

IN THE EUROPEAN COURT OF HUMAN RIGHTS

P. versus Ukraine
(Application no. 40296/16)

WRITTEN COMMENTS

Submitted jointly by

ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association)

OII Europe (Organisation Intersex International Europe)

14 November 2017

Introduction

1. These written comments are submitted jointly by ILGA-Europe and OII Europe.
2. The present case involves an intersex person registered at birth as male, but identifying herself as female. The applicant requested that the competent Registration Office in Kyiv, Ukraine to confirm her status as female and adjust her name, patronymic and surname accordingly. Her request was rejected as the legislation in place provided only for the civil status records of transsexual persons to be changed following sex reassignment surgery, but did not regulate the situation of intersex persons.
3. This submission is structured as follows.
 - (1) Introduction: The meaning of 'intersex' status
 - (2) Law and practice of legal gender recognition and name change in Ukraine
 - (3) The Court's case-law on names and legal gender recognition
 - (4) International trends

I. Introduction: The meaning of 'intersex' status

4. The term 'intersex' is an umbrella term covering the spectrum of variations of sex characteristics that naturally occur within the human species. Intersex individuals are born with physical, hormonal or genetic features that are neither wholly female nor wholly male; or a combination of female and male; or neither female nor male. These features can manifest themselves in secondary sexual characteristics such as muscle mass, hair distribution, breasts and stature; primary sexual characteristics such as reproductive organs and genitalia; and/or in chromosomal structures and hormones.
5. Historically, the term 'intersex' was used as if it was as a disorder that needed medical intervention to 'fix it'. This is a misconception: despite the wide variety of situations concerned, the majority of intersex people are physically healthy. Being intersex is not a medical condition. Only a few intersex individuals suffer from medical conditions that put their health at risk.¹
6. A person's sex characteristics are set out from birth, but the intersex traits can become apparent at different times in their life.² Some common intersex variations are diagnosed prenatally via pre-natal genetic screening. Intersex differences may be visibly apparent at birth. Some intersex traits become apparent at puberty, or when trying to conceive, or through random chance. Other instances may only be discovered during an autopsy.
7. Thus, being intersex is primarily a question of biology, not of gender identity or sexual orientation: intersex people can have any gender identity (male, female, intersex, non-binary, neutral, undetermined, etc.) and any sexual orientation, as these are distinct from sex characteristics.³
8. Intersex people encounter serious barriers to the enjoyment of their human rights. Parents of intersex babies are often ill-informed and medical professionals can be quick to propose "corrective" surgery and treatment aiming to "normalise" the sex of the child. Such treatment can result in irreversible sex assignment and sterilisation performed without the fully informed consent of the parents or, even more importantly, the intersex persons themselves.⁴
9. Growing up, intersex persons may identify with a different gender from the one assigned at birth through official registration (and "corrective" procedures). This potential mismatch between assigned sex and

¹ PACE Resolution 2191 (2017), Promoting the human rights of and eliminating discrimination against intersex people, 12 October 2017, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>.

² "Standing up for the Human Rights of Intersex People- How can you help?", ILGA-Europe and OII Europe, December 2015: https://www.ilga-europe.org/sites/default/files/how_to_be_a_great_intersex_ally_a_toolkit_for_ngos_and_decision_makers_december_2015_updated.pdf

³ PACE Committee on Equality and Non-Discrimination, Promoting the human rights of and eliminating discrimination against intersex people Report | Doc. 14404 | 25 September 2017, Draft Recommendation para. 12, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24027&lang=en>.

⁴ See https://www.ilga-europe.org/sites/default/files/magazine_ilga-europe_summer_2014_web.pdf, at p. 4.

gender identity means that sex or gender classifications need to be amendable through a simple administrative procedure at the request of the individuals concerned. Many intersex organisations have further stressed that, as regards gender markers, all adults and capable minors should be able to choose between female, male, non-binary or multiple options. In the longer term, sex or gender should in future not be a category on birth certificates or identification documents.⁵

10. In addition, in order to access gender recognition procedures and change their gender marker (if such procedures are available at all), intersex people are often required to declare themselves as trans persons. In some countries, the requirements for legal gender recognition may prevent people with an intersex-related medical diagnosis from using those legal procedures, most often leaving them in legal limbo. The applicant is faced with a similar situation.

