

The Supreme Court of Cassation asked the Constitutional Court how legal gender recognition of a person is compatible with the Bulgarian Constitution, namely the right to private life (Art 32(1)) as well as Bulgaria’s international obligations arising out of the European Convention on Human Rights and EU law.

OII Europe
Heidelberger Straße 63/64
12435 Berlin
Germany

www.oiiEurope.org
info@oiiEurope.org

facebook.com/oiiEurope
twitter.com/oiiEurope
vimeo.com/oiiEurope
instagram.com/oiiEurope

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.¹

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.² For Bulgaria this means, that, with a population of 6,934,015 persons, as of December 2021, up to 117.357 persons living in Bulgaria have a variation of sex characteristics, i.e., are intersex.

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

3. 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 Iceland and Germany 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

¹ 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.

² United Nations Office of the High Commissioner for Human Rights (2015): Fact Sheet. Intersex.
https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf

immediate danger to health and no genuine therapeutic purpose for the treatment”.³ 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.⁴

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www.oii-europe.org
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facebook.com/oii-europe
twitter.com/oii-europe
vimeo.com/oii-europe
instagram.com/oii-europe

4. Since 2009, United Nations Treaty Bodies have made 63 calls on Member States to stop human rights violations against intersex people.⁵ 17 Council of Europe Member States have received 39 UN Treaty Bodies recommendations⁶, among which 15 European Union countries have received 34 recommendations, including Bulgaria⁷. 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.”⁸

5. In practice, the right to self-determination is not safeguarded when decisions affecting intersex children are made under the pressure of the binary 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. [...]”⁹. 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.¹⁰

³ Parliamentary Assembly of the Council of Europe (PACE), Resolution 2191 (2017), Promoting the human rights of and eliminating discrimination against intersex people, §2.

⁴ European Parliament (EP), Resolution of 14 February 2019 on the rights of intersex people (2018/2878(RSP)), §2.

⁵ 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 (2021, February). *Intersex Resources*, available at <<https://oii-europe.org/wp-content/uploads/2018/05/International-intersex-human-rights-movement-Links-to-human-rights-documents-addressing-intersex-and-important-events-February-2021-1.pdf>>

⁶ Country (Number of recommendations): Austria (2); Belgium (3); Bulgaria (1); Denmark (3); France (3); Germany (5); Ireland (2); Italy (3); Liechtenstein (1); Luxembourg (1); Malta (1); Netherlands (3); Portugal (2); Slovakia (1); Spain (1); Switzerland (4); UK (3). See OII Europe, *Intersex Resources*.

⁷ 2020: The United Nations Committee on the Elimination of Discrimination against Women Concluding observations on the eighth periodic report of Bulgaria (CEDAW/C/BGR/CO/8)

⁸ 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.

⁹ 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/endl_human_rights_between_the_sexes.pdf?dimension1=ds_feminismus, p.24.

¹⁰ European Union Agency for Fundamental Rights (EU FRA), *A long way to go for LGBTI equality. EU LGBTI II, 2020*, p. 51.

Contextual information regarding practical obstacles faced by intersex people seeking legal gender recognition

6. 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 forcibly assigned to them at birth.¹¹

7. Research has shown that a gender marker in official documents that reflects and recognizes the person's gender identity has a positive impact on an individual's mental and emotional health.¹² Legal gender recognition also reportedly improves a person's life with regards to social inclusion and reduces the risk of structural and other discrimination.¹³

8. Intersex people who have been forcibly assigned a gender through surgical or other means often face trauma and may face severe obstacles in life.¹⁴ 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.

9. 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.

10. 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.¹⁵ 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.¹⁶

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12435 Berlin
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www.oii-europe.org
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facebook.com/oii-europe
twitter.com/oii-europe
vimeo.com/oii-europe
instagram.com/oii-europe

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

¹² See: European Court of Human Rights (2002): Christine Goodwin vs. United Kingdom, n° 28957/95.

¹³ Global Commission on HIV and the Law. HIV and the law: risks, rights and health; New York, NY: UNDP; 2012.

¹⁴ 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.

¹⁵ The Universal Declaration of Human Rights, Article 16. <https://www.un.org/en/universal-declaration-human-rights/>.

¹⁶ 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.

11. 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.¹⁷

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12. 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 harmonization in the European Union. It noted that intersex persons are often not recognized in law or in practice which creates legal difficulties in their private and family life, including in cross border situations.¹⁸

www.oii europe.org
info@oii europe.org

13. 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.¹⁹ 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.²⁰

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OII Europe (Organisation Intersex International Europe) is the European umbrella organisation of intersex-led human rights organisations with 25 member organisations in 14 member states of the EU (18 in the Council of Europe region). OII Europe works to end human rights violations intersex people/people with variations of sex characteristics face in the EU and the Council of Europe region and to promote visibility and recognition of intersex people in Europe and worldwide. To this aim OII Europe works with and is regularly consulted by Council of Europe and European Union bodies as well as national governments and other stakeholders, NGOs and professionals.

¹⁷ Ruse District Court, Decision No. 260303 of 23 October 2020 in civil case No. 54/2020.

¹⁸ European Commission, EU LGBTIQ Equality Strategy 2020-2025, p.16.

¹⁹ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 2018, A/73/152, §22.

²⁰ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 2018, A/73/152, §25.