European Court of Human Rights - *Y v. France* (Application no. 76888/17)

Third Party Intervention by the Human Rights Centre at Ghent University[1] in collaboration with the Equality Law Clinic at the Université Libre de Bruxelles[2]

1. Introduction

The interveners submit that the case of *Y v. France* raises important issues in respect of the rights of some intersex persons (also referred to as persons with variations of sex characteristics), such as the applicant, to respect for their identity, as protected under the right to respect for private and family life (Article 8 ECHR), taken alone and in conjunction with the prohibition of discrimination (Article 14 ECHR). It raises similar issues in respect of the rights of non-binary persons, gender-fluid persons and anyone who cannot identify with the binary division of sex and/or gender. For the sake of this intervention, we will use the term 'sex/gender non-conforming persons' to refer to all those persons concerned.

The Court has the opportunity, for the first time, to pronounce itself on the scope of Contracting Parties' positive and negative obligations to provide for sex/gender registration beyond the binary of 'male/man' and 'female/woman'. This submission sets out the legal and societal backdrop against which this case should be assessed (part 2). It proceeds to argue, in part 3, that the scope of States' positive obligation of legal gender recognition under Article 8 ECHR needs to be interpreted as encompassing a duty to provide for legal gender recognition that accurately represents the identity of persons identifying outside the sex/gender binary. In part 4, the interveners set out why mandatory binary sex/gender registration should moreover be considered an unjustified interference with the right to gender autonomy, giving rise to negative obligations under Article 8 ECHR. Part 5 argues that the denial of legal recognition of non-binary gender identity amounts to discrimination in breach of Article 14 ECHR in conjunction with Article 8.

2. Legal and societal background

2.1. Lived sex/gender realities

'Sex' is traditionally seen as a biological concept of a factual nature (mostly) determined by the presence of a certain configuration of X- and Y-chromosomes, hormones, gonads, internal and external genitalia and secondary characteristics in an individual human being. Although external genitalia are only one of the constituting elements of a person's biological sex, they are usually decisive for assigning a person's sex at birth through a superficial check by the gynaecologist or midwife. In most societies, human beings are discretely 'sexed' into two categories, male and female, leading to the construction of 'sex' as a binary notion. However, between at least 1[3] and 1.7%[4] of the population are born with one or more natural variations of sex characteristics. Indeed, advances in science, as well as the experiences of individuals with variations of sex characteristics reveal that sex is much more nuanced than the binary categories would have us believe. Persons with variations of sex characteristics thus show that universal sex bipolarity does not exist in human nature, even if it does exist in culture or cultural norms. However, it is important to state that while persons with variations of sex characteristics will have *physical sex characteristics* that fall outside of the male/female binary, the majority of people with this range of conditions still identify their *gender identity* within the binary, and therefore as either man or woman.[5]

The binary classification of sex is also reflected in the law. The current status of the majority of legal systems worldwide shows how self-evident the law considers the 'male'/'female' dichotomy and how it fails to account for diversity.[6] This is best evidenced by the sex registration on official documents, such as the birth certificate. When including a sex marker, the birth certificate codifies

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[3] EU Fundamental Rights Agency, "A long way to go for LGBTI equality" 2020, 58.
[4] Council of Europe Commissioner for Human Rights, *Human Rights and Intersex People*, 2015, available at https://rm.coe.int/16806da5d4, 16 [accessed 17 November 2020].
[5] Christina Richards et. al, *Non-binary or genderqueer gender,* 28 INT. REV. PSYCHIATRY 95, 95 (2016).
[6] Wendy O'Brien, *Can International Human Rights Law Accommodate Bodily Diversity?*, 15 H. R. L. REV. 1, 5 (2015).

the sex of a new-born child, giving it the aura of truth and permanence, institutionalising 'male' or 'female' as a characteristic of identity to this particular child.[7]

Although official sex registration in first instance refers to a person's biological sex at birth, its uses are also connected to that person's gender identity—understood as "*each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body […]*".[8] Indeed, not only is a person's sex marker used for government processes concerning (public) health, but also for identification purposes and policies or processes that require gender specification.[9] In other words, the legal system assumes that information concerning a person's biological *sex*, as well as their *gender identity* can be deduced from the assigned sex at birth. This logic is heavily cisnormative: all persons born with 'male' sex characteristics are assumed to (have) develop(ed) a'masculine' gender identity, and all persons born with 'female' sex characteristics are assumed to (have) develop(ed) a 'feminine' gender identity. For these reasons, we will from here forward refer to the practice of registration as 'sex/gender registration'.

Sex/gender non-conforming persons (i.e some persons with variations of sex characteristics and persons who do not identify as either man or woman) have increasingly challenged the binary normativity of the sex/gender registration in human rights terms, either resisting the application of sex/gender labels, or demanding recognition of other sex/gender markers besides 'male/man or 'female/woman'.

