

IN THE EUROPEAN COURT OF HUMAN RIGHTS

**Y.P. v. RUSSIA**  
(Application no. 8650/12)

**WRITTEN COMMENTS**  
submitted jointly by

Transgender Europe  
ILGA Europe  
Transgender Legal Defense Project  
Human Rights Centre “Memorial”  
Coming Out

4 August 2017

## I. Introduction

1. These written comments are submitted on behalf of Transgender Europe (TGEU), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), Transgender Legal Defense Project (TLDP), Human Rights Centre “Memorial” (HRC “Memorial”) and “Coming Out”, pursuant to leave granted by the President of the First Section on 10 July 2017.<sup>1</sup> The present case raises the issue of how the effects of legal gender recognition are reflected in the legal documentation on the ties between the trans parent and their biological child, and of the corresponding state obligations derived from the right to respect for family life under Article 8 of the Convention. The present case is part of a wider pattern of violation of rights against trans parents and their families, characterised among others by the withholding of adequate legal recognition and protection. At the same time, the present case comes against the backdrop of change in the area of family law across Europe and beyond caused by an increased awareness of the great diversity of different family formats and their needs for recognition and protection.<sup>2</sup>

2. The present intervention is structured as follows. The second part details the emergence of a range of family formations involving trans people in a frequently indifferent or restrictive legal environment. The third part analyses the principle that a change to an individual’s gender markers in official documents should apply for all legal purposes. The fourth part looks at the particular case of the effects of legal gender recognition in relation to rules on filiation. Finally, the last part looks at the situation of trans people and their families in the Russian Federation.

## II. On transgender parents and their families

3. Existing research estimates that between a quarter and a half of trans people have children.<sup>3</sup> Trans people with children usually come out as trans later in their life.<sup>4</sup> Sixteen percent of the trans respondents in a pan-European survey published by the European Union Agency for Fundamental Rights (FRA) live with at least one child under the age of 18 in their household.<sup>5</sup> Restrictive legal gender recognition

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<sup>1</sup> The interveners gratefully acknowledge the contribution of Constantin Cojocariu in the preparation of this submission.

<sup>2</sup> These developments are described in among others, Jens M. Scherpe, *The Present and Future of European Family Law*, Volume IV, Edward Elgar Publishing Ltd, 2016; Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 *Harvard Law Review* 1185 (2016); Bala, Nicholas, and Christine Ashbourne. "The Widening Concept of Parent in Canada: Step-Parents, Same-Sex Partners, & Parents by ART." *American University Journal of Gender Social Policy and Law* 20, no. 3 (2012): 525-560. The trend of adapting traditional filiation rules to current realities is also visible in the Court’s jurisprudence, in relation to international surrogacy arrangements (*Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts) and *Labassee v. France*, no. 65941/11, 26 June 2014), same-sex couples with children (*X and Others v. Austria [GC]*, no. 19010/07, ECHR 2013), adoption (*Gözüm v. Turkey*, no. 4789/10, 20 January 2015), or children born out of wedlock (*Marckx v. Belgium*, 13 June 1979, Series A no. 31).

<sup>3</sup> Myrte Dierckx, Joz Motmans, Dimitri Mortelmans & Guy T’sjoen (2015): *Families in transition: A literature review*, International Review of Psychiatry, DOI: 10.3109/09540261.2015.1102716, p. 2, [*Families in transition*]; Rebecca L. Stotzer, Jody L. Herman, Amira Hasenbush, *Transgender Parenting: A Review of Existing Research*, the Williams Institute, 2014, [*Transgender parenting*]

<sup>4</sup> *Families in transition*, p. 3.

<sup>5</sup> European Union Agency for Fundamental Rights, *Being Trans in the European Union: Comparative analysis of EU LGBT survey data*, 2014, p.127.

procedures hinder the ability of trans people to enjoy their family life, particularly through eligibility requirements that seek to control their reproductive rights or which trigger the termination of any existing marriage.