II. Law and practice on legal gender recognition and name change in Ukraine

Lack of relevant legislation specific to intersex persons

11. There is lack of awareness about intersex people in Ukraine and the issues they face in their everyday lives. This results in a lack of non-pathologising information on intersex and lack of administrative procedures to reflect the person's gender identity which may be wrongfully assigned after birth.
12. As the Interveners explain below, in order to change documents and/or names intersex people in Ukraine are forced to "fit" the procedure available for transgender people as the only procedure available for legal gender recognition in the country. The narrowly defined rules and criteria are not designed for broader application of the law to encompass intersex people. However, the issues and variations pertaining to intersex people do not correspond to the ones faced by trans people and therefore their needs cannot be met by a procedure available and tailored to strictly trans people. As a result, intersex people are wrongfully precluded from name change and legal recognition procedures that are available to trans people.

Legal requirements for gender recognition

13. Legal gender recognition procedure in Ukraine is regulated by Rules on "Unified clinical protocol of primary, secondary (specialized) and tertiary (highly specialized) medical care". It came into force on 30 December 2016 by the Order No. 1041 of October 5 "On the establishment of medical and biological and social-psychological indications for the change (correction) of sexual affiliation and approval of the form of primary accounting documentation and instructions for its filling".
14. The new order provides for a more simplified procedure for legal gender recognition, being facilitated through a visit to a family doctor and subsequent assessments by a psychiatrist and endocrinologist. It thus abolishes the formerly centralized Commission on "sex change", which was a state body authorising for gender reassignment surgery and legal gender recognition.
15. The new order has introduced a new form of medical certificate of sex change and new indications for it based on definition of "Transsexualism" diagnosis in ICD-10. According to the text of the protocol an assessment should be done on outpatient basis, but there is still a possibility of hospitalization for 2 weeks or more without clearly defined criteria for it. Thus, legal gender recognition in the new clinical protocol is still medicalised and linked to a psychiatric assessment for such diagnoses as "gender dysphoria" and "transsexualism".
16. While the new procedure is more progressive and has removed the requirement of compulsory psychiatric hospitalization for 30 to 45 days, it still entails psychiatric assessment for at least 2 years. The rules lack clarity and certainty. For example, while the general provisions of the protocol state that medical interventions should be limited to what each patient finds sufficient for themselves, in the more detailed chapters of the protocol psychotherapy and hormonal replacement therapy are declared as a required treatment. Similarly, eligibility for hormone treatment is available only to those who feel "constant gender dysphoria". This puts in question availability of life-long hormone replacement therapy (HRT) for trans people who no longer feel dysphoria. A fortiori, intersex people who do not feel "gender dysphoria" and thus do not need hormonal treatment cannot avail themselves of the legal recognitions procedure.

⁵ PACE Report, op. cit., para. 60.

Legal requirements for name change

17. Ukrainian law on changing the surname, name, and patronymic in connection with gender reassignment is governed by the Rules on “Changing, renewing or annulling the civil status records”, approved by order of the Ministry of Justice of Ukraine on 12.01.2011 No. 96/5 and registered by the Ministry of Justice of Ukraine on 14.01.2011 №55 / 8793⁶. Paragraph 2, 15.5 of these rules provides the list of grounds for making changes in the records in connection to “gender change”.
18. Article 51 of the Law on Fundamentals of the Health Protection in Ukraine⁷ stipulates that “a person who has undergone sex change (correction) is provided with a medical certificate which serves as a basis for changing their legal status”. Such certificate is provided to persons diagnosed with “transsexualism” and serves as a basis for using the procedure on amending civil status records⁸. Again, this excludes intersex people from the procedure.

III. The Court’s practice on names and legal gender recognition

19. The Interveners submit that, given the very personal nature of an individual’s name, and its role in self-identification, the State’s margin of appreciation in change of name cases should be narrow, particularly where the reason for a person’s proposed change of name is to live publicly according to their gender identity.
20. Moreover, in light of the continuing international trend in favour of acceptance and recognition of intersex people, the States have a positive obligation to ensure their ability to change name and have their gender recognized in a quick, transparent and accessible way. Legislative gaps that result in intersex individuals remaining in legal limbo are not only discriminatory vis-à-vis males, females and transgender persons (for whom such procedures may have already been established), but also in violation of Article 8 of the Convention.
21. As a preliminary remark, the Court has previously stressed on numerous occasions that the concept of “private life” is a broad term not susceptible to exhaustive definition. It includes not only a person’s physical and psychological integrity, but can sometimes also embrace aspects of an individual’s physical and social identity.⁹ Elements such as gender identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8 of the Convention.¹⁰
22. Importantly, Article 8 also protects the right to personal development and the right to establish and develop relationships with other human beings and the outside world.¹¹ In that regard, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of the Article 8 guarantees. Article 8 thus protects the personal sphere of each individual, including the right to establish details of their identity as individual human beings.¹²

