# Legal Gender Recognition in Europe

## Toolkit


Richard Köhler · Alecs Recher · Julia Ehrt

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TGEU
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The present document has been created with the greatest care, but it does not it cannot claim to be complete. Please send feedback and suggestions for amendments to *tgeu@tgeu.org*. While the toolkit aims to provide information and inspiration regarding legal questions pertaining to legal gender recognition, it is strongly recommended that you seek professional counsel before taking legal action in concrete cases.

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# Introduction

Many trans people face problems in daily life because their ID documents do not reflect their true self. Picking up a parcel at the post, applying for a job, boarding a plane or lodging a harassment complaint can become a repeated source of harassment, and unfounded suspicion and may lead even to violence. The purpose of gender-recognition procedures is to overcome the gap, giving official recognition to a trans person's gender identity. Gender Recognition goes beyond being an administrative act: it is essential in order for many trans people to be able to participate in society and live a life of dignity and respect.

This publication aims to support trans-rights activists and those working professionally on gender recognition procedures aspiring to advance the human rights of trans people. The toolkit discusses the current European-level jurisprudence and the applicable human rights standards that need to be implemented by states in Europe. With this publication, we want to contribute to a development that puts the human rights of the individual at the heart of recognition procedures in Europe. We hope to contribute to the manifold discussions and attempts currently occurring in many countries in Europe to reform or introduce gender recognition legislation that is respectful of the human rights of those it seeks to serve.

Authorities and trans-rights activists have expressed a great interest in learning from practical experience in other countries. By presenting both the European- and national-level gender recognition jurisprudence and legislation from different states with strong support for human rights, we seek to inspire positive spill-over effects. However, while some existing laws in Europe are promising, and are thus emphasized in the text, no law currently fully protects the human-rights of trans persons. The Irish proposal by Senator Zappone , one of the many promising examples of human-rights developments, is briefly discussed. The Argentinean Gender Identity Law, as a benchmark in this area, is presented hence in greater detail.

Gender-recognition legislation is often complex. The gender recognition checklist is a unique practical tool to help readers assess simply whether existing or planned gender recognition procedures are human rights compatible.

Last but not least, arguments and political debates can only be partly won with legal arguments. Hearts and minds have to be won as well. To this end, a number of myths and fears that often surface when advocating for simplified gender recognition procedures are addressed.

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# Fact Sheet Legal Gender Recognition

## Why Legal Gender Recognition?

Identification documents reflecting your genuine self are elementary for everyone. Not only for transgender persons. Without a set of matching documents such as a passport, ID-card, social security number or bank card, basic transactions and participation in society become very difficult. For many trans people, the gendered information in these documents, including as name, gender marker or a gendered digital code, is a constant source of discomfort and trouble. Whenever having to show ID, presenting these documents means having to come out as transgender, even in very inappropriate situations, which can spark humiliation, discrimination and violence. This often also leads to trans people being suspected of using falsified documents.

A person's gender identity is "*one of the most intimate areas of a person's private life*", according to, among other organisations, the European Court for Human Rights.[1] For many trans people without matching ID documents, their gender identity keeps on being dragged into the public sphere. Can you imagine being harassed every time you try to travel, open a bank account, start a new job or file a complaint?

73% of trans respondents to an EU-wide survey expressed that easier gender recognition procedures would allow them to live more comfortably as a transgender person.[2]

## What is Legal Gender Recognition?

***Legal Gender Recognition*** is the official recognition of a person's gender identity, including gender marker and name(s) in public registries and key documents. The European Court of Human Rights has repeatedly ruled on gender-identity recognition and its conditions, strengthening the human rights of trans people.

***Transgender or trans people*** have a gender identity that is different from the gender assigned at birth. This includes people who intend to undergo, are undergoing, or have undergone gender reassignment as well as those who prefer or choose to present themselves differently from the expectations of the gender assigned to them at birth.

***Gender identity*** refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. (Yogyakarta Principles)

## Overview Legal Gender Recognition in Europe

**"*Quick, transparent and accessible*"** procedures are European standards as established by the Council of Europe [3] and must be implemented by member states. However, only 33 states in Europe have legal provisions to recognize a trans person's gender identity. Trans people's existence is de facto made illegal in 16 countries, as these countries provide for no recognition. 24 states in Europe require by law that trans people undergo sterilization before their gender identity can be recognized.[4]

"*Transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation.*"
(Council of Europe Commissioner for Human Rights Thomas Hammarberg 2009) [5]

***Other requirements*** may include a mandatory diagnosis of mental disorder, medical treatment and invasive surgery, assessment of time lived in the person's gender identity and being single (that means having to divorce if married). Such requirements violate a person's dignity, physical integrity, right to form a family and be free from degrading and inhumane treatment.

# Basic Standards in Legal Gender Recognition

*The positive obligation for European states to provide for legal gender recognition has been unequivocally established by the European Court of Human Rights (ECtHR[6]). However, when it comes to the practical implementation of this obligation, it is necessary to carefully assess procedures for their human rights compatibility. This section assists in amending or introducing gender recognition legislation by explaining guiding principles for the design of procedures, requirements or effects of a law, providing information on established case law and the relevant human rights framework, and flagging commonly known issues.*

## Positive Obligation

Without name and gender recognition, trans people are revealed as trans in all aspects of life. This is also true for official documents such as ID cards, passports, social security card or driving licenses. But also other certificates such as school and university degrees, job references, credit and bank cards, student cards etc. can also become a source for daily trouble. If, for instance, the diploma still says "Ms Sarah Meier" but its holder presents a male appearance, difficulties in finding a job are inevitable. Equally, boarding a plane, crossing borders and simply having a personalized public transport pass may might become a source of ridicule and discrimination. And may sometimes even lead to violence. Without official recognition, educational institutions may find it difficult to respect a student's gender identity, with teachers not using proper name and pronoun, let alone having school records and diploma displaying the correct information. This experience continues in working life. As a result, stigmatization is engrained in every aspect of life, often resulting in the trans person's exclusion from meaningful participation in social and economic life.

The aim of gender-recognition legislation must therefore be to protect individuals' right to private life as guaranteed by the European Convention on Human Rights, (ECHR) Article 8, "Right to Private and Family Life". Consequently, the European Court of Human Rights (ECtHR) ruled that Council of Europe Member States must provide for the possibility of legal gender recognition[7] and that regulations in place need to respect the right to a fair trial, i.e. it must be possible to fulfill any set requirements in the given country. General regulations lacking concrete im-

plementation rules resulting in dysfunctional processes are unacceptable.[8]

While procedures for legal gender recognition are in place in 33 European states, more than a third of European states (16) do not offer such a possibility. However, even where procedures are in place, imposed requirements, procedures or the effects of the law might not be human-rights compatible. For example, all countries have a 'Gender Identity Disorder' diagnosis/ psychological opinion as prerequisite; 24 states require sterilization; 19 states require divorce /single status and 14[9] do not allow a trans person to marry upon legal gender recognition.[10]

In 2010, the Council of Europe Committee of Ministers set standards for legal gender recognition with its adoption of Recommendations on measures to combat discrimination on grounds of sexual orientation and gender identity - CM/Rec 2010(5) (the Recommendations). The Recommendations are based on the case law of the European Court of Human Rights interpreting the European Human Rights Convention inter alia on gender recognition procedures. The standards defined are hence binding for all Council of Europe member states.

The Recommendations are very specific in Par 20 – 22 of the Annex regarding gender recognition legislation:

"20. *Prior requirements, including changes of a physical nature, for legal recognition of gender reassignment, should be regularly reviewed in order to remove abusive requirements.*

21. *Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.*

22. *Member states should take all necessary measures to ensure that, once gender reassignment has been completed and legally recognised in accordance with paragraphs 20 and 21 above, the right of transgender persons to marry a person of the sex opposite to their reassigned sex is effectively guaranteed."*

# Procedure

*Gender recognition procedures have to be "quick, transparent and accessible", says the Council of Europe (Paragraph 21 LGBT Recommendations CM 2010(5)). Both the procedures for and the effects of the gender-recognition process must respect the right to a fair trial and the right to privacy. It is of less importance what the form of law takes, as long as it serves the purpose in practice. The ECtHR requires trans people's rights to be upheld effectively, such that the "Convention [ECHR] is interpreted and applied in a manner which renders its rights* ***practical and effective****, not theoretical and illusory"* (Goodwin & I. v UK[11]).

***Quick:*** The time span between applying for and being granted recognition should be as short as feasible, as the time component is often highly relevant for the applicant. Extending the period unnecessarily is cruel, as the trans person's right to privacy keeps on being violated for the duration of the proceedings take (right to privacy). The right to a fair trial is not respected if the length of the pending case is excessive, e.g. if a decision has still not been made four yearsafter the case began.[12]

Some requirements might in themselves request lengthy procedures, e.g. a country might require a minimum time span of 2 years of psychological supervision before the mental-health diagnosis,[13] and thus violate the rights to privacy and a fair trial. These pre-phases need to be included in a time analysis of the overall process.

The Portuguese law[14] is considered best practice in terms of the speed of the administrative procedure: a decision upon an application has to be given within 8 days by the relevant authorities. (However, to fulfill the necessary medical perquisites takes considerably longer.)

***Transparent:*** The legal provision needs to prescribe a clear procedure on how to change the name and recorded sex of a person. This includes clarification on how the law should be implemented and which bodies are responsible, e.g. to which institution an application needs to be addressed. Clarity is equally important, as it avoids legal uncertainty both for the transgender individual and the authorities dealing with gender recognition.

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

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

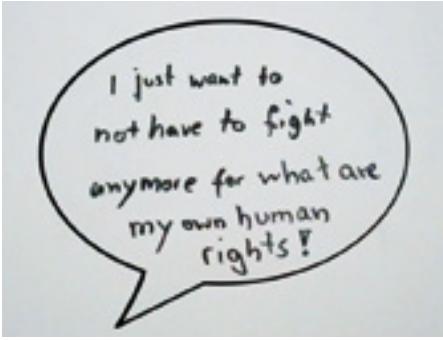
These accessibility criteria also apply to prerequisites and other indirect aspects, which might not be visible in the texts. For instance, costly court or administrative procedures may be significant economic barriers to gender recognition. For positive examples, change of name in the UK (non-trans-specific deed poll) is available from £ 5-10, and in Argentina gender recognition is for free.

Also, **no degrading procedure** may be implicitly or explicitly included in the requirements. For example, an implicit degrading procedure could be where the legal text refers merely to a medical opinion, but this opinion is only available after a mandatory institutionalization in a psychiatric ward. Mandatory, non-therapeutic institutionalization to satisfy an administrative rule can be seen as degrading treatment. The Committee of Ministers Recommendations call for a review of laws to remove "*abusive requirements*". For more details on requirements, see the next chapter.

## Right to Privacy

As previously pointed out, the essential functions of a gender recognition procedure is to protect the individual's right to privacy. This protection relates to outcomes (changed documents and registries) as well as to the procedure itself. To this end, it shall be foreseen that a person who has acquired information about an individual's gender recognition in an official capacity must not disclose the information. A person may acquire this information as a holder of a public office or in connection with the functions of a local or public authority or of a voluntary organisation, an employer, or prospective employer, or otherwise in connection with, the conduct of business or the supply of professional services. The UK Gender Recognition Act 2004 is very detailed in this regard.

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




## Right to a Fair Trial

Applicants have a right to a fair trial (Article 6 European Convention on Human Rights), no matter whether procedures are handled by an administrative body or the court. This extends to the right to be heard [15] by a competent, independent and impartial tribunal, the right to a public hearing, [16] the right to be heard within a reasonable time, the right to counsel and the right to interpretation.

Equality before the law needs to be ensured, if necessary by providing legal aid to the applicant to cover the costs for the legal. It needs to be noted, that to date no case has been brought before European courts on legal aid for requirements in gender recognition procedures.

The right to a fair trial also includes the right to appeal, that is to have a higher court review the decision.

The applicant cannot be requested to prove that they did not "cause" being transgender themselves, e.g. through unsupervised hormonal treatment.[17] The ECtHR stated that to date no reliable information is available on the cause of being transgender. In decisions on gender recognition, this also means that experts' opinions, e.g. from medical professionals, may not be ignored or dismissed and replaced by *ex officio* judicial opinions.

The right to a fair trial also includes applicants, right to have their case handled swiftly and to challenge excessive procedural delays.

### Change of Name

Change of name, including gendered family names, should be possible separate from change of legal gender in order to better accommodate the wide range of individuals' experienced gender identity. For instance, some trans people would not need the name change as they have been given an androgynous name. Also, those trans people who do not aim at a gender marker change should not be excluded from having their name recognized.

### Citizens living abroad and Recognition of foreign procedures

For those trans citizens living abroad, it is essential to ensure the procedure does not stipulate that trans people must travel to their state of origin to access the procedure. The official change or providing citizens with new documents shall be accessible through the country of origin's embassy in the state of residence. In times of increased mobility and globalization, international compatibility of gender recognition legislation is gaining importance and the recognition of foreign decisions needs to be regulated. Similarly, procedures also need to be accessible for foreign residents if their country of registration (country of origin) does not provide a similar procedure or would expose them to risks or human rights violations.

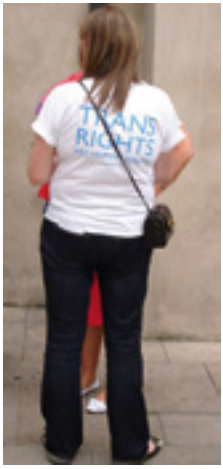
### Benefits of Clear Legislation

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

In some countries where gender recognition procedures are in place that are not defined by law but derive from established practice or case law, hesitance to initiate legislative change may arise. However, there are several drawbacks to not encoding gender recognition procedures. Most

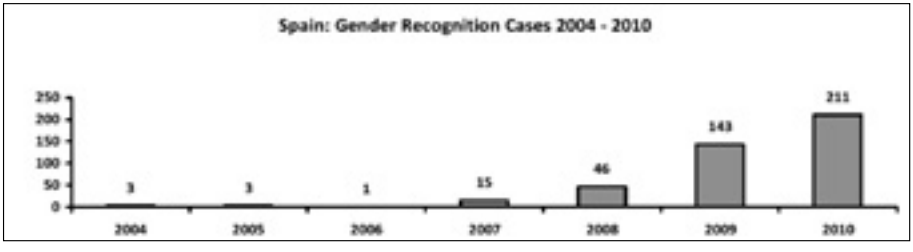
importantly, the applicant has no "right" to claim gender recognition. In case of delays or negative decisions, the legal basis for an appeal is lacking. The right to a fair trial also includes the necessity to outline possiblity of appeal. Further consequences of lacking legislation might be increased lengths and thus costs of a procedure, which strain both the individual and the public authorities. Vague requirements or unclear implementation regulations open the possibility for abuse. Extensive legal actions might be necessary as a result in order to clarify the matter.