4. Some countries do not allow individuals with children to access legal gender recognition.<sup>6</sup> Notably, the Kiev Appeal Administrative Court has recently found that the requirement to not have children under the age of 18 in order to access legal gender recognition was in violation of national law and international human rights norms.<sup>7</sup> Whereas the childlessness requirement has been mostly abandoned, at least in Europe<sup>8</sup> the requirement placed on trans people who are already married to end their marriage before being able to rectify their identification documents is relatively more common. This requirement puts a strain on families wishing to stay together during an already difficult transition period. Notably, this Court has found the divorce requirement to be compatible with the Convention in the particular circumstances prevailing in Finland at the time.<sup>9</sup> Conversely, the United Nations Human Rights Committee has more recently taken the opposite view in a case against Australia, deciding that the divorce requirement in that country was in breach of the right to the protection of the family and the prohibition of discrimination in the International Covenant on Civil and Political Rights.<sup>10</sup> Finally, some countries make legal gender recognition in the case of married trans people contingent on spousal consent.<sup>11</sup> This results in the non-transitioning partner being able to blackmail the trans spouse and effectively block their legal transition by withholding their agreement to a divorce.

5. Beyond formal restrictions, there is abundant evidence to the effect that trans people suffer disproportionately from discrimination in custody and visitation disputes, which are often distorted by preconceived ideas about normative gender roles and expression as well as family formats and the allegedly negative influence that trans parents would have over the development of their children.<sup>12</sup> The Court has in fact examined a dispute between a trans woman and her former spouse over the former's right to visit their child in the case *P.V. v. Spain*.<sup>13</sup> On the facts of the case, the Court decided that the restricted visitation hours were justified by the negative repercussions that the applicant's transition would have had on the child's emotional balance and by psychological evidence that she experienced "temporary emotional instability."

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<sup>6</sup> For example, Order №60 of the Ukrainian Health Ministry «On improvement of medical assistance to persons in need of change (correction) of sex" of 3 February 2011, cancelled on 31 December 2016, automatically disqualified trans people with minor children from legal gender recognition. Japan among other countries currently imposes a childlessness requirement, see Anna Śledzińska-Simon, *Transgender Rights on the Move: Towards Recognition and Gender-Neutral Definition of Parenthood*, in Carlo Casonato and Alexander Schuster, *Rights on the Move: Rainbow families in Europe (conference proceedings)*, University of Trento, 2014, p. 311-326.

<sup>7</sup> Kiev Appeal Administrative Court, Case № 826/16044/14, decision of 30 June 2015 <http://document.ua/pro-viznannja-takim-sho-ne-vidpovidae-pravovim-aktam-vishoyi-doc236923.html>.

<sup>8</sup> Uruguay has chosen to specify explicitly in its legislation that childlessness cannot disqualify a person from legal gender recognition, *License to be yourself: Laws and advocacy for legal gender recognition of trans people*, Open Society Foundations, 2014, p. 19.

<sup>9</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.

<sup>10</sup> HRC, *G. v. Australia*, Communication no. 2172/2012, 17 March 2017, §7.12.

<sup>11</sup> For example England and Wales, under the Legal Gender Recognition Act 2004.

<sup>12</sup> *Families in transition*, p. 2.

<sup>13</sup> *P.V. v. Spain*, no. 35159/09, 30 November 2010.

6. Some countries still impose sterilisation as a pre-condition to legal gender recognition, resulting in permanent infertility.<sup>14</sup> Some national laws went to great lengths to ensure trans people would be unable to beget biological children – for example, in Sweden the legal notion of “lacking the capacity to procreate” was interpreted as including also a ban on saving own reproductive material (eggs or sperm).<sup>15</sup> The sterilisation requirement has been widely condemned for being in breach of fundamental rights, most recently by this Court, in the landmark judgment *A.P., Garçon and Nicot v. France*.<sup>16</sup> On that occasion, the Court noted that consent given to medical treatment forming a mandatory pre-requisite to legal gender recognition was invalid, as it forced trans people to choose between their right to bodily integrity and the right to the recognition of their gender identity. This judgment came against the backdrop of an emerging trend towards legislation on legal gender recognition based on self-identification concomitantly with a separation of legal gender recognition procedures from any gender reassignment treatment that trans people would still be entitled to seek based on informed consent. Thus, 22 countries in Europe do not require sterility, while six countries (Malta – 2015, Ireland – 2015, Denmark – 2015, Norway – 2016, France – 2016 and Belgium – 2017) and several Spanish provinces provide for legal gender recognition based on self-identification, without additional medical requirements.<sup>17</sup>

