/97, judgement of 12 June 2003

¹²³ Grant v United Kingdom, Application no. 32570/03, judgment of 23 May 2006

¹²⁴ L v Lithuania, Application no. 27527/03, judgement of 11 September 2007.

¹²⁵ European Court of Human Rights (41701/16) - Court (Fifth Section) - Judgment (Merits and Just Satisfaction) - CASE OF Y.T. v. BULGARIA.

3.1. Change in the ECHR's approach

The ECtHR was not always willing to decide on issues related to the legal recognition of gender identity, since as we will see in this sub-chapter, in the first decisions it was called upon to decide on such issues, it was quite cautious. But then his initial reticence changed and he now seems willing to contribute to policy making for legal recognition of gender identity through his case law.

The Court was for the first time asked to rule on the question whether the European Convention on Human Rights (ECHR) ensures the right to change one's legal gender in *Rees v. The United Kingdom* (1986).¹²⁶

In *Rees v. The United Kingdom*, the applicant claimed that denying him the right to change the legal gender on his UK birth certificate constituted a violation of Article 8 ECHR, which ensures the right to a private and family life. The Court ruled against the applicant in this case and found no positive obligation that would require the UK to ensure the possibility of changing legal gender on a birth certificate. It concluded that it was within the UK's margin of appreciation to decide on the balance between an individual's rights to private life and public interests, because the requested changes in the birth registry "would have important administrative consequences and would impose new duties on the rest of the population."

Also, in *Cossey v. the United Kingdom*¹²⁷ the Court came to similar conclusions as in *Rees v. the United Kingdom* and did not find new facts or particular circumstances that would lead it to depart from the earlier judgment.

In *B v. France*¹²⁸, the Court concluded for the first time that there had been a violation of Article 8 of the Convention in a case -concerning the recognition of transsexuals. In this case a male-to-female transsexual complained of the refusal of the French authorities to amend the civil-status register in accordance with her wishes.

The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention, taking into consideration factors distinguishing the case of *B.* from *Rees v. the United Kingdom* and *Cossey v. the United Kingdom* (see

¹²⁶ *Rees v The United Kingdom* [1986] European Court of Human Rights Application 9532/81, 17 October 1986.

¹²⁷ *Cossey v The United Kingdom* [1990] European Court of Human Rights Application 10843/84, 27 September 1990.

¹²⁸ *B v. France* [1991] European Court of Human Rights Application 13343/87, 27 March 1992.

above), particularly the differences between the United Kingdom and the French civil status systems. Whilst there were major obstacles in the United Kingdom preventing birth certificates from being amended, in France these were intended to be updated throughout the life of the person concerned. The Court observed that in France many official documents revealed “a discrepancy between [the] legal sex and [the] apparent sex of a transsexual” (§ 59 of the judgment), which also appeared on social-security documents and payslips. The Court accordingly held that the refusal to amend the civil status register in her regard had placed the applicant “in a daily situation which was not compatible with the respect due to her private life”.

In **Sheffield and Horsham v. the United Kingdom**¹²⁹ the Court was not persuaded that it should depart from its Rees and Cossey judgments (see above, page 1): transsexualism continues to raise complex scientific, legal, moral and social issues in respect of which there is no generally shared approach among the Contracting States” (§ 58 of the judgment). The Court held that there had been no violation of Articles 8 (right to respect of private and family life), 12 (right to marry and found a family) and 14 (prohibition of discrimination) of the Convention. However, it reaffirmed “that the area needs to be kept under permanent review by the Contracting States” (§ 60 of the judgment), in the context of “increased social acceptance of the phenomenon and increased recognition of the problems which post-operative transsexuals encounter”.

In **Christine Goodwin v. the United Kingdom** overturned the previous ECtHR jurisprudence and decided that it can no longer be assumed that the word "man and woman" in Article 12 of the ECHR referred to the determination of gender based on biological criteria only, since there are substantial social changes in the institution of marriage and dramatic changes brought about by advances in medical science.