2.2. Growing recognition of legal sex/gender registration as a matter of personal autonomy and self-determination

The present case has arisen against the backdrop of a noticeable trend, in Europe and beyond, towards the recognition that legal sex/gender registration raises important issues of self-determination.

Within the Council of Europe itself, then Commissioner for Human Rights, Nils Muižnieks, released a research paper[10] on human rights and intersex people in May 2015, which addresses a series of medical, legal and administrative obstacles preventing intersex people from fully enjoying their human rights. The Commissioner recommended that Member States should "*facilitate the recognition of intersex individuals before the law through the expeditious provision of … official personal documentation while respecting intersex persons' right to self-determination*", adding that "*[m]ember states should consider the proportionality of requiring gender markers in official documents*" (Recommendation 4).

In 2015, the Council of Europe Parliamentary Assembly (PACE) adopted Resolution 2048 (2015), which not only welcomed the emergence of a right to gender identity that gives every individual the right to recognition of their gender identity and the right to be treated and identified according to this identity, but also called on States to develop quick, transparent, and accessible procedures based on self-determination for changing the name and registered sex/gender on birth certificates, identity cards, passports, educational certificates, and other similar documents.[11] PACE also suggested that States provide for a third sex/gender option in official registration for those who seek it.[12] The same call regarding legal gender recognition and gender self-determination was repeated in PACE Resolution 2191 (2017).[13] Regarding non-binary gender recognition, the Assembly strengthened its recommendations by explicitly calling on States to ensure, wherever gender classifications are in use by public authorities, that a range of options are available for *all* people.[14] In other words, a single third option for gender recognition (e.g.

[7] Elizabeth Reilly, Radical Tweak – Relocating the Power to Assign Sex. From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality, 12 CARDOZO JOURNAL OF LAW & GENDER 297, 311.

[8] *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, Preamble, March 2007, available at: http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf [accessed 15 November 2020]. The Yogyakarta Principles are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. Unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds, they promote an LGBTIQ+ inclusive reading of binding international legal standards with which all States must comply. Although the Court is yet to refer to the Principles, Judges Sajó, Keller and Lemmens already pointed out their relevance in their dissenting opinion in the case Hämäläinen v. Finland.

[9] For instance, demographic (statistical) research based on gender identity, gender segregation in public services or facilities such as restrooms, hospitals, prisons etc.

[10] CoE Commissioner for Human Rights (n 4).

[11] Council of Europe Parliamentary Assembly, Resolution 1728(2010) on discrimination on the basis of sexual orientation and gender identity; Resolution 2048(2015) on discrimination against transgender people in Europe.

[12] Ibid. Accentuation added.

[13] Resolution 2191(2017) promoting the human rights of and eliminating discrimination against intersex people.

[14] Accentuation added.

'X') would no longer be sufficient to meet the requirements stemming from the right to self-determination. These calls are in line with Principle 31 of the Yogyakarta Principles +10.[15] In November 2017, the Inter-American Court of Human Rights issued an advisory opinion that held that – referring *inter alia* to the Yogyakarta Principles +10 – all individuals have the right to have their name and official documents amended in light of their gender identity, solely on the basis of self-determination.[16]

The past years have seen significant developments in State practice as well, as several jurisdictions worldwide have introduced administrative procedures for legal gender recognition based solely on self-determination – among those Argentina, Belgium, Chile, Denmark, Iceland, Ireland, Luxembourg, Malta, Norway, Portugal, and Uruguay. [17] Particularly worth noting is the small but rapidly growing number of countries worldwide that have in recent years introduced neutral, non-binary, or 'third' options for sex/gender registration. While some of these innovations concern the official registration in civil (birth) registers,[18] others deal with the indication of the sex/gender marker on official documents, such as the international passport or identity card.[19]

Some of the most interesting evolutions have occurred in the courtroom. Indeed, in only a few years' time, cases concerning non-binary sex/gender registration, often involving fundamental rights, have been addressed by the judiciary in Austria, Belgium, France (notably in the case at hand), Germany, the Netherlands and the United Kingdom.

In the Netherlands, the Court for the District of Limburg (*Rechtbank Limburg*) held, in a judgment of 28 May 2018, that Article 8 ECHR entailed a positive obligation on the part of the authorities to recognise the applicant's non-binary gender identity (C/03/232248 / FA RK 17-687). Subsequently, the applicant's birth certificate was amended to specify that the applicant's sex/gender 'cannot be determined'. This has permitted them to obtain an internationally valid passport with an 'X' marker. This ruling has paved the way for Dutch nationals to obtain passports with an 'X' sex/gender marker upon application to a judge, who can order the recognition of one's non-binary sex/gender.