European courts’ practice on names

23. Both this Court and the Court of Justice of the European Union (“CJEU”) have recognised that a person’s name is a fundamental part of their identity. The Court has established that issues concerning an individual’s first name and surname fall under the right to private life.¹³

⁶ ПРАВИЛА внесення змін до актових записів цивільного стану, їх поновлення та анулювання, available at: <http://zakon3.rada.gov.ua/laws/show/z0055-11>

⁷ “Основи законодавства України про охорону здоров’я”, available online at: http://search.ligazakon.ua/l_doc2.nsf/link1/T280100.html

⁸ Note: it is only for these persons that it is possible to obtain a medical certificate.

⁹ See *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91; *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I.

¹⁰ See *Dudgeon v. the United Kingdom*, 22 October 1981, § 41, Series A no. 45; *B. v. France*, 25 March 1992, § 63, Series A no. 232-C; *Burghartz v. Switzerland*, 22 February 1994, § 24, Series A no. 280-B; *Laskey, Jaggard and Brown v. the United Kingdom*, 19 February 1997, § 36, Reports of Judgments and Decisions 1997-I; and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI.

¹¹ *Schlumpf v. Switzerland*, no. 29002/06, § 77, 8 January 2009.

¹² *Pretty v. the United Kingdom*, no. 2346/02, 29 April 2002, §61; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §90, 11 July 2002; *Schlumpf v. Switzerland*, op. cit., §100, *YY v. Turkey*, § 57.

¹³ See *inter alia* *Burghartz v. Switzerland*, 22 February 1994, Series A no. 280-B, § 24; *Stjerna v. Finland*, 25 November 1994, Series A no. 299-B, § 37; *Szokoloczy-Syllaba and Palffy de Erdoed Szokoloczy-Syllaba v. Switzerland* (dec.), no. 41843/98, 29 June 1999; *Mentzen alias Mencena v. Latvia*, no. 71074/01, ECHR 2004-XII.

24. With regard to first names in particular, the Court has held that “since they constitute a means of identifying persons within their families and the community, forenames, like surnames [...], do concern private and family life.”¹⁴ In *Garnaga v Ukraine*, the Court confirmed that patronymics also concern private and family life, and thus fall within the ambit of Article 8.¹⁵
25. Further, in *Daróczy v Hungary*, the Court held that names have “a crucial role in a person’s identification” and, in particular, “are central elements of self-identification and self-definition”.¹⁶ In this respect, the Court has distinguished the particular role of names in identification. In the judgment in *Stjerna v Finland*¹⁷ the Court stated that “despite the increased use of personal identity numbers in Finland and other Contracting States, names retain a crucial role in the identification of people.”
26. Similarly, the CJEU in *Bogendorff von Wolffersdorff* held that “a person’s forename and surname are a constituent element of his identity and of his private life”.¹⁸ The CJEU stated that while Article 7 of the Charter of the Fundamental Rights¹⁹ does not refer to protection of names expressly, a person’s forename and surname, as a means of personal identification and a link to a family involves his private and family life.²⁰
27. Furthermore, in *Pretty v. the United Kingdom* the Court expanded that: “Elements such as, for example, gender identification, name and sexual orientation fall within the personal sphere protected by Article 8”²¹.
28. The Court accepted in *Stjerna* that the imposition, in breach of Article 8 ECHR, of legal restrictions on the possibility of changing one’s name may, in certain circumstances, be justified in the public interest. This is a balancing exercise. The Court’s approach, as expressed in *Daróczy*²², has been to determine, that:
- *that the restriction on the applicant’s right was prescribed by law and pursued a legitimate aim*”; and
 - *“focus on the question of necessity and proportionality. In weighing up the different interests at stake, consideration should be given, on the one hand, to the applicant’s right to bear a name, and on the other and the public interest in regulating the choice of names”*.
29. However, in *Daróczy* the Court also stressed that, **imposing a restriction on one’s right to bear or change a name without justified and relevant reasons is incompatible with the purpose of Article 8 of the Convention, which is to protect individuals’ self-determination and personal development**²³.
30. Therefore, it is clear that restrictions on name change should be analysed very critically, and even more so where they are seeking to prevent conformation with an individual’s gender identity.
31. The Court took this approach in *B. v France*,²⁴ in which a transgender woman complained that the French authorities had refused to amend the civil-status register to allow her to change her first name to a name perceived as a female one. Under French law, the procedure for change of first name was subject to judicial permission and the demonstration of a “*legitimate interest*” capable of justifying it. At the time of the Court’s judgment, there was no settled case-law in France that regarded being transgender as giving rise to such an interest. As a consequence, the applicant was denied her request to obtain a new first name that better reflected her gender identity. In circumstances where many French official documents revealed the discrepancy between the legal gender and the perceived gender/gender expression of a transgender person, the Court held that there had been a violation of Article 8: the refusal to amend the civil status register had placed the applicant “*in a daily situation which, taken as a whole, was not compatible with the respect due to her private life*”.