7. Post-legal gender recognition, trans people may become parents because they retained their reproductive capacity, through assisted reproductive technologies, adoption or recognition of social parenthood.<sup>18</sup> Cases of men giving birth became increasingly common over the past few years, attracting considerable media attention.<sup>19</sup> Australian authorities reported that, 54 transgender men have given birth in Australia during the first half of 2017 following an earlier change in policy allowing persons registered as male to also get support for pregnancy-related care.<sup>20</sup> The numbers of transgender men giving birth are increasingly allowing research to embrace the topic.<sup>21</sup> At the same time, family formats involving trans parents have

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<sup>14</sup> As of May 2017, twenty Council of Europe member states still were in this situation, see the TGEU Trans Rights Map and Index 2017, available at [http://tgeu.org/idahot\\_forum\\_map-launch/](http://tgeu.org/idahot_forum_map-launch/).

<sup>15</sup> See testimony of Aleksa in RFSL, *Forced Sterilization of Trans People – Personal Stories* (video testimonies) (2017) of being threatened by healthcare providers to withhold the permission for legal gender recognition if she had saved sperm, available at: <https://www.rfsl.se/en/organisation/tvaangssteriliseringar-och-skadestaand/forced-sterilisation-of-trans-people-personal-stories/>

<sup>16</sup> *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, 6 April 2017.

<sup>17</sup> TGEU Trans Rights Map and Index 2017.

<sup>18</sup> According to a large study on the social and legal situation of trans people in Belgium, an average of 42,4% of the respondents to the survey wanted to have children, Joz Motmans, *Being Transgender in Belgium*, 2010, p.93. Also see Light et al., *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning in Obstetrics & Gynecology*, 2014 <http://www.ncbi.nlm.nih.gov/pubmed/25415163>.

<sup>19</sup> See for example the case of Thomas Beatie, a trans man who gave birth to three children, which ended up before the Arizona Court of Appeal (*Beatie v. Beatie*, 2014 Ariz. App. LEXIS 156, 2014 WL 3953199 Arizona Court of Appeals, August 13, 2014), as well as nearly two dozen other cases TGEU has documented (see annex).

<sup>20</sup> See Marquita Harris, *More transgender men gave birth this year than you may think*, 13 July 2017, available here: <http://www.refinery29.com/2017/07/163184/54-transgender-men-in-australia-have-given-birth>.

<sup>21</sup> MacDonald et al. *Transmasculine individuals' experiences with lactation, chestfeeding, and gender identity: a qualitative study*, in *BMC Pregnancy and Childbirth*, 2016. The University of Leeds just started a 3-year international project studying the sociological and health care implications of the

multiplied, depending on a number of variables such as the sex assigned at birth and implicitly the reproductive capabilities of the individual in question, the use of various artificial reproductive techniques or the nature of the relationship between the putative parents (marriage, registered partnership or de-facto partnership).<sup>22</sup> Notably, trans people undergoing treatment that results in sterilisation theoretically retain some options for reproduction.<sup>23</sup> However, these options are only accessible for few, depending on availability of knowledge, accessible healthcare providers and often-considerable financial resources.<sup>24</sup>

8. Children in trans families may experience feelings of loss, grief, betrayal or shame over a parent's transition, which may be assuaged by stable and loving relationships within the family.<sup>25</sup> Children also often experience social stigmatisation due to transphobia in society. Various studies reported that children would not allow their trans parents to be seen with them in public, difficulties with being open in public about the trans identity of their parent, as well as fear of stigmatization and bullying.<sup>26</sup> This information is consistent with concerns expressed by the applicant in the present case regarding the forced disclosure of his identity every time he has to present his son's birth certificate. On the other hand, studies regarding outcomes for children with transgender parents have found no evidence that having a transgender parent affects a child's gender identity or sexual orientation development, nor has an impact on other developmental milestones.<sup>27</sup> To accommodate for the great variety in realities of these families TGEU recommends to set up or interpret existing legal provisions in a flexible way to ensure best-possible protection of privacy for the families of trans persons, respecting their gender identity.<sup>28</sup>

### III. The principle of full legal gender recognition

9. The principle that a trans person's officially recognised gender identity should be determinative of all their rights and obligations is embedded in this Court's jurisprudence, in Council of Europe soft law and in the legislation of many countries. With the landmark judgment *Christine Goodwin v. the United Kingdom* handed down in 2002, the Court held for the first time that trans people had to be provided with a possibility to bring their identity documents in line with their gender identity, subject to certain conditions. The Court remarked that although the legal changes envisaged

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reproductive practices of people who become pregnant and/or give birth after transitioning from female to male: <http://pregnantmen.leeds.ac.uk/>, Alexis D. Light, MD, MPH, Juno Obedin-Maliver, MD, MPH, Jae M. Sevelius, PhD. Jennifer L. Kerns, MD MPH, *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning*, *Obstet Gynecol* 2014;0:1–8, DOI: 10.1097/AOG.0000000000000540.

