

***IN THE EUROPEAN COURT OF HUMAN RIGHTS***

***Y against France***

*(Application no. 76888/17)*

***WRITTEN COMMENTS***

*Submitted jointly by*

*Oll Europe  
ILGA-Europe  
C.I.A.*

## I. Introduction

These written comments are submitted on behalf of OII Europe (Organisation Intersex International Europe e.V.), ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), and C.I.A. (Collectif intersexes et allié-e-s) pursuant to leave granted by the President of the Fifth Section. The present case concerns the French authorities' refusal to allow for the current "male" gender marker of the applicant, an intersex person, to be replaced by "neutral" or "intersex" on the birth certificate. The third-party interveners contrast the French authorities' decisions with broader trends at the national, regional and international levels that favour recognizing gender identity on the basis of self-determination, including by allowing for the recognition of non-binary identities. In doing so, the present submission places the Court's jurisprudence in a wider legal and policy context, drawing from regional and international comparative law. The submission provides information about "intersex" as an umbrella term and the spectrum of variations of sex characteristics (II). It documents the violence and discrimination faced by intersex people due to lack of recognition of their human rights (III). It further reviews the current obstacles faced by intersex people seeking legal gender recognition, providing guidance on how to overcome them (IV). Last, the submission brings to light the emerging trend towards recognition of gender identity as non-binary by placing recent national, regional and international law developments in the context of Article 8 of the Convention (V).

## II. Who are intersex people

1. The term "intersex" is an umbrella term for the physical spectrum of variations of sex characteristics that naturally occur within the human species. Intersex individuals are born with sex characteristics - sexual anatomy, reproductive organs, hormonal structure and/or levels and/or chromosomal patterns - that do not fit the typical definition of male or female. The term intersex acknowledges the fact that people with variations of sex characteristics other than male or female exist.<sup>1</sup>

2. Sex characteristics are set out from birth, whether we are intersex or not. However, the fact that someone has an intersex body can become apparent at different times in their life: at birth, during childhood, in puberty or even in adulthood. Depending on the specific life circumstances and the degree of taboo in their environment, a person might learn that they have an intersex body at a very early age or later in life. Some intersex people never find out at all. According to the United Nations up to 1.7% of the population, or, globally speaking, as of 2019, 131 million people have been born with intersex traits.<sup>2</sup>

3. Studies published in the Netherlands in 2014 reveal that at least 1 in 200 people are at risk of being subjected to invasive surgeries and other medical interventions, e.g. hormonal treatment, based on being diagnosed by medical professionals as having a "Disorder of Sex Development" (DSD) or an "unspecified" diagnosis, such as "unspecified malformation of the male/female genitalia".<sup>3</sup>

4. "Disorder of Sex Development (DSD)" is a medical umbrella term, which was introduced in 2006 by a Clinician Consensus Statement. Together with new categories of "syndromes", it replaced the older medical terms. Some clinicians use DSD to stand for "differences of" or "diverse" sex development. However, in all its forms the term pathologises healthy variations of sex characteristics and refers to intersex sex characteristics as characteristics that are "deviant" from the norm of male and female bodies and thus need to be "disambiguated" or "fixed". The term "DSD" does not align with human rights standards.<sup>4</sup>

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<sup>1</sup> Dan Christian Ghattas (2019): Protecting Intersex people in Europe. A toolkit for law and policy makers. With digital Appendix and Checklist. Ed. by ILGA-Europe and OII Europe. Brussels/Berlin, p.9.

<sup>2</sup> United Nations Office of the High Commissioner for Human Rights (2015): Fact Sheet. Intersex. [https://unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf)

<sup>3</sup> The Netherlands Institute for Sociological Research (2014): Living with intersex/DSD. An exploratory study of the social situation of persons with intersex/DSD. Written by Jantine van Lisdonk. Appendix B Prevalence table for intersex/dsd. [https://www.scp.nl/english/Publications/Publications\\_by\\_year/Publications\\_2014/Living\\_with\\_intersex\\_DSD](https://www.scp.nl/english/Publications/Publications_by_year/Publications_2014/Living_with_intersex_DSD); U. Klöppel (2016): Zur Aktualität kosmetischer Operationen „un-eindeutiger“ Genitalien im Kindesalter. Hg. von der Geschäftsstelle des Zentrums für transdisziplinäre Geschlechterstudien der Humboldt-Universität zu Berlin. Berlin [https://www.gender.hu-berlin.de/de/publikationen/gender-bulletins/bulletin-texte/texte-42/kloepfel-2016\\_zur-aktualitaet-kosmetischer-genitaloperationen](https://www.gender.hu-berlin.de/de/publikationen/gender-bulletins/bulletin-texte/texte-42/kloepfel-2016_zur-aktualitaet-kosmetischer-genitaloperationen), p. 56-62.

<sup>4</sup> Dan Christian Ghattas (2019): Protecting Intersex people in Europe. A toolkit for law and policy makers. With digital Appendix and Checklist. Ed. by ILGA-Europe and OII Europe. Brussels/Berlin, p.9.

### III. Violence and discrimination faced by intersex people due to lack of recognition of their human rights

5. Surgeries and medical interventions on intersex infants and children are still common. According to a 2015 survey published by the EU Fundamental Rights Agency, so-called sex-“normalising” surgeries on intersex infants and children are carried out in at least 21 of the EU Member States. Currently, only Malta and, with certain nuances, Portugal prohibit these harmful medical interventions. In 2017, the Parliamentary Assembly of the Council of Europe confirmed in its resolution *Promoting the human rights of and eliminating discrimination against intersex people* that these surgeries are “serious breaches of physical integrity” and highlighted that they are performed “despite the fact that there is no evidence to support the long-term success of such treatments, no immediate danger to health and no genuine therapeutic purpose for the treatment”.<sup>5</sup> In 2019, the European Parliament emphasized in its resolution *The rights of intersex people* that it “strongly condemns sex-normalising treatments and surgery” and that it encourages Member States to adopt legislation prohibiting such surgeries as soon as possible.<sup>6</sup>

6. Many of these interventions, especially but not limited to surgeries, are irreversible, deferrable, non-emergency interventions on healthy bodies and most often take place in infancy and childhood, without personal and fully informed consent.<sup>7</sup> Because being intersex in itself is still seen as a disorder, when pre-implantation diagnosis or pre-natal screening show a risk of variations of sex characteristics in embryos and fetuses, both may be prevented from further developing by way of enforced abortion or being subjected to high-risk off-label use medication.<sup>8</sup>

7. Historically, performing non-emergency, non-vital surgeries on intersex bodies was not always the default practice. Before the middle of the twentieth century, as three Surgeons General of the United States have pointed out, “most children born with genitalia that did not fit the male-female binary norm were not subjected to surgery”. Beginning with the 1950s, however, in “an era when pressure to conform to social norms was often unyielding”, the standard treatment protocol changed. Infants born with atypical genitalia were “increasingly subjected to surgical procedures such as clitoral reduction, vaginoplasty, gonadectomy, and hypospadias repair, primarily to ‘normalize’ gendered appearance, not to improve function”.<sup>9</sup>

8. A clear link has been established in the past years between these practices and the false notion that only two binary human sexes, male and female, exist.<sup>10</sup> In a binary society “being human” is strongly connected – in everyday life as well as legally – to “being male” or “being female”, to being a “man” or a “woman”. Within that cultural construct, the birth of an intersex child has therefore been treated since the 1950s as a “psycho-social emergency” that needs to be “fixed” by medical means, in order to “prevent parental distress”, to “protect” the child from experiencing discrimination as a result of their “ambiguous” genitalia and/or to prevent “lesbianism”, “tomboyism” or a “gender identity disorder” in the child.<sup>11</sup> While doing so, the intersex individual’s human rights to bodily autonomy and bodily integrity have been violated, often egregiously.