The positive effects of clear legislation are well documented, as with the introduction of the Spanish Law[18] in 2007. Within three years of having adopted the law, 15 times more people had their gender identity recognized.[19]




## Procedure – Conclusions

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



# Requirements

## Principle of No Conflict

It is essential that a legal procedure does not create a conflict between the individual's human right to legal gender recognition (protection of private life) and other fundamental rights (e.g. human dignity, physical integrity, being free from torture, a fair trial, etc.). European states define in their legislation or through informal practice certain criteria an individual has to meet before being able to change their name or registered gender. Often these requirements run counter a person's human rights, in a person's private life, self-determination or health-care choices. The ECtHR ruled in this respect that states have a margin of appreciation on what they can require, but also that the requirements should take into account "*scientific and societal developments*" (*Goodwin & I v. UK*). For the time being, the Standards of Care (SoC) Version 7,[20] developed and published by the World Professional Association for Transgender Health (WPATH), outline the actual state-of-the-art treatment for trans people. The authoritative association emphasises that transgender identities and expressions are not pathological or negative. Policy makers should pay attention to these SoC and strive for procedures that are based on the individual's self-determination and omit additional proofs and assessments by third parties, e.g. medical or court-ordered experts. The opinions of third parties, such as parents (if applicant is of age before the law), guardians, children, spouses/partners or work colleagues, should also be excluded.

Further, the Court held that it must be possible for an individual to fulfill the set requirements within the respective state.[21] For instance, requesting a proof of gender-reassignment surgery without making such treatment available in the country is not legitimate.

Also, delays in the gender recognition process, which might be caused by standardized waiting periods, e.g. when accessing gender-reassignment surgery, are not lawful. The Court ruled in *Schlumpf v. Switzerland* against a standardized 2-year therapy imposed by an insurance company before granting cost coverage for gender-reassignment surgery. Applying a bureaucratic rule in a rigid manner without regard for the individual's medical needs violates the right to a fair trial, as the judical opinion had substituted its own views for those of a medical expert.

"*Irreversible sterilisation, hormonal treatment, preliminary surgical procedures and sometimes also proof of the person's ability to live for a long period of time in the new gender (the so called 'real life experience')*"[22] are seen as abusive requirements by the Council of Europe. Domestic laws "*should be regularly reviewed in order to remove abusive requirements*".[23] In 2011, the European Parliament requested procedures "*for changing identity to be simplified*".[24]

## Diagnosis/ Medical Opinion

Transgender and human rights activists in Europe and around the globe advocate that having a transgender identity is not a disease or a marker of illhealth. The World Professional Association for Transgender Health (WPATH) maintains that "*The expression of gender characteristics, including identities, that are not stereotypically associated with one's assigned sex at birth is a common and culturally-diverse human phenomenon which should not be judged as inherently pathological or negative*".[25]

However, to date the World Health Organization's ICD Version 10 lists the diagnosis of being "transsexual" (F64.0) as a mental and behavioural disorder. To date, all official procedures in Europe are based – explicitly or implicitly – on such a mental-health diagnosis. As a consequence, many transgender persons[26] who seek gender recognition are unable to obtain it. It is particularly problematic that a person's self-determination is supplanted by a third party's opinion. Requiring a healthy person to be labelled as mentally ill for an administrative procedure conflicts with human dignity and leads to further stigmatization and discrimination. 63% of trans respondents in a German study felt that the mental-health diagnosis "Gender Identity Disorder" required for gender recognition is a source of significant distress for them.

Ideally, the mandatory involvement of the medical establishment such as mental-health professionals is omitted from procedures to increase their accessibility. As well, regulations that ensure non-pathologising access to trans-specific health care need to be further developed.

Where a diagnosis is explicitly or implicit required by a gender recognition procedure, it is not within a state's remit to define or assess a person's gender identity. In this regard, the ECtHR ruled that a medical expert opinion cannot be substituted by juridical opinion. [27] Further, the court held that an applicant cannot be requested to prove that they had not caused themselves to become transgender, e.g. by administering hormonal treatment without medical supervision. Related costs for a medical or third-party opinion must equally be met through legal aid or other financial support. A diagnosis may not be delayed considerably through, e.g. a mandatory period of therapy or period of long waiting lists due to a lack of recognised specialists.

### Real-life experience and physical examinations

Real-life experience" is the term often used for a person's ability to live for a long period of time in their self-determined gender identity. It is often requested before ID documents are changed. Requesting a person to already live in their gender identity without providing matching ID documents could lead to exposure and the risk of discrimination and violence. Requiring real-life experience and physical examinations as prerequisites for gender recognition is not state of the medical art according to WPATH's, Standards of Care Version 7 and is thus to be avoided. It is the obligation of member states to pay respect to societal and medical requirements as ruled by ECtHR (see above). Again, the principle from *Schlumpf v. Switzerland* has to be followed: instead of applying a mandatory rule in a rigid manner, consideration should be given to an individual's personal situation.

### Compulsory medical intervention

24 states in Europe require sterilisation as a precondition for a gender recognition procedure.[28] This requirement runs counter to the demand from WPATH: "*No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person's lived gender, regardless of reproductive capacity.*"[29] Demanding endocrinologic or surgical medical intervention (such as hormones, surgery, and sterilisation) "*clearly run[s] counter to the respect for the physical integrity of the person*", according to the Council of Europe Human Rights Commissioner. [30] "*States which impose intrusive physical procedures on transgender persons effectively undermine their right to found a family.*" [31] In a specific report on coercive sterilisation to the Parliamentary Assembly of the Council of Europe (PACE)[32] Rapporteur Pasquier clarifies "*even where consent is ostensibly given – also in written form*

– , *it can be invalid if the victim has been misinformed, intimidated, or manipulated with financial or other incentives.*" In regard to gender recognition procedures for trans people, the report maintains: "neither forced nor coerced sterilizations or castrations can be legitimated in any way in the 21st century – they must stop."


Coercive sterilisation amounts to a violation of the UN Human Rights Convention's Article 3, which protects the principles of dignity, individual autonomy and non-discrimination. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment called upon all states to "*outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups*",[33] with explicit reference to transgender people. Also, the UN Committee on the Elimination of All Forms of Discrimination against Women expressed its "*concern at specific health problems experienced by transgender women, in particular the compulsory sterilization they should undergo to get their birth certificates changed*".[34]

The implications on the right to found a family are laid out by the Human Rights Commissioner: "*States which impose intrusive physical procedures on transgender persons effectively undermine their right to found a family.*"[35]

Requiring medical intervention remains a human rights violation irrespective of whether the individual would want to undergo these procedures voluntarily. These are questions of the individual's health care, which should not impinge on their ability to update their legal information. Compulsory treatment is also contrary

to a person's free will. An applicant would be forced to choose between the right to physical integrity and the right to private life. Hence, there is no free will as required by Art. 5 of the Convention on Human Rights and Biomedicine. The Council of Europe Commissioner for Human Rights recommended that member states "*abolish sterilization and other compulsory medical treatment as a necessary legal requirement to recognize a person's gender identity in laws*".[36]

The Commission preceding the ECtHR declared in 1997[37] that it is permissible for states to require sterilisation as part of their gender recognition procedures. Since then, no new case law has been developed[38] that would provide an opportunity to develop a new legal perspective on this matter.

Currently, 11 countries in Europe do not demand forced sterilisation: Austria, Belarus, Estonia, Germany, Hungary, Iceland, Poland,[39] Portugal, Spain, Sweden and the United Kingdom. In Austria, Germany and Sweden, courts declared the sterilization requirement to be unconstitutional, remaining countries have adopted regulations which did not involve sterilisation. Recent years have seen more and more case law in Switzerland, Italy and France, where courts have not insisted on demanding sterilisation. (*see also the section "Compilation of National Level Jurisprudence on Legal Gender Recognition"*)

### Forced divorce

In the case of a trans person who, *prior to gender recognition*, entered into *a different-sex* marriage and who wants to stay married throughout legal gender recognition, legislators *in countries without same-sex marriages* are faced with the challenge that this would result in *legal* same-sex unions. To avoid this situation, 34 countries in Europe require a divorce before fully recognising a trans person's gender identity.

However, the protection of existing marital unions has to be taken into account. This is particularly the case in countries where there is no equivalent to marriage for same-sex couples. In any case, gender recognition procedures must not infringe on the rights of a trans person's children and partner. Often the question is wrongly conflated with discussions about marriage equality for same-sex couples. This argument is mistaken, because in the case of gender-recognition requirements the rights of an already lawfully married couple are at stake. Divorce, dissolution or transferal into a registered partnership (where available) means a loss in acquired rights also for family members as well, a situation that must be avoided.

The Commissioner for Human Rights demanded that "*any restriction on the right of transgender persons to remain in an existing marriage following a recognized change of gender*" be removed.

At the time of writing, the case of a Finnish trans woman who wants to remain married is pending before the ECtHR's Grand Chamber.[40]

No forced divorce is required in 15 European countries: Austria, Belgium, Denmark, Estonia, Georgia, Germany, Iceland, Luxembourg, Netherlands, Norway, Portugal, Romania, Spain, Sweden and Switzerland. German and Austrian Courts[41] found the requirement to divorce prior to gender identity recognition as incompatible with the rights of rightfully married spouses, irrespective of the fact that in both countries marriage is defined as a different-sex union.[42]

## Age restriction

Explicit or implicit age restrictions obstruct young as well as older transgender people 's access to gender-recognition procedures. These restrictions violate non-discrimination provisions in the Convention on the Rights of the Child (Art 3.1), the Yogyakarta Principles,[43] the European Convention on Human Rights,[44] case law of the European Court of Human Rights on "Age",[45] the European Social Charter (ETS No. 35) (Article 23 - the right of elderly persons to social protection) and the EU Fundamental Rights Charter (Art. 21). A life of dignity and autonomy, the right to privacy and the right be heard and to play an active role in all administrative and judicial procedures that concern them must hence be provided for minors as well as persons of age, taking into account their individual capacities. Thus, gender recognition may not discriminate on grounds of age, e.g. being too young. This restriction also applies to any requirements that restrict access above a certain age, . For example, medical interventions are often only available at the age of majority and only until a certain age (e.g. 65 years). The removal of any age-discriminatory provisions in gender recognition is becomeing more pressing as Europe gets older demographically and as more young transgender persons come out at an earlier age. SoC 7 confirms that "*increasing numbers of adolescents have already started living*

*in their desired gender role upon entering high school"*[46] and highlights the large number of transgender adolescents showing gender identity continuity throughout adulthood (WPATH, Standards of Care Version 7). 88% of young trans respondents (18 – 24 y[47] ) and 83% of elderly trans respondents (55+) to the EU LGBT Survey expressed a desire for easier legal gender recognition procedures, as these would allow them to be more comfortable living as a transgender persons.

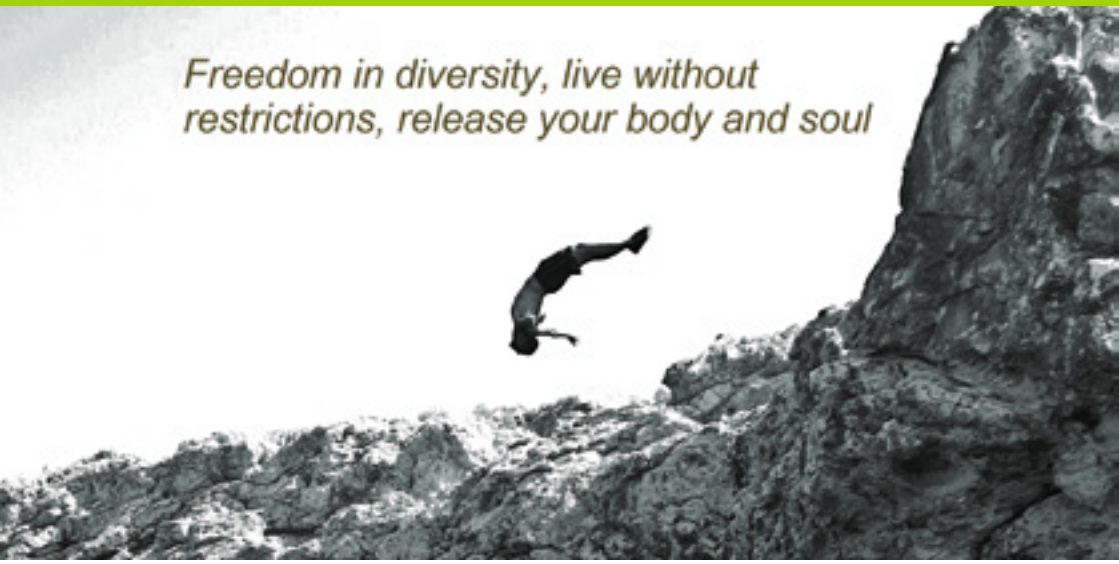
To this end, the Council of Europe asks member states to provide pupils and students with the necessary information, protection and support to enable them to live in accordance with their gender identity. (Rec Com 2010(5) Para 31) and specifically demands "*facilitating the changing of the entry as to first name or gender in school documents*" to adequately meet the special needs of transgender students in their school life (Rec Com 2010(5) The Explanatory Memorandum p. 18).