¹⁴ *Guillot v. France*, 24 October 1996, §§ 21 and 22, Reports of Judgments and Decisions 1996-V.

¹⁵ *Garnaga v. Ukraine*, no. 20390/07, § 36.

¹⁶ *Daróczy v. Hungary*, no. 44378/05, §§ 26 and 32, ECHR 2008.

¹⁷ *Stjerna v. Finland*, no. 18131/91, 25 November 1994, § 39.

¹⁸ Judgement of 2. June 2016, *Bogendorff von Wolffersdorff*, Case C-438/14, § 35.

¹⁹ Charter of the Fundamental Rights of the European Union, 2012/C 326/02

²⁰ Judgement of 2. June 2016, *Bogendorff von Wolffersdorff*, Case C-438/14, § 35.

²¹ *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III.

²² *Daróczy v. Hungary*, no. 44378/05, §§ 28, ECHR 2008.

²³ *Daróczy v. Hungary*, no. 44378/05, § 32.

European courts' practice on legal gender recognition

32. Similarly, the Court has acknowledged that gender identity belongs to “one of the most intimate areas of a person’s private life”,²⁵ is a free-standing “right”,²⁶ a “fundamental aspect of the right to respect for private life”,²⁷ and is “one of the most basic essentials of self-determination”.²⁸
33. The Court has addressed legal gender recognition in the context of transgender persons’ rights. The Court has held that, as the very essence of the Convention is respect for human dignity and human freedom, the right of transgender persons to personal development and to physical and moral security is guaranteed.²⁹ Serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity.³⁰
34. The Court has further observed that, while the boundaries between the State’s positive and negative obligations under Article 8 do not lend themselves to precise definition, the applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; in both contexts the State enjoys a certain margin of appreciation.³¹
35. In *Hämäläinen v. Finland*, the Court held that the State’s margin of appreciation will depend, in part, upon:³²
- “the importance of the interest at stake and whether “fundamental values” or “essential aspects” of private life are in issue [...] or the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8 [...]”* (emphasis added).
36. When it comes to balancing the competing interests, the Court has emphasised that the margin allowed to the State will be restricted, when a particularly *important facet of an individual’s existence or identity is at stake*.³³
37. The Court has interpreted the States’ obligations in the light of present-day conditions, taking into account “developments in medical and scientific thought”³⁴ () and the “uncontested evidence of a continuing international trend in favour of increased social acceptance” of trans people and legal gender recognition.³⁵ In *Christine Goodwin*, the Court noted:
- “It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.”*³⁶
38. On the basis of these principles, the Court has endorsed the evolving improvement of State measures and has gradually narrowed the margin of appreciation given to the States in cases involving the legal recognition and protection of transgender people.
39. In *Christine Goodwin v. the United Kingdom* and *Grant v. the United Kingdom*, the Court ruled that States are required, by their positive obligation under Article 8, to implement the recognition of the gender change in post-operative transsexuals through, *inter alia*, amendments to their civil-status data, with its ensuing consequences.

²⁵ *Van Kück v. Germany*, no. 35968/97, §56, ECHR 2003-VII.

²⁶ *Idem*, §75.

²⁷ *Idem*, §75.

²⁸ *Y.Y. v Turkey*, no. 14793/08, §102, 10 March 2015 (extracts).

²⁹ *Christine Goodwin v. the United Kingdom* [GC], op. cit., § 90; *Van Kück v. Germany*, op. cit., § 69; and *Schlumpf v. Switzerland*, op. cit., § 101.