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<sup>5</sup> Parliamentary Assembly of the Council of Europe (PACE), Resolution 2191 (2017), Promoting the human rights of and eliminating discrimination against intersex people, §2.

<sup>6</sup> European Parliament (EP), Resolution of 14 February 2019 on the rights of intersex people (2018/2878(RSP)), §2.

<sup>7</sup> Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Switzerland, 2015, CRC/C/CHE/CO/2-4, III.D.Harmful practices.

<sup>8</sup> In the UK for example, embryos determined to have intersex variations are on the termination list for pre-implantation and several parents from different countries in the Council of Europe region have reported to OII Europe that they were under huge pressure from doctors to abort their intersex child. In other cases, prenatal treatment with high-risk off-label use medication (dexamethasone) is prescribed. Dexamethasone has proven to be at high risk of long-term negative effects on the child’s physical health and cognitive capacity, and also impacts on the health of the parent carrying the child. However, to date only Sweden has discontinued the use of the drug for foetal treatment. S. Monroe, D. Crocetti, T. Yeadon-Lee, with F. Garland and M. Travis (2017): Intersex, Variations of Sex Characteristics and DSD: The Need for Change. University of Huddersfield, p. 19-20. <http://eprints.hud.ac.uk/id/eprint/33535/1/Intersex%20Variations%20of%20Sex%20Characteristics%20and%20DSD%20%20the%20Need%20for%20ChangereportOct10.pdf>; Pressure by doctors to perform even late abortions of an (alleged) intersex foetus have been reported to OII Europe.

<sup>9</sup> M. J. Elders, David Satcher, R. Carmona (2017): Re-Thinking Genital Surgeries on Intersex Infants, p. 1. <https://www.palmcenter.org/wp-content/uploads/2017/06/Re-Thinking-Genital-Surgeries-1.pdf>. For a short summary of the development of the current practices see Amnesty International (2017), p. 17-19. A comprehensive historical overview is to be found in U. Klöppel (2010): XX0XY ungelöst. Hermaphroditismus, Sex und Gender in der deutschen Medizin. Eine historische Studie zu Intersexualität. Bielefeld: Transcript Verlag.

<sup>10</sup> United Nations Office of the High Commissioner for Human Rights (2015), p. 1.

<sup>11</sup> M. J. Elders, David Satcher, R. Carmona (2017): Re-Thinking Genital Surgeries on Intersex Infants, p. 1; U. Klöppel (2010): XX0XY ungelöst. Hermaphroditismus, Sex und Gender in der deutschen Medizin. Eine historische Studie zu Intersexualität. Bielefeld: Transcript Verlag., p. 314-318, 479.

9. From 2009 to the present, United Nations Treaty Bodies have made 57 calls on Member States to stop human rights violations against intersex people.<sup>12</sup> Of these, 16 Council of Europe Member States have received 33 UN Treaty Body recommendations - three concerning France - 16 of these in the past two years alone<sup>13</sup>. In particular, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has recognized that “medical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned.”<sup>14</sup> The Yogyakarta Principles plus 10 call for protection of intersex people on the ground of “sex characteristics” and for ending human rights violations on intersex people, including protecting their right to bodily and mental integrity.<sup>15</sup>

10. Additionally, the Inter-American Commission on Human Rights (IACCommHR) also considered forced and involuntary sterilization of intersex persons as a grave human rights violation. It deplored the serious implications for the physical and psychological integrity, right to reproductive autonomy, and **right to self-determination** of intersex persons. The Commission recommended that medical classifications that pathologize all intersex persons or all variations in sex characteristics should be reviewed and modified accordingly in order to ensure that intersex persons can effectively enjoy the highest attainable standard of health and other human rights.<sup>16</sup>

11. Furthermore, recent medical opinions and guidelines have pointed out that a DSD diagnosis does not allow any presumption on a person’s gender identity.<sup>17</sup> As a result, early interventions on the bodies of intersex children affect their ability to fully exercise their right to self-determination of their gender identity. This Court has established that gender identity is a fundamental personal characteristic and a basic attribute of self-determination, which is protected under the right to respect for private life according to Article 8 of the Convention.<sup>18</sup>

12. The Inter American Court of Human Rights (IACtHR) has noted that gender identity is an expression of the possibility that every human being should have “to self-determine and freely choose the options and circumstances that give meaning to their existence, according to their own convictions.”<sup>19</sup> Self-determination is a key feature of the Yogyakarta Principles definition, stating that “gender identity is each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. This includes personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, such as dress, speech and mannerisms.”<sup>20</sup> Self-determination is no longer confined to the gender binary and an emerging

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<sup>12</sup> The United Nations Committee on the Rights of the Child (CRC); The United Nations Committee against Torture (CAT); The United Nations Committee on the Elimination of Discrimination against Women (CEDAW); The United Nations Committee on the Rights of the People with Disabilities (CRPD). See OII Europe, Intersex Resources, June 2020, [https://oiieurope.org/wp-content/uploads/2018/05/International-intersex-human-rights-movement\\_Links-to-human-rights-documents-addressing-intersex-and-important-events\\_June-2020.pdf](https://oiieurope.org/wp-content/uploads/2018/05/International-intersex-human-rights-movement_Links-to-human-rights-documents-addressing-intersex-and-important-events_June-2020.pdf).

<sup>13</sup> Country (Number of recommendations): Austria (2); Belgium (2); Denmark (2); France (3); Germany (4); Ireland (2); Italy (3); Liechtenstein (1); Luxembourg (1); Malta (1); Netherlands (2); Portugal (1); Slovakia (1); Spain (1); Switzerland (4); UK (3). See OII Europe, Intersex Resources, June 2020,

<sup>14</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, February 1, 2013, para. 32; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/63/175, July 28, 2008, para. 47.

<sup>15</sup> International Commission of Jurists (ICJ), The Yogyakarta Principles Plus 10 (The YP Plus 10) - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 10 November 2017, available at: <https://www.refworld.org/docid/5c5d4e2e4.html>

<sup>16</sup> Inter-American Commission on Human Rights, 2015, Violence against LGBTI Persons, OAS/Ser.LV/II.rev.1, p. 119.

<sup>17</sup> S2k-Leitlinie Varianten der Geschlechtsentwicklung 2016. Leitlinie der der Deutschen Gesellschaft für Urologie (DGU) e.V., der Deutschen Gesellschaft für Kinderchirurgie (DGKCH) e.V., der Deutschen Gesellschaft für Kinderendokrinologie und -diabetologie (DGKED) e.V., p. 5 [https://www.awmf.org/uploads/tx\\_szleitlinien/174-001l\\_S2k\\_Geschlechtsentwicklung-Varianten\\_2016-08\\_01.pdf](https://www.awmf.org/uploads/tx_szleitlinien/174-001l_S2k_Geschlechtsentwicklung-Varianten_2016-08_01.pdf)

<sup>18</sup> *Van Kück v. Germany*, no. 35968/97, §56 and 75, ECHR 2003-VII.

<sup>19</sup> On 24 November 2017, the IACtHR published a binding advisory opinion regarding the provisions of the American Convention on Human Rights as applied in relation to gender identity, *Corte interamericana de derechos humanos, Opinión consultativa OC-24/17 de 24 de noviembre de 2017*, §85-101 and particularly §93. This Court has often referenced IACtHR jurisprudence in order to interpret the provisions of the Convention (*European Court of Human Rights, Research Report: References to the Inter-American Court of Human Rights and Inter-American instruments in the case-law of the European Court of Human Rights*, 2016)

<sup>20</sup> International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at: <https://www.refworld.org/docid/48244e602.html>. Preamble.

trend in Europe and beyond recognises the right of trans or intersex individuals to self-determine their gender identity as non-binary (see below, Section V.).