In many countries, medical requirements in legal gender recognition are age-sensitive, e.g. available above 18 years or before 65 years. In *Schlumpf v. Switzerland*,[48] the Court held that the Swiss authorities applied a two-year waiting-time rule to access gender reassignment in an overly rigid fashion, failing to take into consideration the applicant's individual circumstances, namely her advanced age (i.e. 67 years old).

The German Constitutional Court in 1982 ruled that making gender recognition available for those 25 years of age or above was discriminatory.[49] In 2011, in the case of a trans woman of age, the German Constitutional Court followed her argumentation, that the requested surgery requirement was not possible to fulfil due to her age.[50] To date, legal procedures in Austria and Germany and Sweden are accessible to underage trans persons. In November 2013, a six-year-old girl was able to change her documents under the Gender Identity Law Argentina.[51]

### Requirements - Conclusions

In order to respect their human rights obligations under international and European human rights law, states' gender recognition legislation must not force individuals to trade one human right for another.




# Effects

When it comes to the scope and effects of gender recognition legislation and which effects, the ECtHR ruled that legislation has to render the rights under the Convention "*practical and effective, not theoretical and illusory*" (*Goodwin* & *I v.* UK). Thus legislation needs to be designed in a way that ensures full legal recognition in "*all areas of life*", as requested by the Council of Europe.[52]

## Protection of privacy

The law and its implementation guidelines may leave no doubt about the need to protect of the individual's privacy. This privacy requirement relates to the gender recognition procedure itself [53] as well as to the effects of the law. The obligation to rectify birth certificates was established by the European Court of Human Rights in *Goodwin* & *I v.* UK. The content and authority of the law need to be sufficient to make "*possible the change of name and gender in official documents*" and to ensure "*corresponding recognition and changes by non-state actors with respect to key documents*".[54]

Thus, the obligation is not limited to states, but also includes non-state actors and also extends to educational and employment certificates, credit cards and other documents. No other law, e.g. freedom of information requests, may be invoked to trump measures for privacy protection.

Registries and documents are to be changed without any trace. Scratching out a previous name on a document and marking on top a new name is not acceptable, as it would constantly reveal the person's trans background, i.e. violating their

privacy. The UK Gender Recognition Act[55] is very detailed in regard to the protection of privacy in different areas. Article 5 of the German "Transsexual Law" has a specific disclosure ban; a previous supplier of a document, e.g. an employer,[56] has to issue a new employment certificate, even if doing so entails additional efforts for the institution.

## Full Legal Capacity

The recognition procedure in place has to ensure full legal capacity so that the person can access all rights associated with the confirmed gender. This includes the right to marry according to the legal gender as ruled by the ECtHR[57] and confirmed by the Committee of Ministers.[58] Thus, for example, upon being officially recognised as "female" a trans woman should be able to marry a partner who is registered as "male". Also, non-equal treatment in regard to pension and similar employment-related rights may amount to discrimination.[59] Nonetheless, gender-specific rights and duties should be limited where they can harm the individual, e.g. army conscription for a trans man or where the legally registered gender is not important, e.g. medical check-ups for prostate cancer should also be available for a trans woman who has obtained a female gender marker.

## Parent-Child Relationships

Gender recognition legislation may not affect a trans person's kinship status, according to the European Court of Human Rights. Barring a (legal) relationship or guardian or visiting rights because of a parent's gender identity amounts to discrimination.[60] The right of a child to have contacts with their parents may not be lawfully limited due to a parent's gender identity. A child has the right to be cared for by both their parents according to the UN Convention on the Rights of the Child – UNCRC Article 7 (1) and not be separated from them against their will (Article 9 UN CRC). Article 18 foresees common responsibilities of both parents for the upbringing and development of the child, while Article 2 guarantees a child the right to non-discrimination.

## Effects - Conclusion

The process and outcomes of gender recognition procedures must be suitable to protect the private life of the individual and to ensure full legal capacity in accordance with the recognised gender of the person.

# European level Jurisprudence on Legal Gender Recognition [61]

## European Court of Human Rights

***Judgments in which a violation was found***

**B *v.* *France***
(Application no.13343/87)
[25 March 1992]

*Complete lack of recognition in law of post-operative gender constituted a violation of* Art. 8.

The applicant is a trans woman and a French citizen, born in 1935. She underwent genital surgery in Morocco, in 1972. At the time of the judgment, the applicant had been living fully as a woman for a long time and was involved in a heterosexual relationship. In 1978 the applicant filed a request with domestic courts asking that her documents be changed to reflect her female identity, including with respect to her first name and gender marker, as she wanted to marry her partner. Domestic courts denied the applicant's requests partly on the grounds that by undertaking genital surgery abroad, she did not follow the correct procedures as prescribed in France, and that she con-tinued to "*show the characteristics of a person of male sex*".

The applicant complained to the Court that the authorities' refusal to recognise her gender identity was in breach of Article 8. The applicant sought to distinguish her case from the transgender cases that the Court had previously *Rees* and *Cossey*, arguing that there are substantial differences in the legal status of trans people in France and the United Kingdom. The Court examined several areas where such differences were alleged to exist and that were relevant from the standpoint of Article 8.

The Court found that in France, as opposed to the United Kingdom, birth certificates could be updated throughout the life of the person concerned, and that indeed numerous courts of first instance ordered that information pertaining to a person's gender included in their birth certificates be rectified. Whereas the applicant did undergo genital surgery abroad, without "*benefiting*" from the "*medical and psychological safeguards available in France*, "*the operation nevertheless involved the irreversible abandonment of Miss B.'s original sex*". The Court noted that the applicant's "*manifest determination*" was a sufficiently significant factor that had to be taken into account under Article 8. Unlike in the United Kingdom, the applicant could not

change her forename freely. The Court also found that because numerous official documents including information pertaining to the applicant's sex were required in the course of daily life, the inconvenience was sufficiently serious so as to constitute a violation of Article 8.

In view of all of the above, the Court held that the applicant "*found herself daily in a situation which, taken as a whole, was not compatible with the respect due to her private life*" and that there was therefore was a violation of Article 8. The Court specified that it was not overruling *Rees* and *Cossey* since the *B.* case could be distinguished from those other cases. The Court also noted that "*the respondent State had several means to choose from for remedying this state of affairs*" and that "*it was not the Court's function to indicate which was the most appropriate*".

Six out of 21 judges on the Court's panel issued dissenting opinions in the case.

***Goodwin and I. v. United Kingdom***
(Application no. 28957/95)
[decided by the Grand Chamber on 11 July 2002]

*Denial of legal recognition of post-operative gender amounts to a violation of Article 8. Barring post-operative transsexuals from marrying into their acquired gender is a violation of Article 12.*

Christine Goodwin is a post-operative MTF transsexual. She complained that she faced discrimination with regard to the payment of her National Insurance contributions: because she was legally a man, she had to continue paying the contributions until the age of 65, whereas if she had been recognised as a woman she would have ceased to be liable at the age of 60. As a result, she had to enter into a special arrangement to continue paying her contributions directly so as to avoid questions from her employers.

I. is a male-to-female post-operative transsexual. I. was denied the amendment of her birth certificate. She was unable to obtain admittance to a nursing course because she did not want to face the humiliation of producing a birth certificate that did not match her present situation.

Both applicants complained about the lack of legal recognition of their post-operative gender and about the legal status of transsexual persons in the United Kingdom.

The Court noted that transsexual persons suffered from "*stress and alienation*" as a result of "*the discordance between the position in society assumed by a post-operative transsexual and the status imposed by the law which refuses to recognise the change of gender*". The Court criticized the incoherence of British legal and administrative practices. While the UK allowed and funded the treatments necessary for transsexuals, it "*refused to recognise the legal implications of the result to which the treatment leads.*"

With regard to the state of medical and scientific knowledge, the Court noted that "*transexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief*". Furthermore, considering the intrusiveness and extent of procedures involved and the level of personal commitment required, it can not be "*suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment*". Finally, the Court noted that the chromosomal element could not automatically be considered decisive "*for the purposes of legal attribution of gender identity for transsexuals*".

The Court then observed a "*continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals*".

While acknowledging the extensive consequences that full legal recognition would entail in the fields of birth registration, access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance, the Court noted that no concrete and substantial detriment to the public interest could be determined. The Court concluded that the failure to ensure full legal recognition constituted a breach of Art. 8, but at the same time left the choice as to the appropriate means for achieving legal recognition to the discretion of the state.

Concerning Art.12, the Court considered that given the major social changes in the institution of marriage, the term "man and woman" does not only refer to a determination of gender by purely biological criteria. The Court held that a complete bar on the right to marry could not be justified and was therefore a violation of Art. 12.

***Van Kück v. Germany***
(Application no. 35968/97)
[decided on 12 June 2003]

*Burden on applicant to prove medical necessity of gender reassignment and genuine nature of her transsexualism during court proceedings was unreasonable. Violation of Articles 6 and 8.*

The applicant is a MTF transsexual who sued her health-insurance company for refusing to reimburse the cost of her hormone treatment. She further requested a declaratory judgement stating that the company was liable to reimburse 50% of the cost of gender reassignment surgery (that had not yet been undergone). The Berlin Regional Court misinterpreted the expert's opinion, rejecting the request on the grounds that hormone treatment and gender re-assignment could not be seen as necessary medical treatments. The Court of Appeal upheld the Regional Court's decision, insinuating that the applicant was not entitled to be reimbursed, as she had deliberately caused her condition. The applicant had undergone surgery in the meantime as she could not wait until the end of the proceedings for her suffering to be relieved. The applicant invoked Art.6. § 1, Art.8 and Art.14.

The Court concluded that the proceedings as a whole were not fair, in breach of Art.6.§1, on account of the manner in which domestic courts determined the medical necessity of gender re-assignment measures in the applicant's case and the cause of the applicant's transexualism. The Court stated that "*determining the medical necessity of gender reassignment measures by their curative effects on a transsexual is not a matter of legal definition*". Considering that "*gender identity is one of the most intimate areas of a person's private life*", the burden placed on the applicant to prove the medical necessity of treatment was disproportionate. Further more, the interpretation of the term "medical necessity" and evaluation of the evidence in this respect was not reasonable.

The Court also held that it could not be said that there was anything arbitrary or capricious in a decision to undergo gender re-assignment surgery. Furthermore, the applicant had already obtained legal recognition of her acquired gender and had undergone gender reassignment. The approach adopted by domestic courts to question the causes of the applicant's transexualism was therefore inappropriate and unreasonable given that a) the courts could not have sufficient information and medical expertise to assess such complex medical questions; and b) no conclusive scientific findings as to the cause of transexualism were available.

Regarding Art.8, the Court held that the case concerned "*the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination*". The central issue here was "*the impact on the court decisions on the applicant's right for her sexual determination as one of the aspects of the right to private life*". Domestic courts, "*on the basis of general assumptions as to male and female behaviour substituted its views on the most intimate feelings and experiences for those of the applicant, and this without any medical competence*". It "*thereby required the applicant not only to prove that this orientation existed and amounted to a disease necessitating hormone treatment and gender reassignment surgery, but also to show the 'genuine nature'* of her transexualism although "*the essential nature and cause of transsexualism are uncertain*". This approach upset the balance between the interests of the private health insurer and those of the applicant, in breach of Article 8.

The Court found that Art.14 did not give rise to a separate issue, although it reiterated the principle that "*where domestic courts base their decisions on general assumptions which introduce a difference of treatment on the ground of sex, a problem may arise under Article 14*".

***Grant v. United Kingdom***
(Application no. 32570/03)
[decided on 23 May 2006].

*Refusal to grant retirement pension to MTF transsexual at the age of 60. Violation of Article 8.*

The applicant is a post-operative MTF transsexual. She was registered as a woman on her National Insurance card and paid the contributions to the NI pension scheme at the female rate. In 1997, at the age of 60, she applied for her retirement pension but was informed that she would be entitled to a state pension from the retirement age of 65 applicable to men. The applicant complained of the refusal of the Department of Social Security to pay her a retirement pension at the age of 60, as was the case for other women.

Following the *Goodwin* judgment, the Court found a breach of Art.8 of the Convention. The Court held that the applicant "*may claim to be a victim of the lack of legal recognition from the moment, after the judgment in Christine Goodwin, when the authorities refused to give effect to her claim, namely, from 5 September 2000*". *There was no violation of Articles 1 of protocol 1 and 14.*

**L. v. Lithuania**
(Application no. 27527/03)
[decided on 11 September 2007]

*Absence of legislation regulating full gender reassignment surgery. Absence of facilities in Lithuania to carry out gender-reassignment surgery. Violation of Article 8. No violation of Articles 3, 12, 14.*

L. is a FTM Lithuanian citizen. After being diagnosed as transsexual, L was officially prescribed a hormone treatment. In 2000, given the imminent adoption of the new Civil Code granting the right to undergo gender re-assignment surgery, L. underwent partial gender reassignment surgery. The law that was supposed to regulate the gender re-assignment procedure as required by the new Civil Code was never passed. L. contends that the government decided to drop the bill following pressure from the Lithuanian Catholic Church. L. decided to change his name but was forced to choose a gender-neutral name. Despite this change, L. still faced humiliations because the personal codes indicating his gender on his ID documents had not been changed and could only be change after gender re-assignment surgery.

Concerning Art.8, the Court found "*that the circumstances of the case revealed a limited legislative gap in gender-reassignment surgery, which leaves the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity*". The applicant was left in "*the intermediate position of pre-operative transsexual*", including with regard to the fact that he did not enjoy full recognition of his chosen gender. In the absence of adequate legislation, it was not possible to assess the extent to which the necessary medical facilities to carry out gender-reassignment surgery existed in Lithuania. Funding surgery carried out abroad would not represent an excessive financial burden for Lithuanian authorities, considering the small estimated number of transsexuals in the country (approx. 50). Therefore, there was a breach of Article 8.

The Court found no violation of Art.12, as the applicant did not complete the gender- reassignment procedure. The Court found no violation of Art.3, as the threshold of intensity required was not reached in the applicant's case. The alleged breach of Art.14 was not examined.