Furthermore, the Court ruled that the question of regulating the consequences of changing gender identity in the context of marriage falls within the margin of appreciation of Member States. However, despite the fact that it is up to the state to determine, among other things, the conditions according to which the person applying for gender identity recognition as transgender proves that his determination has been made legally or that his marriage ceases to be valid and the procedures applicable to

¹²⁹ Sheffield and Horsham v. the United Kingdom [1998], European Court of Human Rights Application 31–32/1997/815–816/1018–1019, 30 July 1998.

future marriage including informing the future spouse, the court decided that it is not justified to ban a transgender person from enjoying the right to marry under any circumstances.

3.2. Marriage, personal circumstances and the different position of the UN Human Rights Commission

The ECtHR apart from the decision *Christine Goodwin v. the United Kingdom*, where it emphasized that there is no justification for banning transgender people from enjoying their right to marry, does not accept the conversion of trans marriage into a cohabitation contract as a condition in national law for changing gender identity either. On the contrary, the ECtHR considers that it is not a violation of the ECHR, given that the protection provided to couples who enter into a cohabitation agreement is identical to that of marriage.

In particular, in the landmark decision **Hämäläinen v. Finland**¹³⁰, the ECtHR considered a case in which the applicant (a trans woman, who married a woman before gender reassignment) was directed against Finland, as she could not have her identity number changed to indicate her female gender in her official documents unless her wife consented to the marriage being turned into a civil partnership, which she refused to do, or unless the couple divorced. Her request to be registered as female at the local registry office was therefore refused. The applicant complained that she could only obtain full official recognition of her new gender by having her marriage turned into a civil partnership.

The ECtHR held that there was no violation of Article 8 as it was not a disproportionate measure to convert marriage into a cohabitation contract as a condition for legal recognition of the desired gender since it provided legal protection to same-sex couples that was almost identical to that of marriage. The minor differences between the two were not capable of rendering the then Finnish system inadequate from the point of view of the state's positive obligation under Article 8 of the ECHR.

Furthermore, according to ECtHR jurisprudence, the conversion of a marriage with a cohabitation agreement must not have any impact on the applicant's family life or the

¹³⁰ *Hämäläinen v. Finland* [2014] European Court of Human Rights Application no. 37359/09.

responsibility for the care, custody or maintenance of the children. (see **Parry v. the United Kingdom** (no. 42971/05)¹³¹ and **R. and F. v. the United Kingdom** (no. 35748/05)¹³²).

However, on the other hand, the UN Human Rights Commission condemned the divorce requirement as incompatible with the International Covenant on Civil and Political Rights. (see **G v Australia** CCPR/C/119/D/2171/2012¹³³):

7.14 The Committee considers that by legally recognizing gender reassignment and prohibiting discrimination against transgender persons, the State party is providing protection against discrimination. However, by denying transgender persons who are married a birth certificate that correctly identifies their sex, in contrast to unmarried transgender and non-transgender persons, the Government is failing to afford the author, and similarly situated individuals, equal protection under the law as a married transgender person. In this regard, the Committee reiterates the considerations discussed in paragraphs 7.5-7.9 above, that the distinction being drawn by the State party is not necessary and proportionate to a legitimate interest, and therefore is unreasonable.¹³⁴

7.15 In the above-mentioned circumstances and in the absence of convincing explanations from the State party, the Committee considers that the differential treatment between married and unmarried persons who have undergone a sex affirmation procedure and who request to amend their sex on their birth certificate is not based on reasonable and objective criteria, and therefore constitutes discrimination on the basis of marital and transgender status, under article 26 of the Covenant.

In addition, the issue of parental care was also dealt with by the ECtHR, in the decision **A.M. and Others v. Russia** (no. 47220/19)¹³⁵. This case concerned decisions by Russian courts to restrict the parental rights of the applicant, a post-transgender woman, and to deprive her of contact with her children due to her gender reassignment and the

¹³¹ Parry v the United Kingdom [2006] European Court of Human Rights Application no. 42971/05.

¹³² R. and F. v. the United Kingdom [2006] European Court of Human Rights Application no. 35748/05.

