

# PROTECTING HUMAN RIGHTS OF TRANSGENDER PERSONS



A short guide  
to legal gender recognition

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

French edition:

*Protection des droits de l'homme  
des personnes transgenres*

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# **PROTECTING HUMAN RIGHTS OF TRANSGENDER PERSONS**

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# Legal gender recognition

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**E**veryday tasks such as picking up a parcel, opening a bank account or simply using a personalised public transport ticket can become a daily source of difficulty if one's gender identity<sup>1</sup> does not match with the gender recorded in official documents such as an ID card, passport or birth certificate. Without official documents matching their gender identity, transgender persons<sup>2</sup> can easily be suspected of using falsified documents. They may also have to reveal their transgender identity against their will. This makes them vulnerable to violations of their right to privacy as well as to discrimination and violence. As a consequence, transgender persons are excluded from their full participation in and contribution to society, including in the labour market. For instance, having educational or employment certificates that do not reflect their gender is a common cause of unemployment among transgender persons.

1. 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 a personal sense of one's body and other expressions of gender, including dress, speech and mannerisms.
2. According to the definition of the Commissioner for Human Rights, "transgender persons include persons who have a gender identity which is different from the gender assigned to them at birth and those people who wish to portray their gender identity in a different way from the gender assigned at birth. It includes those people who feel they have to, prefer to, or choose to, whether by clothing, accessories, mannerism, speech patterns, cosmetics or body modification, present themselves differently from the expectations of the gender role assigned to them at birth. This includes, among many others, persons who do not identify with the labels 'male' and 'female', transsexuals, transvestites and cross-dressers." (*Discrimination on grounds of sexual orientation and gender identity in Europe*, Commissioner for Human Rights, Council of Europe Publishing, 2011, p. 132) Worldwide estimates for male-to-female transgender people are 1 in every 30 000 people. Female-to-male transgender persons are estimated at 1 in every 100 000 people. However, these numbers are likely underestimated because they only account for transgender persons diagnosed with Gender Identity Disorder (GID) and/or people receiving services at gender clinics. They therefore do not include all transgender persons. See "Report of the Task Force on Gender Identity and Gender Variance", American Psychological Association, 2009 and G. DeCuypere et al., "Prevalence and Demography of Transsexualism in Belgium", *European Psychiatry*, April 2007.

States can legally recognise a transgender person's gender identity by allowing for the change of name and gender in official documents and registries. This process is called legal gender recognition. From a legal point of view, it allows transgender persons to live in accordance with their experienced gender identity.

# European standards for legal gender recognition

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**T**he European Court of Human Rights (the Court) has issued judgments with regard to the recognition of a transgender person's gender identity. The Court has ruled that a state's failure to alter the birth certificate of a person who has undergone gender reassignment, and to recognise the "new" gender, constitutes a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR). The Court found, in *B. v. France* and in particular in *Christine Goodwin v. the United Kingdom*, that the refusal by a state to legally recognise a completed sexual reassignment constituted a violation of Article 8.<sup>3</sup>

The situation is very diverse in Council of Europe member states as regards the rights of transgender persons seeking legal gender recognition. Most countries do not have procedures in place for legal gender recognition. In an issue paper on gender identity, the former Council of Europe Commissioner for Human Rights, Thomas Hammarberg,<sup>4</sup> points out that "in most cases the procedures for recognition of gender are a combination of complicated legal and medical requirements where the borderline between the two are often blurred".<sup>5</sup>

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3. Court judgments *B. v. France*, No. 13343/87 (1992); *Goodwin v. the United Kingdom* and *I. v. the United Kingdom*, Nos. 28957/95 and 25680/94 (2002).

4. Mr Hammarberg was the Council of Europe Commissioner for Human Rights from 1 April 2006 to 31 March 2012.

5. Thomas Hammarberg, "Human rights and gender identity", CommDH/IssuePaper(2009)2, p. 16-18. See also "Homophobia and Discrimination on the grounds of sexual orientation in the EU Member States. Part I Legal Analysis", European Union Agency for Fundamental Rights, 2008, pp. 131-133.



In 2010, the Council of Europe adopted 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.<sup>6</sup> Paragraphs 20 to 22 of the appendix to the recommendation provide guidance on how member states can ensure the right to respect for private life of transgender persons.

20. 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.

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.

In 2012, the Steering Committee of Human Rights (CDDH) of the Council of Europe, in its "Questionnaire on the implementation of 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", asked member states about the state of implementation of this recommendation. Some 39 member states replied to the questionnaire. The review showed that the situation of transgender persons, including aspects related to legal gender recognition, needs particular attention.<sup>7</sup> Less than half (17) of the replying member states have appropriate measures in place to guarantee full legal recognition of a person's gender reassignment in all areas of life in accordance with the provisions of paragraph 21 of the appendix to the recommendation. Only 15 member states indicated that they are either currently working on or intend to work on this issue. An even lower number of member states (13) indicated they have reviewed their state's

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6. Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1606669>.