**13.** The Court itself, has confirmed in several rulings that gender identity belongs to “one of the most intimate areas of a person’s private life”,<sup>21</sup> is a free-standing “right”,<sup>22</sup> a “fundamental aspect of the right to respect for private life”,<sup>23</sup> and is “one of the most basic essentials of self-determination”.<sup>24</sup>

**14.** In practice, the right to self-determination is not safeguarded when decisions affecting intersex children are made under the pressure of the binarity model. In particular, the coercion to register either «male» or «female» cements the notion that there are only “men” and “women” top-down, which increases the pressure not only to render the child legally “unambiguous”, but physically, too. A German mother, for instance, explains that, “the pressure exerted by the registry to [...] slot one’s child into one of the two genders [builds] up an unreasonable pressure that is only surpassed when the attending physicians demand to consent to allegedly pressing operations at the same time. [...]”<sup>25</sup>. According to the 2020 FRA survey, 62 % of intersex respondents did not provide – and were not asked for – their or their parents’ consent before undergoing surgical intervention to modify their sex characteristics.<sup>26</sup>

#### **IV. Contextual information regarding practical obstacles faced by intersex people seeking legal gender recognition**

##### **i. Practical obstacles**

**15.** A substantial number of intersex people reject the sex they were registered with at birth. A 2012 clinical review paper found that between 8.5% and 20% of intersex people, regardless of whether their body was subjected to medical interventions, developed a gender identity that did not match the sex or gender that was assigned to them at birth.<sup>27</sup>

**16.** Research has shown that a gender marker in official documents that reflects and recognises the person’s gender identity has a positive impact on an individual’s mental and emotional health.<sup>28</sup> Legal gender recognition also reportedly improves a person’s life with regards to social inclusion and reduces the risk of structural and other discrimination.<sup>29</sup>

**17.** Intersex people who have been forcibly assigned a gender through surgical or other means often face trauma and may face severe obstacles in life.<sup>30</sup> The lack of legal recognition of the gender identity that they developed despite the trauma induced on them through these interventions and the prevailing binary system which denies their existence, amplifies the challenges and discrimination they face in their daily lives.

**18.** According to an EU-wide survey conducted in 2019, one in five intersex survey respondents (19 %) faced obstacles when registering their civil status or gender in a public document. These include bureaucratic obstacles (58%), denials of service or ridicule by staff (41 %), and violations of privacy (44 %). 16% of intersex respondents changed their legal gender status, and 7% were at the time of filing in the survey in the process of changing their legal gender. Concerning intersex respondents who had not yet changed their legal gender, 24% said they would want to do so in the future, however 13% found it too expensive, 12% did not fulfil the requirements of the law, 12% found it too difficult, and 7% said there was no legal procedure in their country to change their legal gender.<sup>31</sup> A non-binary Hungarian respondent noted that “legal discrimination between

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<sup>21</sup> Van Kück v. Germany, no. 35968/97, §56, ECHR 2003-VII.

<sup>22</sup> Idem, §75

<sup>23</sup> Idem, §75.

<sup>24</sup> Y.Y. v Turkey, no. 14793/08, §102, 10 March 2015 (extracts).

<sup>25</sup> Dan Christian Ghattas (2013): Human Rights between the Sexes. A preliminary study on the life situation of inter\* individuals. Ed. by the Heinrich Böll Foundation. Berlin.

[https://www.boell.de/sites/default/files/endf\\_human\\_rights\\_between\\_the\\_sexes.pdf?dimension1=ds\\_feminismus](https://www.boell.de/sites/default/files/endf_human_rights_between_the_sexes.pdf?dimension1=ds_feminismus). p.24.

<sup>26</sup> European Union Agency for Fundamental Rights (EU FRA), A long way to go for LGBTI equality. EU LGBTI II, 2020, p. 51.

<sup>27</sup> P.S. Furtado et al. (2012): Gender dysphoria associated with disorders of sex development, in: Nat. Rev. Urol. 9 (11): 620–627.

<sup>28</sup> See: European Court of Human Rights (2002): Christine Goodwin vs. United Kingdom, n° 28957/95.

<sup>29</sup> Global Commission on HIV and the Law. HIV and the law: risks, rights and health; New York, NY: UNDP; 2012.

<sup>30</sup> Dan Christian Ghattas (2019): Protecting Intersex people in Europe. A toolkit for law and policy makers. With digital Appendix and Checklist. Ed. by ILGA-Europe and OII Europe. Brussels/Berlin, p.37.

<sup>31</sup> European Union Agency for Fundamental Rights (FRA) LGBTI Survey Data Explorer & EU-LGBTI II (2019) Survey Report “A long way to go for LGBTI equality” ISBN 978-92-9474-843-0 • doi:10.2811/667747 • TK-04-20-044-EN-N.

the sexes allows for legal inequalities. It is not a question of increasing the number of legal genders, but of creating a legal system [in which] what you are assigned at birth will not matter.”<sup>32</sup>

**19.** Intersex persons in Europe face numerous practical obstacles when seeking legal gender recognition, especially in relation to enjoyment of their private and family life. The Universal Declaration of Human Rights (UDHR) lays out the fundamental human right to found a family.<sup>33</sup> Requirements that an individual be single or that a marriage be dissolved to undergo legal gender recognition violate this right. For intersex people, accessing the right to found a family can be made especially difficult due arbitrary sex assignments at birth, administrative and legal hurdles to acquiring accurate identity documents, and social isolation and trauma. Further limitations in the form of forced divorce are especially punitive.<sup>34</sup> In 20 countries in Europe legal gender recognition is still only possible if a person is unmarried.<sup>35</sup>

**20.** In Denmark, as reported to OII Europe, intersex persons when changing their civil registration number may face losing access to some of their medical history as well as temporary blocked access to payment or cash withdrawal from their bank.

**21.** In Ukraine, an intersex person seeking LGR reported being pushed back and forth between the court and medical professionals, as the court insisted on treating the case as a transgender case, hence requiring a mental health diagnosis while mental health professionals refused to give this diagnosis based on the person being intersex, hence leaving the person in a legal limbo.<sup>36</sup> This is the result of lack of knowledge and understanding of intersex rights. Easy LGR procedure for everybody, including intersex people, based on self-determination is the only procedure in line with human right norms.

**22.** Growing case law from national courts shows that even in countries that do not recognize intersex people by law courts rulings acknowledge and reference these obstacles. In 2020 an intersex person in Bulgaria was allowed to change the legal gender marker because of “impossibility to [...] find a job” with the current gender marker.<sup>37</sup>

**23.** Legal gender recognition is also crucial for the enjoyment of fundamental rights related to freedom of movement. The European Commission recently deplored the negative impact of lack of legal harmonisation in the European Union. It noted that intersex persons are often not recognised in law or in practice which creates legal difficulties in their private and family life, including in cross border situations.<sup>38</sup>

**24.** Furthermore, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity recalled that equal recognition before the law is also a central tenet for other rights and freedoms as it is, in practice, related to access to health, education, housing, social security and employment. The actualization by the State bureaucracy of all of these entitlements depends on the identification of the individual.<sup>39</sup> The legal vacuum for gender-diverse persons triggers a climate that tacitly permits, encourages and rewards with impunity the acts of violence and discrimination against them, and leads to a situation of de facto criminalization.<sup>40</sup>

## **ii. Best practices to overcome obstacles faced by intersex persons**

**25.** In order to overcome these obstacles, and as long as gender markers are registered at birth,<sup>41</sup> States should ensure that the existing diversity of sexes is reflected in options available to register the child’s

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<sup>32</sup> EU FRA, A long way to go for LGBTI equality – EU LGBTI II, 2020, p. 55.

<sup>33</sup> The Universal Declaration of Human Rights, Article 16. <https://www.un.org/en/universal-declaration-human-rights/>.