¹³³ G v. Australia, CCPR/C/119/D/2172/2012 (HRC, Mar. 17, 2017)

¹³⁴ <https://juris.ohchr.org/Search/Details/2220>

¹³⁵ A.M. and Others v. Russia [2021] European Court of Human Rights Application no. 47220/19/

alleged negative impact it could have on her psychological health and development of her children.

The Court ruled that there had been a violation of Article 8, finding that the Russian courts had failed to carry out a balanced and rational assessment of the case before them, resulting in restrictions on the applicant's parental rights and her contact with her children. The court further noted that a decision to completely deprive a parent of contact should only be made in the most extreme situations, which was not the case here due to the lack of evidence of harm to the children.

The court also held that there had been a violation of Article 14 of the ECHR (prohibition of discrimination) in conjunction with Article 8, finding that the decision to restrict the applicant's contact with her children amounted to discrimination.

The ECtHR noted in particular that the applicant's gender identity had played a significant role in the national courts' decision.

3.3. Medical and Psychiatric requirements – Moving away from pathologisation

Regarding medical sterilization as a condition for legal recognition of gender identity, it has been jurispruded by the ECtHR that it is a violation of the ECHR in the decision **A.P. Garçon and Nicot v. France**¹³⁶. This case concerned three transgender persons of French nationality who wished to change the entries concerning their sex and their forenames on their birth certificates, and who were not allowed to so do by the courts in the respondent State. The applicants submitted, among other points, that the authorities had infringed their right to respect for their private life by making recognition of sexual identity conditional on undergoing an operation involving a high probability of sterility.

The Court held that there had been a violation of Article 8 (right to respect for private life) of the Convention in respect of the second and third applicants, on account of the obligation to establish the irreversible nature of the change in their appearance.

According to the court:

¹³⁶ A.P., Garçon and Nicot v. France [2017] European Court of Human Rights Applications nos. 79885/12, 52471/13 and 52596/13.

130. Medical treatment cannot be considered to be the subject of genuine consent when the fact of not submitting to it deprives the person concerned of the full exercise of his or her right to gender identity and personal development, which, as previously stated, is a fundamental aspect of the right to respect for private life (see *Van Kück v. Germany*¹³⁷ § 75).

131. Making the recognition of transgender persons' gender identity conditional on sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – which they do not wish to undergo therefore amounts to making the full exercise of their right to respect for their private life under Article 8 of the Convention conditional on their relinquishing full exercise of their right to respect for their physical integrity as protected by that provision and also by Article 3 of the Convention.

132. The Court fully accepts that safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and, more generally, ensuring legal certainty, are in the general interest. However, it notes that, on the basis of this interpretation of the general interest, French positive law as it stood at the material time presented transgender persons not wishing to undergo full gender reassignment with an impossible dilemma. Either they underwent sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – against their wishes, thereby relinquishing full exercise of their right to respect for their physical integrity, which forms part of the right to respect for private life under Article 8 of the Convention; or they waived recognition of their gender identity and hence full exercise of that same right. In the Court's view, this amounted to disrupting the fair balance which the Contracting Parties are required to maintain between the general interest and the interests of the persons concerned.

Similarly, in **S.V. v. Italy** (no. 55216/08)¹³⁸ the ECtHR found that Italy violated Article 8 ECHR due to the refusal of the competent authorities to change the name of the applicant, on the grounds that the gender reassignment procedure had not been completed through gender reassignment surgery.

¹³⁷ *Van Kück v. Germany* [2003] European Court of Human Rights Application no. 35968/97.

¹³⁸ *S.V. v. Italy* [2019] European Court of Human Rights Application no. 55216/08.

This denial amounted a failure by the State to comply with its positive obligation to secure the applicant's right to respect for her private life. In the Court's view, the rigid nature of the judicial procedure for recognising the gender identity of transgender persons, as in force at the time, had left the applicant – whose physical appearance and social identity had long been female – for an unreasonable period of time in an anomalous position apt to engender feelings of vulnerability, humiliation and anxiety.

The Court further observed that the legislation had been amended in 2011, with the result that a second court ruling was no longer required in proceedings to confirm the gender reassignment of persons who had undergone surgery, and the amendment of the civil-status records could now be ordered by the judge in the decision authorizing the surgery.