³⁰ See *Christine Goodwin*, op. cit., § 77.

³¹ See, for instance, *B. v. France*, op. cit., § 44, and *Hämäläinen v. Finland* [GC], no. 37359/09, § 67, ECHR 2014.

³² *Hämäläinen v Finland*, op. cit., §§ 66-67.

³³ *Schlumpf v. Switzerland*, op. cit., § 104.

³⁴ *Van Kück v. Germany*, op. cit. § 49

³⁵ *Christine Goodwin v. the United Kingdom*, op. cit., §93; *YY v Turkey*, Press release ECHR 075 (2015) of 10 March 2015, p. 3.

³⁶ *Christine Goodwin v. the United Kingdom*, op.cit., § 74

40. In doing so, the Court attached greater weight to the clear and uncontested evidence of a continuing international trend in favour of the increased social acceptance of transsexuals and legal recognition of their new sexual identity, despite the lack of evidence of a common European approach to the resolution of the legal and practical problems posed³⁷. The Court has noted ever since that the right of transgender persons to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved³⁸.
41. A few years later, in *Y.Y. v. Turkey*, the refusal by the Turkish authorities to grant authorisation for gender reassignment surgery on the grounds that the person requesting it was not permanently unable to procreate (*i.e.* was not sterile) violated Article 8.
42. More importantly, the Court has ruled that legislative gaps that render the legal recognition of trans persons ineffective may constitute a violation of Article 8. In *L. v. Lithuania*, Lithuanian law recognised transsexuals' right to change not only their gender but also their civil status. However, there was no law regulating full gender-reassignment surgery. This legislative gap had left the applicant in a situation of *distressing uncertainty vis-à-vis his private life and the recognition of his true identity*³⁹. In light of the limited budgetary burden imposed on the State and the long delay in enacting the necessary legislation, the Court found that a fair balance had not been struck between the public interest and the rights of the applicant.

IV. International and comparative law

International level

1. The need for quick, transparent and accessible procedures based on self-determination

43. The Council of Europe has repeatedly emphasized the need for a quick, transparent and accessible legal gender recognition and name change procedures based on the principle of self-determination. These procedures should be accessible not only to transgender, but also to intersex individuals.
44. Resolution 2048(2015) of the Council of Europe Parliamentary Assembly ("PACE") welcomes the emergence of a right to gender identity, which gives every individual the right to recognition of their gender identity and the right to be treated and identified according to this identity. PACE calls upon member states to *inter alia* (i) develop *quick, transparent and accessible procedures, based on self-determination*, for changing the name and registered sex of transgender people; (ii) abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognise a person's gender identity in laws regulating the procedure for changing a name and registered gender; and (iii) consider including a third gender option in identity documents for those who seek it.
45. For the Council of Europe, "*prior requirements, including changes of a physical nature, for legal recognition of gender reassignment, should be regularly reviewed in order to remove abusive requirements. In addition, 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.*"⁴⁰
46. The European Parliament has also encouraged states to ensure quick, accessible and transparent gender recognition procedures that respect the right to self-determination.⁴¹

³⁷ *Christine Goodwin v. the United Kingdom, op.cit.*, § 85

³⁸ see *Christine Goodwin*, § 90; reiterated in *Y.Y. v. Turkey*, § 109

³⁹ *L v Lithuania* §59

⁴⁰ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, §§ 20 and 21.

⁴¹ European Parliament, Report on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter (2014/2216(INI)).