7. Report on the implementation of the Committee of Ministers' Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity. Steering Committee for Human Rights (CDDH), CDDH (2013)R77 Addendum VI, paragraph 90.

prior requirements for legal recognition of a gender reassignment in order to remove any abusive requirements.<sup>8</sup>

The information above highlights the need for further work on issues related to legal gender recognition in all 47 Council of Europe member states. In its 5th monitoring cycle, the European Commission against Racism and Intolerance (ECRI) systematically recommends that authorities develop legislation on gender recognition and gender reassignment ensuring that it is in line with international standards and expertise.

On a positive note, many member states are considering ways to improve the protection of transgender persons' human rights, in particular with regard to legal and policy measures to ensure the full legal recognition of gender reassignment in all areas of life and reviewing of prior requirements for recognising transgender persons' gender identity.

The Parliamentary Assembly welcomes, in its Resolution 2048 (2015) on discrimination against transgender people in Europe, "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".<sup>9</sup>

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8. Member states' replies to the CDDH Questionnaire on the implementation of Committee of Ministers' Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity. All the answers are available at: [www.coe.int/t/dghl/standardsetting/hrpolicy/Others\\_issues/LGBT/Follow\\_up\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Others_issues/LGBT/Follow_up_en.asp).
  9. <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=21736&lang=EN>.



# Legal challenges

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## Prior requirements for legal gender recognition

In many Council of Europe member states, procedures for legal gender recognition include certain criteria that an individual has to meet before being able to change their name and registered gender. The Committee of Ministers of the Council of Europe has held that such criteria “should be regularly reviewed in order to remove abusive requirements”.<sup>10</sup> The explanatory memorandum to Recommendation CM/Rec(2010)5 lists some of the abusive prior requirements for legal recognition of gender: irreversible sterilisation, hormonal treatment, preliminary surgical procedures and sometimes proof of the person’s ability to live for a long period of time in the new gender (so called “real-life experience”).<sup>11</sup> The list is not exhaustive, as requirements in Council of Europe member states may also include age and civil status.

Even though states have a margin of appreciation on what requirements they can set for legal gender recognition, the Court has emphasised the importance of keeping the need for such criteria under review “having regard to scientific and societal developments”.<sup>12</sup> The requirements should not be arbitrary. Within this margin of appreciation, member states have to ensure that a fair balance is struck between competing interests of the individual and the community.<sup>13</sup> Member states have to take into account not only the individual’s right to respect for private life, but also other individual human rights at stake, such as the respect for human dignity and physical integrity, the prohibition of torture as well as the right to a fair trial and an effective remedy.

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10. CM/Rec(2010)5, Appendix, paragraph 20.

11. Explanatory Memorandum to CM/Rec(2010)5, see section IV. Right to respect for private and family life, <https://wcd.coe.int/ViewDoc.jsp?id=1570957>.

12. *Goodwin v. the United Kingdom* and *I. v. the United Kingdom*, Nos. 28957/95 and 25680/94 (2002).

13. *Hämäläinen v. Finland*, No. 37359/09 (2014).

In the replies to the CDDH questionnaire, 15 Council of Europe member states have indicated that they are working on, or intend to work on, some aspects of legal gender recognition. Some member states indicate that they will review prior requirements for legal gender recognition; others that they will review how to guarantee the full legal recognition of a person's gender identity. Some member states have recently undertaken reforms regarding legal gender recognition of transgender persons. They provide examples of good practice for the full respect of transgender persons' human rights when dealing with legal gender recognition.

## Medical requirements

Currently, 29 of the Council of Europe member states have in place requirements such as receiving a psychiatric diagnosis or compulsory medical interventions such as hormonal treatment and surgery for legal gender recognition.<sup>14</sup> Council of Europe bodies are increasingly drawing attention to compulsory intrusive medical interventions. The Commissioner for Human Rights has recommended that member states should abolish sterilisation and other compulsory medical treatments from the prior requirements for change of name and gender.<sup>15</sup> The Parliamentary Assembly of the Council of Europe has adopted a report that calls on states to stop coerced sterilisations or castrations, including of transgender people.<sup>16</sup> Furthermore, in Resolution 2048 (2015), the Assembly calls upon member states to “abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis”. In its conclusions from 2013, the European Committee of Social Rights has included a question to contracting parties on whether the legal recognition of gender requires, in law or in practice, sterilisation or any other invasive medical treatment that could impair the health or physical integrity of transgender persons.<sup>17</sup>

The Committee of Ministers, in its Recommendation CM/Rec(2007)17 on gender equality standards and mechanisms, affirms that “both women and men must have a non-negotiable right to decide over their own body, including sexual and reproductive matters. Such acknowledgement must be reflected

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14. ILGA Europe Rainbow Map 2014. [www.ilgaeurope.org/home/publications/reports\\_and\\_other\\_materials/rainbow\\_europe](http://www.ilgaeurope.org/home/publications/reports_and_other_materials/rainbow_europe).