<sup>22</sup> A typology of trans families based on these various criteria is included in Anna Śledzińska-Simon, *supra* note 6.

<sup>23</sup> Through procedures such as embryo cryopreservation, oocyte cryopreservation and ovarian tissue cryopreservation (for trans men), and sperm cryopreservation, surgical sperm extraction and testicular tissue cryopreservation (for trans women), see Chloe De Roo, Kelly Tilleman, Guy T'Sjoen, Petra De Sutter, *Fertility options in transgender people*, *International Review of Psychiatry*, 2016, VOL. 28, NO. 1, 112–119.

<sup>24</sup> In Sweden these options were specifically ruled out under the previous legal regime on legal gender recognition, see *supra* para. 6.

<sup>25</sup> *Families in transition*, p. 3.

<sup>26</sup> *Idem*.

<sup>27</sup> *Transgender parenting*, p. 2.

<sup>28</sup> TGEU, *Legal Gender Recognition in Europe Toolkit*, 2dn edition, November 2016, p. 34.

had significant “repercussions” in terms of birth registration, access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance, these were “far from insuperable.” The Court was unable to identify any specific ‘hardship or detriment’ flowing from legal gender recognition being made available and stated that “society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”<sup>29</sup> The Court also clarified that with legal gender recognition, trans people were entitled to marry in accordance with ‘re-assigned’ gender identity.<sup>30</sup>

10. In *Grant v. United Kingdom*, the Court held that legal gender recognition also extends to age differentials in relation to pensions. In that case, the authorities’ decision to deny a trans woman the right to a pension on equal terms with ‘biological’ women amounted to a breach of Article 8 of the Convention.<sup>31</sup> More recently, the Court reaffirmed the principle of full legal gender recognition as follows: “states are required, in accordance with their positive obligation under Article 8, to recognize the change of gender undergone by post-operative transsexuals through, *inter alia*, the possibility to amend the data relating to their civil status, *and the ensuing consequences*” (emphasis added).<sup>32</sup> A particularly interesting case regarding the consequences of gender reassignment in the field of family law is *X, Y and Z v. United Kingdom*.<sup>33</sup> The applicant, a trans man, complained about the authorities’ refusal to register him as father to his long-standing partner’s child, who had been born by artificial insemination by donor. The Court rejected the application, partially based on the fact that the applicant would have been considered simultaneously a man in relationship to his child and a woman for other legal purposes. The *X, Y. and Z* case predated *Christine Goodwin v. the United Kingdom* and the availability of legal gender recognition in the United Kingdom. Had the case been decided today, the applicant would have presumably prevailed.

11. For its part, the Committee of Ministers called on States to “take appropriate measures to guarantee the full legal recognition of a person’s gender reassignment in all areas of life.”<sup>34</sup> The *Yogyakarta Principles* provide that States should ensure that changes to identity documents will be recognized in all contexts where the identification or disaggregation of persons by gender is required by law or policy.<sup>35</sup> The principle of full legal gender recognition is often spelled out explicitly in the national law of countries where reform in the area has recently taken place. For example, the Maltese law specifies that all public or private actors have an obligation

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<sup>29</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §91, ECHR 2002-VI

<sup>30</sup> *Idem*, §103.

<sup>31</sup> *Grant v. the United Kingdom*, no. 32570/03, §43, ECHR 2006-VII.

<sup>32</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, §68, ECHR 2014.

<sup>33</sup> *X, Y and Z v. the United Kingdom*, 22 April 1997, Reports of Judgments and Decisions 1997-II.

<sup>34</sup> *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010, §21.