2. Increasing international awareness of intersex people's rights

47. Intersex issues have emerged as relevant to fundamental rights protection. There is a growing international consensus of the need to recognise and protect their rights.
48. The Commissioner for Human Rights of the Council of Europe has urged member states to “*facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons’ right to self-determination. Flexible procedures should be observed in assigning and reassigning sex/gender in official documents while also providing for the possibility of not choosing a specified male or female gender marker. Member states should consider the proportionality of requiring gender markers in official documents.*”⁴²
49. In 2016, the Council of Europe took active steps to integrate intersex issues in different parts of its work. In a very recent Resolution, the Parliamentary Assembly of the Council of Europe addressed specifically the rights of intersex people. With regard to their civil status and legal gender recognition, the PACE urged the member states to:⁴³
- “7.3.2. *simplify legal gender recognition procedures in line with the recommendations adopted by the Assembly in Resolution 2048 (2015) and ensure in particular that these procedures are quick, transparent and accessible to all and based on self-determination;*
- 7.3.3. *ensure, wherever gender classifications are in use by public authorities, that a range of options are available for all people, including those intersex people who do not identify as either male or female;*
- 7.3.4. *consider making the registration of sex on birth certificates and other identity documents optional for everyone”*
50. According to Report 14404 (2017) of the Committee on Equality and Non-Discrimination of the PACE, to protect the right to private life, birth registration systems should allow sufficient flexibility to accommodate the needs of intersex people, and quick, transparent and accessible legal gender recognition procedures must also be available.⁴⁴
51. A number of developments at the EU level in recent years have contributed to a better understanding of the problems intersex people face. For example, in 2013, the ‘working definitions’ laid down by the Council of the European Union stated that traditional notions of maleness and femaleness are culturally established.⁴⁵ The ‘Lunacek Report’ of the European Parliament, also adopted in 2013, urges the European Commission and EU Member States to take specific action in relation to intersex people, including to address the current lack of knowledge, research and relevant legislation on the human rights of intersex people.⁴⁶
52. Member States and relevant agencies have become aware of the need to protect intersex persons. In 2012, the German Ethics Council (Ethikrat) published an opinion on intersex issues, providing a range of recommendations to safeguard the rights of intersex people. The opinion argues that legal systems presume a strict sex binary that does not always occur in nature. Thus, intersex issues should concern legal professionals and policy makers, and not only health and healthcare professionals. It further advocates for a third gender to be allowed on civil registration documents.⁴⁷

⁴² Issue paper published by the Council of Europe Commissioner for Human Rights, Human rights and intersex people, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>.

⁴³ PACE Resolution 2191 (2017), Promoting the human rights of and eliminating discrimination against intersex people, 12 October 2017, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>.

⁴⁴ PACE Committee on Equality and Non-Discrimination, Promoting the human rights of and eliminating discrimination against intersex people Report | Doc. 14404 | 25 September 2017, Draft Recommendation para. 12, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24027&lang=en>.

⁴⁵ European Agency Union for Fundamental Rights, The fundamental rights situation of intersex people, April 2015, available at <http://fra.europa.eu/en/publication/2015/fundamental-rights-situation-intersex-people>.

⁴⁶ Committee on Civil Liberties, Justice and Home Affairs, Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, 8 January 2014 (2013/2183(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0009+0+DOC+XML+V0//EN>.

⁴⁷ European Agency Union for Fundamental Rights, The fundamental rights situation of intersex people, op. cit.

53. A report from the Swiss National Advisory Commission on Biomedical Ethics emphasises that individuals whose sex is not clearly identifiable as male or female are assigned to one of these two categories. A subsequent amendment of the recorded sex requires considerable effort and sometimes entails significant disadvantages for the person concerned. This procedure should be reviewed from the viewpoint of possible discrimination. The Commission then suggests different possibilities to improve the condition of intersex people and to ensure that they are treated on an equal footing with the traditional categories of “males” and “females” the most appropriate one being, to facilitate the amendment of the recorded sex.⁴⁸

National legislators increasingly adopt legal gender recognition and name change procedures based on self-determination

54. Many national legislators have adopted or are in the process of adopting legal gender recognition and name change procedures based on self-determination that intersex people could make use of.
- (a) Malta’s ‘Gender Identity, Gender Expression and Sex Characteristics Act’, adopted in April 2015, simplified the procedures that individuals need to follow in order to align their recorded gender with their gender identity. The State is also required to recognise gender markers other than male or female, or the absence thereof, that have been lawfully recognised by foreign courts or authorities. In addition the entry of a sex marker on the birth certification can be postponed until the gender identity of the child is determined. More recently, Malta introduced non-binary X-gender passports and ID cards.⁴⁹
 - (b) Since 2014, Danish citizens can change their legal gender without undergoing surgery. They can do so if they are over 18 and, once they have applied, they must wait 6 months (“reflection period”).⁵⁰ Alongside its gender recognition reforms in 2014, Denmark’s previous practice of enabling trans people to apply for an ‘X’ in international passports became official law.⁵¹
 - (c) In 2016, Norway’s parliament voted in favour of legislation based on the principle of self-determination.
 - (d) In France, a legal gender recognition procedure that removed references to sterilisation and medicalisation was passed in 2016. Pursuant to Article 56 of Law no. 2016-1547, any person over 18 (or emancipated minor) can change their gender marker on the civil registry if they show that their current gender marker does not match the one they seem like and are known as. The application is presented before the *tribunal de grande instance*. The court may not reject the request on the grounds of failure to undergo medical treatment, surgery or sterilization. The updated gender marker will be indicated on the side of the person’s birth certificate.⁵²
 - (e) Since 2013, The Netherlands have enabled Dutch citizens over the age of 16 to file a request to change gender accompanied by an expert statement affirming the person’s permanent conviction to belong to another gender. The applicant does not need to have undergone any sort of hormone treatment or surgery.⁵³
 - (f) Iceland is working towards legislation similar to the Maltese law. It proposes including protection of a person’s bodily integrity and self-determination on the ground of sex characteristics. It also plans to offer protection from hate crime and hate speech as well as protection in the area of employment, goods and services and other spheres of life on the basis of gender identity, gender expression and sex characteristics.