15. “Human rights and gender identity”, *op. cit.*, p. 23-25, 44.

16. Parliamentary Assembly Resolution 1945 (2013) on putting an end to coerced sterilisations and castrations, <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=19984&lang=EN>.

17. Conclusions 2013, General Introduction, European Social Charter, European Committee of Social Rights.

in the development, implementation, access to, monitoring and evaluation of health-care services and in research priorities.”<sup>18</sup> The Commissioner for Human Rights has stressed that requiring sterilisation or other surgery as a prerequisite to legal recognition of gender, ignores the fact that while many transgender persons wish to have access to such treatments, others may not want or need them. In addition, such treatments are not always prescribed by a transgender person’s medical specialist. The Commissioner has also pointed out that states which impose intrusive physical procedures on transgender persons effectively undermine their right to found a family.<sup>19</sup>

The Court, in its judgment *YY. v. Turkey*,<sup>20</sup> found that a state’s refusal to authorise a transgender person, who has not been previously sterilised, to have access to gender reassignment breaches the right to respect for private life (Article 8 of the ECHR).<sup>21</sup>

The requirement of sterilisation has been abandoned through court procedures or legislative changes in several member states. In Austria<sup>22</sup> and Germany<sup>23</sup> the requirement of sterilisation has been declared unconstitutional by their respective constitutional courts. In Switzerland, the Zurich High Court decided that there is no need for an individual to be irreversibly infertile to obtain legal recognition of gender.<sup>24</sup> The Administrative Court of Appeal in Stockholm, in a verdict of 19 December 2012, found the requirement of sterilisation in legal gender recognition to be unlawful and a violation of the European Convention on Human Rights.<sup>25</sup> In the Netherlands, the explanatory memorandum to the Gender Recognition Law<sup>26</sup> recognises that in the view of contemporary

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18. Recommendation CM/Rec(2007)17 of the Committee of Ministers to member States on gender equality standards and mechanisms. (21 November 2007), Principle 44.

<https://wcd.coe.int/ViewDoc.jsp?id=1215219&Site=CM>.

19. “Human rights and gender identity”, op. cit., pp. 19 and 21.

20. *YY. v. Turkey*, No. 14793/08 (2015).

21. In 1997, the Court declared inadmissible the case of *Roetzheim v. Germany* (No. 40016/98), which concerned the validity of a prior requirement of sterilisation for legal gender recognition.

22. Austrian Constitutional Court (VfGH), Case V 4/06 (2006).

23. German Constitutional Court (BVerfG), Case 1 BvR 3295/07 (2011).

24. Cantonal High Court of Zurich, Case NC090012 (2011).

25. Court verdict in English: [http://tgeu.org/wp-content/uploads/2015/01/Sweden\\_Sterilisation\\_verdict\\_19\\_12\\_2012\\_EN.docx](http://tgeu.org/wp-content/uploads/2015/01/Sweden_Sterilisation_verdict_19_12_2012_EN.docx). Verdict in Swedish: [www.tgeu.org/sites/default/files/Sweden\\_Sterilisation\\_verdict\\_19\\_12\\_2012\\_SE.pdf](http://www.tgeu.org/sites/default/files/Sweden_Sterilisation_verdict_19_12_2012_SE.pdf).

26. Wijziging van Boek 1 van het Burgerlijk Wetboek en de Wet gemeentelijke basisadministratie persoonsgegevens in verband met het wijzigen van de voorwaarden voor en de bevoegdheid ter zake van wijziging van de vermelding van het geslacht in de akte van geboorte. [www.rijksoverheid.nl/documenten/brieven/2012/09/03/memoratie-van-toelichting-voorwaarden-voor-en-de-bevoegdheid-ter-zake-van-wijziging-van-de-vermelding-van-het-geslacht-in-de-akte](http://www.rijksoverheid.nl/documenten/brieven/2012/09/03/memoratie-van-toelichting-voorwaarden-voor-en-de-bevoegdheid-ter-zake-van-wijziging-van-de-vermelding-van-het-geslacht-in-de-akte).

standards the prerequisite of irreversible infertility “goes too far, and must be considered disproportionate in relation to the desired result: changing the description of sex in the birth certificate”.