The Court ordered the Lithuanian government to adopt the required legislation within three months of the judgment, or alternatively pay the applicant € 40.000 in pecuniary damages, representing the costs of undertaking the necessary gender reassignment treatment abroad. The Court also awarded the applicant €5.000 as in non-pecuniary damages.

## Implementation

As of December 2013, Lithuania has not yet fully implemented the judgment of the Court: the government failed to adopt the required legislation within three months as requested by the Court, but did pay the applicant the costs of undertaking treatment abroad. The government indicated to the Committee of Ministers that it intended to repeal the provision from the Civil Code recognising to right to undergo gender reassignment surgery, and opined that transgender rights would enjoy adequate protection through judicial proceedings.

***Schlumpf v. Switzerland***
(Application no. 29002/06)
[Decided on 8 January 2009]

*Validity of judicially imposed two-year waiting time before a claim for coverage of costs associated with gender reassignment surgery may be satisfied. Violation of Articles 6 and 8.*

The applicant is a transgender woman (MTF). Although she had felt female since childhood, she lived in the male gender role until the death of her wife in 2002. From this date, the applicant decided to live as a woman. In 2003, the applicant began hormonal therapy and psychiatric and endocrinological treatment. In 2004, she was issued with a medical certificate confirming the diagnosis of gender dysphoria and stating that the conditions for gender reassignment surgery were satisfied. She thus asked her health insurer to reimburse the cost of the operation, only to have her request turned down.

This decision was based on two rulings of the Federal Insurance Court dating from 1988, which held that gender reassignment surgery will only be reimbursed in cases of "real transsexuality" which could not be established until there had been an observation period of two years during which the person concerned had to undertake psychiatric and endocrinological treatment. The applicant decided to proceed with the operation and appealed to the insurer to reverse its previous decision. The appeal was rejected. The applicant then initiated administrative proceedings against the insurer. The Cantonal Insurance Court annulled the insurer's decision, but the case was brought before the Federal Insurance Court. The Federal Court refused to hold a public hearing with expert witnesses and rejected the applicant's appeal in a cursory manner. In doing so, it applied its previous case law and held that the two-year requirement was obligatory and had not been not satisfied by the applicant.

The ECtHR referred to the *Van Kück* judgment, where it had held that "*determining the medical necessity of gender reassignment*

*measures by their curative effects on a transsexual is not a matter of legal definition*". Here, the Court considered that it was unreasonable not to accept expert opinions, especially since the applicant's transgender status was not disputed. By refusing to allow the applicant to adduce such evidence, on the basis of an abstract rule that had its origin in two of its own decisions, the Federal Insurance Court had substituted its view for that of the medical profession. The Court thus concluded that there had been a violation of Art.6.1. The Court also found a separate violation of Art.6.1 in that the applicant had not been afforded a public hearing.

The Court recalled that the Convention guaranteed the right to personal self-fulfilment and reiterated that the concept of "private life" could include aspects of gender identity. It noted that the state benefited from a narrow margin of appreciation considering that the issues involved in the case concerned one of the most intimate aspects of the applicant's private life. The Court held that the Swiss authorities had applied the two-year rule in an overlyrigid fashion, failing to take into consideration the applicant's individual circumstances, namely her advanced age (i.e. 67 years old), and the strong medical arguments in favour of swift gender reassignment surgery. The Court considered that the delay with which the applicant opted to transition to her preferred gender was justified by concern for her family (wife and children) and therefore could not place in question the genuine nature of her transformation. The Court thus found a violation of Art.8.

***Implementation***

The implementation of this judgment by the Swiss government is currently being examined by the Committee of Ministers. On 14 September 2009, Switzerland sent the Committee an Action Report, which has not yet been made public on the Committee's website.

## 1. Negative judgments/ decisions (selection[62])

**X., Y. *and* Z. *v.* United Kingdom**
(Application no. 21830/93)
[decided on 22 April 1997]

*Refusal to recognize a transgender man (FTM) as the father of his partner's child born through artificial insemination did not constitute a violation of Article 8.*

The case concerned X., a transgender man (FTM) who had lived in a long-term relationship with Y., who was a woman. The couple had a child, Z., born as a result of artificial insemination by donor, and lived together as a de facto family. When X applied to be registered as the father of Z, his request was rejected on that basis that only a biological man could be regarded as a father for such purposes. The applicants complained that the refusal to legally recognise the relationship between X and Z was in breach of Articles 8 and 14 of the Convention.

X., Y. *and* Z. is known as the first case in which the Court formally extended the notion of "family life" to cover de facto relationships, even in the absence of a blood tie. In the Court's view, the factors that had to be considered in determining whether family life existed for the purposes of Article 8 included whether the couple lived together, the length of their relationship and whether they demonstrated their commitment to each other by having children together, or by any other means. The relationships between the applicants fulfilled these criteria and therefore qualified as "family life".

On the merits, however, the Court rejected the applicants' claims. The Court emphasized that this case was different from other legal gender recognition cases since it mainly concerned the recognition of a family tie with a child. Given the lack of consensus in Europe on the granting of parental rights to transsexual persons and filiation to a child conceived by AID, the Court granted the respondent state a wide margin of appreciation. The Court proceeded to compare the interests of the parties to the case with the issue at stake. On the one hand, it was necessary to maintain the cohesion of family law, potentially imperilled by changes such as those requested by the applicant, which had implications which were as yet indeterminate. On the other hand, the Court dismissed the legal consequences flowing from a lack of recognition as inconsequential, and noted that nothing prevented X from continuing to act as Z.'s father in the social sense. Consequently, there was no violation of Article 8. Furthermore, it was not necessary to examine the Article 14 claims separately.

A number of dissenting opinions were annexed to the judgment, criticising the majority's conclusion with respect to the existence of an Article 8 violation.

## 2. Negative judgments/ decisions concerning the validity under the Convention of conditions attached to legal gender recognition

**Roetzheim v. Germany**
(Application no. 40016/98)
[Commission decision of inadmissibility 23rd October 1997]

*Validity of conditions to complete gender reassignment surgery and lack of ability to procreate in order to achieve legal recognition of acquired gender.*

The applicant is a transgender woman (MTF) who had not undergone gender reassignment surgery and lodged a request to have her documents rectified in order to reflect her gender identity. National courts turned down her request on the basis that she did not meet the requirements set out in the 1980 Transsexual Law, namely an inability to procreate, the necessity to undergo gender reassignment surgery and being unmarried. The applicant complained to the Court, alleging that the denial of legal gender recognition violated her Article 8 rights. The Commission specifically distinguished this case from previous transgender cases on the grounds that it concerned a "*transsexual refusing gender reassignment surgery*", as opposed to "post-operative transsexuals". It went on to specifically endorse the decisions taken at the national level and reiterated previous its findings regarding the "*remaining uncertainty as to the essential nature of transsexualism and the extremely complex legal situations that result therefrom*". In conclusion, it held that the respondent state "*has in principle taken appropriate legal measures in this field*" and rejected the application as manifestly ill-founded.

**Parry v. United Kingdom**
(Application no. 42971/05)
[Decided on 28 November 2006]

*Validity of condition that a previous marriage be dissolved before recognition of acquired gender takes place. Inadmissibility decision.*

This case concerned a married couple. They remained together after the husband, a transgender woman, underwent gender-reassignment surgery and was recognised in her new gender. The husband applied for a Gender Recognition Certificate (GRC) but was told she could not obtain a full certificate unless she sought the annulment of her marriage. Both applicants have

strong religious beliefs and neither wishes to annul their marriage.

The Court accepted that the husband had to choose between living in her preferred gender role and her marriage. This situation constituted a "*direct and invasive effect on the applicants' private and family life*". The Court ruled, however, that the application was manifestly ill-founded under Article 8 because the annulment precondition stemmed from the prohibition in English law of same sex-marriages. The system establishing the possibility of a civil partnership was deemed to strike a fair balance between the applicants' interest and the public interest.

As for the alleged violation of Article 12, the Court observed that following the *Goodwin* judgment, the determination of sex is no longer limited to biological criteria but can derive from a gender recognition procedure. However, Art.12 still refers to opposite-sex marriage, and same-sex marriages are not permitted under British law.

No violation of Articles 9, 1 of Prot. 1, or 14.

**Nunez v. France**
(Application no. 18367/06)
[27 April 2008]

*Length of proceedings leading to legal gender recognition. Validity of surgery requirement for the purposes of legal gender recognition.*

The applicant is a transgender woman first diagnosed as such in 2002, and who started undergoing hormone therapy immediately afterwards. In 2005, the applicant received breast implants. She was examined by two further psychiatrists, in 2006 and 2007. The latter confirmed that the applicant was fit to undergo reassignment surgery. At the date of the Court's decision, the applicant was still awaiting surgery. The applicant complained mainly about the length of time she had been waiting for gender reassignment surgery, approximately six years by the time the Court's judgment was rendered. She documented numerous difficulties occasioned by the discrepancy between her documents and her gender identity. She alleged that this situation amounted to a violation of her Article 8 rights.

Relying on the decision in *Christine Goodwin and I v. UK* (application nos. 28957/95 and 25680/94), the Court confirmed that contracting states are obliged to legally recognise a person's gender reassignment once "*final*" surgery is completed. Nonetheless, it falls within the contracting states' margin of appreciation to decide whether to allow legal recognition of a change in gender prior to final gender reassignment surgery. Also, whilst the applicant was not legally recognised as a female in France, the Court noted that she had not availed herself of other available domestic provisions to improve her situation; such as opting for a non-gender-specific forename. Accordingly, the Article 8 claim was dismissed for failure to exhaust domestic remedies.

## 3. Negative judgments/ decisions concerning discrimination against trans people in other areas

***P.V. v. Spain***
(Application no. 35159/09)
[decided on 30 November 2010]
*Restriction of contact arrangements between a transgender woman and her six-year-old son was in the child's best interests and did not constitute a violation of Articles 8 and 14.*

The applicant is a Spanish transgender woman (MTF) who, prior to her gender reassignment, had a son with P.Q.F. in 1998. When they separated in 2002, the judge approved the amicable agreement they had concluded, by which custody of the child was awarded to the mother and parental responsibility to both parents. The agreement also laid down contact arrangements for the applicant, who was to spend every other weekend and half of the school holidays with the child.

In May 2004, P.Q.F. applied to have P.V. deprived of parental responsibility and to have the contact arrangements suspended, arguing that the father had shown a lack of interest in the child and adding that P.V. was undergoing hormone treatment and usually wore make-up and dressed like a woman. The judge decided to restrict the contact arrangements rather than suspend them entirely, since ordinary contact arrangements could not be made on account of P.V.'s lack of emotional stability, as acknowledged by a psychological report, and a gradual arrangement was put in place from February to November 2006 *„until [P.V.] undergoes surgery and fully recovers her physical and psychological capacities"*.

In December 2008, an amparo appeal by the applicant was dismissed. The Constitutional Court held that the ground for restricting the contact arrangements had

not been P.V.'s transsexualism, but her lack of emotional stability, which had entailed a real and significant risk of disturbing her son's emotional well-being and the development of his personality. The court held that in reaching that decision, the judicial authorities had taken into account the child's best interests, weighed against those of the parents. The applicant complained about the restrictions ordered by the judge, alleging that they had violated Article 8 taken in conjunction with Article 14.

The Court agreed that once they had learned of P.V.'s gender emotional instability, the Spanish courts had adopted contact arrangements that were less favourable to her than those laid down in the separation agreement. The Court emphasised that, although transsexualism was covered by Article 14, the decisive ground for the restriction had been the child's best interests, the aim being that the child would gradually become accustomed to his father's gender reassignment.

The Court therefore considered that the restriction of the contact arrangements had not resulted from discrimination on the basis of the applicant's transsexualism and concluded that there had been no violation of Article 8 taken in conjunction with Article 14.

***Guerrero-Castillo v. Italy***
(Application no. 39432/06)
[decided on 12 June 2007]

*Conflict of laws in the context of immigration proceedings with respect to legal gender recognition.*

Since March 1998, the applicant, originally from Peru, had resided in Busto Arsizio (Varese), Italy. The applicant received a residence permit for the purpose of work from the Italian authorities in March 1998. The residence permit was due to expire on 5 March 2004. In June 2003, the applicant received authorisation from the local court to undergo female to male gender reassignment, which took place in February 2004. On 30 April 2004, the Italian courts officially changed the applicant's sex and name and empowered the responsible State officers to change any relevant act. In turn, the applicant received an identity card and a "*code fiscal*" (tax code card). However, the Italian authorities were unable to renew the applicant's residence permit because the details contained within his identity card differed from those in his passport. The Peruvian authorities refused to issue the applicant a new passport because Peruvian law did not recognise gender reassignment surgeries.

The applicant complained that his Article 8 right to a private and family life had been violated because he could neither return to his native Peru nor gain the required Italian papers to live and work in Italy as he had been doing since 1998. The applicant described himself as a de facto "*stateless person*". The applicant contended that the Italian authorities were under a positive obligation to ensure that such a scenario did not arise and/or that they should have informed him of the consequences of undergoing gender reassignment. The applicant contended that he should be granted either Italian citizenship or permanent residence. He also argued that if his gender was not recognised, he would be exposed to constant humiliation, violating his Article 3 rights against inhuman and degrading treatment.

The Court accepted that the refusal of the Peruvian authorities to renew the applicant's passport meant that he could not renew his residence permit under Italian law. Nonetheless, the Court noted that neither the Convention nor its Protocols confer a right to a residence permit or a right to nationality. In particular, the Court remarked that the Italian authorities had officially recognised the applicant's gender reassignment surgery and his change of name, and had also issued the applicant a new identity card and a tax code card. These were sufficient for the Italian authorities to discharge its obligations under Article 8. The Court recognised that as a consequence of the refusal by the Peruvian authorities to renew the applicant's passport, the applicant no longer qualified to obtain a residence permit in Italy. However, the Court noted that it received no information that Italy had initiated any actions with a view to removing the applicant from Italy. The Court also found that the difficulties in which the applicant found himself were insufficient to reach the minimum level of gravity necessary to engage Article 3. Accordingly, the applicant's complaints were manifestly ill-founded.