⁴⁸ Swiss National Advisory Commission on Biomedical Ethics, On the management of differences of sex development, Ethical issues relating to “intersexuality”, Opinion No. 20/2012, Berne, November 2012, pp. 5 and 14-15, available at http://www.nek-cne.ch/fileadmin/nek-cne-dateien/Themen/Stellungnahmen/en/NEK_Intersexualitaet_En.pdf

⁴⁹ TGEU Toolkit, Legal Gender Recognition in Europe, 2nd Revised Version, November 2016; http://www.maltatoday.com.mt/news/national/80228/malta_introduces_x_marker_on_passports_id_cards_and_work_permits#.WgrUdlWnGpr.

⁵⁰ <http://www.loc.gov/law/foreign-news/article/denmark-changing-legal-sexual-identity-simplified/>

⁵¹ Transgender Europe, Denmark: X in Passports and New Trans Law Works, 12/09/2014, accessible at: <http://tgeu.org/denmark-x-in-passports-and-new-trans-law-work/>

⁵² Article 56, LOI n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle, available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033418805&categorieLien=id>

⁵³ <https://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights>

- (g) The government in Portugal pledged to introduce plans for self-determined legal gender recognition in 2017.⁵⁴
- (h) Argentina has recently legally recognized an individual right to gender identity and self-determination and allows for a change of name and gender marker in official documents via a simple declaration.⁵⁵

Relevant national court rulings on absence of legal gender recognition procedure and self-determination

- 55. The principle of self-determination emerges in many national court decisions. The most notable example is the German Constitutional Court's seminal decision⁵⁶ in a case where a transgender person wished to be recognised as a woman, but had not gone through gender reassignment surgery and was not permanently infertile (requirements under German law at that time). The Court ruled that those two requirements violated the German Constitution. The petitioner's right to *sexual self-determination and physical integrity* outweighed the legislator's interest to secure the notion of civil status as "permanent and unambiguous", as well as "avoid a divergence of biological and legal gender affiliation." The Court emphasized that genital surgery constituted a "massive interference" with physical integrity, involving "considerable risks and side effects," while at the same time not being indicated in all cases of "transsexuality".
- 56. The Swiss Regional Court has found that requiring a transgender person seeking legal gender recognition to undergo any form of medical intervention (surgical or hormonal) is an invasion of bodily integrity. It ruled that medical and hormonal treatment are no longer required when seeking a change in legal gender⁵⁷.
- 57. Courts have also condemned the failure of national governments and agencies to put in place implementing measures for effective legal recognition procedures. In a case⁵⁸ concerning a transgender boy Croatia, whose request for change of legal gender was repeatedly rejected and the relevant process was delayed on numerous occasions, the Constitutional Court found a violation of the applicant's right to private life. The Court noted that the delays were partially due to unclear Croatian legislation on legal gender recognition. While the law stated that genital-altering surgery was not necessarily required, no implementing regulations had been put in place.

Additional national actions specifically addressing intersex people's rights

- 58. Countries such as Malta, Latvia, the Netherlands and Portugal allow a person to be registered as of unknown/unclear/undetermined sex or to postpone sex registration to a time when the person has decided. In cases of errors in birth certificates, it is possible for intersex people to change the sex identifier later in life in EU Member States, such as Denmark, France and the Netherlands, without meeting the requirements demanded for trans people.
- 59. In Germany, since 2013, a newborn's gender marker must be left blank if the child cannot be identified as either male or female.⁵⁹ In addition, the German Constitutional Court ruled that not offering a positive option for those identifying other than a man or a woman violates the gender non-discrimination provisions of the Basic Law. It ordered the German legislator to introduce procedures until end 2018 enabling another option of registration besides female or male. The Court also clarified that there are different ways of how the gender entry could be named, *inter alia* suggesting the possibility of removing mandatory gender registration, as this is not required by German Basic Law.⁶⁰