The Commissioner for Human Rights has also pointed out problems in the medical classification of transgender identities<sup>27</sup> and the Parliamentary Assembly called upon member states to “amend classifications of diseases used at national level and advocate the modification of international classifications, making sure that transgender people, including children, are not labelled as mentally ill, while ensuring stigma-free access to necessary medical treatment”.<sup>28</sup>

The World Health Organization (WHO), in its International Statistical Classification of Diseases and Related Health Problems (ICD-10), lists transsexualism as a “mental and behavioural disorder”.<sup>29</sup> Reflecting progress in scientific and political debate, WHO has proposed in its ICD-11 beta draft<sup>30</sup> that the category “gender identity disorders” would be removed from the Mental and Behavioural Disorders chapters. To facilitate the stigma-free access to trans-specific health care, the diagnosis “gender incongruence in adolescents and adults” is mentioned in the beta draft of ICD-11.

A clear trend can be observed among states in Europe that are moving from compulsory medical requirements towards procedures based on self-determination. Norway,<sup>31</sup> Sweden<sup>32</sup> and Finland<sup>33</sup> are reviewing their legal recognition procedures following the examples of Denmark (2014),<sup>34</sup> Malta (2015)<sup>35</sup> and Ireland (2015).<sup>36</sup> These countries no longer require a psychiatric diagnosis on “gender identity disorder” and/or psychological analysis for the

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27. “Human rights and gender identity”, op. cit., pp. 23, 25, 44.

28. Parliamentary Assembly Resolution 2048 (2015) on discrimination against transgender people in Europe, 22 April 2015, paragraphs 6.2.2. and 6.3.3.

29. F64.0 in ICD-10.

30. 3. 1. <http://apps.who.int/classifications/icd11/browse/l-m/en>.

31. [www.regjeringen.no/contentassets/d3a092a312624f8e88e63120bf886e1a/rapport\\_juridisk\\_kjonn\\_100415.pdf](http://www.regjeringen.no/contentassets/d3a092a312624f8e88e63120bf886e1a/rapport_juridisk_kjonn_100415.pdf).

32. See Swedish Government inquiry report: available at [http://tgeu.org/wp-content/uploads/2015/07/Sweden\\_Report\\_Age-Requirement-LGR.pdf](http://tgeu.org/wp-content/uploads/2015/07/Sweden_Report_Age-Requirement-LGR.pdf).

33. The final report of the expert group of the Finnish Social and Health Ministry (in Finnish): *Sosiaali- ja terveystieteiden tutkimusryhmän loppuraportti Sukupuolen oikeudellisen vahvistamisen edellytykset* <http://stm.fi/julkaisu?pubid=10024/125997>.

34. L 182 Motion to amend the Act on the (Danish) Civil Registration System, unofficial English translation available at: [http://tgeu.org/sites/default/files/Denmark\\_Civil\\_Registry\\_Law.pdf](http://tgeu.org/sites/default/files/Denmark_Civil_Registry_Law.pdf).

35. [https://socialdialogue.gov.mt/en/Public\\_Consultations/MSDC/Documents/GIGESC/70%20-%202014%20-%20GIGESC%20-%20EN.pdf](https://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/GIGESC/70%20-%202014%20-%20GIGESC%20-%20EN.pdf).

36. [www.oireachtas.ie/documents/bills28/acts/2015/a2515.pdf](http://www.oireachtas.ie/documents/bills28/acts/2015/a2515.pdf).

legal recognition of gender. The completion of the ICD reform process will encourage governments to reform their procedures.<sup>37</sup>

Many national legal gender recognition procedures still require a diagnosis of transsexualism from a mental-health professional. While the Court case law recognises the role of medical aspects in the gender recognition procedure, medical requirements must not be disproportionate. In the case of *Van Kück v. Germany*,<sup>38</sup> the Court held that placing the burden of proof for the medical necessity of gender reassignment on the applicant was disproportionate, as gender identity is one of the most intimate areas of a person's private life. Consequently, the Court decided that the national procedure had resulted in a violation of Articles 6, paragraphs 1 and 8, of the ECHR because it did not fulfil the criteria of a fair hearing and did not respect the applicant's right to privacy.

## Civil status

In countries which do not allow same-sex marriages, a situation where a transgender person who has entered into a different-sex marriage, and who wants to stay married after going through legal gender recognition, brings an additional challenge for legislators: legal same-sex unions. The Commissioner for Human Rights has recommended that states remove any restrictions which prevent transgender persons from remaining in an existing marriage after the legal recognition of their gender.<sup>39</sup> The Commissioner also draws attention to the fact that, in several member states, a parent who chooses to undergo gender reassignment might lose the custody of their child, as a result of a forced divorce.<sup>40</sup>

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37. The World Health Organization is currently revising the International Statistical Classification of Diseases and Related Health Problems (ICD). In the working draft (ICD-11 beta draft), WHO proposes to remove the category "gender identity disorders" from section 7: Mental and behavioural disorders (which used to be section F in the ICD-10, <http://apps.who.int/classifications/icd11/browse/l-m/en>); "Human rights and gender identity", op. cit., pp. 23-25; Principle 3 of the Yogyakarta Principles states: "Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom." Principle 18 states: "Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, a medical condition and are not to be treated, cured or suppressed." Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006. [www.yogyakartaprinciples.org/](http://www.yogyakartaprinciples.org/).