<sup>34</sup> Dan Christian Ghattas (2019): Protecting Intersex people in Europe. A toolkit for law and policy makers. With digital Appendix and Checklist. Ed. by ILGA-Europe and OII Europe. Brussels/Berlin, p.37.

<sup>35</sup> TGEU, Trans Rights Europe & Central Asia Index 2020, <https://tgeu.org/trans-rights-europe-central-asia-index-maps-2020/>

<sup>36</sup> P. v. UKRAINE, Application no. 40296/16,11/06/2019. <http://hudoc.echr.coe.int/eng?i=001-194520>

<sup>37</sup> Ruse District Court, Decision No. 260303 of 23 October 2020 in civil case No. 54/2020.

<sup>38</sup> European Commission, EU LGBTIQ Equality Strategy 2020-2025, p.16.

<sup>39</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 2018, A/73/152, §22.

<sup>40</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 2018, A/73/152, §25.

<sup>41</sup> The Yogyakarta Principles plus 10 clearly indicate that the registration of sex or gender by States should eventually cease. See Principle 31, [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf)

sex/gender.<sup>42</sup> In order to protect the fundamental rights of children, best practices include making three (male, female, non-binary or equivalent) or more gender markers available when registering a child, and allow parents to choose their intersex child's legal gender. This can include leaving the gender marker blank, if available without any medical statement or diagnosis; allow for gender-neutral names, with no obligation to add another, gendered middle name; allow for postponing gender registration on the birth certificate until the child is mature enough to participate in the decisionmaking process; and allow for birth certificates without a gender marker entry for all, regardless of the infant's sex characteristics. In general, the absence of a marker should not indicate the sex characteristics of an individual.<sup>43</sup> These approaches have been notably encouraged by Council of Europe and European Union bodies.<sup>44</sup>

**26.** In addition to allowing for third-gender options, it is also crucial that intersex individuals have the option - like everyone else - to adjust their gender markers by a low-threshold procedure, based on self-determination, so that it matches their gender identity. Intersex people who have been forcibly assigned a gender through surgical or other means often face trauma and may face severe obstacles in developing their own gender identity. Being able to change their gender marker several times while healing from the trauma and while developing their identity is important in order to prevent retraumatization as a result of the pressure that a 'one time only' chance would put on them. Besides, such a change should not be conditional on providing medical records confirming the person is intersex, as it would breach their right to privacy.<sup>45</sup> Furthermore, many intersex people are not able to obtain their medical records<sup>46</sup> and face additional obstacles to access legal gender recognition. They are forced to re-enter the medical setting, in order to receive an examination and a diagnosis, without discernible medical benefit for the individual and with a high probability of (re)traumatisation and stigmatisation.

## **V. Comparative law overview on emerging trends towards recognition of gender identity as non-binary in the context of Article 8**

### **i. National approaches**

#### **a) An increasing trend in Europe towards the self-determination model**

**27.** Identifying as non-binary in a binary world is per se an act of self-determination. The increasing trend in Europe to establish self-determination as the model for legal gender recognition (LGR) increases the acceptance of the fact that the gender of a person can only be determined by the individual themselves and, in a second step this increasing awareness is connected with a growing understanding that gender, like sex, is a spectrum, instead of being binary.<sup>47</sup>

**28.** Increasing number of Council of Europe members, currently 11 States, have LGR legislation with versions of self-determination in place.<sup>48</sup> On 18 June 2019, the Parliament of Iceland passed the Gender Autonomy Act, replacing the previous requirements of mandatory diagnosis and medical interventions for legal gender recognition, and introducing the self-determination model.<sup>49</sup> The law also allows anyone to register a neutral gender marker - which on passports becomes X - and thus positions Iceland at the forefront regarding LGR.

**29.** Other European countries have opted for a full self-determination model, including Belgium, Denmark, Ireland, Malta, Norway, Portugal and ten regions of Spain; among them, while not establishing a non-binary

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<sup>42</sup> Dan Christian Ghattas (2019): Protecting Intersex people in Europe. A toolkit for law and policy makers. With digital Appendix and Checklist. Ed. by ILGA-Europe and OII Europe. Brussels/Berlin. p.35.

<sup>43</sup> Dan Christian Ghattas (2019): Protecting Intersex people in Europe. A toolkit for law and policy makers. With digital Appendix and Checklist. Ed. by ILGA-Europe and OII Europe. Brussels/Berlin, p.35.

<sup>44</sup> See below, paras. 13-15.

<sup>45</sup> Dan Christian Ghattas (2019): Protecting Intersex people in Europe. A toolkit for law and policy makers. With digital Appendix and Checklist. Ed. by ILGA-Europe and OII Europe. Brussels/Berlin, p.37.

<sup>46</sup> PACE (2017): Report, Part C Article 52.

<sup>47</sup> e.g. for an overview of the situation in Europe, see Annex, table 1.a. Please note that this is not a comprehensive mapping, more countries might be in the process of adopting LGR legislations.

<sup>48</sup> Iceland (2019), Portugal (2018), Luxembourg (2018), Denmark (2014), Malta (2015), Ireland (2015), Norway (2016), Belgium (2017) have legislation based purely on self-determination. Belgium and Denmark impose waiting times; France (2016) and Greece (2017) have in place judicial filters, with Greece imposing additional non- medical requirements (single status and age) – see, TGEU, *New Greek gender recognition law fails human rights*, 10 October 2017, available here: [https://tgeu.org/greece\\_lgr/](https://tgeu.org/greece_lgr/). see also *ILGA-Europe Annual Review 2019*: [https://www.ilga-europe.org/sites/default/files/2020/full\\_annual\\_review.pdf](https://www.ilga-europe.org/sites/default/files/2020/full_annual_review.pdf)

<sup>49</sup> Law [80/2019: Lög um kynrænt sjálfbræði](https://www.althingi.is/lagas/nuna/2019080.html) | Lög. <https://www.althingi.is/lagas/nuna/2019080.html>

gender marker yet, Denmark and Malta allow for a neutral X in the passport or other identification documents<sup>50</sup>.

**30.** Some countries have taken a first step towards full self-determination by approving a model which is partly based on self-determination but asks for additional prove - in form of publicly appearing to belong to the affirmed gender, forename change, unmarried status (to different extents, France<sup>51</sup>, Greece<sup>52</sup> - which also impose a judicial procedure - and Luxembourg<sup>53</sup>) - and some have recently started discussing such a model on governmental and parliamentary level (Germany<sup>54</sup>, the Netherlands<sup>55</sup>, Switzerland<sup>56</sup>).

#### **b) An increasing trend in Europe towards the recognition of third or diverse gender markers**

**35.** This increasing trend develops in parallel with an increasing recognition of the need to establish a third gender marker. Some countries have by law established a third or multiple gender markers. Austria and Germany, following rulings by the respective country's Constitutional Court, have established a third gender marker and multiple additional options for gender registration for intersex people. Iceland, as described above, has created a third marker available to everybody.

**36.** The landmark judgment delivered by the German Constitutional Court in 2017 found that the law on civil status registration was in violation of the Constitution.<sup>57</sup> It stipulated that enforcing the sex/gender binary by not allowing for a third gender marker infringed the right to personal development and equal treatment based on sex/gender. The German Government was offered two remedial possibilities: (a) to introduce a positive third gender option or (b) to remove the requirement to register legal gender altogether. The Government opted for the first and subsequently proposed the adoption of a new law in 2018. Pursuant to the regulation currently in force, people with variations of sex characteristics may apply for a **“diverse” gender marker**.

