

## IV. GENDER IDENTITY, GENDER EXPRESSION, AND INTERSEX

### A. INTRODUCTORY REMARKS<sup>406</sup>

This chapter examines the way that state regulation of gender identity and expression influences the health of individuals and groups. Gender, gender relations, and gendered characteristics are important features through which health, including sexual health, is mediated.<sup>407</sup> Gender identification can be both assigned and assumed by individuals, the latter in part by acting in socially gendered ways, i.e., by exercising one's right to expression by means of gendered speech, deportment, or identification/self-naming. When people enact or express gendered conduct, it can conform to or clash with social conventions for male- or female-identified bodies.

To become fully accepted in society requires the acquisition of gender traits, so that persons are socially recognizable. No one lives untouched or outside of gender systems, yet all human rights are meant to be enjoyed equally by all persons regardless of their sex, and ultimately their gender. The inability to live one's life fully and with security in accord with one's preferred gender expression and identity has a negative effect on well-being. In addition, state violence, discrimination, and efforts to mandate gender identity and expression exclude or diminish the access of gender non-conforming persons to the social institutions necessary to live a life with dignity: education; regular employment; family and marriage; and access to appropriate and quality health care.

Two streams of rights-based work address gender as a place of rights and health violations. The analysis of *gender-based violations* tends to focus on girls and women, while the work on *gender identity or gender expression* tends to focus on persons called 'gender non-conforming' or 'transgender,'<sup>408</sup> i.e., persons whose gender expression differs from that which is socially normative, based on their perceived body characteristics at birth (sex assigned at birth). Both streams of rights work challenge culturally stereotyped thinking, norms, and expectations about men and women, including but not limited to their sexual behaviour.

As noted in the chapters on violence, gender-based violence often functions to reinforce gender inequality and discrimination. Violence is directed at non-conforming persons, such as women who transgress local gender norms by enrolling in school or acting sexually outside of marriage, for example, or men who fail to behave in sufficiently 'masculine' ways.<sup>409</sup> State-sponsored violence and discrimination against gender non-conforming persons; toleration of such acts committed by non-state actors, including relatives and community members; or taking (or failing to take) steps to reduce and prevent discrimination and abuse are ways in which state action in the context of gender expression can affect sexual health.

The social rules of gender are in part codified and maintained in law, so that there are legal consequences for transgressing the rules regulating gender.<sup>410</sup> These laws can in themselves be abusive of rights to privacy, equality before the law, freedoms of expression<sup>411</sup> and association, with effects on the health of the gender non-conforming person. States also regulate gender expression by permitting, mandating, controlling, or forbidding surgeries and medical interventions for the purpose of modifying the bodies of persons to align with specific expectations about gender.

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406 These introductory remarks have in part been drawn from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.

407 Nancy Krieger, *Genders, sexes, and health: what are the connections--and why does it matter?* *International Journal of Epidemiology*. 2003 Aug; 32(4):652-7.

408 Some gender non-conforming persons seek to alter their bodies to conform to a chosen gender (often called transsexuality); others adopt speech, dress, or habits associated with one gender but do not alter or wish to alter their bodies.

409 Normative rules regarding masculinity and femininity (dress, appropriate work, modes of verbal and non-verbal expression, for example) are not uniform but can vary across historical period and culture.

410 The social rules of gender, called gender systems that organize the assignments and valuations of persons may vary between and within societies, and may also change historically. Nonetheless, they are implemented through powerful rules, incentives, and socialization, operating through social institutions (church, family, state, health and education, e.g.), which assign status, govern behaviour, and determine access to resources and social legitimacy based on conformity to local gender norms. See Gayle Rubin, "The Traffic in Women: Notes on the Political Economy of Sex," in Rayna Reiter (ed.), *Toward an Anthropology of Women*, New York, 1975.

411 While international human rights law has not fully responded to gender expression as a form of expression, the basic reasoning articulated in the Siracusa Principles [See Chapter 7B: expression and information chapeau] which constrain the arbitrary use of state power to restrict expression can be fruitfully applied. These principles would protect gender non-conforming non-verbal expression such as cross-dressing, and physical deportment as well as verbal expression of gender variance from state regulation, especially from penalization in the criminal law, as an unjustified and arbitrary interference with fundamental rights. State justification by recourse to broad claims of public health and morality, especially where such claims rest on gender stereotypes forbidden under article 5 of CEDAW, would not be sustainable.

Current rights claims include the freedom to access medical technologies and interventions for bodily modification, to better reflect the person's perceived or chosen gender, congruent with prevailing standards of professional practice and patient consent. In addition, claims include the ability to transition to a new gender without submitting to compulsory surgeries, particularly sterilization, or other state-mandated procedures that infringe on privacy rights, and rights to reproduce and found a family. In addition, basic protections against discrimination in the right to access mental and physical health services must apply.

In many societies, the transgender population is marginalized through discrimination and violence, often pushed to the edges of survival with decreased access to basic health services, housing, and employment. This exclusion is compounded for members of lower caste, class, and minority groups. Attempts by transgendered persons to generate income through selling sex or engaging in other criminalized and/or stigmatized practices render them more at risk of violence, including sexual violence. Many policing surveillance systems and morals and public decency regulations are used to harass and target them, for false arrest and extortion, sexual favors, and other abuses. Many persons of gender-variant behaviour or identities are also highly mobile, in part to escape police surveillance and in part to seek out new communities outside the influence of their natal homes and find tolerance or acceptance. In these cases, travel is a resourceful strategy, but at times a risk factor for sexual ill-health, as transgendered persons move outside networks of regular care and information.

Human rights law as a system has evolved to address many of the serious rights implications of laws and state practices regulating gender. First, it increased its capacity to address gendered harms to women. More recently, formal human rights practice has recognized police abuse of transgender persons, or the unwillingness of the law to recognize transition from one sex to another, or living with a gender which is not bounded in the fixed binary. In the last decade, many human rights courts at national and regional level have recognized privacy, health, and non-discrimination rights in striking down laws which exclude transgendered persons from the basic protection of the law.

In the following chapter will be addressed issues related to access to change of legal gender – such as the right to change name and indication of sex on official documents – and access to health services for transgendered individuals. State efforts to combat discrimination against gender non-conforming individuals have been mainly addressed in Chapter 1, non-discrimination, whereas laws against violence and harassment based on gender identity are discussed in Chapter 5, violence.

## A. Civil registration and names

### 1. Introduction

This chapter relates to the state interest in registering all persons' sex at birth, which may cause problems for an individual who wishes to transfer from one gender to the other and to be recognized as such by the state, or to live as a 'third gender' – outside of the binary categories of 'man' or 'woman' – and gain recognition accordingly. State regulation of this area, with all different aspects of a person's life that may be affected, will impact the individual's well-being in a host of ways. Contemporary rights and health work on gender expression and transgendered persons implies corresponding state obligations.<sup>412</sup> In order for a transgendered individual to live in accordance with his or her preferred gender, in law and in fact, the state has obligations to, *inter alia*, provide for the possibility to change name and legal gender, provide access to treatment and health care (including, when relevant, gender reassignment surgery), and ensure the right to marry or to stay married.<sup>413</sup>

Gender identity issues have been addressed on several occasions by both regional courts in Europe. They are also widely regulated on the domestic level, with particular focus on issues

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412 The term "transgender" is an umbrella term for people whose gender identity and/or gender expression differs from what is normative, given the sex they were assigned at birth, including cross-dressers, pre-operative, post-operative or non-operative transsexuals. Transgender people may define themselves as female-to-male (FTM, assigned a female biological sex at birth but who have a predominantly male gender identity) or male-to-female (MTF, assigned a male biological sex at birth but who have a predominantly female gender identity); others consider themselves as falling outside binary concepts of gender or sex. Transgender people may or may not choose to alter their bodies hormonally and/or surgically: the term is not limited to those who have the resources for and access to gender reassignment through surgery. Transgender is not about sexual orientation; transgender people may be heterosexual, lesbian, gay or bisexual. From: Global Rights: Demanding Credibility and Sustaining Activism: A Guide to Sexuality-based Advocacy, 2009.

413 See below the jurisprudence of the European Court of Human Rights, in particular *Goodwin v. United Kingdom* (2002), *Van Kück v. Germany* (2003), and *L. v. Lithuania* (2007). Note however that the Court so far only has addressed the rights of *transsexuals* (persons who either have undergone gender reassignment surgery, or are in the process of doing so). So far, the Court has not addressed the *the right to gender identity* as a broader category than the specific rights of post-operative transsexual individuals.

linked to transsexuality.<sup>414</sup> Trends show that more recent legislation, especially following key European jurisprudence, has increasingly adopted a perspective on gender identity less focused on medicalization and more attentive to the psychological and social well-being of the individual. Whereas 30 years ago the primary concern of law- and policy-makers was to grant gender reassignment only following specific psychological and surgical procedures strictly regulated by law, today the individual's well-being is emerging as a parameter for the individual's right to determination of his or her gender identity.