38. *Van Kück v. Germany*, No. 35968/97 (2003).

39. "Human rights and gender identity", op.cit., pp. 22-23, 45.

40. *Ibid.*, p. 22.



In the case of *Hämäläinen v. Finland*,<sup>41</sup> the Court held that it was not disproportionate to require the conversion of the marriage of a transgender woman into a registered partnership as a precondition to having her acquired female gender legally recognised. As the legal concepts of marriage and registered partnership are almost identical in Finland, the Court found no violation of Article 8 or Article 14 taken in conjunction with Articles 8 and 12. The Court held that there had been no violation of the right to respect for family life as the conversion of the transgender woman's marriage into a registered partnership did not have any implications on the paternity of her biological child or on the responsibility for the care, custody and maintenance of the child. The judgment should be interpreted as allowing for the change of civil status as a precondition to legal gender recognition when an equivalent to marriage that safeguards the rights of the spouses and their children exists.<sup>42</sup>

Although some states provide for the protection of marriage between a man and a woman in their constitution, this constitutional protection does not necessarily cease to apply if one of the spouses acquires legal gender recognition of their experienced gender. For example, although the German Constitution does not refer to the protection of marriage, in 2008 the German Constitutional Court ruled that the change of sex on a birth certificate must not lead to a mandatory divorce, recalling that Article 12 of the ECHR provides for the protection of marriage. This decision prompted a change of German legislation and ended compulsory divorce for married couples in which one of the spouses is transgender.<sup>43</sup> The German legislator justified this approach by stating that "spouses must be able to rely on the fact that their lawfully contracted marriage will remain in force as long as they live together and bear mutual responsibility". As far as this common desire to remain married persists after the change of sex of one of the spouses, the marriage falls under the constitutional protection.<sup>44</sup>

Other Council of Europe member states<sup>45</sup> have abandoned the requirement of divorce as a precondition to legal gender recognition. In 2006, the Austrian

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41. *Hämäläinen v. Finland*, No. 37359/09 (2014).

42. Compare: [www.thejournal.ie/readme/transgender-laws-ireland-1597295-Jul2014/?utm\\_source=shortlink](http://www.thejournal.ie/readme/transgender-laws-ireland-1597295-Jul2014/?utm_source=shortlink).

43. German Constitutional Court (BVerfG), Case 1 BvL 10/05 (2008).

44. See "Proposed transgender laws are good news for lawyers – not couples"; Opinion by Michael Farrell in *The Journal*, ie 31.7.2014; <http://dip21.bundestag.de/dip21/btd/16/131/1613157.pdf>.

45. 18 member states: Austria, Belgium, Croatia, Denmark, Estonia, Georgia, German, Iceland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland. See Transgender Europe's Trans Rights Europe Map 2015, available at: [http://tgeu.org/wp-content/uploads/2015/05/trans-map-Side-B-may-2015\\_image.png](http://tgeu.org/wp-content/uploads/2015/05/trans-map-Side-B-may-2015_image.png).

Constitutional Court granted a transgender woman the right to have her gender recognised while remaining married to her wife. The Court ruled that “changing a sex entry in a birth certificate cannot be hindered by marriage”.<sup>46</sup> In 2009, a Court of First Instance in Luxembourg City permitted a married transgender woman to rectify the gender marker and first name on her birth certificate.<sup>47</sup> In 2012, the Court of Appeals in Rennes, France, refused to enforce a divorce requirement, on the basis that the marriage remained valid post-transition.<sup>48</sup> In all these cases, the marriage between a transgender person and their spouse has been able to continue under the same rights and obligations, as a guarantee of the legal certainty for the spouses.

The Commissioner for Human Rights also draws attention to the fact that in several member states, a parent who chooses to undergo gender reassignment might lose custody rights of their child as a result of a forced divorce.<sup>49</sup> Also, the Court clarified that the gender identity of a person cannot be used to invoke custody or visiting rights of a parent.<sup>50</sup>

## Age

Procedures for legal gender recognition might involve explicit restrictions on age, often in the form of a minimum age for accessing procedures. Where legal gender recognition procedure requires prior medical interventions, these are often only available at the age of majority and only until a certain age (e.g. 65 years), and thus discriminate based on the age of the applicant.<sup>51</sup>

The Commissioner for Human Rights has noted that legal recognition of trans children’s gender remains a huge hurdle in most countries. The Commissioner underlines that children have rights and their views must be taken into account

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46. Austrian Constitutional Court (VfGH), Case V 4/06 (2006).