<sup>35</sup> International Commission of Jurists, *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, March 2007, Principle 3.A. The *Yogyakarta Principles* have been referred to by the Court, in an implicit acknowledgment of their status as an authoritative articulation of international law as applied to LGBT people - see *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014, joint dissenting opinion of Judges Sajó, Keller and Lemmens.

to issue updated identification documents reflecting the amendments to the birth certificate operated upon legal gender recognition.<sup>36</sup> The law also provides that “Every norm, regulation or procedure shall respect the right to gender identity. No norm or regulation or procedure may limit, restrict, or annul the exercise of the right to gender identity, and all norms must always be interpreted and enforced in a manner that favors access to this right.”

#### **IV. The effects of legal gender recognition on the legal ties with children**

12. To the best of our knowledge, the effects of legal gender recognition on how a person is registered in their child’s documents born before or after the legal recognition of the person’s gender identity have not been specifically regulated in many countries and have generated relatively limited jurisprudence.

13. Two cases decided by courts in Gothenburg and Stockholm in 2015,<sup>37</sup> concerning trans men who gave birth before and after gender reassignment respectively and who asked to be registered as fathers, are particularly relevant. The Tax Agency, acting as defendant in both cases, argued that it lacked a legal basis for changing their designation as “biological mothers”, relying on normative provisions that assigned motherhood in the person who gave birth to the child. In addition, the registration as mother reflected historical fact at least in relation to the first petitioner as well as ensuring the traceability of identities in the population registry. The petitioners prevailed in both cases. In the absence of specific rules on the effects of legal gender recognition in the area, the law had to be interpreted in accordance with relevant international law. In that respect, the courts mentioned the principle derived from this Court’s jurisprudence and relevant Swedish law that the official recognition of gender identity should apply for all legal purposes, as well as “best interests of the child” principle derived from the Convention on the Rights of the Child. The principle of full legal gender recognition and the duty to preserve the confidentiality of all parties involved outweighed the rules governing motherhood which prescribed that all children had to be assigned a biological mother. It was also noted that in any event the rules in question were not absolute and that exceptions were permitted for instance in relation to lesbian partners who were allowed to register as mother and parent respectively, without the need to register a ‘biological father.’

14. A British court took the opposite view, albeit in the specific circumstances prevailing in the United Kingdom. The case before the High Court of Justice involved a trans woman who begot two children born before and immediately after she started hormonal treatment, and who intended to apply for legal gender recognition.<sup>38</sup> Before the High Court she challenged the Registrar General’s refusal to record her status in relation to her children as either ‘parent’ or ‘parent/father’ instead of ‘father.’ That decision was based on a provision in the Gender Recognition Act 2004 (still in force)

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<sup>36</sup> *Act No. XI of 2015 for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person.*

<sup>37</sup> Gothenburg Administrative Court, Case no. 6186-14, 5 October 2015 and Stockholm Administrative Court, Case no. 3201-14, 9 July 2015; more detailed summaries included in TGEU, *Legal Gender Recognition in Europe Toolkit*, 2nd edition, November 2016, p. 59.

<sup>38</sup> *The Queen on the application of JK v The Registrar General for England v Wales* [2015] EWHC 990.

whereby “the fact that a person’s gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.” In balancing the various interests at stake, the High Court noted that since the circumstances when the petitioner was likely to be required to present her children’s full birth certificates were very limited, the interference with her Article 8 rights was relatively minor. At the same time, the concern that children would suffer some stress due to the disclosure of the claimant’s status as a trans person, was counterbalanced by their right to know the identity of their biological parentage. The High Court reasoned that the ability to change a child’s birth certificate would be contrary to the coherence of the birth registration scheme, in particular the principle that a birth certificate showed the relevant details of a child as at their birth, and could not be changed. In view of all these considerations, and despite acknowledging the importance of protecting a person’s gender identity, the High Court rejected the complaint.