Several topics are worth highlighting here. One is that state regulation of a person's transition from one gender to the other can follow a two-step model. The first stage is regulating the criteria for name change, in order to have a first name corresponding to one's acquired gender. The next step is regulating the criteria for a change of legal gender, which will appear on one's birth certificate, driver's license, and other official documents. This model was illustrated most clearly in the German Transsexual Law, recently amended. German law allows name change without surgery, but until recently required that a correctional genital surgery had taken place for a change of legal gender. Spain and the United Kingdom, among others, break with this model, allowing change of legal gender even without surgery, when certain criteria have been fulfilled.

Another issue worth paying attention to is the ambiguous nature of the concept 'gender reassignment.' The British law – read in conjunction with the UK anti-discrimination provisions where individuals who have undergone or will undergo gender reassignment are a protected group – demonstrates this, as does jurisprudence from the European Court of Justice (covered in Chapter 1A under Gender identity discrimination). While gender reassignment is now a legal concept, to which rights and obligations are attached, its meaning is not always immediately clear. Does the concept, in a given domestic context, refer to surgery exclusively, or does it also include other kinds of treatment, such as hormone treatment? Or does it simply mean transitioning from one gender to another, with or without medical intervention? This is relevant from a rights-perspective, in that the more broadly the concept is understood, the more inclusive is the group to which rights and protections are awarded under the relevant law.

The definition of gender reassignment in the domestic sphere is also relevant when assessing whether gender identity issues are primarily viewed as medical, psychological, and/or social concerns. This is linked to the third issue worth paying attention to, namely the degree to which 'transsexualism' is seen as a disorder/illness. The European Court of Human Rights has framed transsexualism primarily in this way, and has thus motivated the right to treatment (in *Van Kück*) from the perspective of state obligations to provide relief when medical conditions exist. As will be discussed, this understanding of the issue implies its own complications from the point of view of right to self-determination and agency.

Finally, it is crucial to bear in mind in this context that a general confusion about terminology characterizes European approaches to gender identity issues. This is not only true with regard to the undefined concept of gender reassignment, already discussed. The concepts of 'gender identity,' 'transsexualism,' and 'transgenderism' are usually not defined domestically, and language is also not consistent throughout Europe and across jurisprudence. One example of this is, again, the German law, the official name of which indicates that it regulates name-change and sexual affiliation, suggesting a broad view on gender identity issues. It is usually referred to however as the 'transsexual law' (*Transsexuellengesetz*), suggesting a narrower scope, mainly referring to persons undergoing surgery and thereby changing biological sex.

In the following, to describe the procedure by which the state recognizes transition from one gender to the other for all legal purposes, the term 'change of legal gender' has been employed.

## **2. Council of Europe**

### *Jurisprudence of the European Court of Human Rights*

In *B. v. France*,<sup>415</sup> the applicant had undergone male-to-female gender reassignment surgery in 1972. Domestic courts had denied her the right to change the sex on her birth certificate and other identity documents. This, according to the applicant, forced her to disclose intimate person information to third parties, and had negative effects on her professional life. She claimed that the state's refusal to "recognise her true sexual identity" was a breach of the right to respect for private life in Article 8 of the Convention.

The Court held that the applicant found herself in a daily situation which is not compatible with the

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414 Generally understood as addressing transgendered individuals who are either post-operative or who are in the process of undergoing corrective genital surgery.

415 Application no. 13343/87, decided on 25 March 1992.

respect for her private life under the Convention. In particular, the Court referred to the state's refusal to correct the sex noted on the applicant's birth certificate; the refusal to allow her to change her forename to a feminine name; and the impossibility to change the legal gender on so many official documents. Great distress was caused on a daily basis when the legal gender on the documents differed from the apparent sex. All of these factors taken together made the Court conclude that the applicant's right to respect for her private life had been violated under Article 8.

The Court reached in this case a different conclusion from previous cases involving transsexuals in the United Kingdom, in Rees v. United Kingdom (1986),<sup>416</sup> and Cossey v. United Kingdom (1990).<sup>417</sup> In these two cases, the failure of the state to recognize a change of gender, for civil status purposes, was not found to violate the right to respect for private life under Article 8. The main differences between these cases and B. v. France were factors related to the level of intrusion in the private life of the applicants, following state failure to recognize change of gender. In the British cases, transsexuals could not amend their birth certificates, but they could change their names, and there was no national ID card where sex appeared. Thus, the space for violation of a person's privacy in his or her daily life was more limited. In France, as in other civil law systems, the invasion of privacy is generally deeper. Nevertheless, B. v. France can be seen as an important door-opener in which the Court for the first time pushed for state recognition of and respect for a person's sexual and gender identity. This case led the way to a broader acknowledgement of rights, in that the Court later reversed its previous jurisprudence regarding the United Kingdom (see below) and more fully recognized post-operative transsexuals' rights to privacy.

The case Goodwin v. United Kingdom<sup>418</sup> was decided when more than fifteen years had passed since the UK was first under scrutiny for its treatment of transsexuals in Rees.<sup>419</sup> The applicant was a post-operative male-to-female transsexual, whose treatment and surgery had been provided and paid for by the National Health Service. Nevertheless, she could not have her sex corrected on her birth certificate; her national insurance number still showed her sex to be male; she had been informed that she was ineligible for state pension at the age of entitlement for women in the UK; and she was forced to pay the higher car insurance premium applicable to men. She also claimed to have been subject to harassment at work and that the state had not granted her proper protection against discrimination. All in all, the applicant claimed that the state failure to legally recognize her changed sex caused her "numerous discriminatory and humiliating experiences in her everyday life." She also complained that, although she lived with a man, they could not marry under British law as long as her birth certificate showed that her sex registered at birth was male, which she argued violated the right to marry under Article 12.

The Court came to the conclusion that the state had violated the applicant's right to respect for her private life under Article 8, and thus changed course from its previous case law on transsexuals' claims in the UK. The Court found it illogical that the state, while financing and providing for treatment and surgery, failed to fully recognize the change of gender in law. It noted that transsexuality had wide international recognition as a medical problem for which treatment can be provided to afford relief. It stressed the right of transsexuals to "personal development and to physical and moral security," and stated that it could no longer be seen as sustainable for transsexual individuals to have to live in "an intermediate zone as not quite one gender or the other."

The Court also examined the applicant's right to marry, and found that the fact that she could not marry violated Article 12. In this finding, it made an important statement. Article 12 provides for the fundamental right to marry and to found a family. The Court explained that the second aspect – to found a family (that is, to have children) – cannot be seen as a condition of the first – to marry. In other words, couples who cannot (or will not) conceive or parent a child should for this reason not be deprived of the right to marry. With regard to the terms 'man and woman' in Article 12, the Court agreed with the applicant that these could no longer refer to a determination of gender by purely biological criteria. The Court thereby opened the door to a less biological way of perceiving sex and gender.

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416 Application no. 9532/81, decided on 17 October, 1986.

417 Application no. 10843/84, decided on 27 September 1990.

418 Application no. 28957/95, decided on 11 July 2002.

419 I. v. the United Kingdom (Application no. 25680/94, decided on 11 July 2002) raised many of the same issues and was decided on the same date as Goodwin. The Court employed the same reasoning and came to the same conclusion in the two cases. Likewise, in Grant v. the United Kingdom (Application no. 32570/03, decided on May 23 2006), the issue was again the difference in retirement age between men and women and that the applicant was forced to work until the pension age for men, though she now lived as a woman. The Court referred back to Goodwin and stated the lack of legal recognition of the applicant's acquired gender again constituted a breach of the right to respect for private life under Article 8.

Finally, the Court stated that the right to marry has to be seen as the right to marry a person of one's choice. The applicant lived and identified as a woman and would only wish to marry a man – therefore the argument that she could still marry a woman (her former opposite sex) was an artificial argument.

In *X, Y and Z v. United Kingdom*,<sup>420</sup> the Court examined the right to legal recognition as a parent when one of the two care-providers was a transsexual. The issue was whether a post-operative female-to-male transsexual should be allowed to register as the father of a child, born to his female partner by means of artificial insemination by donor. British authorities had denied the applicant the right to register as father on the child's birth certificate. While the European Commission of Human Rights came to the conclusion that Article 8 had been violated, the Court found that this was not the case, making references to the "complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States" that transsexuality still raised. According to the Court, states should be afforded a wide margin of appreciation in cases like the one at hand and could therefore still deny the 'social father' the right to also be recognized legally as father of the child.