More recently in **X v. FYR of Macedonia** (Application no 29683/16)¹³⁹, the ECtHR focused on the submission, in particular the relevant case-law of the Court with respect to transgender individuals' rights to have their gender identity legally recognised. It referred to the comparative information about the situation in different Council of Europe member States, which given the recent developments, indicated a clear trend towards greater autonomy of individuals in legal gender recognition procedures. The reforms that were underway reflected the fact that the European standard of “quick, transparent and accessible” legal gender recognition procedures “based on self-determination” were implemented in practice. Referring to the case of A.P., Garçon and Nicot, the interveners submitted that legal gender recognition should not be dependent on gender reassignment surgery or hormonal treatment. The lack of statutory regulation of legal gender recognition procedures in the respondent State created a state of uncertainty for transgender people, which mitigated in favour of inconsistent practice being created and applied by the domestic authorities.¹⁴⁰ Furthermore, there was limited access to trans-specific health care, which impeded any medical treatment (not available in the respondent State) in order to have gender identity recognized.¹⁴¹

Moreover, in the recent decision **X. and Y. v. Romania** (nos. 2145/16 and 20607/16)¹⁴² the ECtHR found a violation of Article 8 by Romania, as the national authorities' refusal

¹³⁹ X v. FYR of Macedonia [2019] European Court of Human Rights Application no 29683/16.

¹⁴⁰ Ibid.

¹⁴¹ Ibid. paras 61-62

¹⁴² X. and Y. v. Romania [2021] European Court of Human Rights Application nos. 2145/16 and 20607/16.

to legally recognize the applicants' desired gender identity, without the need for gender reassignment surgery, constituted an unjustified interference with Article 8 (right to respect for private life).

It is worth noting that in 2018, at No. 117/2015 **Transgender-Europe and ILGA-Europe v. Czech Republic**¹⁴³, the European Committee of Social Rights ruled that the Czech Republic violates the European Social Charter of the Council of Europe and specifically the right to health with the condition of medical sterilization (see para-80-89). Therefore, such a condition constitutes a violation of Article 11(1) (right to health) of the European Community Charter.

3.4. The future of gender recognition at the ECHR

Over the past two decades, the Strasbourg Court has made significant contributions towards advancing the recognition and protection of the fundamental rights of transgender individuals since the Goodwin case. It is impossible to dispute the importance of the Court's case law, especially at a time when transgender people are increasingly being subjected to hostilities in several member states of the Council of Europe. In spite of this, it remains disappointing that the Court has not addressed the ways in which transgender persons in law are structurally confronted with cishnormativity.¹⁴⁴ Despite the fact that a court cannot take the lead in a fundamental overhaul of gender registrations, a comprehensive anti-stereotyping approach requires, at the very least, critical analysis of the seemingly self-evident evidence provided by the State's civil records system, as well as the role of gender and sex.¹⁴⁵ Regardless, the Court should refrain from using paternalistic rhetoric towards trans persons who haven't contributed to their legal and administrative difficulties.¹⁴⁶

Pieter Cannoot (2022) argued that:

The judgment in Y. v. Poland breaks a streak of almost 8 years in which the Court found a violation of Article 8 ECHR in the context of legal gender

¹⁴³ Transgender Europe and ILGA-Europe v. the Czech Republic Complaint No. 117/2015.

¹⁴⁴ Pieter Cannoot "Y. V. POLAND: ECTHR CASE LAW ON GENDER RECOGNITION REMAINS EMBEDDED IN CISHNORMATIVITY." (2022) Strasbourg observers. Available at: <https://strasbourgobservers.com/2022/04/07/y-v-poland-ecthr-case-law-on-gender-recognition-remains-embedded-in-cishnormativity/>.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

recognition. Indeed, ever since its judgment in Christine Goodwin v. United Kingdom (2002), the ECtHR has progressively strengthened the protection of the fundamental rights of trans persons, especially in the context of gender recognition. Through a number of judgments, the Court held that States are bound by the positive obligation to allow a legal change of registered sex (Christine Goodwin v. United Kingdom), that procedures need to be quick, transparent and accessible (S.V. v. Italy (2018), X. v. FYR of Macedonia (2019), Y.T. v. Bulgaria (2020)), and that States may not require compulsory sterility or gender affirming surgery as a condition for gender recognition (A.P. , Garçon, Nicot v. France (2017), X. and Y. v. Romania (2021)). However, the Grand Chamber considered a condition of mandatory divorce not a violation of the ECHR, as long as the marriage is converted into a registered partnership with a similar legal status (Hämäläinen v. Finland (2014)). Moreover, the Court has yet to examine cases concerning legal gender recognition under Article 14 ECHR and still upholds general pathologisation of trans persons (A.P., Garçon, Nicot v. France).