15. In Germany, the legal protections available to trans parents have also been the object of intense debate. A law on the regulation of maternity protection adopted on 23 May 2017 clarified that the notion of “pregnant or breastfeeding woman” should be read to include “any person who is pregnant or has recently given birth or is breastfeeding”, irrespective of the legal gender status in their birth registration, as explained in the reasoning of the law proposal.<sup>39</sup> The law is designed to cover the situation arising since 2011, when the surgery requirement for legal gender recognition had been abandoned, enabling persons with a male gender marker to give birth. It also became necessary after the German civil status law was changed in 2013 to provide for the non-registration of a gender marker for newborn intersex persons. Since adults can also use this regulation, the lawmakers wanted to ensure protection in relation to pregnancy and child-birth is adequately covering these situations. A report on the needs on reforming the German Transsexual Law commissioned by the Federal Ministry for Family, Seniors, Women and Youth published in November 2016<sup>40</sup> highlighted the fact that the legal assumptions related to parenthood did not sufficiently accommodate the situation of trans parents with biological children, leaving them without effective protection against discrimination. Thus, trans parents were denied the recognition of parenthood according to their gender identity or their registered gender, as legal protection was only granted according to the biological sex. A report on gender equality and law published in 2017, commissioned by the same Ministry, proposed to balance the rights of the trans parent with the rights of children to knowing their parentage through a layered legislative scheme that combined the gender-neutral designation as ‘parents’ for those begetting children with

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<sup>39</sup> Gesetzentwurf der Bundesregierung, *Entwurf eines Gesetzes zur Neuregelung des Mutterschutzrechts im Gesundheitsschutz*, Drucksache 18/8963, p. 53 available here: <https://www.bmfsfj.de/blob/jump/76054/gesetzentwurf-muschg-data.pdf>; Ulrike Lembke, *Substantial amendments to the Statute on Maternity Protection*, 8 September 2016, available here: <http://www.equalitylaw.eu/downloads/3875-germany-substantial-amendments-to-the-statute-on-maternity-protection-pdf-130-kb>.

<sup>40</sup> Adamietz L., Bager K., *Regelungs- und Reformbedarf für transgeschlechtliche Menschen - Gutachten im Auftrag des Bundesministeriums für Familie, Frauen, Senioren und Jugend*, November 2016, Legal Faculty of the Humboldt University (Berlin), available here: <https://www.bmfsfj.de/blob/jump/114064/regelungs--und-reformbedarf-fuer-transgeschlechtliche-menschen---band-7-data.pdf>.



a possibility of identifying the parent who gave birth.<sup>41</sup>

16. It is also worth noting that the appeal against the decision of a Berlin court denying a trans man who gave birth the possibility of being registered as father is currently pending before the Federal Supreme Court.<sup>42</sup> After the sterilisation requirement in LGR was declared unconstitutional in 2011, the provision in the German Transsexual Law (§7) annulling the name change if a transgender person procreates within 300 days after the decision is still enforced in Germany. As a result a transgender man who gave birth is registered as “mother” with the previous female first name(s), a transgender woman respectively as “father”. They also lose automatically the right to carry the name corresponding to their gender identity and have to bring new court proceedings presenting “strong evidence” to revert this decision. Decisions according to §7 only affects the change in name, but not a legal gender marker change. As a result, the transgender male parent retains the male gender marker but get the previously used female name back. In contrast, it is common practice that a trans man with a legal male gender marker is recognised as the father if his legally female partner gives birth to a child. Applying §1592 of the Civil Code in accordance with §5 (Revelation ban) and §10 (Effects of the decision) of the German Transsexual Law, parental recognition happens either automatically upon birth if the two parents are married or by declaration. This legal set-up is placing homosexual transgender men wishing to form a family at a disadvantage compared to heterosexual transgender men.

17. The adoption of legislation permitting same-sex marriage in many Member States may provide a more accommodating framework for trans parents. For example, Malta has recently adopted legislation<sup>43</sup> that would inter alia remove the gendered connotations of parenthood as follows:

- References to “husband and wife” will be changed to the gender neutral “spouse”;
- The gender neutral “parents” will replace references to “fathers” and/or “mothers”;
- The ‘person/spouse who gave birth’ instead of ‘mother’.

This solution, in line with that envisaged in Germany and mentioned above, may also prove suitable for trans parents seeking changes in their children’s birth certificates that conform with their gender identity.