It is possible but not certain that this case is overruled by Goodwin (above). One may argue that as Goodwin established the right for a transsexual woman to be recognized as a legal woman, from this should follow that since a transsexual man now can be recognized as a legal man, he should also be allowed to register as legal father. On the other hand, the Court's jurisprudence on adoption suggests that this may not be an automatic consequence. The Court stresses that there is *no right to adoption* for anybody, but only a *right to be assessed without discrimination* – and what matters is the best interest of the child.<sup>421</sup> From that perspective, it is possible that the Court would continue to leave to the discretion of states to decide whether a transsexual parent would indeed qualify as legal parent.

In *L. v. Lithuania*,<sup>422</sup> the applicant had been registered at birth as female but had early on realized that his mental sex was male. He had undergone partial surgery for gender reassignment but was unable to complete the process due to lack of adequate legislation in Lithuania. Even though a Gender Reassignment Bill had been prepared and approved by the Government, the parliament had refused to implement it. For as long as the process had not been concluded, the applicant could not change his 'personal code' according to which his sex was still female. Hence, the fact that he was identified legally as a woman while his appearance was male made him subject to hostility and caused him great psychological distress, while also impairing his functioning in society in various ways.

The Court noted that while it was possible according to Lithuanian law to change both gender and civil status, there was a legislative gap with no law regulating full gender reassignment surgery. Until such law was enacted, no medical facility in Lithuania would undertake the surgery. The outcome was that the applicant found himself in an intermediate situation, without being able to receive full legal recognition as a man. The Court noted that this left him in a "situation of distressing uncertainty *vis-à-vis* his private life and the recognition of his true identity." The failure on account of the State to provide for the relevant legislation was found to be a violation of the applicant's right to respect for private life under Article 8 of the Convention.

It is noteworthy that the Court used the term 'true identity' with regard to the applicant's male gender identity. As long as the Lithuanian state had not enacted legislation regulating gender reassignment surgery, which was a precondition for full legal recognition of a change of gender, the state did not allow for people in this category to live according to their true identity. This, the Court found, had detrimental effects on their well-being.

Of great importance are the remedies ordered by the Court in this case, which were unusually concrete. The applicant was awarded 5 000 EUR in non-pecuniary damages. Furthermore, the Court ruled that Lithuania should pass the required piece of legislation within three months, and that, if it failed to do so, it should pay the applicant 40 000 EUR in pecuniary damages. In July 2008, Lithuania paid the 40 000 EUR to the applicant so that he could undergo a full sex change operation. However, as of March 2011 the law has still not been passed. On the contrary, a ban on gender reassignment surgery was proposed by conservative parliamentarians, in an attempt to amend the national Civil Code.

### 3. European Union

The European Court of Justice has in three important judgments examined transsexuals' rights not to be discriminated against in relation to gender reassignment. These cases, *P. v. S.* and *Cornwall County*

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420 Case no. 75/1995/581/667, decided on 22 April 1997.

421 See for a more thorough discussion on the Court's jurisprudence on adoption Chapter 3A, Same-sex marriage, partnership, cohabitation, access to adoption and artificial reproduction technologies.

422 Application no. 27527/03, decided on 11 September 2007.

Council,<sup>423</sup> K.B. v. National Health Service Pensions Agency and Secretary of State for Health<sup>424</sup> and Richards v. Secretary of State for Work and Pensions<sup>425</sup> are discussed in Chapter 1A: Discrimination on the basis of sex, sexual orientation, gender identity, marital status and HIV status.

#### 4. Non-binding regional material

Both the Parliamentary Assembly of the Council of Europe and the European Parliament have issued recommendations and resolutions on rights of transsexuals, both with regard to non-discrimination and the right to correction of gender on official documents. Worth highlighting here is a statement from a 1989 European Parliament resolution,<sup>426</sup> in which the Parliament shows a sensibility to structural problems rarely seen in legal documents. It expresses that

*whereas transsexuality is a psychological and medical problem, [it is] also a problem of a society which is incapable of coming to terms with a change in the roles of the sexes laid down by its culture.*

In 2009, the Council of Europe Commissioner of Human Rights released a report on the rights of transgendered persons with a long list of detailed recommendations to member states. This document explicitly includes all transgendered persons, thus not only those who have undergone corrective surgery.<sup>427</sup>

#### 5. Domestic legislation and case law

In the **United Kingdom**, having undergone gender reassignment surgery is not a precondition for legal change of gender. The Gender Recognition Act 2004<sup>428</sup> provides that a person of either gender who is 18 or older can make an application for a 'gender recognition certificate' on the basis of "living in the other gender" (Section 1 (1)). In the determination of applications, a Gender Recognition Panel must grant the application if it is satisfied that the applicant has or has had gender dysphoria,<sup>429</sup> has lived in the acquired gender for at least two years, and intends to continue living in that gender. Furthermore, the application must include two reports, *either* by two medical practitioners whereof one is practicing in the field of gender dysphoria, *or* one report by a psychologist practicing in that field and one by a medical practitioner (Section 3). The report issued by the expert in the field of gender dysphoria must include "details of the diagnosis of the applicant's gender dysphoria."

When an application has been granted, the applicant will get a full gender recognition certificate, if he or she is unmarried, and, if married, an interim gender recognition certificate (Section 4). If the applicant is married, the marriage must be annulled or dissolved, and after that a full gender recognition will be granted by the court that dissolved the marriage. Schedule 3 to the UK Civil Registration Act 2004<sup>430</sup> allows married individuals, who wish to stay together when one of them is changing gender, to register as civil partners immediately after their marriage has been annulled.

According to Section 9 of the Gender Recognition Act, where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender. The law is not retroactive. Thus, a legal change of gender does not alter any property, parental, or inheritance rights (Sections 9, 12, 13, 15 and 16).

The British Gender Recognition Act exemplifies the shift in thinking about transgendered persons, recognizing their right to be recognized legally in their acquired gender with or without genital surgery. Nevertheless, even without the requirement of surgery, transgenderism is seen as a medical condition requiring a variety of accompanying certifications by medical practitioners, which can reproduce the stigma associated with transgendered persons and deprive them of a sense of agency. Another problematic point is the requirement not to be married for full recognition in the acquired gender. This does not imply that a post-operative transsexual cannot marry – it is a mechanism whereby the institution of marriage is reserved for opposite-sex couples. In the individual case it will mean

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423 Case C-13/94, decided on 30 April 1996.

424 Case C-117/01, decided on 7 January 2004.

425 Case C-423/04, decided on 27 April 2006.

426 Resolution of 12 September 1989 on discrimination against transsexuals, OJ No C 256 of 9 October 1989.

427 "Human Rights and Gender Identity," CommDH/IssuePaper(2009)2, released on 29 July 2009. See also the Council of Europe Parliamentary Assembly Recommendation 1117 (1989) on the condition of transsexuals (adopted on 29 September 1989).

428 Enacted on 1 July 2004.

429 Gender dysphoria is commonly meant to imply a condition of unhappiness or discontent with one's biological sex or its usual gender role, and a desire for the body and/or role of the other sex.

430 Enacted on 18 November 2004.

that a happily married person will have to choose between getting a divorce and gaining full public recognition for his or her preferred gender.

In **Spain**, legal change of gender is regulated by [Act 3/2007 of 15 March, regulating the rectification of entry related to the sex of persons in the civil register](#).<sup>431</sup> Here the expression 'real gender identity' is used to describe why it may be necessary to change the official registration of a person's gender. The Act's purpose is "to regulate the necessary requirements to obtain a change of the entry in the civil register related to the sex of a person, when this entry does not match to his/her real gender identity. It also provides for name change so that [the name] will not be discordant with the claimed sex."

According to Article 1, any Spanish national "with sufficient capacity" and over the age of majority will be able to request a rectification of his/her sex in the civil register. The correction of the entry will be granted when two criteria are fulfilled. First, *gender dysphoria* must have been diagnosed, by means of a report from an accredited physician or clinical psychologist showing that the condition has been persistent and stable and that the person does not suffer from a relevant personality disorder. Second, the person must have been *medically treated* during at least two years to fit his or her physical characteristics to those of the claimed gender. This criterion does not require gender reassignment surgery. When health or age reasons make it impossible to comply with this second criterion, exemptions can be made (Art 4).