The German Federal Constitutional Court (*Bundesverfassungsgericht*), in an order of 10 October 2017 (1 BvR 2019/16), held that the Civil Status Act was unconstitutional to the extent that it did not allow a positive entry for a non-binary sex/gender, in addition to female and male and the existing possibility to leave the sex/gender entry blank if a child's sex could not be determined at birth. This was found to violate the general right to personality and the prohibition on discrimination. The Constitutional Court's finding was based on a recognition that gender identity is a 'constituent part of someone's identity', and that the general right to personality ensures that individuals may autonomously determine and develop their own personalities. The Constitutional Court left it to the legislature how to resolve the issue, presenting as possible remedies to abolish any sex/gender registration altogether or to provide for a third option. The German Federal Parliament, in December 2018, opted for the second alternative, introducing '*divers*' as a third positive sex/gender marker in the Civil Status Act. A recent decision of the Federal Court of Justice (*Bundesgerichtshof*, 22 April 2020 BGH XII ZB 383/19), which denied a non-binary person whose sex could be assigned at birth, the deletion of the sex/gender marker in their civil status and expressly limited the availability of non-binary sex/gender markers to certain intersex persons, will be heard by the Federal Constitutional Court.[20]

On 15 June 2018, the Austrian Constitutional Court (*Verfassungsgerichtshof*) found that mandatory binary sex/gender registration constituted an unlawful breach of Article 8 ECHR for individuals with 'a variation in sex development' (G77/2018-9). It held that individuals must only accept those gender attributions that correspond to their gender identity (point 18). The State is obliged to respect the individual decision for or against a certain marker and to provide for a sex/gender marker that adequately reflects a person's gender identity (point 23). The Court held that the Constitution protects the individual from being assigned a different gender, which applies in particular to persons with a 'alternative' sex/gender identities (point 18). Intersex persons were specifically recognised as a particularly vulnerable group, due to their small number and – in the eyes of the majority – 'otherness'.

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[15] *Yogyakarta Principles plus 10, Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, adopted 10 November 2017, available at https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf [accessed 15 November 2020].

[16] IACtHR 24 November 2017, OC-24/17.

[17] Pieter Cannoot and Mattias Decoster, The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary, Queer, Feminist and Human Rights Analysis, 1(1) INTERNATIONAL JOURNAL OF GENDER, SEXUALITY AND LAW 26, 35 (2020).

[18] For instance in Austria, Germany, Iceland, Canada, Australian Capital Territory, South Australia, Tasmania, California, Oregon and Washington.

[19] For instance in Australia (federal level), Denmark, Malta, New Zealand.

[20] The text of the constitutional complaint is available at: http://dritte-option.de/wp-content/uploads/2020/06/Verfassungsbeschwerde-PStG-15-06-20_anonymisiert.pdf [accessed 16 November 2020].

The Court ordered that the 2013 Austrian Civil Status Act be amended. Given that the Act does not specify which sex/gender markers are to be used but only that a child's sex/gender must be registered at birth, the Court set forth that an additional option should be made available to those who wish to affirmatively express their 'alternative' sex/gender identities. Pursuant to an Order of the Ministry of the Interior in September 2020, there are now no fewer than six entry options ('female', 'male', 'inter', 'divers', 'open', as well as the possibility of deletion). These are, however, reserved for persons who can provide an expert opinion attesting a physical 'variation in sex development'.[21]

On 19 June 2019, the Belgian Constitutional Court followed the German and Austrian examples (judgment no. 99/2019). It struck down several parts of the 2017 Gender Recognition Act, which had established a new – albeit binary – framework of legal gender recognition based on gender self-determination. The Court considered the absence of any form of recognition of non-binary sex/gender markers as a violation of the constitutional right to equality, read together with the right to gender self-determination read in Article 8 ECHR. The Court left it to the legislature how to resolve the issue, presenting as possible remedies to abolish any sex/gender registration altogether or to provide for one or more non-binary option(s) in sex/gender registration. The Belgian government announced in November 2020 that it would explore the available options for implementing the ruling, including the introduction of a third, non-binary gender marker, whilst continuing to place self-determination front and centre.[22]

The sole noteworthy departures from this judicial trend towards legal recognition of non-binary gender identities were the French case at hand, as well as a British High Court of Justice decision of 22 June 2018, in which that court held that "*at present the claimant's Article 8 [ECHR] right to respect for […] personal life [does] not encompass a positive obligation on the part of the Government to permit [them] to apply for and be issued with a passport with an 'X' marker in the gender/sex field*".[23] Upheld by the Court of Appeal in March 2020, this ruling has, however, been challenged and is due to be soon heard by the UK Supreme Court.