**37.** In 2018, an intersex individual reached the Austrian Constitutional Court aiming to change the male gender entry in the central civil status register to “inter,” “other,” “X,” “undefined,” or a similar term, or to strike the gender entry in its entirety. The Court<sup>58</sup> examined the constitutionality of the provision of the Civil Status Act ex officio and based its reasoning on Article 8 of the ECHR: **“Article 8 of the ECHR therefore grants individuals with variations in sex characteristics other than male or female the constitutionally guaranteed right to have their gender variation recognised as a separate gender identity in gender-related provisions; in particular, it protects individuals with alternative gender identities against having their gender assigned by others.”** In addition, the Court interpreted the law under a non-binary lens, elaborating on the fact that “the term used in sect.2 para.2 point 3 of the 2013 Civil Status Act is so general that it can, without any difficulty, be interpreted to include alternative gender identities.”<sup>59</sup> In September 2020, a new governmental decree<sup>60</sup> established that six gender marker options will be available to intersex people, ‘female’, ‘male’, ‘inter’, ‘diverse’, ‘open’, as well as the option to delete the entry. Non-binary options however will only be available to intersex people, based on a medical diagnosis. Intersex activists criticised the decree<sup>61</sup> and, along with other civil society organisations, addressed the Minister of Interior, demanding the introduction of a self-determination model available to all.

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<sup>50</sup> See Annex table 1.a.

<sup>51</sup> [Code Civil, Section 2 bis](#);

[https://www.legifrance.gouv.fr/codes/section\\_lc/LEGITEXT000006070721/LEGISCTA000033437635/#LEGISCTA000033437635](https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070721/LEGISCTA000033437635/#LEGISCTA000033437635)  
See [TRANS LEGAL MAPPING REPORT](#) 2019, France chapter.

[https://ilga.org/downloads/ILGA\\_World\\_Trans\\_Legal\\_Mapping\\_Report\\_2019\\_EN.pdf](https://ilga.org/downloads/ILGA_World_Trans_Legal_Mapping_Report_2019_EN.pdf)

<sup>52</sup> ILGA-World, 2019, [TRANS LEGAL MAPPING REPORT](#) 2019, Greece chapter.

<sup>53</sup> ILGA-World, 2019, [TRANS LEGAL MAPPING REPORT](#) 2019, Luxembourg chapter.

<sup>54</sup> Bundesverband Trans, 2020, [Der selbstbestimmte Geschlechtseintrag wird im Innenausschuss debattiert! Der BVT\\* ist als Sachverständiger geladen](#). <https://www.bundesverband-trans.de/anhoeerung-innenausschuss2020/>

<sup>55</sup> [ILGA-Europe Annual Review](#), Netherlands chapter. NNID reported that they are still waiting for the final draft.

<sup>56</sup> [ILGA-Europe Annual Review](#), Switzerland chapter. See Parlement Suisse, [19.081 | CC. Changement de sexe à l'état civil](#). <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20190081>

<sup>57</sup> Federal Constitutional Court of Germany, 1 BvR 2019/16, 10 October 2017.

<sup>58</sup> Austrian Constitutional Court, *Verfassungsgerichtshof*, 15 June 2018, G 77/2018-9.

[https://www.vfgh.gv.at/downloads/VfGH\\_Entscheidung\\_G\\_77-2018\\_unbestimmtes\\_Geschlecht\\_anonym.pdf](https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_G_77-2018_unbestimmtes_Geschlecht_anonym.pdf).

<sup>59</sup> Nikoletta Pikramenou (2019), *Intersex Rights. Living Between Sexes*. ISBN 78-3-030-27554-9. Springer. p. 165-166.

<sup>60</sup> Federal Ministry of the Interior, BMI - III/3/b. *Geschlechtseintrag bei Menschen, die weder männlich noch weiblich sind*. <https://vimoe.at/wp-content/uploads/2020/10/2020-09-ErlassGeschlechtseintragNeu.pdf>.

<sup>61</sup> Verein intergeschlechtlicher menschen österreich, [September 2020: Neuer Erlass zum dritten Geschlechtseintrag – Ein Teilerfolg](#). <https://vimoe.at/2020/09/10/september-2020-neuer-erlass-zum-dritten-geschlechtseintrag-ein-teilerfolg/>

**38.** In some countries, including the Netherlands and Belgium, the existing case law strongly points to an increasing acceptance of the reality of the existence of multiple genders. In 2018, the District Court of Limburg ruled in favour of a Dutch, self-identified intersex citizen who wished to be recognised as a “third gender” despite the fact that current Dutch legal frameworks did not provide for the possibility to be registered as such.<sup>62</sup> The Court decided that **self-identification prevails over bodily appearance or medical status** and suggested the Dutch legislature initiate legislation to ensure that gender-neutral self-identification is provided for under Dutch law<sup>63</sup>. In its decision, the Court ordered that a new certificate be issued with the words “sex cannot be determined”<sup>64</sup>, which is currently the only option available besides the binary ones.

**39.** In 2019 the Belgian Constitutional Court established that applicants should be able to change their gender registration more than once using the same simple administrative procedure, hinting at a recognition of gender fluidity.<sup>65</sup> Furthermore, it ruled that the government must find a way to legally recognize non-binary persons, either by adding a third legal gender besides ‘male’ and ‘female,’ or by abolishing the system of gender registration altogether. In November 2020, the new government confirmed the introduction of gender-neutrality throughout its term and the access to the official identification “X” for non-binary people, by amending the law on gender registration to comply with the Constitutional Court decision.<sup>66</sup>

**40.** Other countries have taken first steps towards a third option at the governmental level. In November 2017, the Irish Government established a group of experts to carry out a review of the implementation of the Gender Recognition Act 2015. The group issued a report and recommended, inter alia, that LGR be made available to non-binary persons and that Government Departments and other public bodies should take positive steps to improve their situation. In addition, all measures taken to improve access to gender recognition, both with regard to age and gender identity (either binary or non-binary), should also provide access to intersex individuals.<sup>67</sup> In 2019, an interdepartmental group of officials was established to progress this issue and conduct an impact assessment on the legislative and policy consequences. The group aims to complete its work by the end of 2020. In the meantime, Government Departments and other public bodies will already adopt measures to improve the situation of non-binary persons, including by promoting the use and acceptance of correct pronouns and improving the design of official forms and documentation to permit the use of a third gender option, or no gender at all.<sup>68</sup>

**41.** In July 2019, the Ministry for Family and Integration of Luxembourg published the first national LGBTI Action Plan, with the involvement of ten government ministries and in collaboration with human rights organisations. Under the thematic area “To ensure equality of rights to intersex people”, objective 2 reads: “To respect the right to privacy and self-determination of intersex persons with regard to civil status and legal recognition”; and Action 14 “To analyse whether going beyond the binary civil status system is the most favourable option according to the needs of intersex people and what repercussions this would have”. An almost identical action is set forth under the thematic area referred to trans persons (objective 1, action 2).<sup>69</sup> An inter-ministerial LGBTI committee, chaired by the Ministry of Family, was set up to monitor the plan’s implementation.

**42.** In Switzerland, following two requests (*postulats*)<sup>70</sup> accepted by the Federal Council, the *Commission nationale d’éthique dans le domaine de la médecine humaine (CNE)* - National Advisory Commission on

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<sup>62</sup> Nikoletta Pikramenou (2019), p. 198.