Once the decision is made that the legal gender has been changed, this will have immediate effects on the civil registry. The correction in the registry will allow the individual to exercise all rights attached to his or her new condition (Art 5). The civil registry will itself notify government bodies and agencies when the change has been made (Art 6). However, no publicity of the person's sex correction will take place without special authorization (Art 7).

In **Germany**, change of legal gender is regulated in the [Law on the change of the first names and the determination of sexual affiliation in special cases](#) (in short, the Transsexual Law).<sup>432</sup> This law resulted from a Federal Constitutional Court decision in 1978,<sup>433</sup> in which an individual born biologically male who had undergone hormone treatment and surgery sought to be recognized as a woman, primarily to alleviate employment-related problems. The Court based its decision on the right to individuality according to Article 1 of the Constitution, and held that the recognition of a sex change operation would not conflict with social mores as long as it was medically indicated. The Transsexual Law was adopted two years later.

Until recently this law provided for two different procedures with corresponding requirements, whereby one allowed for name change (the so-called minor solution), and the other for full legal recognition of belonging to the other sex (the so-called major solution).

In January 2011 the German Constitutional Court struck down important parts of this law, finding that the requirement that the transgendered person undergo surgery (the 'major solution') in order to access civil partnership, was incompatible with the right to sexual self-determination and physical integrity, protected under the German constitution. In effect, this decision removed the difference between the 'major' and the 'minor' solution under German law.<sup>434</sup>

*Case law: partnership rights for pre-operative transsexuals and dropping the precondition for unmarried status, sterilization and gender reconstruction surgery*

The German Federal Constitutional Court has in several important decisions expanded the rights of transgendered persons under the Transsexual Law. Three examples will be mentioned here.

In decision [1 BvR 3295/07](#),<sup>435</sup> the Constitutional Court struck down important parts of the Transsexual Law, holding that the requirements to undergo sterilization and gender reconstruction surgery in order to achieve full legal recognition of the claimed sex were unconstitutional, in a case regarding the right to enter into a civil partnership for a male born, transgender woman who had not undergone gender reassignment surgery. The Court found that the requirement that the transgendered person undergo surgery – the 'major solution' – in order to access civil partnership, was incompatible with the right to

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431 Unofficial translation to English available.

432 10 September 1980, Location: BGB I | 1980, 1654, changed on 17 July 2009. Updated version not available in English translation.

433 1 BvR 16/72, decision of 11 October 1978. Information from Gregory A. Knott, "Transsexual law unconstitutional: German Federal Constitutional Court demands reformation of law because of fundamental rights conflict," [Saint Louis University Law Journal](#) 54 (2009–10), p. 10.

434 Decision [1 BvR 3295/07](#). The case is only available in German; press release available in English.

435 July 2011, after the main research for this report had been completed.

sexual self-determination and physical integrity, protected under the German constitution.

In case 1 BvL 3/03,<sup>436</sup> decided on 6 December 2005, the issue before the Court was whether the obligation to reverse the name change under the minor solution upon marriage was constitutional, when the gender identity of the transgendered person was the same as that of her partner. The Court held that a male-to-female pre-operative transsexual, who had taken a female name under the minor solution, was allowed to keep the new name after entering into marriage with a woman. This decision did not put into question the constitutionality of the mandated reversal of name change upon marriage as such, but focused on the fact that a pre-operative 'homosexual transsexual' (in the wording of the Court) could not formalize her relationship with her new gender identity intact. Civil partnerships were available to same-sex couples in Germany, but not when the two partners were of the opposite (legal) sex. In the case under consideration, the applicant's gender identity and name were female, but her legal gender was male – thus, she could not preserve her gender identity and have her partnership recognized either through same-sex partnership or opposite-sex marriage. Absent a possibility for couples like this to register as same-sex partners, the Court found it inconsistent with the constitutional right to free development of personality, combined with the right to human dignity, to force the applicant to reverse her name change when getting married.

Under the partnership law, heterosexual pre- or non-operative transgendered persons could register their partnership without having to change their names back. In this sense, the case has been understood to mean that the Court found no justification for discrimination against transsexuals based on sexual orientation.<sup>437</sup> In discussing differences in criteria between the 'minor' and the 'major' solution, the Court established that the transsexuality of a person who has opted for the 'minor solution,' and not undergone surgery, is not less real or irreversible than the transsexuality of a post-operative individual. In acknowledging this, the Court also recognized the psychological rather than physical nature of gender identity and of change of gender, and that many transgendered persons do not desire to go through surgery but that their gender identity nevertheless must be acknowledged by the law. It thereby established that more rights flow from the minor solution than had earlier been recognized.<sup>438</sup>

Until 2008, a requirement for the major solution was, in addition to those discussed above, that the individual had to be unmarried. However, in May 2008 the Federal Constitutional Court ruled that this requirement was unconstitutional. In the case, 1 BvL 10/05<sup>439</sup> the applicant was a man who had been married for 56 years and had three children, and who at the age of 72 had decided to undergo a sex change operation to live fully as a woman. He applied for recognition of his new gender under the 'major solution' of the law. The couple wished to remain married. The Court found in its decision the law unconstitutional, as it forced individuals to choose between the constitutionally protected fundamental rights of individual integrity, on one hand, and of marriage, on the other. As a consequence, the law was changed so that the unmarried requirement was dropped in July 2009.

In **Kazakhstan**, the possibility to change legal gender flows from a ministerial order that sets forth criteria for medical investigations of persons with "gender identification disorders." The Minister of Health Order No. 435: On the guidelines of medical investigation of people with gender identification disorders<sup>440</sup> is related to a 1999 decree on changing and annulling records of civil status. Its purpose is to solve "complaints, statements and referrals of citizens on the issues of gender identity disorders."

The core of the Order is to be found in its enclosed guidelines. Interestingly, this document allows for change of legal gender without gender reassignment surgery. It is built on the notion that gender change can be allowed once the presence of 'gender identity disorder' has been established – and that such disorder can be established without the person having undergone any kind of treatment. The change in name and sex at the civil registry is recognized as either 'social' or 'biological' sex – dependent on whether surgery has been undertaken or not (para 4, Guidelines).

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436 Only available in German.

437 See, for example, 1 BvR 16/72, decision of 11 October 1978. Information from Gregory A. Knott, "Transsexual law unconstitutional: German Federal Constitutional Court demands reformation of law because of fundamental rights conflict," *Saint Louis University Law Journal* 54 (2009–10), p. 10.

438 The author was helped in the interpretation of this case by the written explanation by Philipp Braun, Lesbian and Gay Federation in Germany, at [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/germany/landmark\\_transgender\\_case\\_in\\_german\\_constitutional\\_court](http://www.ilga-europe.org/europe/guide/country_by_country/germany/landmark_transgender_case_in_german_constitutional_court). Last visited on 24 March 2010.

439 1 BvL 10/05, decided on 27 May 2008. Only available in German. See for a close discussion of the case, 1 BvR 16/72, decision of 11 October 1978. Information from Gregory A. Knott, "Transsexual law unconstitutional: German Federal Constitutional Court demands reformation of law because of fundamental rights conflict," *Saint Louis University Law Journal* 54 (2009–10).

440 Order of the Minister of Health of the Republic of Kazakhstan 3 June 2003. Unofficial translation.

However, even with this acknowledgement that gender identity goes beyond physical appearance, the issue is heavily medicalized. An individual medical investigation is conducted through an in-hospital stay (para 2, Guidelines), and investigations of the psychiatric, neurological and somatic conditions of the person will be carried out (para 3, Guidelines). Thereafter, based on the investigation, the person will be presented before a special commission that will make conclusions about the person's medical condition and then recommend either "change of the social (passport) or biological (surgical correction) sex" (para 4, Guidelines). The law is then accompanied by an extensive list of tests and medical documents necessary for the investigation, including blood and urine test, HIV test, liver-test, X-ray of skull in two projections, and conclusions from a 'sexopathologist,' an endocrinologist, and a psychologist.

An annex to the Order contains the form that has to be filled out once a person has undergone all required investigations and tests. This is the form that will confirm that a person qualifies for change of legal gender. The focus of the Order is on the medical investigation itself, and thus it gives no guidance as to what consequences flow from a new legal gender having been granted (*inter alia* on marriage, status with regard to children, and other civil law areas). Those topics are not regulated, as this is the only piece of legislation addressing gender identity concerns in Kazakhstan.<sup>441</sup>

According to Civil Registry legislation in most former Soviet republics, once a person has the correct medical form – resulting from the medical investigation that is regulated in the Kazakh Order – the change of legal gender can follow. Therefore, the medical investigation and the provision of the relevant form are key to the registry of a new legal gender.<sup>442</sup> Compared to other laws in the region, however, most of which include a requirement for surgery and other preconditions before a change of legal gender can take place, the Kazakh Order is unusually liberal. It does not require gender reassignment surgery, nor unmarried status, childlessness, or sterilization. Nor does it set a specific age under which gender change cannot take place. All these are preconditions that are common both in Central Asia and in other parts of the European region. Seen in its context, the Order can be described as progressive. However, it also has problematic points, as it requires a myriad of confusing and potentially humiliating procedures and takes as its point of departure the assumption that the individual in question is ill. The opinions, feelings, and background of the person involved count for very little. The list of tests that accompany the investigation also raises concerns, as several of these can be described as over-inclusive, irrelevant, and subjecting the individual to the risk of discrimination (e.g. HIV test).