In the future, it will be interesting to see how the Court handles cases that fundamentally challenge LGR. The majority of cases so far have addressed the conditions for obtaining legal gender recognition rather than sex and gender registration in general. There's no doubt that the ECtHR will be asked to address these issues, as much of the trans activism and academic scholarship is now advocating the abolition of sex/gender registrations or at the very least a fundamental deconstruction of their binary and cisnormative logic.

As the Court moves toward endorsing unconditional gender recognition laws, individuals can change their legal gender and/or name without any restrictive requirements. The recent case of Y v. Poland, however, shows that European legal systems and judges' conceptions of appropriate gender norms remain deeply rooted in cisnormativity.¹⁴⁷ Nevertheless, the future of gender recognition at the European Court of Human Rights will depend not just on the issues decided by the Court, but also on

¹⁴⁷ Y v Poland [2022] European Court of Human Rights Application no. 74131/14.

how it approaches them. The Court has until now viewed issues of gender recognition as exclusively falling within the scope of Article 8 ECHR.¹⁴⁸

A growing number of Europeans are seeking to live without any state-defined gender label, so the European Court of Human Rights will likely need to consider whether or not it is necessary and proportionate to assign a legal gender. According to the EU Commission, a survey conducted by the Fundamental Rights Agency in 2019 indicates that 25% of transgender and intersex respondents consider identity cards that include sex information problematic. Furthermore, a survey conducted in the UK found that 41% of the 895 non-binary respondents supported the elimination of public gender registration altogether.¹⁴⁹

The future of legal gender at the European Court of Human Rights is thus uncertain and open to be constructed in a way that destabilizes cisnormativity and heterosexism in social norms and laws in Europe.¹⁵⁰

¹⁴⁸ Holzer Lena “Legal gender recognition in times of change at the European Court of Human Rights.” (2022) ERA Forum 23, 165–182.

¹⁴⁹ European Union Agency for Fundamental Rights [11] 33; Valentine [28], p. 73.

¹⁵⁰ Supra note 144.

3.5. Gender identity issues in international human rights committees' communications

UN Human Rights Committee (HRC) and UN Committee on the Elimination of Discrimination Against Women have both advised states to eliminate abusive gender recognition conditions.¹⁵¹

UN Human Rights Council held that the Australian requirement to be unmarried to change birth certificates violated the International Covenant on Civil and Political Rights (ICCPR) (*Toonen v. Australia*, 1994¹⁵²).

According to the Committee in *G v Australia*, divorce prior to gender recognition is inconsistent with ICCPR guarantees. Additionally, the OHCHR emphasizes that states should “*facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights*”.¹⁵³

Several international courts have cited the Yogyakarta Principles, demonstrating their enduring authority around the world. A recent advisory opinion issued by the Inter-American Court of Human Rights (IACtHR) stated that individuals have the right to change their names and official documents based on their gender identities on the basis of self-determination, without having to comply with any medical requirements.¹⁵⁴ Unlike the ECtHR, the IACtHR emphasizes self-determination as an instrumental component of gender recognition.

Moreover, the IACCommHR commended the Argentina jurisdiction for its system of gender recognition based solely on self-determination, which “recognize[s] the right to identity of trans persons in a way that does not pathologize trans persons.”¹⁵⁵

In *M.Z.B.M. v. Denmark*¹⁵⁶, the author underwent gender reassignment surgery in Thailand. However, she continued to appear as a male on her Malaysian ID-card since

¹⁵¹ von Arnould, Andreas, Kerstin von der Decken, and Mart Susi (eds.) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*. Cambridge University Press, 2020.