18. Another feature of legal gender recognition that is material in the present case is the paramount need of ensuring the confidentiality of information pertaining to the gender reassignment of the person in question. Many laws on gender recognition contain safeguards against the unwanted disclosure of such private information by private or public actors that may come across it in connection to their functions.<sup>44</sup> In that respect, it is worth mentioning that the above-mentioned British High Court of

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<sup>41</sup> German Institute for Human Rights, *Gender diversity in law: the status quo and the development of regulatory models for recognising and protecting gender diversity (Short version in English)*, p. 14-15, 16 June 2017, available here: [https://m.bundesregierung.de/Content/Infomaterial/BMFSFJ/Geschlechtervielfalt\\_im\\_Recht\\_-\\_Band\\_8\\_-\\_Gender\\_diversity\\_in\\_law\\_BMFSFJ16-116954.html](https://m.bundesregierung.de/Content/Infomaterial/BMFSFJ/Geschlechtervielfalt_im_Recht_-_Band_8_-_Gender_diversity_in_law_BMFSFJ16-116954.html).

<sup>42</sup> Chamber Court Berlin, decision of 30 October 2014, Az. 1 W 48/14, available here: <http://tinyurl.com/ycpke3c9>. The appeal is currently pending before the Federal Supreme Court.

<sup>43</sup> Marriage Act and other Laws (Amendment) Act, 2017.

<sup>44</sup> For example the Gender Recognition Act 2004 in the United Kingdom.

Justice judgment was premised on the fact that the full birth certificate that featured information revealing the claimant's identity as a trans person was rarely in use, and therefore the risk of any unwanted disclosure was more or less hypothetical. This however is not usually the case in civil law systems such as Russia, where birth certificates are extensively referred to in a variety of circumstances.

## V. The situation of trans people and their families in Russia

19. While cases on change of documentation of trans parents' children have not been widely addressed by the Russian jurisprudence and there are no specific provisions in law to regulate such situations, in practice a certain number of trans persons change their own gender markers and names while having been legally recognized as their children's parents. For example, since 2012, TLDP, the main organisation in Russia that provides legal assistance in legal gender recognition cases,<sup>45</sup> supported several trans persons who managed to get their documentation (including their gender marker and names) changed without losing recognition as their children's parents.<sup>46</sup> 17.4% of trans persons living in Russia who participated in a survey done by the LGBT organisation "Coming Out" indicated that they had their own children.<sup>47</sup> 57 out of 112 respondents (all of them were patients of the Reconstructive Surgery, Andrology and Sexology Clinics in Moscow) who participated in a survey had children (70 children in total, including 64 who were born before and 9 after their parents' transition).<sup>48</sup>

20. Under Russian law,<sup>49</sup> a birth certificate and the birth register include information about a child's parents under the title "a mother" and "a father". No options of gender-neutral indications (such as, for example, "parent 1" and "parent 2") are provided. Birth certificates are frequently used in Russia. As a result, when a trans parent who changed their documentation, but was not able to get relevant amendments in their children's birth certificates, has any contacts with third parties representing the children's interests, it leads to revealing the trans person's personal history and, usually, discrimination against that person and their family members. For example, TLDP provided legal advice to a trans man who was forced to reveal his trans identity while registering his child at a school and who faced mistreatment from the school administration. Moreover, according to a monitoring research done by TLDP in 2015-16, 50% of respondents faced discrimination in employment, 31% in postal services, 24% in bank services, and 17% in public transportation services due to incongruence between their documentation and identity/appearance.<sup>50</sup> Trans

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<sup>45</sup> Only in 2016, TLDP delivered 600 legal consultations and supported 77 court proceedings on legal gender recognition in different Russian regions.

<sup>46</sup> Information on one of these cases is available at: <http://www.avers-samara.com/single-post/2017/07/12/transsud> (accessed on 20 July 2017).

<sup>47</sup> Семенова С. et al. (2014). *Гендерная идентичность в эпицентре дискриминации: жизнь транс\* людей в России*. Санкт-Петербург, p. 13.

<sup>48</sup> Демецкая Я.А. et al. (2017). Трудности формирования семей трансгендерами. *Успехи современной науки*, 9(4), pp. 218-224.

<sup>49</sup> See e.g., the Federal Law on Acts of Civil Status no. 143-FZ of 15 November 1997, chapter II, and the Forms of civil status registries approved by the Order of the Ministry of Justice of the Russian Federation no. 47 of 28 March 2014.