#### *Case law: recognizing gender identity and widening the right to health*

The **Italian Act no. 164 of April 14 1982**<sup>443</sup> establishes that gender reassignment (change of legal gender and name on civil status records and papers) is dependent on the decision of a court, relying on expert opinions on the psycho-physical condition of the individual under examination. Judges may also authorize surgical intervention, when necessary. Once the transition has been completed, the judge orders the correction of identity papers and records. Judges have consistently considered genital surgery a requirement for name change and correction of identity records. After the entry into force of the Act, it was challenged before the Italian Constitutional Court, with the argument that permitting gender reassignment was unconstitutional under Article 5 of the Civil Code, forbidding acts of disposal over one's own body, with reference to Article 32 of the Italian Constitution, guaranteeing the right to health.

The Constitutional Court, in its Decision no. 161 of 1985,<sup>444</sup> not only declared that the Act was constitutional, but also recognized the existence of a fundamental right to gender identity. The Court acknowledged the "contrast between psychological and biological sex" in transsexual persons, but, above all, admitted that the law recognized a new concept of sexual identity. This, contended the Court, is based not only on a person's sexual attributes, but also on psychological and social factors, from which follows the concept of "sex as a complex feature of an individual's personality, determined by a set of factors." Here should be stressed that the Court recognized a broad view of the 'right to health' under the Constitution, including not only physical health, but also mental well-being, in relation to which any changes to one's body, if made with a view to ensuring mental health, are perfectly legal. Moreover, the expression of one's sexual identity is an inviolable right under Article 2 of the Constitution (guaranteeing the inviolability of human rights), as this expression allows transsexual persons to fully develop their personalities, intimately and psychologically, as well as in relationship with others.

441 According to conversation on Dec 9, 2009, with Anna Kirey, founder of Kyrgyz LGBT rights organization Labrys and sexual rights activist in Central Asian countries.

442 Ibid.

443 Act no. 164 of 14 April 1982, on regulations regarding the rectification of the attribution of sex. Only available in Italian, content explained by Stefano Fabeni.

444 Decided on 23 May 1985. Only available in Italian, translation provided by Stefano Fabeni.

### *Case law: recognizing a right to legal change of gender without surgery*

In the Austrian Administrative High Court 2009 case *VwGH 27.02.2009, 2008/17/0054*,<sup>445</sup> the applicant was born male and, after hormone therapies and cosmetic measures, had been living as a woman. The authorities refused her a female name and corresponding documents, since she had not undergone gender reassignment surgery. Removal of genitals was a precondition in Austria for a legal change of gender. The applicant alleged that every time she exhibited one of her documents (driver's license, identification card, passport, birth certificate, etc.) she had to expose her transsexuality which, she claimed, violated her right to privacy.

The issue before the Court was whether a mandatory sex change operation was a lawful prerequisite for the recognition of a person's new gender. It concluded that surgery could not be a legal precondition for attaining the change of legal gender. In reaching this conclusion, the Court referred to the psychological aspects of the sense of belonging to the opposite sex from the birth sex. When this sense of belonging with all probability is irreversible, and takes the form of an effort to appear as the other gender in a way that is obvious to outside observers, then there is no reason that the authorities cannot use these psychological aspects alone as basis for the approval of change of legal gender. In the relevant case, the Court ordered the Ministry of the Interior to reconsider the case of the applicant, based on the notion that gender change can be a fundamentally psychological process.

## **6. Concluding remarks**

See below: joint concluding remarks for Chapter 4A and 4B.

### **B. ACCESS TO HEALTH SERVICES, INCLUDING INSURANCE COVERAGE**

#### **1. Introduction**

Under established human rights principles, the right to health includes the right to access to appropriate health services.<sup>446</sup> For transgendered individuals, this right includes the possibility of undergoing whatever procedure – surgical or not – is determined necessary by the person in order to change gender, as well as of receiving follow-up treatment. These health services shall be respectful of the wishes of the person, guarantee him or her confidentiality, and avoid humiliating or discriminatory treatment. Of particular interest is also to what extent these services are covered by public health insurance since, if they are not covered, they will be effectively unavailable to persons of insufficient means.<sup>447</sup> At the same time, public funding also increases state control over the bodies of transgendered individuals. This may reinforce state notions of what the 'appropriate' remedy to gender identity discomfort is. This, in turn, may open the door to intrusive state medical and psychological assessments that may be questionable from the perspective of a right to privacy.

The European Court of Human Rights has assessed the right to state funding for gender reassignment treatment, primarily under Article 8 (right to respect for private life) of the Convention. In a 1999 UK case, the Court of Appeal grappled with a similar question. As will be shown, in these cases the courts do not establish that there is a right to funding for surgery for transgendered persons as such. Rather, the courts examine particular conditions that have led to the denial of insurance coverage in individual cases, declaring such conditions disproportional and disrespectful of individual rights.

In several European countries, funding for hormone treatment and gender reassignment surgery is covered by national health insurance schemes. As will be shown, the scope of coverage varies, however, and distinctions between what is deemed 'necessary' and what is seen as merely 'aesthetic' dictate whether the relevant procedure will be covered or not. In places such as the United Kingdom where public health services are strongly decentralized, the assessment of whether a procedure is 'core' or 'non-core' is made locally. This makes it difficult to foresee what level of coverage will be available in the individual case.

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445 Decided on 27 February 2009. Only available in German.

446 Article 12 of the ICESCR, as interpreted by the Committee on Economic, Social and Cultural Rights in General Comment 14 (2000), E/C.12/2000/4, 11 August 2000.

447 Ibid. While not discussing the right to gender reassignment treatment directly, the Committee addresses the need for health services to be economically accessible/affordable for all, as part of state obligations to fulfill the right to health under the Convention.

## 2. Council of Europe

### *Jurisprudence of the European Court of Human Rights*

In *Van Kück v. Germany*<sup>448</sup> the applicant had undergone hormone treatment and male-to-female gender re-assignment surgery. She had been able to change her first name to a female name. The case concerned her possibilities of getting her costs for the hormone treatment and surgery reimbursed by her health insurance company. When the private company refused to cover her costs, she challenged this decision in court. The German court denied her the right to have her costs covered, based on the assumption that the treatment and surgery were not “medically necessary” and that the applicant had deliberately caused her transsexuality, which exempted the insurance company from liability. She claimed that the German court decision violated, *inter alia*, her right to respect for private life under Article 8 of the Convention.

The Court built on its finding, in *Goodwin*, that transsexuality is an internationally recognized medical condition. The central issue was how the German court applied existing criteria to the applicant's claim to reimbursement of medical treatment. The Court stated that what mattered in the case was not the entitlement to reimbursement as such, but the impact of the German court's decisions on the applicant's right to respect for her private life. Importantly, the Court declared that sexual self-determination is one aspect of the right to respect for private life, and found that the German court had violated the applicant's sexual self-determination in various ways. The German court had ignored experts' recommendations on what measures were necessary in the case. Without much knowledge or medical competence, it had also accused the applicant of having deliberately caused her transsexuality. The Court sharply reproached the German court for its ill-founded conclusions, based on “general assumptions [about] male and female behaviour,” requiring the applicant not only to prove that her condition amounted to a disease necessitating hormone treatment and surgery, but also to show the genuine nature of her transsexuality.

The Court found this burden to prove the medical necessity of the treatment to be disproportionate, and thus that the applicant's respect for private life had been violated under Article 8. The Court also found that the handling of the case in German courts did not satisfy the requirements of a fair hearing, which amounted to a violation of Article 6.

It is important to note that the Court did not rule that costs for gender reassignment should be covered by private or public health insurance under Article 8.<sup>449</sup> At stake was the level of respect or disrespect with which the German court had treated the applicant's (self-declared) transsexuality. However, the finding that the German court had not respected the applicant under Article 8, led the Court to the conclusion that reimbursement should have been granted. From that can possibly be drawn that reimbursement for gender reassignment expenses is, if not a right under Article 8, a logical conclusion of the right to respect for sexual self-determination.