## Court of Justice of the European Union

***P. v. S. and Cornwall County Council***
(C-13/94)
[decided on 30 April 1996]

In April 1991, P. was hired as general manager of an educational establishment operated by the Cornwall County Council. P. was taken on as a male employee. A year later, P. informed her boss S. that she intended to undergo gender reassignment preceded by a "life test". In the summer, P. took a sick leave for initial surgical treatment. P. was dismissed in September 1992.
The ECJ held that transsexuals can rely on the 76/207/EEC Directive providing for the equal treatment of men and women as regards access to employment. Article 3 of the Directive specifically prohibits discrimination on the grounds of sex. And Art. 5 (1) reiterates this prohibition with regard to the conditions governing dismissal. The court disregarded the contention that no discrimination could be established as the requirement for an adequate comparator could not be met. "Sex" is thus to be given a broad meaning that encompasses the gender-reassignment process. "*The scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one sex or the other sex.*"

***K.B. v. NHS Pensions Agency***
(C-177/01)
[decided on 7 January 2004]

K. B. is a woman who worked for 20 years for the National Health Service (NHS) and is thus a member of the NHS Pension Scheme. She is in a functional relationship with a transgender man (FTM) who has had gender reassignment surgery. K. B. and her partner wish to marry but are legally unable to do so (only opposite sex-marriage was valid under British law, and "sex" refers to what is stated in the birth certificate, which cannot be modified). The NHS Pension Scheme Regulation Act 1995 provides for the allocation of a survivor's pension to the widower of a pension member. K. B. was informed by an NHS agency that her partner would not be able to benefit from the scheme, as they are not married.

The ECJ held that pension schemes fall within the scope of Article 141 EC, which establishes the principle of equal pay for men and women. The 75/117/EEC Directive pertaining to the elimination on all discrimination on grounds of sex with regard to all aspects and conditions of remuneration is also applicable here. While recognising the right of member states to restrict the allocation of certain benefits to married couples, the Court also noted that discrimination can stem from the in-

dividual's legal inability to fulfil the necessary precondition for the granting of the pension. KB and her partner were treated less favourably than heterosexual couples whose right to marry allow them to benefit from the pension scheme. The ECJ referred to the ECHR's *Goodwin* judgment of the ECHR but abstained to try this particular case and ruled on principle instead.

***Richards v. Secretary of State for Work and Pensions***
(C-423/04)
[decided on 27 April 2006]

The case concerns Ms Richards, a transgender woman (MTF) who underwent surgery in 2000. In 2002, Ms Richard was denied the payment of her retirement pension on the grounds that she was not eligible to receive the payment until the age of 65 (the age at which men become eligible). Ms Richard was thus still legally considered a man even after her gender reassignment. Ms Richards appealed before the Social Security Appellate Tribunal, arguing that she was treated less favourably than non-transsexual women who are entitled to claim their retirement pension at the age of 60.

The ECJ was asked to determine the scope of Directive 79/7/EEC pertaining to the implementation of the principle of equal treatment in the field of social security. While recognising the right of national legislators to prescribe differential pensionable ages for men and women, the Court reaffirmed its previous understanding of the notion of "sex". The court ruled that the directive also applied to discrimination arising from gender reassignment and held that "*the national legislation which precludes a transsexual in the absence of recognition of his new gender from fulfilling a requirement which must be met in order to be entitled to a right protected by EC law must be regarded as, in principle, incompatible with EC Law*".

# National Level Jurisprudence on Legal Gender Recognition (Selection)

## Sterility / Gender Reassignment Surgery

### *Austria*

*Austrian Administrative Court Cases (VwGH) 2008/17/0054 (decided on 27 January 2009) and Austrian Constitutional Court (VfGH) Case B 1973/08-13 (decided on 3 December 2009) - proof of gender reassignment surgery not necessary for legal gender recognition*

Both courts dealt with requests from transgender women (MTF) who sought to have their gender entry in the birth registries changed to "female" without having to submit proof of gender-reassignment surgery. "*The requirement for a change of gender entry in the birth register is not a (genital-altering) surgery*" (VfGH B 1973/08-13). The VwGH reasoned that a "*severe surgical intervention*" was not necessary to achieve a distinct approximation to the appearance of the other gender. "*The (psychic) component of the feeling of belonging to the other sex*" is sufficient, if this feeling "*is in all likelihood irreversible and is expressed visibly in a distinct approximation to the external appearance of the other sex.*" (VwGH 2008/17/0054).

### *Germany*

*Constitutional Court Case 1 BVR 3295/07 (decided on 11 January 2011) – non-applicability of medical interventions in gender recognition law*

The case concerned a 62-year-old transgender woman (MTF) applicant who had changed her first name to a female one and wanted to enter into a same-sex registered partnership with her female partner. She was prevented from doing so because she had not undergone gender reassignment surgery and thus did not fulfill the requirements set out in Article 8 TSG (Transsexual Law) for a civil status change that would allow her to be recognised as a woman. The Constitutional Court abolished the requirement to undergo surgery, reasoning that the petitioner's right to sexual self-determination outweighs the legislator's interest to "*avoid a divergence of biological and legal gender affiliation*".

"*If it is imposed on the transsexual person to undergo surgery in order to obtain civil-status recognition in the perceived gender, (...) he is faced with the predicament to either reject surgery and as a consequence forego his legal recognition in the felt gender, which compels him to live permanently in contradiction to his legal-*

*ly registered gender, or to undergo far-reaching surgeries that not only result in physical changes and loss of functionality for him, but also touch upon his human self-understanding (...)".* [63]

*"The unconditional prerequisite of a surgical gender reassignment according to § 8.1 no. 4 TSG constituted an excessive requirement because it requires of transsexual persons to undergo surgery and to tolerate health detriments even if this is not indicated in the respective case and if it is not necessary for ascertaining the permanent nature of the transsexuality. The same applies with regard to the permanent infertility which is required under § 8.1 no. 3 TSG for the recognition under the law of civil status to the extent that its permanent nature is made contingent on surgery. By this prerequisite, the legislature admittedly pursues the legitimate objective to preclude that persons who legally belong to the male sex give birth to children or that persons who legally belong to the female sex procreate children because this would contradict the concept of the sexes and would have far-reaching consequences for the legal order. Within the context of the required weighing, however, these reasons cannot justify the considerable impairment of the fundamental rights of the persons concerned because the transsexual persons' right to sexual self-determination safeguarding their physical integrity is to be accorded greater weight. Here, it has to be taken into account that in view of the fact that the group of transsexual persons is small, cases in which the legal gender assignment and the role of procreator, or person bearing a child, diverge will only rarely occur".* [64]

***Switzerland***

*Regional Court of Bern-Mittelland Case CIV 12 1217 JAC (decided on 12 September 2012) – no mandatory medical interventions in gender recognition*

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

The Court based its reasoning on the consolidated opinion of experts in transsexuality that "*the surgical procedure can not be a necessary prerequisite for a lasting and visible change in a person's gender identity.*"

The Court also notes that a requirement for hormonal therapy is, much like a surgery requirement, "– an invasion into the bodily integrity" and would thus need to be considered in the same way as questions arising from requiring surgical intervention.

## Divorce

**Switzerland**

*District Court of St. Gallen case* SJZ 93/1997 *(decided on* 26 *November* 1996*) – divorce cannot be requested for legal gender recognition of a transsexual spouse*

The married aplicant, a transgender woman (MTF), in accordance with her wife, requested to be registered as of female gender upon having undergone gender reassignment surgery without having to divorce. The court emphasized the importance of having matching documents in order to be able to live the new gender identity without constant interference and forced outing. Weighing the interests of the applicant, her wife and the public interest (protection of marriage), the court found "*that the interests of the married transsexual in having his altered sex recognised and his marriage continued and at the same time the interest of his wife, as well as the public interest in protecting the functioning marriage in this constellation clearly prevail.*"

Commenting on the effects of tolerating a legal same-sex marriage, the court noted: "It should be emphasised that with this solution, a situation that had de facto already existed."

**Austria**

*Constitutional Court Case* V 4/06-7 *(decided on* 8 *June* 2006*) – Removal of divorce requirement*

The case concerned a transgender woman (MTF) who had undergone the then-required gender-reassignment surgery and wanted to rectify the gender marker in officially held registries from "male" to "female". This change was denied by the responsible governor of Steiermark, as the applicant was married and did not plan to get a divorce. The Constitutional Court found: "*Indeed Art.* 44 ABGB *[Civil Code] reserves the right to a marriage agreement for two people of different sex. It is inexplicable, however, why a person's change of sex, through which the existing entry in the register of births, deaths and marriages becomes incorrect (because the* Art. 16 *law on marital status suppresses post hoc inaccuracy through a later change of facts contained in the entry), may only then lead to a change of the registration if this person is not married.*"

"*The certification of a person's sex cannot be impeded by the existence of a marriage. If the new homosexual nature of the existing marriage between two formerly different-sex partners (which resulted through the change of sex) changes something about the continuation of the marriage or leads to, forces or enables its anullment, it is in no respect to be judged by the authority of marital status, which is only responsible for a change of entry into the register of births.*"

The verdict also declared the ordinance regulating gender recognition as void in its entirity, as its publication did not meet legal standards.

***France***

*Court of Appeal of Rennes Case No. 11/08743, 1453, 12/00535 (decided on 16 October 2012) – divorce requirement not necessary for gender recognition*

The petitioners had been in a lawful marriage for 13 years and had three minor children. The MTF transgender spouse sought to have her female name and gender officially recognised, which was denied as the petitioners did not intend to divorce. The Court of Appeal asserted that "*nothing called into question the fact that the plaintiff became a woman in a definitive and legitimate way*". To refuse her the legal recognition of her gender identity would be in breach of Article 8 of the European Convention on Human Rights (right to privacy).

The Court further held that the continuation of the marriage was within the private life of the petitioners, and that it was not up to the court to interfere in the matter. "*The court (...) notes that the choice (...) to continue their life together is a matter of choice of private life in which it does not have to intervene.*"

***Germany***

*Constitutional Court Case 1BvL 10/05 (decided on 27 May 2008) – divorce requirement in gender recognition is incompatible with the Basic Law (Constitution)*

The applicant, a transgender woman (MTF), had been in a marriage for over five decades and sought to change her name and gender marker upon having undergone gender reassignment surgery (a prerequisite in German law for the change of gender marker at that time). The Constitutional Court ruled that the provision in German law to exclude trans people in an existing marriage from obtaining gender recognition was incompatible with the right to a self-determined gender identity.

"*In the court's view, it is a breach of Article 1(1) Basic Law [dignity] combined with 2(1) Basic Law [self-determination] to force transsexual persons to obtain a divorce in order to achieve recognition of what they feel is their, true, gender. The harmony between the mind and the body of the person concerned, and not the question of sexuality, should be in the foreground. If a divorce cannot be carried out because the required conditions have not been met, the person concerned should not be refused the possibility to change his/her gender status. As the Federal Constitutional Court has commented, the imperative to assign to a person the gender to which he/she belongs mentally and physically follows from respect for human dignity and*

*from the fundamental right to personal self-determination."*

The court also upheld the argumentation of the local court that the applicant and her wife are afforded the protection of Article 6(1) Basic Law (special protection of marriage and family), since neither spouse wanted to divorce and the required conditions for an annulment be could not found.

"*In the opinion of the court, it is also a breach of Article 3(1) Basic Law [equality before the law;] to make divorce a precondition for the recognition of a changed gender status. Married transsexuals are excluded from the mechanism under § 8 TSG (Transsexual Law), in contrast to those who are unmarried. The restriction of the recognition under § 8 TSG to unmarried transsexuals is a differentiation based on personal characteristics and has a significant impact on the personal rights of the person concerned. The court noted this was an exclusion of married transsexuals, and the court could not see any grounds sufficient to justify this differentiation in treatment vis-à-vis unmarried transsexuals.*"


## Minimum age requirements

***Germany***

*German Constitutional Court Case 1 BvR 938/81 (decided on 16 March 1982) – removal of an age limit of 25 years for a change of gender marker*

The 21-year-old postoperative transgender woman (MTF) contested the age limit of 25 for being able to change one's gender marker. The court decided that the age limit was a breach of the rule of equality (Art. 3 Civil Code) and therefore invalid. The Court argued that since lawmakers had not determined a binding minimum age for gender reassignment surgery, they had no leeway in determining a minimum age for the subsequent regulation of the legal recognition of gender.

"*The legislation has the effect that a 25-year-old transsexual person receives the coveted change in his civil status, while a transsexual person under 25 is denied it, despite their conditions otherwise being the same. This difference in treatment is incompatible with the general principle of equality*". An alternative, lower age limit, which would have allowed a new gender to be recognised (for minors with the consent of the individual's legal guardians) was not adopted.

*German Constitutional Court Cases 1 BvL 38/92, 40/92 and 43/92 (decided on 26 January 1993) – removal of age limit for a change of name*

The two transender men (FTM) and one transgender woman (MTF), who had obtained the requested external expertise and were between 22 and 24 years of age, challenged the age limit of 25 years for a name change under the German Transsexual Law. In its decision the Constitutional Court declared that the age limit of 25 for a change of name violated the Basic Law's Art. 3.1 guarantee of equality before the law.

*"If the legislator, however, does not prohibit gender-corrective surgery before a certain age limit and lets the transsexual person ultimately decide if and when he wants to make the therapeutically indicated intervention, the space for the legislator to regulate orders pertaining to civil status is restricted."*

The reasoning included fundamental explanations of the understanding of the principle of equality. Legislators must strictly observe the principle of proportionality in cases of the unequal treatment of groups of people, if those affected are unable to influence the manifestation of the characteristics according to which a differentiation is made through their own behaviour, or when the unequal treatment could have a negative effect on their ability to exercise the freedoms protected by the Basic Law.

No alternative age limit was given in this context.

## Rectification of employment or educational certificates (Effects of Gender Recognition)

***Germany***

*Higher Labour Court Hamm (Westfalen) LAG Hamm Case 4 Sa 1337/98 (decided on 17 December 1998) – Claim of a transsexual person to the re-issuing of a work certificate with the changed name or the amended gender*

The transgender woman (MTF) claimed from her previous employer the re-issuing of a work certificate with the changed name and amended gender. The court decided that it was part of the employer's after-contractual duty of care to re-issue the work certificate with the new information.