<sup>63</sup> Ibidem, p. 199

<sup>64</sup> [Rechtbank Limburg, 28-05-2018 / C/03/232248 / FA RK 17-687](https://linkeddata.overheid.nl/front/portal/document-viewer?ext-id=ECLI:NL:RBLIM:2018:4931). <https://linkeddata.overheid.nl/front/portal/document-viewer?ext-id=ECLI:NL:RBLIM:2018:4931>

<sup>65</sup> Cour constitutionnelle, Arrêt n° 99/2019 du 19 juin 2019, Moniteur belge 21.01.2020 p. 2348. [http://www.ejustice.just.fgov.be/mopdf/2020/01/21\\_1.pdf#Page10](http://www.ejustice.just.fgov.be/mopdf/2020/01/21_1.pdf#Page10)

<sup>66</sup> Gabriela Galindo, The Brussels Times, 9 November 2020. <https://www.brusselstimes.com/belgium/139909/belgium-to-introduce-x-as-third-non-binary-gender-genderfluid-genderqueer-belgian-laws-transgender-justice-minister-vincent-van-quickenborne-minister-petra-de-sutter/>

<sup>67</sup> [Review of the Gender Recognition Act 2015 - Report to the Minister for Employment Affairs and Social Protection](https://www.gov.ie/en/press-release/6b7814-review-of-the-gender-recognition-act-2015-report-to-the-minister-for/) p. 97-99, para. 6.7-8. <https://www.gov.ie/en/press-release/6b7814-review-of-the-gender-recognition-act-2015-report-to-the-minister-for/>

<sup>68</sup> See [Gender Recognition Act 2015: Report to the Oireachtas under Section 7 of the Act](#), p. 10 and [Minister Doherty Publishes her Report on the Review of the Gender Recognition Act](#)

<sup>69</sup> Gouvernement du Grand-Duché de Luxembourg, 2018, [Plan d'action national de la promotion des droits des personnes lesbiennes, gays, bisexuelles, transgenres et intersexes](#) p. 42 and 49. <https://mfamigr.gouvernement.lu/dam-assets/publications/plan-strategie/lgbti/Plan-d-action-LGBTI.pdf>

<sup>70</sup> See Parlement Suisse, [17.4121 | Inscription d'un troisième sexe à l'état civil](#) <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20174121> and [17.4185 | Introduction d'un troisième genre. Conséquences pour l'ordre juridique et pour Infostar](#) <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20174185>.

Biomedical Ethics - was mandated by the Federal Office of Justice to write a report on the ethical and legal implications of the “question of abandoning all mention of gender or introducing new gender categories in civil status”<sup>71</sup>.

## ii. European approaches and developments

**43.** In 2017, the Parliamentary Assembly of the Council of Europe called upon States to take into consideration the situation of intersex people with regard to civil status, and ensure that wherever gender classifications are in use by public authorities, a range of options are available for all people, **including those intersex people who do not identify as either male or female.**<sup>72</sup>

**44.** For its part, the European Parliament stressed the importance of **flexible registration procedures** based on self-determination and encouraged Member States to adopt legislation allowing for flexible procedures to change gender markers, as long as they continue to be registered, as well as name on birth certificates and identity documents, including the possibility of gender-neutral names.<sup>73</sup>

**45.** In November 2020, the European Commission adopted its first-ever LGBTIQ equality strategy, with a strong focus on the needs of the most vulnerable members of the community, namely the trans, non-binary and intersex people, identified as being among the least accepted groups in society, generally experiencing more discrimination and violence.<sup>74</sup> As part of its third pillar - Building LGBTIQ inclusive societies - the Commission recalled the importance of improving the **recognition of trans and non-binarity identities, and intersex people.** It noted the positive trend in Europe towards adoption of LGR models based on personal self-determination, and made the commitment to support Member States to “improve the inclusion of trans, non-binary and intersex people in relevant documentation, applications, surveys and processes” and to “rigorously apply the right to free movement and EU Rules on family law”.<sup>75</sup>

**46.** It must be noted that the existence of more than two gender markers is already established within the EU legal system since the transposition of the International Civil Aviation Organisation (ICAO) guidelines through regulation 2252/2004 on biometric passports which compels all EU passports to be in line with ICAO regulations.<sup>76</sup> According to the ICAO guidelines, countries must include gender markers on passports, which may be expressed as F, M or X.<sup>77</sup> This means X is an officially-established gender marker, which must be recognized by all 192 ICAO Member States for the purpose of letting foreign citizens enter their country.<sup>78</sup>

## iii. International approaches and developments

**47.** Principle 31 of the Yogyakarta Principles clearly enounces that States must make available a multiplicity of gender marker options.<sup>79</sup>

**48.** The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity considered that for all humankind to enjoy human rights, it was crucial to challenge a series of misconceptions, including “that human nature is to be classified with reference to a male/female binary system on the basis of the sex assigned at birth; that persons fall neatly and exclusively into that system on the same basis (...)”<sup>80</sup>. It urged States to enact gender recognition systems based on self-determination and

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<sup>71</sup> [National Advisory Commission on Biomedical Ethics](https://www.nek-cne.admin.ch/en/homepage-nek-cne/), <https://www.nek-cne.admin.ch/en/homepage-nek-cne/>

<sup>72</sup> Parliamentary Assembly of the Council of Europe (2017): Resolution 2191 (2017). Promoting the human rights of and eliminating discrimination against intersex people, 7.3.3.

<sup>73</sup> European Parliament (2019): Intersex Resolution, 2018/2878(RSP) §9.

<sup>74</sup> European Commission, EU LGBTIQ Equality Strategy 2020-2025, p.5.

<sup>75</sup> European Commission, EU LGBTIQ Equality Strategy 2020-2025, p.19.

<sup>76</sup> Council Regulation No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States 2004 [L 385/1] Preamble (3), Annex para 2.

<sup>77</sup> “Sex of the holder, to be specified by use of the single initial commonly used in the language of the State where the document is issued and, if translation into English, French or Spanish is necessary, followed by an oblique and the capital letter F for female, M for male, or X for unspecified”. International Civil Aviation Organization, ‘Machine Readable Travel Documents. Part 4 — Specifications for Machine Readable Passports (MRPs) and Other TD3 Size MRTDs’ (2015) Doc 9303 14.

<sup>78</sup> Lean Holzer for ILGA-Europe, 2018, Non-binary registration models in Europe, Report on third gender marker or no gender marker options, p.20. [https://www.ilga-europe.org/sites/default/files/non-binary\\_gender\\_registration\\_models\\_in\\_europe\\_0.pdf](https://www.ilga-europe.org/sites/default/files/non-binary_gender_registration_models_in_europe_0.pdf)

<sup>79</sup> The Yogyakarta Principles plus 10. Principles (n 11) Principle 31 (C)(ii).

<sup>80</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 2018, A/73/152, §6.

which “**acknowledge and recognize non-binary identities**, such as gender identities that are neither “man” nor “woman” and offer a **multiplicity of gender marker options**”.<sup>81</sup>

**49.** According to the Inter-American Commission on Human Rights, the binary system is rigid, it excludes some intersex people, and it has had “concrete and devastating effects on the lives of intersex persons” who suffered unnecessary genital surgery and other treatments, prompted by a desire to “attempt to produce genitalia of the assigned sex”.<sup>82</sup> Referring to Council of Europe’s Commissioner for Human Rights position, the IACHR recalled that intersex persons may identify as intersex, as men, as women, as neither or as both.<sup>83</sup>

**50.** The Inter-American Court also adopted the **self-determination approach** in its decision regarding the request for Advisory Opinion OC-24 filed by the State of Costa Rica: “the right of each person to define his or her sexual and gender identity autonomously and that the personal information in records and on identity documents should correspond to and coincide with their self-defined identity is protected by the American Convention (...). Thus, States must respect and ensure to everyone the possibility of registering and/or changing, rectifying or amending their name and the other essential components of their identity such as the image, or the reference to sex or gender, without interference by the public authorities or by third parties. **This necessarily means that those who identify themselves with diverse gender identities must be recognized as such.**”<sup>84</sup>

**51.** In a 2018 Report, the IACHR noted the positive trend of recognition of gender identity based on self-determination in the region of the Americas.<sup>85</sup> In particular, it welcomed the progress made in Uruguay - the first country in the region to adopt a gender identity law in 2009 - through the adoption, in 2018, of Law 19.684. The new law guarantees the right to gender identity so as to focus on their self-determination and dignity, taking into account the self-perceived gender identity of the person.<sup>86</sup>

**52.** The IACHR further noted the position of the National Institute Against Discrimination, Xenophobia and Racism of the Ministry of Justice, Security and Human Rights of Argentina (INADI). According to INADI, genitalia and sex assignment are two distinct concepts and there is no inevitable connection between them;<sup>87</sup> the categorization of a man or a woman is a “social, cultural and institutional act”.<sup>88</sup> The gender identity law adopted by Argentina in 2012 constitutes, in the opinion of the IACHR “the best practice in the region, insofar as it does not require any type of medical intervention or procedure, judicial procedure or psychiatric or medical certification, for the recognition of the gender of persons”, according to their gender identity. In effect, this law guarantees the free development of persons, extending its protection to children and adolescents, according to their gender identity, whether or not it corresponds to the sex assigned at birth.<sup>89</sup>

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<sup>81</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 2018, A/73/152, p.23-24.