2.3. Lessons to be drawn from these standards and developments

These moves away from the binary sex/gender normativity of the law have been hailed as a positive step towards better protection of the human rights of sex/gender non-conforming persons. Yet, the existence of a binary sex/gender registration still creates legal pressure that can result in serious violations of intersex persons' physical integrity:[24] binary registration systems are seen to increase the risk that intersex infants are subjected to invasive genital surgery to remove any ambiguity and allow for their registration as 'male' or 'female'. Such medically unnecessary interventions on intersex children are experienced by many of the persons concerned as a form of 'intersex genital mutilation'.[25] Moreover, the continued focus, in most jurisdictions, on sex characteristics as the decisive factor for legal recognition, as well as the commitment to a single 'third box', have been criticised by scholars and civil society as being both over- and under-inclusive and not human rights centred.[26]

On the one hand, the introduction of any third sex/gender marker that is *only available or even mandatory for intersex persons* would be over-inclusive and entail problems of its own: it is based on an assumption that all persons with variations of sex characteristics have a non-binary gender identity which they want to have reflected on their identity documents and in legal

[21] Bundesministerium Inneres, Verwaltungsangelegenheiten - Sonstige; Ergänzung zur DA November 2019 (Zl. BMI-VA1300/0415/III/3/b/2019), Geschäftszahl: 2020-0.571.947, 9 September 2020.

[22] See https://www.vrt.be/vrtnws/nl/2020/11/09/derde-gender/ [accessed 18 November 2020].

[23] R on the application of Christie Elan-Cane v. Secretary of State for the Home Department [2018] 131, emphasis added.

[24] Sonia K. Katyal, 'The Numerus Clausus of Sex' 84 THE UNIVERSITY OF CHICAGO LAW REVIEW 389 ; Charly Derave, 'Entre « fille » et « garçon », il faut choisir : les traitements médicaux normalisateurs des personnes inter* à l'épreuve de la Convention européenne des droits de l'Homme', *e-legal (revue de la Faculté de droit et de criminologie de l'ULB)*, 2020, to be published. The European Court of Human Rights itself has been seized to rule on a case concerning the bodily integrity of an intersex person, in a recently communicated case against France (*M v. France*, Application no. 42821/18).

[25] CoE Commissioner for Human Rights (n 4), pp. 30-31; M. Jones, 'Intersex Genital Mutilation – A Western Version of FGM', *International journal of children's rights*, 25/2017, pp. 396-411.

[26] P. Cannoot, 'The right to personal autonomy regarding sex (characteristics), gender (identity and/or expression) and sexual orientation : towards an inclusive legal system', Ghent University, Faculty of law and criminology, 2019, available at https://biblio.ugent.be/publication/8631237; B. Moron-Puech, 'La mention du sexe sur les documents d'identité : par-delà une binarité obligatoire', Study Days 'Dimension sexuée de la vie sociale : État civil, genre et identité', led by EHESSCNE and the Gendermed Network, Marseille, France, June 2016, available at : https://hal.archives-ouvertes.fr/hal01374403v2/document, p. 7; F. Vialla, 'De l'assignation à la réassignation du sexe à l'état civil : étude de l'opportunité d'une réforme', Mission de recherche Droit et justice, September 2017, available at http://www.gip-recherche-justice.fr/wp-content/uploads/2017/11/15-23-Rapport-final.pdf; OII-Europe and ILGA-Europe, 'Défendre les droits humains des intersexués – comment être un allié efficace ? Un guide pour les ONG et les décideurs politiques', 3 January 2017, available at: https://oiieurope.org/wpcontent/uploads/2016/03/Oii_A4magazine_humanrights.pdf.

registers. This is inaccurate, as the majority of persons with variations of sex characteristics do in fact identify as either 'man' or 'woman'.[27] A third gender marker can also be stigmatising for intersex persons. As noted by the Council of Europe Commissioner for Human Rights, where it is mandatorily used for persons with varying sex characteristics, much like in the case of binary categories, the fear of stigmatisation may lead parents, children and medical professionals to agree to 'normalising' surgeries and treatments being performed on intersex minors.[28]

On the other hand, the introduction of any third sex/gender marker that is *only available or even mandatory for intersex persons* would be under-inclusive. Limiting the legal recognition of a non-binary sex/gender marker to persons with variations of sex characteristics would inherently create new harms or forms of vulnerability for sex/gender non-conforming persons with no variation of sex characteristics, who are in fact the largest group that would benefit from a legal move beyond the sex/gender binary. It would in turn create an unjustified differential treatment.