¹⁵² *Toonen v. Australia*, UN Human Rights Committee, UN Doc. CCPR/C/50/D/488/1992 4/41994

¹⁵³ Office of the United Nations High Commissioner for Human Rights (2012) *Combating discrimination based on sexual orientation and gender identity*.

¹⁵⁴ Advisory Opinion OC-24/17 of the Inter-American Court.

¹⁵⁵ von Arnould, Andreas, Kerstin von der Decken, and Mart Susi (eds.) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*. Cambridge University Press, 2020.

¹⁵⁶ *M.Z.B.M. v. Denmark*, CCPR/C/119/D/2593/2015, UN Human Rights Committee (HRC), 3 April 2017, available at: <https://www.refworld.org/cases,HRC,5937abb04.html>

it is not possible to change the gender on that card. She also appeared as a Muslim in her ID card. From around 2001 to 2010, on several occasions after being stopped on the street and having her ID-card checked, the author was taken into custody by Malaysian police for up to 24 hours and physically and sexually abused. The author arrived in Denmark on 25 January 2014 and applied for asylum. After three interviews with the Danish Immigration Service (DIS) her application was rejected. By the end of 2014 the author appealed that decision on her asylum request, and in 2015 she requested a reopening of her case, but both of these claims were rejected.

The author claimed that her forcible return to Malaysia would violate her rights under article 7, in conjunction with articles 17(1), 18(1) and 26 of the Covenant. Article 7 would be violated due to the risk that she would face sexual violence by the police upon return based on her gender identity and appearance. Secondly, art. 18(1) would be violated in conjunction with article 7 because her religious conversion would put her at risk of imprisonment under Sharia law. Finally, the author claimed a violation of articles 17(1) and 26 in conjunction with article 7 because her gender identity and appearance are being made public as a consequence of her pending case before the Sharia Court.¹⁵⁷

The UN Human Rights Committee declares the communication inadmissible with regards to the author's complaint under article 18(1) in conjunction with article 7 of the Covenant, as it considers that her claim of an alleged punishment for her religious conversion to Hinduism was insufficiently substantiated. First, because the author had informed the Danish authorities that she had not formally converted to Hinduism, and she has also not provided any details to the Committee with respect to her conversion. Second, the author has not claimed that her case before the Sharia Court relates to her religious conversion. She has also not established that she had already been, or that she would be, at risk of persecution upon return in Malaysia on account of her religious conversion.¹⁵⁸

Nonetheless, the Committee considers that the author has sufficiently substantiated her claims with regards to the violations of article 7 in conjunction with articles 17(1) and 26 of the Covenant. First, because the author claims that she had been previously detained and subjected to sexual abuse on account of her gender identity and appearance

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

which do not correspond to her ID documents and to Sharia law, and because her return to Malaysia would expose her to a risk of police harassment and further abuse.¹⁵⁹

Also, *M.W. v. Denmark*¹⁶⁰ constitutes the first case in which the Committee on the Elimination of Discrimination against Women (CEDAW Committee) granted victim standing to an individual who did not identify as a woman to allege a violation of their rights under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁶¹

¹⁵⁹ ICCPR Case Digest. Available at: <http://ccprcentre.org/decision/16749>

¹⁶⁰ *M.W. v. Denmark* [2016] CEDAW Communication no 046/2012.

¹⁶¹ Jessica Tueller “*Not Hers Alone: Victim Standing Before the CEDAW Committee After M.W. v. Denmark.*” (2021) *The Yale Law Journal* 131(1), 256-305.

4. Best Practices and Recommendations

Based on the above analysis of the legal procedures for gender recognition and the case-law of the European Court of Human Rights, it is imperative to highlight and recommend good practices for the development of a policy that would guarantee transgender individuals the right to change their gender identity without compromising their other fundamental rights.