The applicant in *Schlumpf v. Switzerland*<sup>450</sup> was a male-to-female transsexual who, similar to the previous case, had been denied reimbursement from her health insurance company for gender reassignment surgery. The reason she had been denied coverage was that according to Swiss case law, reimbursement was only mandatory in cases of ‘true transsexualism.’ True transsexualism could, according to the Swiss High Court, only be established after a so-called observation period of two years, which in this case had not elapsed before the operation took place. The applicant was 67 years old when she underwent the surgery and claimed that her age justified an exemption from the two-year rule.

The Court determined that the two-year rule was likely to influence the decision to undergo the procedure of the applicant, given her age, and that the rule therefore impaired her freedom to determine her gender identity.<sup>451</sup> In mechanically applying the rule, without taking into consideration the particular situation of the applicant, a fair balance had not been struck between the interests of the insurance company and those of the applicant. Therefore, there had been a violation of the right to respect for private life under

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448 Application no. 35968/97, decided on 12 June 2003.

449 The Court noted: “In the present case, the central issue is the German courts' application of the existing criteria on reimbursement of medical treatment to the applicant's claim for reimbursement of the cost of gender reassignment surgery, not the legitimacy of such measures in general. Furthermore, what matters is not the entitlement to reimbursement as such, but the impact of the court decisions on the applicant's right to respect for her sexual self-determination as one of the aspects of her right to respect for her private life” (para 78).

450 Application no 29002/06, decided on 8 January 2009. So far available in French only. Press release in English.

451 Note that in the official press release from the Court, in English, the term ‘gender identity’ is used, while in the French text of the case (the whole case has so far not been translated into English) the Court uses the term ‘identité sexuelle,’ which has a slightly narrower connotation than the English concept ‘gender identity.’

Article 8. The Court reaffirmed that issues of gender identity concern one of the most intimate aspects of private life, which have to be respected by states under the Convention.

The Court noted again that the Convention does not guarantee reimbursement for sex-change operations. What was assessed was not the right to reimbursement *per se* but the rigidity of the two-year rule.<sup>452</sup> However, as in the Van Kück case, the Court addressed a very practical aspect of gender identity issues, and stressed the need for the state to take individual, emotional concerns into consideration in order for Article 8 to be respected.

### 3. European Union

Right to gender identity treatment does not fall within the scope of binding EU law.

### 4. Domestic case law and legislation

In **Finland**, it is possible to get a change of gender legally approved without surgical procedure. According to Law No. 563 of 28 June 2002 on the determination of sexual identity of transsexual persons,<sup>453</sup> it will be determined that a person's sexual identity is different from the sex registered at birth if the person demonstrates a medical examination attesting to the fact that he or she permanently finds him/herself belonging to the opposite sex; has undergone sterilization or is otherwise proven to be infertile; is over age of majority; and is unmarried and not in a registered partnership (1§). A person who is married or in a registered partnership may get their gender change approved, if the spouse or partner gives his/her consent – in those cases, a marriage will automatically be turned into a registered partnership, and a partnership into a marriage (§2).

The Finnish Social Affairs and Health Ministry has given specific instructions concerning the treatment of transsexual people in Ordinance No. 1053 of 3 December 2002 on the organization of examinations and treatment for the purposes of sex change and on the medical statement determining the gender of transsexual persons.<sup>454</sup> This Ordinance regulates examinations and treatment for the purposes of sex change; establishes guidelines for the multi-professional working group with specialist knowledge concerning transsexualism; and sets forth criteria for a treatment plan and for the medical statement determining the gender of transsexual persons. Preconditions for treatment are that the person finds him/herself permanently belonging to the other gender, lives according to a gender role corresponding with that other gender, and has undergone sterilization or is otherwise proven infertile. The medical examination of the person must result in a statement by a psychiatrist attesting to the fact that these criteria have been met.

Types of available treatment include psychological, hormonal, and surgical treatment, in accordance with the needs defined by the person and the medical staff involved in the examination. Gender reassignment surgery is performed at only one hospital in the country: the university hospital in Helsinki, where a specialist on plastic surgery performs the procedure.

In Finland, health care is given high priority as a public responsibility, and thus Finnish public health insurance provides funding for most aspects of gender reassignment treatment. According to a 2008 report, treatments such as hormone therapy, vagino-plasty, breast-augmentation, mastectomy, and hysterectomy are all covered by public health insurance; for psycho-therapy and hair removal, public funding is also occasionally available.<sup>455</sup>

In the **United Kingdom**, the Department of Health allocates funding for treatment of all conditions to the 152 local Primary Care Trusts (PCTs). Each PCT sets its own priorities on how to distribute the money it has received from the Department of Health. For this reason there is no nationwide uniform policy on what elements of gender reassignment treatment will receive public funding.

*Case law: establishing a basic right to funding for gender reassignment treatment*

However, a basic right to public funding for gender reassignment treatment was established in 1999 through the decision of the British Court of Appeal (Civil Division). In the case, North West

452 It is interesting to note, for the purpose of this report, that the two-year rule is part of the WHO definition of transsexualism. For the diagnosis transsexualism to be made, "the transsexual identity should have been present persistently for at least 2 years" according to the WHO "Classification of Mental and Behavioural Disorders", available at <http://www.who.int/classifications/icd/en/bluebook.pdf>. Last visited on 8 May 2010.

453 Official versions available in Swedish and Finnish.

454 Official versions available in Swedish and Finnish.

455 Stephen Whittle et al, *Transgender EuroStudy: Legal Survey and Focus on The Transgender Experience of Health Care*, Transgender Europe and ILGA-Europe, 2008, p. 22 and p. 31.

Lancashire Health Authority v. A., D., G.,<sup>456</sup> the petitioners, in the words of the judge, suffered from gender dysphoria. The local health authority had refused them treatment, including surgery, under the National Health Service (NHS) scheme because of its policy not to conduct surgery in the absence of 'overriding clinical need' or other exceptional circumstances. The applicants argued that they were ill and that, given that the Authority had classified transsexualism as an 'illness,' its policy not to fund their treatment was irrational.

The main issue in the case was whether the application of said policy was rational and, therefore, could be deemed proper. The judge found it incoherent that the Authority on one hand declared transsexualism an illness and, on the other, stated more or less automatically that individual cases did not correspond to an overriding clinical need and so refused funding for the condition's treatment:

*Accordingly, given the Authority's acknowledgment that transsexualism is an illness, its policy, in my view, is flawed in two important respects. First, it does not in truth treat transsexualism as an illness, but as an attitude or state of mind which does not warrant medical treatment. Second, the ostensible provision that it makes for exceptions in individual cases and its manner of considering them amount effectively to the operation of a "blanket policy" against funding treatment for the condition because it does not believe in such treatment.*

Thus, the judge declared that a policy to fund treatment for gender identity dysphoria only in exceptional cases was not irrational *as such*, but that the possibility of obtaining funding in such cases had to be real and not merely fictional. Each person's needs had to be assessed individually. In conclusion, the judge ordered that the matter be remitted to the Authority for reformulation of its policy, to give proper weight to its acknowledgement that transsexualism is an illness.

This case has been understood to establish a 'floor' under which no Primary Care Trust can go, in regard to funding for gender reassignment treatment. According to the NHS, most PCTs will fund specialist psychiatric assessment and hormonal medication. Some will fund hair removal and speech therapy. With regard to surgery, funding opportunities vary. Many PCTs have adopted the view that there are 'core procedures' that will be funded (such as chest reconstruction for a transgendered man), while 'non-core procedures' (such as facial feminizing surgery or breast augmentation) may be deemed aesthetic or cosmetic, and will therefore not receive funding.<sup>457</sup>

*Case law: the right to respect for gender identity for imprisoned transgendered person linked to right to treatment*

Another United Kingdom case, from 2008, highlights how state recognition of a person's true gender identity is intertwined with that person's right to gender reassignment surgery. In the Administrative High Court case AB. v. the Secretary of State for Justice and the Governor of HMP Manchester,<sup>458</sup> the claimant was a 27-year-old pre-operative transgendered woman serving a prison sentence for having committed various violent crimes. She sought judicial review to challenge the decision that she be kept within the male prison and thus not transferred to a female prison facility. She had been undergoing the process for gender reassignment, though not surgery, and had in 2006 been granted a certificate under the Gender Recognition Act recognizing her as a woman for all purposes.