47. First Chamber of the arrondissement of Luxembourg, Civil Judgment No. 184/2009, (2009).

48. Cour d’Appel de Rennes (France), Case No. 11/08743, 1453, No. 12/00535 (2012).

49. “Human rights and gender identity”, op. cit., p. 22.

50. *P. V. v. Spain*, No. 35159/09, 30 November 2010, concerned the restriction of contact arrangements between a trans woman and her six-year-old child. While the Court did not find a violation in *P. V.*’s case, it issued a general statement that a parent’s gender identity cannot be invoked to limit their parental rights.

51. On age restrictions, see “The state decides who I am – Lack of legal gender recognition for transgender people in Europe”, Amnesty International 2014, pp. 27-28; see also, Richard Köhler, Alecs Recher and Julia Ehrh, “Legal gender recognition in Europe – A toolkit”, TGEU, 2013, pp. 22-23.

in decision making that concerns them.<sup>52</sup> The Parliamentary Assembly, in its Resolution 2048 (2015), emphasises that “the best interest of the child are a primary consideration in all decisions concerning [them]”<sup>53</sup> in relation to legal gender recognition.

Some member states have recently reconsidered their age limits for gender recognition. Under the new law for legal gender recognition in the Netherlands, young persons who are 16 years old are eligible to apply for legal gender recognition. The Swedish Government has recently commissioned a report on the implications of lowering the age restriction.<sup>54</sup> The ministerial experts groups revising the legal frameworks in Finland<sup>55</sup> and Norway<sup>56</sup> also recommend reconsidering the strict age limit. One important reason which has led to considerations to lower the age limit in Sweden is the fact that young transgender persons may encounter rejection and other problems from their environment in everyday life, such as bullying and exclusion. In addition, the fact that legal recognition of gender in Sweden is no longer linked to medical interventions gives further reason to the government to review the age requirement.

In the judgment *Schlumpf v. Switzerland*,<sup>57</sup> the Court held that a waiting period of two years before gender reassignment surgery constituted a violation of Article 8 with regard to the age of the applicant. Given the age of the applicant (67), the decision to undergo gender assignment surgery was likely to be affected by the long waiting time. The set waiting period should therefore not have been mechanically applied without regard to the personal circumstances of the applicant, since it was likely to restrict the freedom to determine one’s gender.

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52. “LGBTI children have the right to safety and equality”, Commissioner’s Human Rights Comment, 2 October 2014. [www.coe.int/en/web/commissioner/-/lgbti-children-have-the-right-to-safety-and-equality](http://www.coe.int/en/web/commissioner/-/lgbti-children-have-the-right-to-safety-and-equality).

53. Parliamentary Assembly Resolution 2048 (2015), paragraph 6.2.5.

54. [http://tgeu.org/wp-content/uploads/2015/07/Sweden\\_Report\\_Age-Requirement-LGR.pdf](http://tgeu.org/wp-content/uploads/2015/07/Sweden_Report_Age-Requirement-LGR.pdf).

55. Final report of the ministry expert group of 6 April 2015 (in Finnish): Sosiaali- ja terveystieteiden ministeriön translakityöryhmän loppuraportti Sukupuolen oikeudellisen vahvistamisen edellytykset.

56. Norwegian working group report, 10 April 2015 (in Norwegian): [www.regjeringen.no/contentassets/d3a092a312624f8e88e63120bf886e1a/rapport\\_juridisk\\_kjonn\\_100415.pdf](http://www.regjeringen.no/contentassets/d3a092a312624f8e88e63120bf886e1a/rapport_juridisk_kjonn_100415.pdf).

57. *Schlumpf v. Switzerland*, No. 29002/06 (2009).

## Quick, transparent and accessible procedures

Member states should ensure that the change of name and gender on official documents can be obtained through quick, transparent and accessible procedures that effectively guarantee full legal recognition in all areas of life. Abusive requirements render the legal recognition of a person's gender identity less accessible and may result in lengthy and costly procedures. When it comes to legal gender recognition, the Court has held that national legislation must render the rights under the ECHR "practical and effective, not theoretical and illusory".<sup>58</sup> According to the Court, it must be possible, in practice, for an individual to fulfil the requirements for legal recognition set by the state.<sup>59</sup> For example, requesting gender reassignment surgery when such services are not offered in the country or financed when sought abroad constitutes a barrier to legal gender recognition.

The need to provide for quick procedures for legal gender recognition requires member states to ensure that the duration from application to full legal recognition is not unreasonably long. For instance, the administrative procedure for legal recognition of gender provided for by Portuguese law<sup>60</sup> stipulates that for a change of name and gender, relevant authorities have to give a decision within eight days of receiving the application. However, some states require proof of a person's ability to live for a long period of time in their self-determined gender identity before personal documents can be changed. Requesting a person to already live in their gender identity without providing matching personal documents can lead to discrimination and violence. In the 12 months preceding an EU-wide survey conducted by the European Union Agency for Fundamental Rights (FRA), nearly one in three trans respondents felt discriminated against in a situation where they had to show their identity documents or an official document that identifies their sex.<sup>61</sup>

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58. *Goodwin v. the United Kingdom* and *I. v. the United Kingdom*, Nos. 28957/95 and 25680/94 (2002).