These wider ramifications of any judgment in cases pertaining to non-binary registration of persons with variations of sex characteristics, such as the case at hand, ought to be borne in mind. They call for the greatest possible diligence in judicial reasoning in order to avoid both over- and under-inclusiveness. In light of the above, our scholarly opinion is that *allowing for the possibility of non-binary gender registration for all individuals without making a third marker mandatory for anyone* is the best option to protect sex/gender non-conforming persons, with a viable alternative being to abolish sex/gender registration altogether.[29]

3. Article 8: positive obligation to recognize the gender identity of sex/gender non-conforming persons

With this submission, we respectfully invite the Court to extend the positive obligation concerning legal gender recognition under Article 8 of the Convention (3.1.), in order to include persons whose gender identity does not match the binary options in sex/gender registration. We also ask the Court to restrict the State's margin of appreciation in gender recognition cases (3.2.).

3.1. The need to extend the positive obligation

For nearly twenty years, the ECtHR has continuously held that a person's gender identity belongs to the personal sphere as protected by Article 8 ECHR.[30] In *A.P., Garçon, Nicot v. France,* the Court went so far as to hold that Article 8 ECHR encompasses "*a right to self-determination, of which the freedom to define one's gender identity is one of the most essential elements*" (para. 93)[31] and that gender identity is "*an essential aspect of intimate identity of all persons, if not of their existence*" (para. 123). In its landmark ruling in the case of *Christine Goodwin v. United Kingdom,* the Court held that States have a positive obligation under Article 8 ECHR to foresee a procedure for legal gender recognition, yet left the matter of the appropriate means to implement this obligation to the State's margin of appreciation.[32] Recently, in the case of *A.P., Garçon, Nicot v. France*, the Court found that the requirement of the '*irreversibility of the transformation of the bodily appearance*', i.e. treatment involving (a high risk of) sterility, for obtaining legal recognition of a person's gender identity violated Article 8 ECHR. In this way, the Court significantly widened the personal scope of the State's aforementioned positive obligation. After all, since many persons who experience disparity between the (registered) sex assigned to them at birth and their self-identified gender do not wish to undergo any form of invasive medical treatment on their sex characteristics, any medical requirement in the procedure of legal gender recognition considerably limits the potential usage thereof.

[27] See *supra*.
[28] CoE Commissioner for Human Rights (n 4), p. 38.
[29] "Rapport au sujet de l'arrêt n° 099-2019 de la Cour constitutionnelle du 19 juin 2019 annulant partiellement la loi du 25 juin 2017 réformant des régimes relatifs aux personnes transgenres, et de ses conséquences en droit belge à la lumière du droit comparé" made by the Equality Law Clinic at the request of the Belgian Institute for equality between women and men, October 2020, available at https://igvm-iefh.belgium.be/sites/default/files/rapport_elc_-_cc_099-2019_-_fr.pdf, pp. 54-56.
[30] ECtHR, 28957/95, Christine Goodwin v. United Kingdom, para. 90: "in the twenty first century, the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved".
[31] See also, ECtHR, 35968/97, Van Kück v. Germany, para. 73.
[32] ECtHR, 28957/95, Christine Goodwin v. United Kingdom.

We respectfully argue that the scope of this positive obligation to enact a procedure of legal gender recognition currently recognised in the Court's case law,[33] is still under-inclusive, leading to a gap in the human rights protection of sex/gender non-conforming persons. While the scope of the positive obligation established in the Christine Goodwin case requires adequate respect for the gender identity of (post-operative) transgender persons, it does presently not cover the situation of persons who are faced with a binary sex/gender marker (either male/man or female/woman) that does not correspond to their self-identified, non-binary gender. It is respectfully submitted that such under-inclusiveness cannot be upheld, taking into account the fact that, as with (post-operative) transgender persons, persons who identify outside the binary, are confronted with *"[a] conflict between social reality and law*" which similarly places them in "*an anomalous position in which [they] may experience feelings of vulnerability, humiliation and anxiety*" (mutatis mutandis Christine Goodwin, para. 77).

Although it appears from the case law that the Court *"fully accepts that safeguarding the principle of the inalienability of civil status, the consistency and reliability of civil-status records and, more broadly, the need for legal certainty are in the general interest and justify putting in place stringent procedures aimed, in particular, at verifying the underlying motivation for requests for a change of legal identity*",[34] it still requires State authorities to strike a fair balance between the individual interests at stake and the general interest.[35] In this regard, we respectfully argue that the State does not have any genuine interest in impeding the legal recognition of sex/gender non-conforming persons. Indeed, if a person's lived gender does not correspond to their assigned sex, keeping the sex/gender marker corresponding to their assigned sex in public records is less accurate than changing it into a non-binary marker. In other words, artificially maintaining binary sex/gender registration in public records in the face of sex/gender non-conforming lived realities strongly affects the pertinence of such registration.