In prison, the claimant dressed as a woman to the extent possible, and was held in a special unit due to safety concerns. Her identification as female did not allow her to partake in the full range of prison activities, which hindered her progress towards release. Furthermore, the Gender Identity Clinic treating the claimant would not approve her gender reassignment surgery until she had spent a considerable amount of time living 'in role' as a woman, which under present circumstances could only happen within a female prison. Thus, as long as the claimant remained in the male prison she was unable to progress towards surgery.

The Administrative Court examined the case in light of UK obligations under the European Convention on Human Rights, and in particular Article 8, the right to respect for private life, and Article 14, non-discrimination. In quoting a 2008 UK Appeals Case, the Court reiterated that the right to personal autonomy under Article 8 should make the person the "master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image [...]; and also of the 'zone of interaction' [...] between

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456 [2000] 1 WLR 997. Decided on 29 July 1999.

457 Information from *NHS funding processes and waiting times for adult service-users. Trans wellbeing and healthcare*. NHS, 2008. Available at [http://www.dh.gov.uk/dr\\_consum/dh\\_groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_082955.pdf](http://www.dh.gov.uk/dr_consum/dh_groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_082955.pdf). Last visited on 28 March 2010.

458 Case CO/9490/2008 [2009] EWHC 2220 (Admin), decided on 4 September 2009.

himself and others” (para 39). The Court emphasized that the continued detention of the claimant in a male prison interfered with her ability to progress to full gender reassignment – hence placing a significant restriction on her autonomy and her wishes to seek to qualify for surgery. This interference was found to go “to the heart of her identity [and] appear[ed] to be closely related to her offending behaviour.”

In conclusion, in denying the claimant’s right to transfer to the female prison the State limited her personal autonomy, identity, and integrity, and its justifications for doing so were all insufficiently weighty. Her continued detention in a male prison was found to be in breach of Article 8 of the Convention.

In this context it may be worth mentioning a passage in the above-mentioned (non-binding) Council of Europe Commissioner on Human Rights 2009 report “Human Rights and Gender Identity,”<sup>459</sup> in which the Commissioner addressed the special needs for health services of transgendered individuals in correctional institutions:

*[P]roblems are faced by transgender people in prison who may face periods of time without hormone therapy. This may result in a long time without treatment and may cause serious health problems, such as the development of osteoporosis in transsexual men, and irreversible physiological changes to take place such as the development of baldness in transsexual women. Transsexual people will frequently face difficulties in accessing assessment, hormone therapies, or surgery as many prisons or prison systems feel they do not have the facilities to manage transsexual prisoners, or in some cases they are seen as forgoing their right to such treatments because of their conviction.*

## 5. Concluding remarks

Matters concerning gender identity raise an array of issues, that all demand separate legal responses. Gender identity concerns areas that are deeply personal, intimate, and constitutive of the person. At the same time, when individuals transgress the traditional divide between ‘male’ and ‘female,’ the issues raised tend to stir strong public reactions. On one level, it may be relevant to reflect upon why the state claims an interest in regulating and registering the individual’s sex at all. On a more practical level, however, given that most societies organize themselves in fundamental ways around categories of ‘men’ and ‘women,’ it is important to examine how the rights of persons not conforming to traditional gender roles are being guaranteed and protected. From a human rights perspective, the self-determination of the individual, both with regard to establishing his or her true gender identity, and to choosing the adequate remedy when she will undergo a gender or sex change, must be seen as paramount.

For the purpose of sexual health, several of the European bodies have emphasized the connection between gender identity and well-being. In L. v. Lithuania, the European Court of Human Rights stressed the right of every person to live by his or her ‘true identity,’ and in Recommendation 1117 the Parliamentary Assembly of the Council of Europe states that the ‘sexual identity’ of a person is an important feature of his or her personality. These statements clearly link gender identity to issues of psychological and social well-being.

Three health-related aspects of gender identity have been examined here. One is the fact that transsexuality/transgenderism is still to a large extent seen as a mental disorder. The second aspect relates to state recognition, or denial, of a transgendered individual’s true gender identity, and the effects such state action has on that individual’s well-being. The third relevant aspect is access to health care for transgendered persons, as primarily discussed in Chapter 4B.

With regard to the first issue the following can be concluded. In the region, the dominant view is that transsexuality is seen as an illness, or at least a ‘mental disorder.’ On one hand, this approach provides an obvious connection with health, and the right to health. If the pre-operative state of the transgendered individual is seen as a medical/psychological problem, it can be argued that the state, under its obligations to respect and fulfil the right to health, has a responsibility to provide for and support adequate remedy, namely treatment and (when appropriate) surgery. Only when a person’s ‘mental sex’ corresponds with his or her ‘apparent sex,’ will that person have attained an acceptable level of health.

On the other hand, it is problematic to medicalize the issue and make legal recognition of a person’s gender identity so dependent on surgery or other medical requirements, such as sterilization. Surgery and sterilization are serious interferences with the physical integrity of a person. Statements from the transgendered/transsexual community strongly argue that gender identity goes beyond the physical

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459 CommDH/IssuePaper(2009)2, 29 July 2009.

appearance, and that there is danger in pathologizing the issue of transsexuality.<sup>460</sup> A medical approach also tends to lead to stigmatization and social exclusion of transgendered persons. There will always be individuals who do not wish to undergo, cannot afford, or for some other reason cannot access gender reassignment surgery; it is critical that their rights also be respected both with regard to civil status registration, health care access, and state protection against violence.

In European Court of Human Rights jurisprudence, the approach to the issue of state responsibility to enable an individual to change his or her legal gender has so far been strongly linked to a view of transsexuality as a 'medical condition,' albeit with strong psychological bearings for the individual. A more inclusive and social perspective on gender identity issues comes across in the European Parliament 1989 resolution on discrimination against transsexuals. In this document, the European Parliament states that transsexuality points to a reluctance in society to accept more fluctuating gender roles. While this document is non-binding, it may still suggest an increasing willingness in Europe to widen the view on gender identity matters – also demonstrated by some recent domestic legislation on gender change.

The Italian Constitutional Court declared as early as 1985 that a right to gender identity is inherent in the human rights recognized by the Italian Constitution, and that gender identity is linked to psychological and social factors. This has not affected a basic tendency to require surgery for legal recognition of a new gender in Italy, however. More recent European legislation and case law have taken a less medicalized approach to the possibility of transition from one gender to the other and getting legal recognition for this transition. Examples from Spain, the United Kingdom, and Kazakhstan illustrate that surgery is no longer always required in order for legal change of gender to be recognized. The Austrian Administrative High Court recently reached the same conclusion. However, even where official gender change no longer depends on surgery, problematic aspects remain in several of these laws. These include requiring sterility and non-married status to qualify for a new legal gender or, in the Kazakh Order, an extensive, obligatory medical assessment with features that have an innate potential for discrimination and abuse. From a human rights perspective, the Spanish law may be the one providing the most permissive and most rights-based approach with regard to state recognition of a transgendered person's gender identity. Not only are requirements such as sterilization or non-married status absent in this law; it also offers flexibility to individuals who may be unable to undertake the medical treatment that the law otherwise requires in order to grant a change of legal gender. This illustrates a recognition both of the importance a legal change of gender may have for the individual, and how this process may for many people be more complex than previously acknowledged.

As for a right to treatment for transgendered individuals, it is worthwhile to analyze the European Court of Human Rights cases from a health and rights perspective. On one hand, in *Van Kück* the Court states that the freedom to define oneself as a female (or male) person constitutes one of the most basic essentials of self-determination. This suggests a view on gender identity as something over which the individual has a certain level of control and which should be respected as such. On the other hand, the Court stresses the nature of transsexuality as a medical condition – suggesting a state of disease which can be objectively verified and corrected. These two perspectives are somewhat incoherent. However, the Court reconciles them by the statement that transsexuality is a disease if the person involved herself perceives it as such, which was the case in *Van Kück*. In a curious way this approach protects both the right to sexual self-determination for the individual and the medicalized view of transsexuality, on which (according to the Court) the right to reimbursement relies.

Both cases discussed here suggest that the Court looks favourably upon the right for transsexuals to live fully according to their preferred gender. Here it is important to point out that the Court so far has only addressed the rights of either post-operative transsexual individuals or individuals seeking surgery. The Court has *not* addressed the right to treatment, or the right to change of legal gender, for pre-operative transgendered persons. The Court has, thus, not ruled that there is a right to 'gender identity' *per se*. Until such a statement is made, the contradiction between self-determination of gender identity and the medicalized approach will not be fully resolved. Again, the enactment of permissive laws and policies on the domestic level, such as in Spain and to some extent in Finland and the United Kingdom, constitute an approach that more clearly embraces the right to gender identity as such.

460 See, *inter alia*, the Stop Trans Pathologization 2012 website, available at <http://stp2012.wordpress.com/>. Last visited on 26 November 2009.