This chapter will focus on:

1. Implementing International Human Rights Standards (endorsement of the Yogyakarta Principles at national level);
2. Adopting Expeditious and Transparent Procedures for Change of Name and Sex;
3. Abolishing Sterilisation and Other Compulsory Medical Treatment;
4. Making Healthcare and Public Health Insurance Coverage Accessible;
5. Dissociating Marital Status from the Gender Recognition Process;
6. Providing Training and Raising Awareness.¹⁶²

Unfortunately, institutionalized transphobia and severe human rights violations against trans people continue to be the order of the day across the European continent, despite recent progress. Yogyakarta Principles and other authoritative human rights documents can aid European institutions and national governments in protecting trans people's fundamental rights and addressing discrimination based on gender identity and gender expression.¹⁶³

The European Commission should facilitate the exchange of best practices on LGR legal and procedural requirements, as well as best practices in their practical implementation. The European Commission can support mutual learning among Member States in the process of adopting a new LGR legal framework.¹⁶⁴

¹⁶² Ilvan Agius. Richard Köhler. Sophie Aujean. Julia Ehrt. December 2011. Human Rights and Gender Identity: Best Practice Catalogue. ILGA-Europe and TGEU.; Directorate-General for Justice and Consumers (European Commission), ICF2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>.

¹⁶³ Ilvan Agius. Richard Köhler. Sophie Aujean. Julia Ehrt "Human Rights and Gender Identity: Best Practice Catalogue. ILGA-Europe and TGEU." (2011). Available at: <https://www.ilga-europe.org/report/human-rights-and-gender-identity-best-practice-catalogue/>

¹⁶⁴ Directorate-General for Justice and Consumers (European Commission), ICF. (2020). Legal gender recognition in the EU: The journeys of trans people towards full equality. Available at: <https://op.europa.eu/>

In addition, it would be good in European law to pass a directive, which would regulate the issue of legal recognition of gender identity, so that at least at the European level there is an obligation for the member states to integrate this directive into their national legal order and settle the matter.

Also it is necessary to adopt expeditious and transparent procedures for change of name and sex of a transgender person on birth certificates, identity cards, passports, educational certificates and other similar documents. Member States should strive to adopt LGR procedures based on self-determination and meet the human rights principles set out in the Yogyakarta principles, in particular under Principle 3:

- Take all necessary measures ‘to legally recognise each person’s self-defined gender identity’.
- Take all necessary measures to ‘ensure that procedures exist whereby all State- issued identity papers which indicate a person’s gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person’s profound self-defined gender identity’.
- ‘Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned’.
- ‘No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity’.
- ‘No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity’
- ‘Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy’.
- Remove requirements to satisfy medical (including psychiatric), civil status, age preconditions or ‘real-life experience’ (RLE) requirements.

Another matter than needs to be settle is the abolishing of Sterilisation and Other Compulsory Medical Treatment from the LGR procedures. Within the Council of

Europe, the vast majority of Member States require proof of permanent sterility or operations that inevitably lead to sterility prior to legal gender recognition.¹⁶⁵

Abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in laws regulating the process for name and sex change.

Moreover, it is necessary to make healthcare and public health insurance Coverage accessible to everyone that needs medical treatment in order to regulate the issue of gender dysphoria

World Professional Organisation for Transgender Health (WPATH) has recognised this need as well as the need to have trans related medical measures covered by public and private health insurances, and stated:

“The WPATH Board of Directors urges state healthcare providers and insurers throughout the world to eliminate transgender or trans-sex exclusions and to provide coverage for transgender patients including the medically prescribed sex reassignment services necessary for their treatment and well-being, and to ensure that their ongoing healthcare (both routine and specialized) is readily accessible.”¹⁶⁶

As we observe in the previous chapters, many countries set as a requirement for LGR the divorce and is important to dissociating marital status from the gender recognition process.

The requirement for trans people to be ‘unmarried’ (also referred to as ‘the divorce requirement’) prior to their gender recognition is still very widespread in Europe. When this requirement was first introduced, its purpose was to preserve marriage as an unambiguous heterosexual institution consisting of opposite-sex spouses. It is hence both homophobic and transphobic, since it severely interferes with the privacy of both spouses to have their existing marriage protected and respected. It also acts as a gatekeeper for those trans people who would like to transition but are not willing to divorce their spouse.