<sup>50</sup> See Проект правовой помощи трансгендерным людям. (2016). *Нарушения прав трансгендерных людей в России: результаты исследования*. Санкт-Петербург. Available at: [http://pravo-trans.eu/files/violation\\_of\\_the\\_rights\\_of\\_transgender\\_people\\_in\\_Russia.pdf](http://pravo-trans.eu/files/violation_of_the_rights_of_transgender_people_in_Russia.pdf) (accessed on 20 July 2017).

persons are also hindered by public authorities to practice their parental rights, e.g. as documented in a case of a trans woman being denied visitation rights.<sup>51</sup>

21. The situation is exacerbated by the discriminatory social and legal environment in Russia. According to a public opinion poll conducted by “Levada Center” in 2014, 66% of Russian respondents had negative attitudes towards “transsexual people”.<sup>52</sup> The United Nations Committee on the Rights of the Child expressed its concerns in relation to the Russian legislation prohibiting “propaganda of unconventional sexual relationships”, generally intended to protect children, but which encouraged the stigmatization of and discrimination against, inter alia, children from LGBTI families.<sup>53</sup> The Committee recommended that the Russian Federation repeal its laws on “propaganda” and ensure that children from LGBTI families are not subjected to any forms of discrimination.<sup>54</sup> However, the law is still in force, and the level of discrimination faced by trans persons and their family members remains substantial.

22. Summing up, trans parents and their children in Russia require legal protection and recognition of their relations through, inter alia, providing possibilities to amend children’s birth records and certificates after a change of their parents’ gender marker and names under legal gender recognition procedure. While ideally this would require relevant legislative initiatives, even the current laws already provide for some solutions. Particularly, according to article 5 of the Family Code of the Russian Federation, “if relations between family members have not been regulated by the family legislation or by an agreement between the parties, and in the absence of the norms of civil law directly regulating the said relations, to these relations shall be applied, if this does not contradict their essence, the norms of family law and (or) civil law, regulating similar relations (the analogy of law)”. According to article 63(2) of the Federal Law on Acts of Civil Status, “information about parents in a birth registry related to an underage child, shall be amended in case of change of their parents’ names”. By analogy, one could claim that a child’s documentation should also be changed in case of a change of gender marker and names of their parent. However, as far as the forms of birth registries in Russia include gender-related titles (“a mother” and “a father”), amendments in these titles should also be done.

23. This logic was applied in 2016 by a court in the city of Priozersk (Leningrad region, Russia), in a case litigated by the "Coming Out" LGBT group (St. Petersburg).<sup>55</sup> In 2016, a transgender man, after changing his documents in the birth registry in 2014, applied for changes to be made in the birth registry of his child. Originally, the birth certificate of his child, born in 2009, included information in the “mother” box, while there was no information in the “father” box, since at the time

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<sup>51</sup> See e.g. <https://www.lgbtnet.org/ru/content/sud-vnov-otkazal-transgendernoy-zhenshchine-vo-vstrechah-s-rebenkom> (accessed on 20 July 2017). More information on such cases see in Проект правовой помощи трансгендерным людям. (2016). *Нарушения прав трансгендерных людей в России: результаты исследования*. pp. 73-74.

<sup>52</sup> See <https://www.levada.ru/2014/06/21/otnoshenie-rossiyan-k-nudistam-i-transseksualam/> (accessed on 20 July 2017).

<sup>53</sup> Committee on the Rights of the Child (2014). Concluding Observations: Russian Federation. UN Doc. CRC/C/RUS/CO/4-5, para 24.

<sup>54</sup> *Ibid*, para 25.

<sup>55</sup> Decision of the Priozersk city court (Leningrad region, Russia), dated 21.07.2016, case no. 2-1081/2016.

the transgender man was legally recognized as the mother of the child, and later received legal recognition as a man. The transgender man asked to change the child's birth certificate to include information about himself in the "father" box. The Russian registration authority denied the application. The transgender man applied to court, which in 2016 obliged the Russian registration authority to make changes to the birth certificate of the child: to enter dash in the "mother" box, and the data of the transgender man in the "father" box.

24. The court pointed out that "if the gender of a person is changed, it is possible not only to change the data of that person (gender, first/last name in the birth record of the person whose gender has been changed), but also to amend other documents, including those in which this person is indicated to be the parent (birth certificates of children born and registered before the gender change)." The court concluded that although the Russian law did not regulate such a situation, it was possible to apply the principle by legal analogy based on Article 63 (2) of the Federal Law on Acts of Civil Status.

*Enclosed:* List of cases of transgender parents collected by TGEU, as of 01 August 2017