<sup>82</sup> Inter-American Commission on Human Rights, 2015, Violence against LGBTI Persons, OAS/Ser.L/V/II.rev.1, p. 37-38.

<sup>83</sup> Inter-American Commission on Human Rights, 2015, Violence against LGBTI Persons, OAS/Ser.L/V/II.rev.1, p. 221.

<sup>84</sup> I/A Court H.R. Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 115.

<sup>85</sup> Inter-American Commission on Human Rights, “Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas”, 2018, OEA/Ser.L/V/II.170, p.56.

<sup>86</sup> Ley Integral Para Personas Trans, [Law 19.684](#) (October 26, 2018).

<https://legislativo.parlamento.gub.uy/temporales/docu9303363750742.htm#:~:text=%2D%20La%20presente%20ley%20tiene%20como,%2C%20protecci%C3%B3n%2C%20promoci%C3%B3n%20y%20reparaci%C3%B3n>

<sup>87</sup> Inter-American Commission on Human Rights, 2015, Violence against LGBTI Persons, OAS/Ser.L/V/II.rev.1, p. 28.

<sup>88</sup> INADI, Ministerio de Justicia y Derechos Humanos, Presidencia de la Nación, “Buenas prácticas en la comunicación pública. Informes Inadi: Identidad de género, [Minister of Justice and Human Rights, Office of the President, Best Practices in public communication. INADI’s Report: gender identity], 2011, p. 13.

<sup>89</sup> [Ley No. 26.743](#) (May 24, 2012). <http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/197860/norma.htm>. See, in this regard, IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, November 12, 2015, para. 419.

## ANNEX

**Table1. Overview of LGR models by country.**

✓ Implemented

≈ Partially implemented (subjected to conditions)

→ On the way of being implemented

**Table 1.a. Europe and Central Asia**

Countries	Model based on self-determination	X on passports and/or other identity documents	Alternative markers for intersex people	Third/ neutral markers for everybody, including non-binary people
Austria <sup>1</sup>		✓	✓	
Belgium	✓ However with a reflection period <sup>2</sup>			→ Constitutional Court judgement <sup>3</sup>
Denmark	✓ However with a reflection period <sup>4</sup>	✓ <sup>5</sup>		
France	≈ Court procedure, facts to be proven <sup>6</sup>			

<sup>1</sup> Austrian Constitutional Court, *Verfassungsgerichtshof*, 15 June 2018, G 77/2018-9, [VfGH G 77/2018](#).

[https://www.vfgh.gv.at/downloads/VfGH\\_Entscheidung\\_G\\_77-2018\\_unbestimmtes\\_Geschlecht\\_anonym.pdf](https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_G_77-2018_unbestimmtes_Geschlecht_anonym.pdf).

<sup>2</sup> See [ILGA-Europe Annual Review 2020](#), Belgium chapter and [TRANS LEGAL MAPPING REPORT 2019](#), Belgium chapter.

<sup>3</sup> Cour constitutionnelle, [Arrêt n° 99/2019 du 19 juin 2019](#), Moniteur belge 21.01.2020 p. 2348.

[http://www.ejustice.just.fgov.be/mopdf/2020/01/21\\_1.pdf#Page10](http://www.ejustice.just.fgov.be/mopdf/2020/01/21_1.pdf#Page10).

<sup>4</sup> [Bekendtgørelse af lov om Det Centrale Personregister](#), LBK nr 1297 af 03/09/2020.

<https://www.retsinformation.dk/eli/ta/2020/1297>.

<sup>5</sup> [BEK nr 953 af 28/08/2014 Justitsministeriet](#) amended §4,5 of the Passport Order. <https://www.retsinformation.dk/eli/ta/2014/953>.

<sup>6</sup> [Code Civil, Section 2 bis](#). See [TRANS LEGAL MAPPING REPORT 2019](#), France chapter.

Germany	→ Discussion in the Government <sup>7</sup>	√ <sup>8</sup>	√ <sup>9</sup>	→ Favourable case-law, Constitutional Court case pending <sup>10</sup>
Greece	≈ Court procedure, unmarried <sup>11</sup>			
Iceland <sup>12</sup>	√	√		√
Ireland	√ <sup>13</sup>			→ Group appointed by the Minister to conduct an impact assessment <sup>14</sup>
Luxembourg	≈ Facts to be proven <sup>15</sup>			→ Inter-ministerial LGBTI committee to analyse whether to go

<sup>7</sup> Bundesverband Trans\*, 2020, [Der selbstbestimmte Geschlechtseintrag wird im Innenausschuss debattiert! Der BVT\\* ist als Sachverständiger geladen](https://www.bundesverband-trans.de/anhoerung-innenausschuss2020/). <https://www.bundesverband-trans.de/anhoerung-innenausschuss2020/>.

<sup>8</sup> See circular of the German Ministry of the Interior (2018): [Sachstand WD 7 - 3000 - 098/18. Personenstandsrechtliche Regelungen bei intersexuellen Menschen in verschiedenen Rechtsordnungen](#), p. 7.

<sup>9</sup> Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben, 18 December 2018.

<sup>10</sup> Dritte Option, Verfassungsbeschwerde gegen den BGH-Beschluss vom 22.4.2020 zum §45 b PStG, <http://dritte-option.de/>

<sup>11</sup> [ΝΟΜΟΣ 4491/2017 - ΦΕΚ Α 152/13.10.2017](https://www.kodiko.gr/nomologia/document_navigation/304143/nomos-4491-2017). [https://www.kodiko.gr/nomologia/document\\_navigation/304143/nomos-4491-2017](https://www.kodiko.gr/nomologia/document_navigation/304143/nomos-4491-2017). See also [TRANS LEGAL MAPPING REPORT](#) 2019, Greece chapter.

<sup>12</sup> [80/2019: Lög um kynrænt sjálfræði](https://www.althingi.is/lagas/nuna/2019080.html). <https://www.althingi.is/lagas/nuna/2019080.html>

<sup>13</sup> Irish Statute Book, [Gender Recognition Act 2015](http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/print). <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/print>

<sup>14</sup> [Review of the Gender Recognition Act 2015 - Report to the Minister for Employment Affairs and Social Protection](https://www.gov.ie/en/press-release/6b7814-review-of-the-gender-recognition-act-2015-report-to-the-minister-for/#) p. 97-99, para. 6.7-8. <https://www.gov.ie/en/press-release/6b7814-review-of-the-gender-recognition-act-2015-report-to-the-minister-for/#>.

<sup>15</sup> [Loi du 10 août 2018 relative à la modification de la mention du sexe et du ou des prénoms à l'état civil et portant modification du Code civil](http://legilux.public.lu/eli/etat/leg/loi/2018/08/10/a797/jo). <http://legilux.public.lu/eli/etat/leg/loi/2018/08/10/a797/jo>.

				beyond the binary system <sup>16</sup>
Malta	√ <sup>17</sup>	√ <sup>18</sup>		
Netherlands	→ Government draft law <sup>19</sup>	→ X for intersex already implemented; for binary people: favourable case law; for everybody: Government's announcement <sup>20</sup>	→ <sup>21</sup>	→ Favourable case-law <sup>22</sup>
Norway	√ <sup>23</sup>			
Portugal	√ <sup>24</sup>			

<sup>16</sup> [Plan d'action national de la promotion des droits des personnes lesbiennes, gays, bisexuelles, transgenres et intersexes](#) p. 42 and 49. <https://mfamigr.gouvernement.lu/dam-assets/publications/plan-strategie/lgbti/Plan-d-action-LGBTI.pdf>.