⁵⁴ ILGA –Europe Annual Review 2017, available at: <https://www.ilga-europe.org/sites/default/files/2017/portugal.pdf>

⁵⁵ TGEU Toolkit, Legal Gender Recognition in Europe, 2nd Revised Version, November 2016

⁵⁶ Germany, Constitutional Court, 1 BVR 3295/07, 11 January 2011

⁵⁷ Switzerland, Regional Court of Bern-Mittelland, CIV 12 1217 JAC, 12 September 2012

⁵⁸ Constitutional Court, No. U-III B-3173/2012, 18 March 2014

⁵⁹ PACE Report (14404) 2017

⁶⁰ http://www.lemonde.fr/europe/article/2017/11/08/la-justice-allemande-demande-l-inscription-d-un-troisieme-sexe-sur-les-registres-de-naissance_5211827_3214.html?utm_term=Autofeed&utm_campaign=Echobox&utm_medium=Social&utm_source=Facebook#link_time=1510135396; see also <https://tgeu.org/joint-statement-civil-society-welcomes-ground-breaking-german-constitutional-court-demand-for-a-new-regulation-of-sex-registration/>

60. In Ireland, a third gender marker option is being discussed in the context of the revision of that jurisdiction's gender recognition law.
61. In March 2016 Scottish First Minister Nicola Sturgeon announced the recognition of gender identities other than male or female in forthcoming legal reform to be enacted by the Scottish Government.⁶¹
62. In 2016, more institutions and governments explicitly included intersex issues in their work. Bosnia and Herzegovina added sex characteristics to its anti-discrimination law, meaning intersex people are now protected against discrimination in all spheres of life. Countries like Belgium and the Netherlands initiated political discussions towards adopting more inclusive legislation. The Cypriot Parliamentary Committee on Human Rights convened to analyse a report on the rights of intersex children. The United Kingdom committed to reviewing its own legislation, with activists calling for a move to self-determination.⁶²
63. In addition, several countries, including Canada, Nepal, Australia, New Zealand, Pakistan and India, allow for passports with gender markers other than "F" or "M"; these countries typically use "X", which is recognised by the International Civil Aviation Organization.
64. In Australia, non-binary passports (using an "X" gender marker) have been issued since 2003. Initially issued only to persons holding a birth certificate that presents their sex as indeterminate, such passports have since 2011 been made available on the basis of a simple letter signed by a medical doctor. Current government guidelines on the recognition of sex and gender note that "individuals may identify and be recognised within the community as a gender other than the sex they were assigned at birth or during infancy, or as a gender which is not exclusively male or female. This should be recognised and reflected in their personal records held by Australian Government departments and agencies". They expressly recognise that a person's sex and gender may not necessarily be the same and that intersex people may identify as male or female or neither. They provide that where sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified).⁶³
65. In New Zealand, "indeterminate" birth certificates have been available since at least the 1950s.⁶⁴
66. In the United States, courts in Oregon and California have granted permission to at least seven individuals since mid-2016 to have their gender changed to non-binary.⁶⁵
67. The Supreme Court of the Philippines relied on the fact that the complainant's wish to change the sex marker on the birth certificate was the result of a "natural" biological medical condition, and that it was thus reasonable to allow an intersex person to determine her or his own sex as his or her body matured.⁶⁶

⁶¹ "Nicola Sturgeon: Scots to be allowed to change gender so they are neither male nor female", The Telegraph, 31/03/2016 accessible at: http://www.telegraph.co.uk/news/2016/03/31/nicola-sturgeon-scots-to-be-allowed-to-change-gender-so-they-are/?utm_source=dlvr.it&utm_medium=twitter.

⁶² ILGA Annual Report 2017

⁶³ Australian Government Guidelines on the Recognition of Sex and Gender, July 2013, updated November 2015. See §§ 1, 15, 19 and 20; PACE Report (14404) 2017.

⁶⁴ PACE Report (14404) 2017.

⁶⁵ PACE Report (14404) 2017.

⁶⁶ Republic of the Philippines v. Jennifer B. Cagandahan, Supreme Court of the Philippines, Second Division, G.R. No. 166676, 12.09.2008.