## C. INTERSEX

### 1. Introduction<sup>461</sup>

Persons born with genitalia or bodies deemed gender ambiguous or gender non-conforming fall under the broad label of 'persons with intersex conditions.' The causes of these developments are diverse, including a variety of genetic anomalies and hormonal over- and under-exposures during fetal development, many of which are discovered shortly after birth or during childhood. Although most manifestations are not life-threatening, it has become common to alter the infant's or child's body, particularly sexual organs, to conform to gendered physical norms, including through (repeated) surgeries, hormonal interventions, and other measures. The rationale for gender reassignment or 'normalizing' surgery for minors includes reducing gender confusion for the child and parents, responding to parental concerns that the child be normal and accepted, and to promote the child's social integration and happiness.

Until recently, states have generally given minimal attention to these interventions, requiring only parental consent (assumed to be motivated by the 'best interests of the child') and in conformity with locally accepted, general standards of medical care. Intersex advocates have emphasized the insufficiency of these conventional standards, highlighting the lack of the child's consent for drastic interventions that are irreversible; life-long in their consequence for physical and mental health, particularly sexual response; and the absence of medical justification for imposing these interventions in childhood, before the person has the opportunity and mature judgment to determine the advantages and disadvantages of these procedures.

Legally and politically, the claims of persons with intersex conditions engage not only with children's rights, but also more generally with claims to the highest attainable standard of health, non-discrimination, and autonomy-privacy rights around determining one's own gender. Specific legal issues involve informed consent procedures (for parents, intersex children, and intersex adults undergoing surgery later in life); potential violations of bodily integrity; self-determination; and rights to privacy.

There appear to be few binding laws, official policies, or uniform medical regulations regarding the treatment of intersex individuals in Europe. Indeed the appropriate course of treatment for children born intersexed or with ambiguous genitalia is increasingly contested within the medical community, and there has been no substantive quality control regarding irreversible genital surgery interventions. However, there are a few promising policies in the region that are promoting a 'wait-and-see' approach, not only to avoid potential physical and sexual complications as a result of neonatal surgery, but also to allow the child to grow to an age when he or she can clearly express his or her own gender identity and can elect whether or not to undergo such surgery. There are also a limited number of cases where individuals have successfully sued doctors who performed surgeries and removed reproductive organs without informed consent.

The Council of Europe bodies have not addressed the human rights of intersex individuals; nor has it arisen in the context of EU law. In 2009, a German intersex activist group filed a shadow report to the 6th National Report of the Federal Republic of Germany to CEDAW,<sup>462</sup> claiming, *inter alia*, that uninformed surgery removing reproductive organs may constitute a violation of the right to reproductive self-determination, the right to health, and the right to reproductive and health education and access to medical services. The CEDAW Committee, in its Concluding Observations, criticized the German government's poor dialogue with organizations promoting the rights of intersex individuals, and urged the German government to improve such dialogue "in order to better understand their claims and to take effective action to protect their human rights" (para 62).<sup>463</sup> The Committee also requested a report in two years regarding the state's efforts to do so (para 67).

### 2. Domestic policy and case law

According to news reports, in the **United Kingdom** the National Health Service (NHS) has adopted a policy that discourages surgery to 'normalize' babies born with genital ambiguity and abandons policies of non-disclosure to parents of such babies.<sup>464</sup> Doctors are trained to discuss issues related

461 Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.

462 Available at <http://intersex.shadowreport.org/>, visited on 23 April 2010.

463 Concluding observations of the Committee on the Elimination of Discrimination against Women, report on Germany 10 February 2009, CEDAW/C/DEU/CO/6.

464 Researchers have been unable to locate this policy or to get information from persons involved in its adoption. This information is from Times Online, "Caster Semenya and the middle sex," 19 November 2009, available at [http://women.timesonline.co.uk/tol/life\\_and\\_style/women/families/article6922193.ece](http://women.timesonline.co.uk/tol/life_and_style/women/families/article6922193.ece). Visited on 23 April 2010.

to genital ambiguity with parents and refer them to one of the major medical centers in the UK for tests and genetic analysis. Parents are to be informed of the risks associated with 'genital normalization' surgeries, such as potential impairment of future sex life and sexual sensation. In particular, British parents are discouraged from seeking surgery solely for reasons of social acceptability.

Similarly, and also according to news reports, in **Switzerland** some hospitals now adhere to a policy of surgical intervention only if the configuration of the genitals adversely affects urinary or bowel function. In those hospitals chromosome tests are carried out on infants of indeterminate sex, and doctors advise parents to wait until their child can choose a gender itself.<sup>465</sup>

**Germany** has established medical guidelines to address the treatment of intersex children, which, *inter alia*, establish that surgery on intersex infants generally is not called for, and stress that parents must have full and clear information before a decision about infant surgery can be made.<sup>466</sup> Some ethical guidelines have also been developed, in which the right of the child and future adult to bodily integrity, life quality, ability to procreate, sexual experiences, and free development of personality are listed as important principles. Furthermore, the right of both children and parents to participate in the decision of how to address the intersex condition is stressed.<sup>467</sup> However, intersex activists report that these guidelines do not clearly distinguish between medically indicated treatments and purely cosmetic surgeries. For this reason the guidelines can easily be misused to the effect that parents can consent to any kind of surgery they want for the child, regardless of medical necessity.<sup>468</sup>

In the German case 5U 51/08,<sup>469</sup> a civil appeals court in Cologne addressed the issue of lack of informed consent in 'normalizing' surgery of an intersex individual. In 2007 an intersex woman sued a surgeon for pain and suffering due to the removal of her ovaries and uterus over 30 years earlier. She was born with an enlarged clitoris which was mistakenly taken to be a penis, and was raised as a boy. During a routine appendectomy at the age of 17, doctors observed that she had a uterus and ovaries, which were subsequently removed by the surgeon without her knowledge or consent. The claimant only discovered that she was biologically female later in life. Since she was 18 at the time of the surgery, she had a chance to sue before the statute of limitations expired.

The Court determined that the operation "doubtlessly" had been illegal due to lack of informed consent, and thus that the claimant's self-determination had been violated. It stated that the doctors present and surgeon in charge should have immediately ceased the operation, sewn the patient back up, and discussed their discovery with her in detail rather than concealing their findings. The claimant was awarded €100,000 in damages.

### 3. Concluding remarks

It is difficult to draw conclusions on European policies on the rights of intersex individuals, given the scarcity of the material. Nevertheless, the fact that so few official policies exist is in itself an indication that the intersex condition is still taboo, under-reported, and under-researched in the region. This fact raises serious concerns regarding the rights of persons born with ambiguous genitalia. In particular, the protection of fundamental rights of children is critical, given the social pressure to assign a gender on an infant at birth and the tradition of subjecting infants to 'normalizing' surgery regardless of medical necessity. Under standard legal norms parents can decide on most issues concerning their young child. However, it may be argued that assigning a gender touches issues so deeply individual to the person that he or she should be able to decide it when capable of doing so. No country in the European region appears to have legally binding policies on restriction of non-necessary surgery to that end or on informed consent. In fact, most countries seem to lack even clear guidelines for medical staff. This leads to the conclusion that the rights of intersex individuals, not only to bodily integrity and self-determination but also to sexual health, broadly speaking, are still severely under-protected in the region.

That stated, it should be acknowledged that although modest, a few policies have emerged in the region that embrace the perspective that cosmetic genital surgery of children is problematic both from a medical and a rights-based perspective. The adoption of policies that discourage 'normalizing'

465 According to Swissinfo.ch, "Doctors 'Playing God with children's sex,'" 26 August 2009, at [http://www.swissinfo.ch/eng/index/Doctors\\_playing\\_God\\_with\\_childrens\\_sex.html?cid=981950](http://www.swissinfo.ch/eng/index/Doctors_playing_God_with_childrens_sex.html?cid=981950). Visited on 23 April 2010.

466 Guidelines from the Society for Child and Adolescent Medicine (DGKJ): Disorders of Sexual Development (2007). Only available in German.

467 Ethics Working Group in the Intersexuality Network "Features of Sexual Development:" Ethical Policies and Advice in regard to DSD (2008). Only available in German..

468 According to email by intersex activist at Swiss organization [Zwischengeschlecht.org](http://Zwischengeschlecht.org) in April 2010.

469 Civil Appels Court Cologne, decided on 3 September 2008. Only available in German.

surgery on infants, if only on hospital level – as well as the German court's recognition that genital surgery without informed consent is a breach of the right to self-determination – are small steps in the direction towards a less dogmatic and more rights-based approach to intersexuality.