<sup>17</sup> Legizlazzjoni Malta, [Gender Identity, Gender Expression, and Sex Characteristics Act 2015](#). <https://legislation.mt/eli/cap/540/eng/pdf>.

<sup>18</sup> [TRANS LEGAL MAPPING REPORT](#) 2019, Malta chapter.

<sup>19</sup> [ILGA-Europe Annual Review](#) 2020, Netherlands chapter. NNID reported that they are still waiting for the final draft.

<sup>20</sup> Human Rights Watch, [Netherlands Sees No Role for Gender Marker on ID Documents](#), 8 July 2020. <https://www.hrw.org/news/2020/07/08/netherlands-sees-no-role-gender-marker-id-documents>.

<sup>21</sup> Undetermined gender, see C / 03/232248 / FA RK 17-687 (Limburg District Court in Roermond

<sup>22</sup> ECLI:NL:RBNNE:2019:3437, Rechtbank Noord-Nederland, 126841 FA RK 19/966.

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBNNE:2019:3437>.

<sup>23</sup> [Lov om endring av juridisk kjønn](#). <https://lovdata.no/dokument/NL/lov/2016-06-17-46?q=lov%20om%20endring%20av%20juridisk>. See also [ILGA Annual Review 2017](#), Norway chapter and [TRANS LEGAL MAPPING REPORT](#) 2019, Norway chapter. [Unofficial translation from TGEU](#): <https://tgeu.org/wp-content/uploads/2016/07/Prop74LEng.pdf>.

<sup>24</sup> [Lei 38/2018, 2018-08-07](#). <https://dre.pt/web/guest/pesquisa/-/search/115933863/details/maximized>. See also [ILGA-Europe Annual Review](#) 2020, Portugal chapter and [TRANS LEGAL MAPPING REPORT](#), 2019 Portugal chapter

Spain	✓  Only in 10 Regions - however, Spain is also currently debating a Bill which would remove pathologisation requirements and introduce self-determination <sup>25</sup>			
Switzerland	→  Government draft law <sup>26</sup>			→  National Advisory Commission on Biomedical Ethics working on a report <sup>27</sup>
United-Kingdom (Scotland)				→  The Scottish Government considered an incremental approach towards full LGR for non-binary identities, with intermediate steps such as X on identity documents <sup>28</sup>

**Table 1.b. International**

Countries	Model based on self-determination	X on passports and/or other identity documents	Alternative markers for intersex people	Third/neutral markers for everybody, including non-binary people
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<sup>25</sup> [TRANS LEGAL MAPPING REPORT](#) 2019, Spain, p.165.

<sup>26</sup> [ILGA-Europe Annual Review](#) 2020, Switzerland chapter. See also Parlement Suisse, Changement de sexe à l'état civil, 19.081. <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20190081>

<sup>27</sup> National Advisory Commission on Biomedical Ethics. <https://www.nek-cne.admin.ch/en/homepage-nek-cne/>

<sup>28</sup> Scottish Government, Review of the Gender Recognition Act 2004, November 2017, part 7. [https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/user\\_uploads/sct1017251758-1\\_gender\\_p4--3-.pdf](https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/user_uploads/sct1017251758-1_gender_p4--3-.pdf). However, no measures on LGR for non-binary people were included in the following proposed reform: [ILGA-Europe Annual Review](#) 2020, United Kingdom chapter.

Argentina	✓ <sup>29</sup>	→  Draft-law presented in 2020 for allowing third gender marker on ID <sup>30</sup>		✓  In some provinces <sup>31</sup>
Brazil	✓ <sup>32</sup>			
Canada <sup>33</sup>		✓		✓  In some provinces
Chile <sup>34</sup>	≈  Unmarried		✓  Possibility of «indeterminate» sex at birth	
Colombia	✓  Constitutional Court judgement, 2019 <sup>35</sup>			

<sup>29</sup> Nikoletta Pikramenou (2019), Intersex Rights. Living Between Sexes, p. 95 and 97.

<sup>30</sup> La voz de Cataratas, 9 July 2020, [Proyecto de ley busca sumar una tercera opción a “masculino” y “femenino” en el DNI.](https://www.lavozdecataratas.com/noticia_66863.html)  
[https://www.lavozdecataratas.com/noticia\\_66863.html](https://www.lavozdecataratas.com/noticia_66863.html).

<sup>31</sup> [TRANS LEGAL MAPPING REPORT](#) Argentina chapter

<sup>32</sup> [TRANS LEGAL MAPPING REPORT](#) 2019, Brazil chapter p.8.

<sup>33</sup> [TRANS LEGAL MAPPING REPORT](#) 2019, Canada chapter.

<sup>34</sup> Nikoletta Pikramenou (2019), Intersex Rights. Living Between Sexes, p. 98-100.

<sup>35</sup> Constitutional Court of Colombia. Judgement T-447/2019, Judge Gloria Stella Ortiz, 17 September 2019:  
<http://www.corteconstitucional.gov.co/relatoria/2019/t-447-19.htm>

Costa Rica <sup>36</sup>	✓	✓ Elimination of the sex marker from cédulas (ID for adults)		
United States (only in some states) <sup>37</sup>	✓	✓	✓ <sup>38</sup>	✓
Uruguay	✓ <sup>39</sup>			
Australia <sup>40</sup>	✓ In some provinces	✓		✓ In some provinces
New Zealand <sup>41</sup>		✓	→ Favourable case-law	
Bangladesh		✓ However, uncertainty exists <sup>42</sup>		
India <sup>43</sup>		✓ “T” and “E” markers		→ Supreme Court decision
Nepal <sup>44</sup>		✓ “O” marker		→

<sup>36</sup> [TRANS LEGAL MAPPING REPORT](#) 2019, Costa Rica chapter.

<sup>37</sup> [TRANS LEGAL MAPPING REPORT](#) 2019, USA chapter.

<sup>38</sup> Sam Levin, ‘First US Person to Have “intersex” on Birth Certificate: “There’s Power in Knowing Who You Are”’ The Guardian (11 January 2017)

<sup>39</sup> Ley Integral Para Personas Trans, [Law 19.684](#) (October 26, 2018).

<https://legislativo.parlamento.gub.uy/temporales/docu9303363750742.htm#:~:text=%2D%20La%20presente%20ley%20tiene%20como,%2C%20protecci%C3%B3n%2C%20promoci%C3%B3n%20y%20reparaci%C3%B3n>.

<sup>40</sup> Nikoletta Pikramenou (2019), Intersex Rights. Living Between Sexes, p. 116 and [TRANS LEGAL MAPPING REPORT](#) 2019, Australia chapter

<sup>41</sup> Nikoletta Pikramenou (2019), Intersex Rights. Living Between Sexes, p. 119.

<sup>42</sup> [TRANS LEGAL MAPPING REPORT](#) 2019, Bangladesh chapter.

<sup>43</sup> Nikoletta Pikramenou (2019), Intersex Rights. Living Between Sexes, p. 124.

<sup>44</sup> [TRANS LEGAL MAPPING REPORT](#) 2019, Nepal chapter.

				Supreme Court decision; implementation non-compliant with self-determination
Pakistan <sup>45</sup>		✓		

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<sup>45</sup> [TRANS LEGAL MAPPING REPORT](#) 2019, Pakistan chapter.