59. In *L. v. Lithuania*, No. 27527/03 (2007), the Court held that there had been a violation of Article 8. Even though Lithuanian law recognised transgender persons' right to change their legal gender, there was no law regulating gender reassignment surgery, which in practice made legal gender recognition very difficult.

60. Lei No. 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 [Law establishing procedures for legally changing sex and name in official registries].

61. *Being Trans in the European Union – Comparative analysis of EU LGBT survey data*, p. 82 [http://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative_en.pdf).

Increased length of a procedure can be a strain on an individual as the source of the potential discrimination continues until completion of the legal process of gender recognition. The personal situation of each individual has to be taken into account in order to fully guarantee a “quick, transparent and accessible” procedure. Mechanically applied waiting periods before gender reassignment surgery may violate Article 8 of the ECHR (*Schlumpf v. Switzerland*).<sup>62</sup> Thus, time requirements and their assessment should take into account not only quantitative but also qualitative elements.

Furthermore, the procedure for legal gender recognition needs to be transparent in order to enhance legal certainty as to a predictable outcome for the applicant and the relevant authorities. This is best guaranteed when a state takes appropriate measures to provide for legal gender recognition in its national legislation. The legal provisions should be clear as to their interpretation, implementation and should contain appeal mechanisms. Removing vague or unnecessary requirements or unclear procedural and administrative regulations reduces the possibility of abuse. It also diminishes the administrative burden and regulatory pressure as well as reduces the pressure on the judiciary to clarify the matter.<sup>63</sup>

Finally, member states should also ensure that procedures for legal gender recognition are accessible. Improving the accessibility may involve practical considerations with regard to the personal situation of the applicant. As pointed out by the Court, some transgender persons might be unable to fulfil certain prior requirements for legal gender recognition, for instance due to their age or personal health. Simplification and low costs increase accessibility as well. For instance, in the UK, the change of name on official documents only costs £5-10.<sup>64</sup>

Changing a legal procedure with a judicial review into a simple and clear administrative procedure that ensures the possibility of appeal – without substantive medical, psychological or “real-life experience” tests – provides transgender persons with a quick, transparent and accessible way of having their lived and experienced gender legally recognised. Experience also shows

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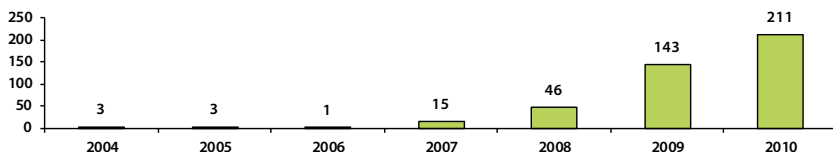
62. *Schlumpf v. Switzerland*, No. 29002/06 (2009).

63. Compare the approach taken by the Government of the Netherlands while reviewing the legal gender recognition procedures in 2012: [www.rijksoverheid.nl/documenten/brieven/2012/09/03/memorie-van-toelichting-voorwaarden-voor-en-de-bevoegdheid-ter-zake-van-wijziging-van-de-vermelding-van-het-geslacht-in-de-akte](http://www.rijksoverheid.nl/documenten/brieven/2012/09/03/memorie-van-toelichting-voorwaarden-voor-en-de-bevoegdheid-ter-zake-van-wijziging-van-de-vermelding-van-het-geslacht-in-de-akte).

64. “Legal gender recognition in Europe – Toolkit”, 2013, available at: [www.tgeu.org/sites/default/files/Toolkit\\_web.pdf](http://www.tgeu.org/sites/default/files/Toolkit_web.pdf).

that the removal of arbitrary requirements leads to an increased number of requests for legal gender recognition. Within three years after the adoption of the Spanish law<sup>65</sup> on gender recognition in 2007, the number of persons who had their gender identity recognised<sup>66</sup> was multiplied by 15.

Legal gender recognition cases in Spain 2004-2010



## Full legal recognition in all areas of life

Member states should ensure that the change of name and gender on official documents effectively guarantees full legal recognition in all areas of life. CM/Rec(2010)5 states that the content and scope of procedures relating to the legal recognition of a person's gender identity need to be sufficient for "making possible the change of name and gender in official documents" and "corresponding recognition and changes by non-state actors with respect to key documents". Thus, member states need also to ensure that documents provided by non-state actors, such as educational and employment certificates can also be changed to match a person's legally recognised gender. Legal gender recognition procedures should also ensure protection of a transgender person's private life by making sure that third parties cannot obtain information on gender reassignment.<sup>67</sup>

The Court has held, in the case of *B. v. France*,<sup>68</sup> that official documents revealing a discrepancy between the legal sex and the apparent sex of a transgender person constitute a violation of Article 8 (right to respect for private and family life), due to the difficulties in everyday life they create for transgender

65. Law 3/2007 of 15 March on Rectificación registral de la mención relativa al sexo de las personas [the rectification of the mentions of sex in registries].