*"Even if the personnel file of the transsexual person should be destroyed as a result of time lapse, the employer may not refuse to re-issue the certificate, citing forfeiture as the originally issued certificate is given back, therefore the employer only needs to "reformulate" it, without any substantive check of details, in respect of the changed gender and changed name of the transsexual person and the resulting grammatical and spelling modifications."*

The scope of the employer's after-contractual duty of care derives from Art. 242 of the Civil Code (good faith) in conjunction with Article 2.1 of the Basic Law

(right to self-determination) and Art. 5.2 TSG (disclosure ban).

The Court explicitly made this ruling also relevant to cases where a change of name without a change of gender marker took place, as the legislative aim of a separate procedure for changing the name (independent of a gender marker change, which at the time required surgical interventions) was to be able "*to appear early-on in the role of the other gender (...) without having to reveal themselves in everyday life to third parties and authorities.*"

***Netherlands***

*Equality Opportunities Commission (decided on 30 November 2010) – refusal of replacement diploma upon gender recognition is discrimination*

The transgender man (FTM) complained to the Equality Opportunities Commission that his previous university, the University of Amsterdam, would not re-issue a diploma with his officially registered name and gender upon gender recognition. The university based its refusal on the grounds that the law regulating replacement diplomas did not foresee the possibility for replacing a diploma upon gender recognition. The Equal Opportunities Commission ruled that the university's previous refusal to grant the new diploma amounted to discrimination.

# Country Best Practices

## The Argentinean Gender Identity Law

***Introduction***

The Argentinian "Ley de Identitdad de Género" (Gender Identity Law) is a good example of human-rights compatible gender recognition legislation. The law was approved on 8 May 2012 and came into force in July 2012.

As of this moment, the law is seen by human rights activists as the best legislation on legal recognition of trans identity worldwide. The law is ground breaking and unique because it takes a different approach towards legal gender recognition than other laws: a human rights approach. The Argentinian law affirms everybody's right to change their name and gender upon a simple application. It safeguards the right of self-determination of every trans individual and defines it as a responsibility of the state to change name and gender in a quick and transparent way. Moreover, the law affirms the right to the free personal development of every (trans) person by way of securing access to trans-related health care, covered in the national health plan. In this sense, the Argentinean law exceeds the minimum requirements of the Committee of Ministers recommendations 2010(5) to provide for "quick, accessible and transparent" procedures.

***Structure of the law***

The law has 15 articles. Articles 1-10 define the procedure regarding the legal recognition of gender identity ("right to identity"); Article 11 regards the provision of trans-related health care ("right to free personal development"); and Article 12 defines norms regarding the usage of names according to an individual's gender identity ("dignified treatment").The remaining three articles (13-15) contain enforcement and technical questions.[65]

In the following text, key aspects of the law will be discussed, providing direct reference to the text of the law. The relative simple structure and language of the legislation are an example how "accessibly" a law can be drafted.

***Procedures for Legal Gender Recognition***

In short, the procedure defined in the law can be described as quick, transparent and accessible. The corner stone of the law is "the right to identity" encoded in Article 1: "*All persons have the right to the recognition of their gender identity*", to the "*free development of their person according*

*to their gender identity*" and to be treated accordingly. This makes the law unique, as it defines legal gender recognition in a context of rights of the individual, not, as other laws have done and continue to do, in a context of requirements or medicalization. From the principle of a right to identity the procedural requirements and the question of access to the law follow consequently.

The "right to identity" as a juridical concept was not created by the Gender Identity Law: it is enshrined in the Argentinean Constitution in Articles 17 (respect for identity for Indigenous peoples) and Article 19 (protection of cultural identity).

Article 2 of the Gender Identity Law defines the term "gender identity" in its broadest sense, taking inspiration from the Yogyakarta Principles: "*Gender identity is the internal and individual way in which gender is perceived by persons that can correspond or not to the gender assigned at birth, including the personal experience of the body.*" [66].

This definition forms the basis for Article 3, which defines who is permitted to change their legal gender: every person can request to have the recorded sex amended and their first name(s) changed "*whenever they do not agree with the self-perceived gender identity.*" Except for an age restriction (18 years old), there are no further restrictions regarding access to change of name and sex entry, not even citizenship or permanent residency. However, special provisions are made for persons younger than 18, years special provisions are being made as they do not have full legal capacity (see Article 5 below).

The only other requirements in order to change name and sex entry are of an administrative nature, including having submitted a request to the National Bureau of Vital Statistics to fall "*under the protection of the current law*" and to provide the new first name. No gatekeeping requirements such as forced sterility, compulsory medical intervention, divorce or a diagnosis of gender dysphoria, transsexuality are needed, and no external evaluation process exists (for why these kinds of requirements are problematic, see the previous chapter). From the statement of the applicant to seek "*protection under the law*", the Argentinean law creates an obligation on the state to change name and gender. While gender recognition legislation in other countries, imposes on the applicant to provide sufficient documentation and to fulfill state-imposed requirements. In this regard, the Argentinean law does not produce a conflict between the applicant's rights (see above).

In fact, the Argentinean law goes a step further: explicitly banning medical re-

quirements "*In no case will it be necessary to prove that a surgical procedure for total on partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place*".

Hence the law fully respects the self-determination of trans people and does not question their self-defined gender identity.

Article 12 (dignified treatment) guarantees the right to use a name different from the one that is officially recorded, putting particular emphasis on the importance of this provision for minors. "*The gender identity adopted by the individual must be respected, particularly in the case of girls, boys and adolescents using a first name that is different from the one recorded in their national identity documents. Whenever requested by the individual, the adopted first name must be used for summoning, recording, filing, calling and any other procedure or service in public and private spaces.*"

***Provisions for Minors***

Provisions for minors (under the age of 18) are regulated in Article 5. The change of name and gender for minors will be granted under the same procedures as for adults if the legal representatives file a request under the current law with the "*explicit agreement of the minor*". In the event that the legal representatives deny their consent, the minor can "*resort to summary proceedings*" in which the corresponding judge will decide upon the case. The judicial decision has to be based on the "*evolving capacities and best interests of the child*". In November 2013, a six-year-old girl was able to change her documents under the Argentinean Gender Identity Law.[67]

A key issue in gender recognition legislation is the protection of privacy. Confidentiality is regulated in Article 9 of the law, which prohibits the disclosure of the original birth certificate to anybody or without the explicit authorisation of the document holder, except in the case of a "*well founded judicial authorisation*".

***Access to trans-related health care in the Argentinian Gender Identity Law***

While the first ten articles of the law regulate the amendment of the sex entry and the change of first name, Article 11 is concerned with the right to trans-related medical interventions (right to free personal development). Once more, it needs to be stressed that health care needs and access to gender recognition treated completely separately and do not depend on each other in the Gender Identity Law.

The governing concept here is "informed consent by the individual concerned". Respect for the self-determination of trans people guides the provisions in this article as well. Article 11 seeks to ensure the "holistic enjoyment" of health for all people

defined under Article 1 and guarantees access to "total and partial surgical intervention and/or comprehensive hormonal treatments to adjust their bodies, including their genitalia, to their self-perceived gender identity, without requiring any judicial or administrative authorization". The only requirement defined in the law is the "informed consent of the individual". Moreover, the law requires that all such medical measures are included in the "Compulsory Medical Plan", which means that costs for medical interventions are covered. At the time of writing, the Ministry of Health had not established subsidary regulations on how the law is to be implemented, which means that both the public and private health-care systems are implementing them without an official protocol. Local activists report that some private health -insurance companies are using this lack of official regulation to deny coverage, but this situation is being litigated right now. This problem underlines once more the need for transparent procedures, also in access to health care.

***Summary***

The Argentinean Gender Identity Law is a good example for policymakers aiming to implement the Council of Europe standards in this regard, since it is in full compliance with the Recommendations. In short, the law:

- respects the self-determination of trans people
- has no prerequisites such as infertility, gender reassignment surgery, divorce or diagnosis
- protects trans people from disclosure of former name and gender
- is open to anyone
- is fast: the administrative procedure takes 2-3 weeks to complete
- guarantees access to trans-related health care on the basis of informed consent and guarantees the coverage of such medical intervention in the national health-care plan.

According to official statistics, 3,000 new ID documents have been issued under the law in a year's time, demonstrating the efficiency of the procedures.[68] No cases of fraudulent use are known. This once more demonstrates the success and quality of the legislation.

## Comparison Council of Europe Legal Gender Recognition Standards versus the Argentinean Gender Identity Law

| LGBT Recommendations (Com Rec 2010(5)) | Argentina - Gender Recognition Law |
|---|---|
| **1) Full Legal Recognition In All Areas Of Life** | |
| *"Member states should take appropriate measures to guarantee the* ***full legal recognition*** *of a person's gender reassignment* ***in all areas of life*****[...]** *member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates"*<br><br>Appendix CM/ Rec Rec 21 | "All persons have the right<br>a) To the recognition of their gender identity;<br><br>[...]<br><br>c) To be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of the first name/s, image and sex recorded there." (Art. 1) |
| **2) Quick, Transparent And Accessible Procedures** | |
| *"[...] in particular by making possible the change of name and gender in official documents in a* ***quick, transparent and accessible*** *way [...]."*<br><br>Appendix CM/ Rec Rec 21 | Once the said requirements are met "without any additional legal or administrative procedure required", amendments to the registered sex and change of first name(s) are recorded and a new birth certificate and national identity card reflecting the amended sex are issued. Any reference to the current law in the amended documents is forbidden.<br><br>"The procedures are free personal and do not require the intervention of any agent or lawyer" (Ar.t 6).<br><br>"Only those authorised by the document holder or provided with a written and well-founded judicial authorisation can have access to the original birth certificate" (Art. 9). |

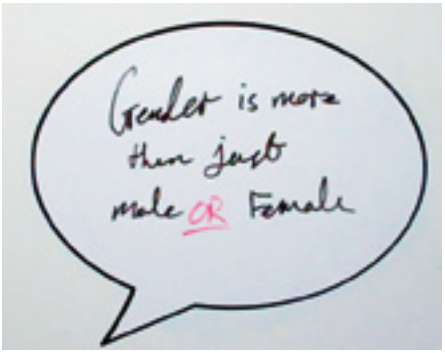
| LGBT Recommendations (Com Rec 2010(5)) | Argentina - Gender Recognition Law |
|---|---|
| **3) Remove Abusive Requirements In Gender Recognition** | |
| *"Prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements."*<br><br>*Appendix* CM/ Rec 20 | „All persons have the right,<br>[…]<br>b) To the free development of their person according to their gender identity;"<br>(Art. 1)<br><br>Accessible for all persons "whenever [the registered sex, first names and image] do not correspond with the self-perceived gender identity" (Art. 3)<br><br>Requirements (Art. 4):<br>- Minimum age of 18 years (with the exception established in Art. 5)<br>- Submit simple application "requesting the amendment of their birth certificate in the records and a new national identity card, with the same number as the original one"<br>- Provide the new first name to be registered<br><br>"In no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place" (Art. 4). |
| **4) Ensure Right to Marry** | |
| *"Member states should take all necessary measures to ensure […] the right of transgender persons to marry a person of the sex opposite to their reassigned sex is effectively guaranteed."*<br><br>*Annex* CM/ Rec Rec 20 | No direct reference to marriage in the law, but Article 7 says the effects of the amendments "will create rights against third parties since the record is first made." |

## Ireland: Draft Legal Recognition of Gender Bill (Zappone Proposal)

In the absence of any legal possibility to change one's officially recorded gender in Ireland, Senator Katherine Zappone launched a draft Legal Recognition of Gender Bill 2013 on 27 June 2013.[69] Based on a statutory declaration, this Bill makes the rights contained therein available to trans and intersex people, irrespective of their marital or civil-partnership status or their age. The bill establishes a simple scheme to facilitate one's legal recognition of the gender identity where it differs from the gender noted on the register of births. It adopts a self-declaration model that acknowledges and accepts that individuals are the experts on their own identity and gender.

Under the scheme, applicants complete a statutory declaration as to the gender according to which they wish to be legally acknowledged and file it at their local registry office. An entry will then be made on the Gender Recognition Register, which will operate akin to the adoption register in that it is private and access thereto is restricted. Once an entry has been placed in the Gender Recognition Register, any request for a birth certificate will draw the information from the new Gender Recognition Register rather than the birth register. Recognition is prospective only. Thus, anything done previously in the birth gender remains legally valid.[70]

For details of the law, see the annex.



# Checklist Gender Recognition Legislation

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

This list does not claim to be complete; suggestions for amendments can be sent to tgeu@tgeu.org. Depending on the context, it might also be necessary to take additional issues into consideration.