3.2. The limits of the margin of appreciation

We respectfully submit that the Contracting States' margin of appreciation in cases relating to the legal recognition of sex/gender needs to be narrow. We argue that this finding naturally results from the Court's existing case law (3.2.1), as well as from the international trend towards full self-determination with regard to a change of sex/gender registration, including for sex/gender non-conforming persons (3.2.2).

3.2.1. The Court's case law

The Court has already addressed the extent of the Contracting States' margin of appreciation in several cases relating to gender identity. As mentioned above, it has continuously held that a person's gender identity belongs to the personal sphere protected by Article 8 ECHR. Moreover, it regards gender identity as one of the most basic essentials of self-determination.[36] While the Court in *Christine Goodwin v. United Kingdom* held that States have a wide margin of appreciation regarding the conditions relating to procedures of legal gender recognition, it has since then pointed out that medical requirements directly involving the individual's (right to) physical integrity require special consideration and thus a narrow margin of appreciation.[37] In recent case law, the Court has more generally emphasised "the particular importance of matters relating to a most intimate part of an individual's life, namely the right to gender identity, a sphere in which the Contracting States have a narrow margin of appreciation".[38] We respectfully argue that this reasoning necessarily applies to *all persons*, and therefore not only to persons who seek a change of their registered sex/gender within the male/man-female/woman binary.

3.2.2. International trend towards self-determination in procedures of legal gender recognition

In its case law regarding legal gender recognition, the Court has consistently taken into account the changing legal and social circumstances concerning sex/gender non-conformity. Indeed, already in *Rees v. United Kingdom* (1986), it held that "*the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and social developments*" (para. 47). In

[33] Since the case of X. v. FYR Macedonia, the Court requires procedures of legal gender recognition to be quick, transparent, and accessible. See ECtHR, 29683/16, X. v. FYR Macedonia, para. 70.
[34] ECtHR, 55216/08, S.V. v. Italy para. 69; 41701/16, Y.T. v. Bulgaria, para. 70.
[35] ECtHR, 41701/16, Y.T. v. Bulgaria, para. 71.
[36] ECtHR, 35968/97, Van Kück v. Germany, para. 7.
[37] ECtHR, 79885/12, A.P., Garçon, Nicot v. France, para. 123.
[38] ECtHR, 55216/08, S.V. v. Italy, para. 62.

A.P., Garçon, Nicot v. France, the fact that an *increasing* number[39] – yet not a majority – of Contracting States reformed legislation in a short period of time (*in casu* seven years) was of particular importance.[40]

Although the Court referred to various international instruments in its *A.P., Garçon, Nicot* judgment, it regrettably only deduced from these instruments an agreement among human rights actors on the unacceptability of a(n) (implicit) condition of compulsory sterility for legal gender recognition (para. 125).[41] However, we respectfully submit that the international trend is towards the recognition of a *right to gender self-determination* in procedures of legal gender recognition. This can be noted in several international (soft law) instruments, starting with the Yogyakarta Principles +10. Principle 3 holds that States shall "[…] *take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity* […]". On the basis of Principle 31, States shall "*[…] while sex or gender continues to be registered, ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity; make available a multiplicity of gender marker options […]".* As mentioned in section 2.2, the Council of Europe Parliamentary Assembly has also called for procedures of sex/gender recognition based on self-determination, and the provision of non-binary sex/gender markers.

As noted above (2.2), in recent years, a rapidly increasing number of States worldwide have reformed their legal framework concerning gender recognition. Within the Council of Europe, 10 States adopted an administrative or judicial procedure of gender recognition solely based on gender self-determination. Progressive amendments were made in Denmark (2014), Ireland (2015), Malta (2015), France (2016), Norway (2016), Greece (2017) Belgium (2017), Portugal (2018), Luxembourg (2018) and Iceland (2019). Moreover, several States have introduced one or multiple non-binary markers in sex/gender registration. Within the Council of Europe, relevant examples can be found in Austria (option 'divers' available since 2019), Germany (option 'divers' available since 2018), Iceland (option 'X' available since 2020), Malta (option 'X' available since 2018) and the Netherlands (option 'X' possible through a judicial procedure since 2018). Consultations are underway in Belgium with a view to implementing the Belgian Constitutional Court's June 2019 ruling, according to which the absence of non-binary gender recognition in law violates the constitutional right to equality and non-discrimination.[42]

We therefore respectfully invite the Court to recognise the clear international trend among human rights actors and States towards the recognition of gender self-determination in law, including for sex/gender non-conforming persons, and argue that the State's margin of appreciation in cases regarding gender recognition is narrow.

4. Article 8: negative obligation to refrain from mandatory binary sex/gender registration

We respectfully submit that the practice of sex/gender registration is an interference with Article 8 of the Convention (4.1.), and that a binary model of mandatory sex/gender registration is a violation of the negative obligation stemming from that provision (4.2.)