66. Recher A., *Änderung von Name un amtlichem Geschlecht bei Transmenschen*, University of Zurich, 2012, p. 92.

67. CM/Rec(2010)05, Appendix, paragraph 21, and Explanatory memorandum, paragraphs 20-21.  
68. *B. v. France*, No. 13343/87 (1992).

persons. In addition, the Court of Justice of the European Union (CJEU) has granted transgender persons protection against discrimination based on their gender identity. In the case of *P. v. S. and Cornwall County Council*,<sup>69</sup> the CJEU held that the dismissal of a transgender woman because of her gender reassignment constituted discrimination on the grounds of sex. Furthermore, both the Court in the case of *Grant v. the United Kingdom*<sup>70</sup> and the CJEU in the case of *Richards v. Secretary of State for Work and Pensions*<sup>71</sup> have confirmed that transgender women are entitled to a retirement pension at the age applicable to other women, regardless of whether their female gender has been legally recognised or not.

The protection of transgender persons' right to respect for their private life also prohibits those who acquire information about an individual's gender recognition, in an official capacity, from disclosing such information. Such a person may hold public office or be associated 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. For example, Article 5 of the German "Transsexual Law" has a specific disclosure ban. State registry files of a person who has changed their gender under this law are automatically blocked and can only be accessed by authorised personnel. Based on this article, the Higher Labour Court Hamm held that a supplier of a previous employment certificate has to issue a new one, even if doing so entails additional efforts for the institution. The UK Gender Recognition Act<sup>72</sup> is also very detailed in regard to the protection of privacy in different areas of life with regard to transgender persons.

## The right to marry

The starting point for legal gender recognition should be to guarantee full legal rights to the transgender person. The Court, in the cases of *Goodwin v. the United Kingdom* and *I. v. the United Kingdom*<sup>73</sup> held that there was "no justification for barring the transsexual from enjoying the right to marry under any circumstances". Similarly, in the case of *K.B. v. National Health Service Pensions*

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69. CJEU Case *P. v. S. and Cornwall County Council*, C-13/94 (1996).

70. *Grant v. the United Kingdom*, No. 32570/03 (2006).

71. CJEU Case *Richards v. Secretary of State for Work and Pensions*, C-423/04 (2006).

72. UK Gender Recognition Act 2004, [www.legislation.gov.uk/ukpga/2004/7/contents](http://www.legislation.gov.uk/ukpga/2004/7/contents).

73. *Goodwin v. the United Kingdom* and *I. v. the United Kingdom*, Nos. 28957/95 and 25680/94 (2002); see also Recommendation CM/Rec(2010)5, paragraph 22.

*Agency*,<sup>74</sup> the CJEU found discrimination on the grounds of sex in a situation where an unmarried transgender man had not been granted the right to the survivor's pension of his female partner since they were not married. Even though the couple had been unable to marry because of the national legislation on gender reassignment, the principle of equal pay for men and women under European Union law entitled the applicant to a survivor's pension.

Today, most Council of Europe member states that have a procedure for legal gender recognition in place also recognise the right of transgender persons to marry a person of the opposite sex after the legal recognition of their gender identity.

### Concluding remarks

Legal gender recognition is about ensuring respect for transgender persons' right to privacy, self-determination, non-discrimination and dignity. This can be guaranteed through quick, accessible and transparent, legally prescribed administrative procedures without any abusive prior requirements. In practice, this means providing transgender persons with identity papers and other relevant official documents which match the person's gender identity. States should also consider to include, in addition to the male and female gender markers, a third or neutral gender option for those who seek it.<sup>75</sup>

When planning legislation, policies and other measures which will have an impact on transgender persons' human rights, as recalled by the Committee of Minister's recommendation,<sup>76</sup> it is important to appropriately consult with the transgender community and NGOs that defend their human rights.

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74. CJEU Case *K.B. v. National Health Service Pensions Agency*, C-117/01 (2006).

75. The EU Survey on LGBT experiences of discrimination (FRA 2012) found that 73% of trans respondents do not identify within the gender binary. See also Parliamentary Assembly Resolution 2048 (2015).

76. CM/Rec(2010)5, Appendix, paragraph 12.



” States should ensure that procedures for legally changing a person’s gender and name are swift, transparent, accessible and that they respect the person’s physical integrity and their private life.

Recommendation CM/Rec2010/5 –  
Explanatory memorandum

[www.coe.int/lgbt](http://www.coe.int/lgbt)

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