How to use the check list: Go through the three different sections and compare whether the legal text complies with the criteria given below. If a question cannot be answered positively, *or if the text does not address the mentioned criteria or is ill-defined*, the text should be reviewed and brought into line.

| *Does the proposed text comply?* | |
|---|---|
| **Criteria** | |
| **Procedures** | |
| Separate procedures are available for change of name and registered gender. | |
| The institution in charge (e.g. administration or court) is clearly indicated in the text of the regulation. | |
| The procedure is quick, and the maximum duration is clearly and explicitly regulated. | |
| The procedure is accessible to anyone, irrespective of their economic or other capacity. | |
| Access of persons with limited legal capacities (minors or those under guardianship) is regulated explicitly. | |
| Access to the procedure for citizens living abroad is regulated explicitly. | |
| Recognition of foreign decisions for residents or citizens is regulated explicitly. | |
| Access to the procedure for foreign residents is regulated explicitly. | |
| The privacy of the applicant is ensured during and after the procedure. | |
| Professionals who disclose private information about the applicant without explicit permission of the person concerned are held accountable. | |
| The involvement or interference of spouses, children, work colleagues or other third parties in the procedure is barred. | |
| Grounds for refusal, such as fraudulent intention, are limited and explicitly listed. | |
| The applicant is free in the choice of names, including gender-neutral names. | |
| The possibility for an applicant to appeal the decision is clearly indicated, including the body to whom to address the appeal. | |
| Enforcement of the legislation for its correct implementation is supervised. A remedy or review mechanism is in place where practice does not correspond to the legislation. | |

| Requirements | |
|---|---|
| The self-determination of the applicant is the sole basis for the gender recognition. | |
| No interference or opinion of a third party, neither professional (mental health expert , etc.) nor private (parents, spouses, children, work colleagues, etc), is requested. | |
| A request for proof of surgical procedure, hormonal therapy or any of her medical or psychological treatment or status is omitted. | |
| The procedure is fully accessible for young and elderly applicants , irrespective of their age. | |
| The procedure is fully accessible for applicants who are married or in a registered partnership. | |
| An existing marriage or registered partnership prevails and does not need to be altered. However, the applicant and their partner can, if freely chosen, transfer their marriage into a registered partnership and vice versa (where available). | |
| The procedure is fully accessible for an applicant, who is a parent or has custody of, guardian ship over or visiting rights with children (independent of their age). | |
| The procedure is fully accessible to an applicant who has a criminal conviction. | |
| The applicant is not required to have lived for a certain time in their gender identity (so called „real-lifeexperience“) or have used the requested name. | |
| No other personal characteristics, such as physical appearance, sexual orientation, disability, health or social status may pose a valid ground for refusal or delay. | |

| Effects | |
|---|---|
| Upon the decision, the applicant is considered a member of the registered gender for all intents and purposes. | |
| Equity provisions aiming at protecting the applicant on grounds of their gender identity are explicitly regulated. (For example, prostate-cancer check-ups should be made available for trans women.) | |
| Upon the decision, the applicant enjoys all (gendered) rights and duties at par with others of the same registered gender. | |
| A change of name and gender marker leads to an automatic (ex officio) change in all held registries without a trace, where feasible. | |
| Once a decision is in force, the name(s) and gender marker that were in use prior to such a decision may not be made public or searchable, unless there is an overriding interest or the applicant consents. | |
| A change of name leads to the right to be addressed in all official documents as belonging to the corresponding gender. | |
| State and non-state actors are obliged to rectify gendered information, including letter and number combinations on working references, educational certificates, etc. without a trace, also retroactively. | |
| Existing rights and acquired privileges relating to a marriage or registered partnership remain unaffected. | |
| Acquired pension rights and/ or similar recurring benefits remain unaffected. | |
| Next-of-kin relationships, especially custody and visiting rights regarding children, remain unaffected (neither can they be prerequisites for changes to gender identity). | |

# Myth Busters

*When discussing gender-recognition procedures and how to reform them, certain stereotypes and fears reoccur. In the following, we address a number of frequent myths and provide ideas and facts on how to counter them.*

*Easier access to gender recognition procedures would lead to the following scenarios:*

1. ***Criminals will abuse the procedure to mask their identity, avoid prosecution or conscription, obtain fraudulent gender-related benefits or commit other kinds of fraud.***

There is no scientific evidence suggesting that simplified procedures would lead to increased abuse, e.g. the Dutch authorities investigated this question thoroughly before reforming their gender recognition law and could not identify relevant obstacles to lowering access requirements. Given the high emotional costs and social burdens associated with the change of legal documents, it is rather unlikely that a gender-recognition law will be abused systematically. Restricting access in order to prevent hypothetical abuse, however, would undermine the function of the law (to serve those persons who need such a law to access their human rights) . The abuse of a law is already punishable under criminal law.

Under the simplified procedures of the Argentinean Gender Identity Law 3.000 ID cards were changed in one year without a documented case of misleading or fraudulent intentions.

2. ***Societal functioning will suffer as the norms of "man" and "woman" will be challenged.***

Gender recognition is requested only by a relatively small group and does not impact the social fabric. States without invasive medical requirements – like Austria, Germany, UK, Hungary, Sweden and Portugal – have not forgone the social and legal notion of men and women.

3. ***A male convict would be able to transfer to a women's prison.***

A trans woman in detention has the right to be treated as any other woman and hence to be placed in a facility according to her gender identity. In fact, the safety and dignity of trans women in male prisons is often threatened due to transphobic discrimination and harassment by other inmates and prison authorities.

4. ***Easier access to gender recognition will lead to pregnant men and women begetting children.***

Reproductive rights do not depend on a person's gender identity; they are an individual's human right. While some trans people might wish to reproduce, they are a minority within the trans community. So far, there is no evidence at all that the gender identity of trans parents might have a negative effect on their children.

5. ***People will switch identities back and forth.***

There is no evidence that in countries with quick, accessible and transparent procedures, the number of gender recognition procedures per person increases. Nor is there any evidence that trans people's gender identity is less stable than any one else's. Trans people do not wake up one morning and think they are trans from this moment on. Coming to terms with one's gender identity is often a long process involving careful considerations before taking decisive steps.

A person obtaining several gender recognitions would be as burdensome as a person getting married several times. While it may create additional bureaucratic hassles, administrations should serve people's needs and not the other way around.

6. ***Allowing a married trans person to stay married throughout identity recognition automatically leads to same-sex marriages.***

It is a state's obligation to protect the rights of a valid and lawfully concluded marriage, both for the trans person and their spouse. These rights cannot be set off against the right to integrity or gender recognition.

The parties to the union were legally of a different gender at the time that the marriage was initially entered into, and, the conditions for marriage were therefore complied with. It is irrelevant to the validity of the marriage that, at some later stage, one of the spouses seeks to have the gender marker on their birth certificate legally changed. Protecting an existing marriage is not the same as enabling two persons of the same (registered) gender to get married under the national marriage law.

7. ***Children's well-being will suffer and/or they will be influenced to be(come) transgender.***

Available evidence does not support concerns that a parent's transgender identity directly adversely impacts a child's well-being, nor does it lead to an increased number of transgender children (Green, R,(1998; Freedmann, D, 2002). The longterm evidence of children raised by same-sex couples demonstrates that quality of parenting is far more significant for children's psychological well-being than whether they are being raised in one type of family or another (Golombok, S, 2000).

Children are growing up in increasingly diverse societies. However, the majority of their experiences will occur in a society where people are not transgender.

**8. *Whether a person is really transgender can only be assessed by an expert (doctor, lawyer, etc).***

Evidence shows that requiring a transsexual, transgender or similar diagnosis in gender recognition procedures is neither possible nor appropriate. It is not "possible" because there is no objective assessment available to assess a person's gender identity. In fact, applicants often adapt their personal stories to meet the expert's expectations in order to obtain the diagnosis. It is also not "appropriate" because the inherent power imbalance between expert and applicant prevents the establishment of a trustful relationship, which is a pre-condition for any therapeutic relationship. The state-of-the-art expert approach is to respect a person's self-determination.

While the assessment of a person's gender identity (in contrast to assessing a disorder or dysphoria) by an expert may appear less intrusive, the problematic aspects of a gatekeeping system – undermining a person's dignity – remain.

**9. *Sex offenders will have an easier time to accessing women's bath rooms.***

Sexual harassment is a criminal act independent of a person's gender recognition certificate. Again, the social costs of transitioning (all ID documents show the adapted data) are so high that gaining access to women's washrooms cannot be assumed to be a big enough incentive to obtain gender recognition.There is no evidence showing a link between lowering access requirements in gender recognition and an increase in sexual offenses.

**10. *A confused person who is not transgender will be manipulated into obtaining legal gender recognition.***

Every person has the right to make decision for themselves within their legal capacities. This is particularly true for such an intimate area as a person's gender identity. If a person was to explore their gender identity, quick, accessible and transparent legal gender recognition procedures do not involve irreversible any steps. Gender recognition is a purely administrative process of adapting official registries and ID documents and does thus not create an entitlement to access gender-reassignment treatment.

# Annex

## Annex 1: Argentina Gender Identity Law

Translated by Alejandra Sardá – Chandiramani and Radhika Chandiramani; Translingua – Traducciones feministas multigenéricas (translingua_tfmg@yahoo.com.mx) / GATE

**Gender Identity Law**

Buenos Aires, November 30th

***Article 1 – Right to gender identity.***

All persons have the right,

a) To the recognition of their gender identity;
b) To the free development of their person according to their gender identity;
c) To be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of the first name/s, image and sex recorded there.

***Article 2 – Definition.***

Gender identity is understood as the internal and individual way in which gender is perceived by persons, that can correspond or not to the gender assigned at birth, including the personal experience of the body. This can involve modifying bodily appearance or functions through pharmacological, surgical or other means, provided it is freely chosen. It also includes other expressions of gender such as dress, ways of speaking and gestures.

***Article 3 – Exercise.***

All persons can request that the recorded sex be amended, along with the changes in first name and image, whenever they do not correspond with the self-perceived gender identity.

***Article 4 – Requirements.***

All persons requesting that their recorded sex be amended and their first name and images changed by invoking the current law, must comply with the following requirements:

1. Prove that they have reached the minimum age of eighteen (18) years, with the exception established in Article 5 of the current law.
2. Submit to the National Bureau of Vital Statistics or their corresponding district offices a request stating that they fall under the protection of the current law and request the amendment of their birth certificate in the records and a new national identity card, with the same number as the original one.
3. Provide the new first name with which they want to be registered.

In no case will it be necessary to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place.

***Article 5 – Minors.***

In relation to those persons younger than eighteen (18) years old, the request for the procedure detailed in Article 4 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 Rights 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 it is impossible to obtain it, it will be possible to resort to summary proceedings such that the corresponding judges will decide, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Rights of the Child and in Law 26061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents.

***Article 6 – Procedure.***

Once the requirements stated in Articles 4 and 5 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 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 pursuant to it is forbidden.

The procedures for amending the records as described in the current law are free and personal and do not require the intervention of any agent or lawyer.

***Article 7 – Effects.***

The effects of the amendment of the sex and the recording a new first name/s according to the current law will create rights against third parties from the time that the record is first made.

The amendment in the records will not change the legal entitlements to rights and legal obligations that could have corresponded to the persons before the recording of the amendments, nor those derived

from the relationships consecrated by family law at all levels and degrees, which will remain unchanged, including adoption.

In all cases, the number in the persons' national identity document will take precedence over the first name or morphological appearance of the persons, for identification purposes.

***Article 8 –***
The record amendments prescribed by the current law, once completed, can only be modified again with judicial authorisation.

***Article 9 – Confidentiality.***
Only those authorised by the document holder or provided with a written and well-founded judicial authorisation can have access to the original birth certificate.

The amendment of the recorded sex and the change in first name will never be made public, except with the authorisation of the document holder. The publication in newspapers prescribed by Article 17 of the Law 18248 will be omitted in these cases.

***Article 10 – Notifications.***
The National Bureau of Vital Statistics will provide information about the change of national identity document to the National Registry of Criminal Records, to the corresponding Electoral Registry for correction of electoral rolls and to other bodies as determined in the regulation of this law, including those that might have information on existing precautionary measures involving the interested party.

***Article 11 –***
***Right to free personal development.***
All persons older than eighteen (18) years, according to Article 1 of the current law, and with the aim of ensuring the holistic enjoyment of their health, will be able to access total and partial surgical interventions and/or comprehensive hormonal treatments to adjust their bodies, including their genitalia, to their self-perceived gender identity, without requiring any judicial or administrative authorisation.

There will be no need to prove the will to have a total or partial reassignment surgery in order to access comprehensive hormonal treatment. The only requirement will be, in both cases, informed consent by the individual concerned. In the case of minors, the informed consent will be obtained following the principles and requirements established in Article 5. Without prejudice to the former, when consent for total or partial surgical intervention is to be obtained, the competent judicial authorities for the jurisdiction must also express their agreement, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Rights of the Child

and in Law 26061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents. Judicial authorities must express their views within sixty (60) days from the time they were required to provide their agreement.

Public health officials, be they from the state, private or trade-union-run healthinsurance systems, must guarantee in an ongoing way the rights recognised by this law. All medical procedures contemplated in this article are included in the Compulsory Medical Plan (that is, they are not subjected to additional costs for those who have private or trade union-run insurance plans), or in whatever system replaces it, as decided by the enforcing authority.

***Article 12 – Dignified treatment.***
The gender identity adopted by the individual must be respected, particularly in the case of girls, boys and adolescents using a first name that is different from the one recorded in their national identity documents. Whenever requested by the individual, the adopted first name must be used for summoning, recording, filing, calling and any other procedure or service in public and private spaces.

When the nature of the procedure makes it necessary to register information in the national identity document, a system will be employed that combines the initials of the first name, the surname in full, date and year of birth, and the number of the document, adding the first name chosen by the individuals on the ground of their gender identity if so desired by them.

In those circumstances in which the person must be named in public, only the chosen first name respecting the adopted gender identity will be used.

***Article 13 – Enforcement.***
Every norm, regulation or procedure must respect the human right to gender identity. No norm, regulation or procedure may limit, restrict, exclude or annul the exercise of the right to gender identity, and all norms must always be interpreted and enforced in a manner that favours access to this right.

***Article 14 –***
Section 4 of Article 19 in Law 17132 is repealed. [This 1967 law regulates the practice of Medicine, Dentistry and their auxiliary professions. The repealed section forbade doctors to carry on "surgical interventions modifying the sex of the sick person, unless they are performed after judicial authorisation has been provided."]

***Article 15 –***
The passing of this law is to be communicated to the Executive Power.

# Annex 2:
# Draft Legal Recognition of Gender Bill 2013 (Zappone Proposal)

## LEGAL RECOGNITION OF GENDER BILL 2013

Bill ***entitled***

An act to give effect to a person's right to have their gender identity recorded and recognised by the State, to establish and provide for the Gender Recognition Register, to provide for certificates of birth that reflect a person's gender identity, to provide for the right to self-determine a person's preferred gender identity and to provide for the dignity of such persons and to provide for related matters.

Be it enacted by the Oireachtas as follows:

**1.**—In this Act:

"the Act of 2004" means the Civil Registration Act 2004 as amended;

"An tArd-Chláraitheoir" has the meaning assigned to it in section 7 of the Act of 2004;

"child" means a person under the age of 18 years;

"guardian" means a guardian under the Guardianship of Infants Act 1964 as amended;

"gender identity" refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms;

"Minister" means the Minister for Social Protection; "permanently" means for the remainder of the life of the person;

"statutory declaration" means a statutory declaration in the form prescribed in the Schedule to this Act.