4.1. Binary sex/gender registration as an interference with the right to autonomy

It is well-established for the Court, civil society and scholars that gender is a matter relating to one's private life. In *A.P., Garçon, Nicot v. France,* the Court ruled that Article 8 ECHR entails "a right to self-determination, of which the freedom to define one's gender identity is one of the most essential elements" (para. 93). One's gender is a self-determined, personal, and, as the existence of people with variations in sex characteristics and non-binary people illustrates, not necessarily binary aspect of one's identity.

[39] ECtHR, 79885/12, A.P., Garçon, Nicot v. France, para. 71. At the time of the judgment, 22 Contracting States required sterilisation for legal gender recognition, whilst 18 States did not.
[40] ECtHR, 79885/12, A.P., Garçon, Nicot v. France, para. 124; 41701/16, Y.T. v. Bulgaria, para. 63. The Court famously relied on an 'international trend', instead of a common European approach, in the Christine Goodwin case. See ECtHR, 28957/95, Christine Goodwin v. United Kingdom, para. 85.
[41] ECtHR, 79885/12 A.P., Garçon, Nicot v. France, para. 97-100.
[42] "Rapport au sujet de l'arrêt n° 099-2019 de la Cour constitutionnelle du 19 juin 2019 annulant partiellement la loi du 25 juin 2017 réformant des régimes relatifs aux personnes transgenres, et de ses conséquences en droit belge à la lumière du droit comparé", see note 31.

The practice of sex/gender registration directly interferes in a twofold way with individuals' right to freely determine their sex/gender. On the one hand, mandatory sex/gender registration not only forces individuals to determine their gender for legal purposes (which some individuals prefer to avoid), it also forces them to determine it with at least a certain level of permanence (which some other individuals refuse to do) in light of the administrative burdens that come with changing one's registered sex/gender. On the other hand, a system of mandatory registration forces individuals to determine their gender in accordance with a pregiven (binary or non-binary) system of categories, with which many individuals do not relate. Binary or non-binary mandatory sex/gender registration therefore inherently interferes with a person's autonomy to freely determine their sex/gender that is derived from Article 8 of the Convention.

Moreover, the practice of sex/gender registration, and especially *mandatory binary* sex/gender registration, also interferes in a more indirect way with individuals' autonomy to determine their sex/gender. While one's gender identity is a private matter, gender entails a public component in the form of societal gender norms and gender 'policing'. In such way, gender-based violence, discrimination and stigma against those who transgress cisgender and binary gender norms serve to keep in place the belief in the natural congruence between one's gender identity and the binary sex assigned at birth.[43] State-sponsored (binary) sex/gender registration reinforces and validates the belief in the naturalness of (binary) sex/gender because it rests upon the idea that sex and gender are objective givens to be found upon inspection of the body. In doing so, a State practice of mandatory binary sex/gender registration contributes to, or at least legitimizes gender-based violence and discrimination proscribed by the Istanbul Convention.[44]

Gender-based violence and discrimination may affect all individuals, whether transgender, cisgender or intersex, even if sex/gender non-conforming persons disproportionately suffer from both.[45] Because no one wants to be subjected to these harms, such violence and inequalities – which are validated by (binary) sex/gender registration – induce individuals to act in line with the conventional gender norms linked to the sex assigned to them at birth. In doing so, this State practice hinders all individuals from freely determining and expressing their gender identity, inducing them instead to conform to conventional (binary) gender norms. While the practice of sex/gender registration therefore interferes with all individuals' right to freely determine their gender, it is especially problematic for sex/gender non-conforming persons.

4.2. Mandatory binary sex/gender registration violates the right to gender autonomy

While sex/gender registration *as such* interferes with individuals' right to freely determine their gender, we respectfully submit that a practice of *mandatory binary* sex/gender registration violates States' negative obligation to respect individuals' right to self-determine their gender guaranteed by Article 8 of the Convention.

The conformity of mandatory binary sex/gender registration with the right to respect for private life can be questioned. The Yogyakarta Principles explicitly require States to halt mandatory sex/gender registration. However, as long as States certify sex/gender, individuals should not be limited to *either* 'male/man' *or* 'female/woman' and procedures for changing one's sex/gender should rely on self-determination.[46] The Council of Europe Parliamentary Assembly adopted the same position in Resolution 2048 (2015).