¹⁶⁵ Commissioner for Human Rights (2011), Discrimination on grounds of sexual orientation and gender identity in Europe – Background Document, Strasbourg: Council of Europe.

¹⁶⁶ WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage for Transgender and Transsexual People Worldwide, online at: www.wpath.org/medical_necessity_statement.cfm

Despite the above legal and political measures, it is important to emphasize that things will not change unless states and international organizations invest in providing training as well as procedures that will raise awareness for the LGR.

There is lack of awareness on trans issues among wide sectors of society including decision makers, educators, lawyers and medical practitioners amongst others. In addition, trans people themselves are not always aware of their rights and the redress mechanisms at their disposal. Thus, it is important that awareness is raised among as many people as possible, while training is provided to professionals and to the trans community itself.

Access to adequate healthcare services is paramount for trans people. This means access to well-trained professionals in the pertinent specialisations who are competent to work with gender variant clients. For such a standard to be met, professionals in the field need to be trained both in terms of trans specific healthcare needs; and in gender diversity and the diversity within the trans community itself.

Also, a few local school and university boards across Europe have acknowledged the need to address the high instances of bullying and exclusion experienced by transgender youth. For example, the UK Government Department for Children, Schools and Families is working with the major transgender support groups in the UK to produce guidance for schools on transphobic bullying. Moreover, the Centre for Excellence in Leadership has worked with a transgender rights group to publish a self-study course on transgender issues for senior staff and managers in colleges and other higher educational institutions.¹⁶⁷ Regarding the issue of university degrees and papers with the new name and sex of a transgender person, the University of Torino issues student identity cards with the chosen name before the legal name change has occurred in order to facilitate matters for transgender students.¹⁶⁸

Finally, the Council of Europe underlines that member states should:

-Enact hate crime legislation which affords specific protection for transgender persons against transphobic crimes and incidents;

¹⁶⁷ Whittle Stephen and Turner Lewis “*Leading Trans Equality: A Toolkit for Colleges, Lancaster: The Centre for Excellence in Leadership.*” (2007) Available at: http://services.pfc.org.uk/files/CEL_toolkit.pdf.

¹⁶⁸ Council of Europe: Commissioner for Human Rights, Human Rights and Gender Identity, 29 July 2009, CommDH/IssuePaper(2009)2. Available at: <https://www.refworld.org/docid/4a7bff742.html>

- Prepare and implement policies to combat discrimination and exclusion faced by transgender persons on the labour market, in education and health care;
- Involve and consult transgender persons and their organisations when developing and implementing policy and legal measures which concern them;
- Address the human rights of transgender persons and discrimination based on gender identity through human rights education and training programmes, as well as awareness-raising campaigns;
- Include the human rights concerns of transgender persons in the scope of activities of equality bodies and national human rights structures;
- Develop research projects to collect and analyse data on the human rights situation of transgender persons including the discrimination and intolerance they encounter with due regard to the right to privacy of the persons concerned.¹⁶⁹

¹⁶⁹ *ibid.*

Conclusion

The right to gender identity means a person's ability to freely act in society on the basis of the social role by which he/she identifies herself on the basis of gender. Accordingly, the point is about actions of a legal (the implementation of rights and obligations based on self-identification, the social gender change) and medical nature (the possibility of changing (correcting) the biological gender).¹⁷⁰

In other words, the right to gender identity means an individual's ability to freely act in society on the basis of the social role he/ she identifies himself / herself with in view of gender.

Despite the recommendatory nature of international legal acts in the field of ensuring the human right to gender identity, it should nevertheless be noted that the international community is increasingly calling on states to take appropriate measures on the proper observation of the principles of equality, non-discrimination, individuals' autonomy and respect for their dignity while implementing gender identity right and provide its proper legal regulation.

Therefore, the international community must maintain constant contact with gender experts as well as with state officials, in order to conduct research into transgender people's needs and develop best practices so that transgender people are able not only to change their gender identity, but at the same time feel protected and protected against violations of their basic human rights.

¹⁷⁰ Tereziia Popovych "The Right to Gender Identity: The Basic Principles for Understanding and Legal Enforcement". Конституційно-правові академічні студії, (3), 59-66.

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