**2.**— (1) There shall be established and maintained by an tArd-Chláraitheoir a Gender Recognition Register.

(2) A person who is of or over 18 years of age may apply to An tArd-Chláraitheoir to record and recognise the person's gender identity in the Gender Recognition Register and to attach a note to the entry concerning that person in the registry of births indicating that there is now an entry concerning the person in the Gender Recognition Register and that access to the entry in the register of births shall be restricted to a person authorised under the Act of 2004.

(3) A person shall make an application under *subsection* (2) by completing a statutory declaration in the form prescribed in the *Schedule* to this Act—

(a) *identifying* the person's gender identity, and (b) declaring that it is that person's intention to live permanently as a person of that gender identity,

(c) and specifying, where appropriate, the person's preferred forename or forenames.

(4) An application under *subsection* (2) may be made in respect of a person who is under 18 years of age on the date of application by that child's guardian or guardians.

(5) An application under *subsection* (2) may be made by or in respect of a child who is of or over the age of 16 years and under 18 years of age on the date of application with the consent in writing of at least one of the child's guardians.

(6) Where an application under *subsection* (2) is made on behalf of a child (otherwise than by the child himself or herself) the applicant shall—

(a) in so far as is practicable, give due weight to the views of the child, having regard to the child's age and maturity; and

(b) in the resolution of any such application, ensure the best interests of the child shall be the paramount consideration.

(7) An tArd-Chláraitheoir shall as soon as practicable upon receipt of a statutory declaration under *subsection* (2) record and recognise the applicant's preferred gender and as appropriate the preferred forename or forenames in the Gender Recognition Register and shall attach the appropriate note to the entry concerning the applicant in the register of births.

(8) Any requirement of law for the production of a certificate of birth shall be satisfied by the production of a copy of a certificate of birth containing the particulars entered in the gender recognition register and purporting to be certified in accordance with section 13(4) of the Act of 2004.

(9) A request to An tArd-Chláraitheoir for a certificate of birth by or concerning a person with an entry on the Gender Recognition Register shall, unless otherwise specified and duly authorised, be deemed to be a request for the production of a copy of a certificate of birth containing the particulars entered in the Gender Recognition Register.

(10) An tArd-Chláraitheoir shall ensure that it is not evident, from examination of any certificate of birth containing the particulars entered in the Gender Recognition Register, that such certificate is in any way distinguishable from a certificate containing particulars entered in the register of births.

(11) Save where the law requires otherwise, An tArd-Chlárai- theoir, the Minister and their respective officers shall ensure that the identity of an applicant under subsection (2) and all other particulars relating to the application are kept confidential.

(12) A person may appeal a refusal by An tArd-Chláraitheoir to record that person's identity in the Gender Recognition Register, within 3 months from the date of the refusal, to the High Court and seek an Order direct-

ing An tArd-Chláraitheoir to record and recognise the person's gender identify in the Gender Recognition

***Register.***

(13) Proceedings under *subsection* (11) shall be heard otherwise than in public.

3.—(1) Save where the context otherwise requires it, the making of an entry in the Gender Recognition Register does not affect the previous operation of anything duly done under law or affect any right, privilege, obligation or liability acquired, accrued or incurred, or affect any penalty incurred, or prejudice or affect any legal proceedings (civil or criminal) pending at the time of the making of the entry in the Gender Recognition Register concerning the person in question.

(2) Save where the context or law otherwise requires it, the gender entered and recorded in the Gender Recognition Register on foot of an application under section 2 of the Act shall be for all purposes the recognised gender of that person from the date of entry.

4.—(1) This Act may be cited as the Legal Recognition of Gender Act 2013.

(2) This Act shall come into operation on the day or days that the Minister may appoint by order either generally or with reference to a particular purpose or provision and different days may be so appointed for different purposes or different provisions.

***Section* 2.**

Schedule

Statutory declaration of a person seeking recognition of their preferred gender under the *legal recognition of gender act* 2013

The making of this declaration will affect the legal position of the person making the declaration. It is advisable to obtain legal advice before making this declaration

In the Matter of a Declaration under section 2 of the *Legal Recognition of Gender Act* 2013

I, [insert Name], _____
_____

of [insert address] _____
_____
_____
_____
_____
_____

being aged 18 years and upwards MAKE OATH/do solemnly and sincerely declare and say as follows:—

1. It is my settled and solemn intention, formed after careful consideration, to live permanently as a person of the _____ gender.

2. I wish to be treated for all purposes as a person of the _____ gender.

3. I wish to have the details set out in this statutory declaration recorded in the Gender Recognition Register.

4. Once recorded in the Gender Recognition Register, I wish that any requests for a copy of my birth certificate, shall be treated as requests for a copy of the entry concerning me recorded on the Gender Recognition Register, unless I specify otherwise.

5. [If different from the name above] I wish to be known henceforth by the following forename(s)_____
_____
_____

I make this solemn declaration conscientiously believing the same to be true by virtue of the Statutory Declarations Act 1938 and pursuant to the *Legal Recognition of Gender* Act 2013.

Signed _____
_____
_____

Declared before me by the said

_____

*Who is personally known to me
*Who has been identified to me by

_____

who is personally known to me

*Whose identity has been established to me before the taking of this Declaration by the production to me of [passport/driving licence/or other identifying document]

** at _____
this_____day of_____
20_____
Signed

_____

*notary public

*commissioner for oaths
*peace commissioner
*person authorised by
(insert authorising statutory provision)

_____
_____

to take and receive
statutory declarations

*Delete words of clauses
that are not applicable

**Postal address in full

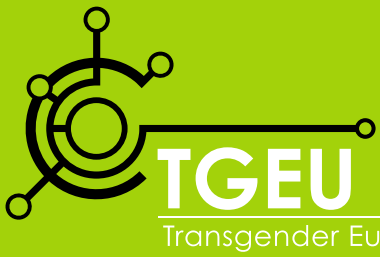
# Endnotes

1. *Van Kück v. Germany* (Application no. 35968/97 ECtHR) [decided on 12 June 2003]
2. EU LGBT Survey by the Fundamental Rights Agency 2013, accessible at http://fra.europa.eu/DVS/DVT/lgbt.php
3. Committee of Ministers of the Council of Europe Recommendations on Measures to Combat Discrimination on Grounds of Sexual Orientation and Gender Identity - CM/Rec 2010(5), accessible at https://wcd.coe.int/ViewDoc.jsp?id=1606669
4. TGEU Trans Rights Europe Map & Index 2013 accessible at http://www.tgeu.org/Trans_Rights_Map_Europe
5. "Human Rights and Gender Identity" [2009] Thomas Hammarberg, Council of Europe Commissioner for Human Rights https://wcd.coe.int/ViewDoc.jsp?id=1476365
6. See for an overview the ECtHR-Factsheet on Gender Identity accessible at: www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf
7. ECtHR Case *Goodwin and I. v. United Kingdom* (Application no. 28957/95) [decided by the Grand Chamber on 11 July 2002]
8. *L. v. Lithuania* (Application no. 27527/03) [decided on 11 September 2007]
9. Legislation in Malta changed in 2013 now allowing marriage upon legal gender recognition.
10. Trans Rights Europe Map 2013
11. *Goodwin & I. v. UK*
12. *X. v. Germany*, Admissibility decision of the Commission on 15 December 1977 on Application no. 6699/74
13. See ECtHR ruling *Schlumpf v. Switzerland* where the enforcement of a strict 2-year waiting period has been found to violate the right to fair trial and insufficiently take into account the individual's medical needs.
14. Lei n.º 7/2011 de 15 de Março Cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração ao Código do Registo Civil
15. Frohwein, Jochen Abraham/ Peukert Wolfgang: Europäische MenschenRechtsKonvention, Kommentar, 3rd edition, Kehl 2009
16. See *Schlumpf v. Switzerland*
17. See *Van Kück v. Germany*
18. Law 3/2007 of 15 March on Rectificación registral de la mención relativa al sexo de las personas [Rectification of the Declaration of Sex in the Registry]

19. Recher Alecs, Änderung von Name und amtlichem Geschlecht bei Transmenschen, p. 92, University Zurich, 2012
20. Standards of Care Version 7 are available at The WPATH https://tinyurl.com/okc9829
21. ECtHR Case L. *v. Lithuania*
22. Explanatory Memorandum to CM/Rec 2010(5) https://wcd.coe.int/ViewDoc.jsp?id=1570957 (accessed June 26, 2013)
23. CM/Rec(2010)05
24. European Parliament Resolution, 28.9.2011
25. WPATH De-Psychopatholisation Statement of 26 May 2010 accessible at: http://www.wpath.org/uploaded_files/140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf
26. According to the LGBT Survey by the Fundamental Rights Agency, 73% of trans respondents did not identify within the gender binary.
27. ECtHR Van Kück v. Germany
28. Trans Rights Europe Map 2013
29. WPATH Identity Recognition Statement, June 16, 2010 http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf
30. Hammerberg, Issue paper "Human Rights and Gender Identity" [2009] p. 19
31. Ibid. p. 21
32. Putting an End to Coerced Sterilizations and Castrations, Liliane Maury Pasquier, PACE, 2013 http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19755&Language=EN
33. Report of the Special Rapporteur onTorture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez [2013] http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/68/295&Lang=E
34. Concluding Observations of the Committee of on the Elimination of Discrimination Against Women on The Netherlands http://daccess-ods.un.org/TMP/442422.740161419.html
35. "Human Rights and Gender Identity" [2009] Thomas Hammarberg, Council of Europe Commissioner for Human Rights https://wcd.coe.int/ViewDoc.jsp?id=1476365
36. Ibid.
37. *Roetzheim v. Germany* (Application no. 40016/98) [Commission decision of inadmissibility 23 October 1997]

38. However, the case of *Y.Y. v. Turkey* (Appl No 14793/08) , in which an individual is challenging the necessity of sterilisation in Turkish gender recognition procedures, is pending.
39. However, cases have been reported where the applicant had to prove sterility before being granted gender recognition.
40. *Hämäläinen v. Finland* (Application no. 37359/09)
41. Austrian Const Court V4/06 Appl No 17849 [decided 8 June 2006], German Const Court BVerfG, 1 BvL 10/05 [decided 27 May 2008]
42. Austria Art. 44 ABGB; Germany: Court Interpretation of Art. 6 Basic Law
43. Yogyakarta Principles (Principle 24 C: "the best interests of the child shall be a primary consideration" and the " gender identity of the child [...] may not be considered incompatible with such best interests."), accessible at http://www.yogyakartaprinciples.org/
44. The Convention has an open list of non-discrimination grounds. Age is not mentioned explicitly. At the time of writing, the Recommendations of the Committee of Minister to member states on the promotion of the human rights of older persons are under preparation and can be accessed at: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/CDDH-AGE/default_en.asp
45. See, for instance, the ECtHR Factsheet on Children's Rights, accessible at: www.echr.coe.int/Documents/FS_Childrens_ENG.pdf
46. deVries, Steensma, Doreleijers, & Cohen-Kettenis, 2010 in WPATH, Standards of Care Version 7 (2013)
47. For legal reasons, the FRA LGBT survey was not available for persons younger than 18 years.
48. *Schlumpf v. Switzerland* (Application no. 29002/06) [decided on 8 January 2009]
49. German Constitutional Court (Case 1 BvR 938/81) [decided on 16 March 1982]
50. German Constitutional Court (Case 1 BvR 3295/07) [decided on 11 January 2011]
51. Huffington Post, Argentina Grants Lulu, 6-Year-Old Transgender Child, Female ID Card, of 10 October 2013; accessible at http://www.huffingtonpost.com/2013/10/10/argentina-child-transgender_n_4077466.html?view=print&comm_ref=false
52. CM/Rec(2010)05 Appendix Para 21
53. See above in Procedures chapter
54. Ibid.
55. UK Gender Recognition Act 2004 accessible at http://www.legislation.gov.uk/ukpga/2004/7/contents
56. LAG Hamm (Case 4 *Sa* 1337/98) [decided on 17 December 1998]
57. *Goodwin* & I. *v.* UK

58. See CM/Rec(2010)05 Appendix Para 22
59. Case law of the European Court of Justice – ECJ: P v. S and Cornwall County Council (C-13/94) [decided on 30 April 1996], K.B v. NHS Pensions Agency (C-177/01) [decided on 7 January 2004].
60. Case *P.V. v. Spain* (Application no. 35159/09) [decided on 30 November 2010]
61. This collection has been compiled by Constantin Cojocariu, Lawyer, Interights. The summaries employ terminology used in the original judgments, even though some of it is outdated or currently considered to be inappropriate.
62. This selection represents only a number of cases that are still relevant relevant and have not yet been overruled.
63. Constitutional Court, 1 BvR 3295/07, Para 69
64. Federal Constitutional Court Press Office Press Release no. 7/2011 of 28 January 2011 on Order of 11 January 2011 1 BvR 3295/07
65. The full text of the law can be found in the Annex.
66. The Yogyakarta Principles (2006) are accessible at www.yogyakartaprinciples.org/principles_en.htm
67. Huffington Post Argentina Grants Lulu, 6-Year-Old Transgender Child, Female ID Card of 10 October 2013;
68. For the official statistics of the Ministry of Interior (May – Sept 2012), see: http://www.mininterior.gov.ar/poblacion/archivos_estadisticas/identidadGenero.pdf and this article published in the official media agency (TELAM): http://www.telam.com.ar/notas/201305/17099-a-un-ano-de-la-sancion-de-la-ley-3000-personas-trans-gestionaron-su-nuevo-dni.html
69. See TENI's Submission to the Joint Oireachtas Committee on Education and Social Protection in response to the Government's Gender Recognition Bill 2013 available at teni.ie.
70. N' Mhuirthile, Tanya and Ryan, Fergus, in Human Rights in Ireland 2013 can be found at www.humanrights.ie

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