The legitimate aim behind such practice is less obvious than at first may seem. Indeed, as scholars have aptly pointed out, mandatory binary sex/gender registration seems to be largely a habit, rather than a practice serving a well-reasoned purpose.[47] The accuracy, consistency, and reliability of an individual's civil status and legal identity, which in turn seemingly generate legal

[43] UN HRC, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, May 11, 2018, A/HRC/38/43.
[44] Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), signed 11 May 2011, entered into force 1 August 2014.
[45] Parliamentary Assembly of the Council of Europe, Resolution 2048(2015) on discrimination against transgender people in Europe; EU Fundamental Rights Agency, A long way to go for LGBTI equality, 2020, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf (last consulted 18 November 2020).
[46] Yogyakarta Principles 31, see note 8.
[47] Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law, Durham, Duke University Press, 2011, p. 240 ; Marjolein van den Brink, "Mag het een hokje meer zijn? Ontwikkelingen rond sekseregistratie", ARS AEQUI 2016, pp. 774-780.

certainty, are often set forth in order to justify rigid procedures for sex/gender registration at birth, or the change thereof later in life. However, we respectfully submit that protecting the coherence and reliability of the civil status can hardly be considered legitimate, when that (binary) civil status often actually fails to correspond to the complex reality of sex/gender non-conforming persons.

Even if the Court would consider *mandatory binary* sex/registration a legitimate inference with the right to self-determination, it is disproportionate. This is because mandatory binary sex/gender registration is not suited to achieve the aforementioned aim. Given the fluid and non-binary nature of sex and gender, a system of mandatory binary sex/gender registration will never be able to reliably document sex/gender. Such system is literally inaccurate when it leads to a forced registration of persons openly identifying outside the binary categories of 'male/man' and 'female/woman'.

It is correct that official sex/gender data may serve certain public health policies and allow for demographic research, as well as measuring and tackling gender inequality through affirmative action. However, in this light, a system of mandatory binary sex/gender registration again fails to pass the proportionality test because it is not the least restrictive nor most suited measure to achieve these goals. First, these policies and programs can persist without State-assigned or certified binary gender and rely instead on self-identified gender.[48] Second, most of these programs can be operationalised on the basis of other criteria than sex or gender, which are more relevant. For example, for a preventative breast or prostate cancer screening, the presence of certain sex characteristics matters more than an individual's gender. Third, these alternative options to guarantee public health and ensure gender equality without relying on mandatory binary State-certified sex/gender, are only a few amongst the many that scholars have suggested.[49] Given the narrow margin of appreciation warranted in cases concerning gender identity (see section 3.2.2), a system of mandatory binary sex/gender registration should be considered a violation of the negative obligation to respect an individual's self-determined sex/gender stemming from Article 8 ECHR.

5. Article 14 jo. Article 8: prohibition of discrimination on the basis of gender identity

Considering the vulnerability of sex/gender non-conforming persons in society, we respectfully argue that the prohibition of discrimination under Article 14 should always be examined when evaluating whether their rights have been ensured. We will proceed to such an examination, and consequently argue that mandatory binary sex/gender registration amounts to prohibited discrimination under Article 14 jo. Article 8.

Gender has been confirmed by the Court to be a core aspect of one's identity under Article 8, for *all persons,*[50] and legal gender recognition has been recognised as a right by the Court since the Christine Goodwin case.[51] Unlike cisgender persons, however, persons whose gender does not conform to (binary) normative expectations are obliged to meet a number of requirements for that core aspect of their identity to be recognised by the State.[52] In the case of sex/gender non-conforming persons, such recognition is often still flat-out impossible. Despite the fact that the Court has recognised that gender is a core aspect of personal identity for all persons, only sex/gender non-conforming persons have to go through several, sometimes inaccessible, administrative and medical hoops for their lived gender identity to be legally registered.

In its aforementioned advisory opinion OC-24/17, the Inter-American Court of Human Rights fully endorsed that view.[53] The Court took care to use inclusive language, which has positively impacted the implementation of the advisory opinion at the national

[48] Anna Neuman Wippler, "Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents", HARVARD JOURNAL OF LAW AND GENDER, 2016, vol. 39, pp. 491-554.

[49] See for example, D. Cooper and F. Renz, "If the State Decertified Gender, What Might Happen to its Meaning and Value?", JOURNAL OF LAW AND SOCIETY, 2016, vol. 43, n°4, pp. 483-505 ; T. Hoquet, *Sexus nullus, ou l'égalité*, Donnemarie-Dontilly, Edition iXe, 2015.

[50] ECtHR, 29683/16, X v. the FYR Macedonia, para. 38.

[51] ECtHR, 28957/95, Christine Goodwin v. United Kingdom.

[52] With regards to those requirements, we refer to the Third Party Intervention by the Human Rights Centre of Ghent University in the case of A.D. and A.K. v. Georgia: https://hrc.ugent.be/wp-content/uploads/2019/10/AD-AKvGeorgia-tpi.pdf.

[53] Inter-American Court for Human Rights, Advisory Opinion OC-24/17 of 24 November 2017 on gender identity and equality and non-discrimination of same-sex couples, para. 131 : "the Court considers that, pursuant to the principles of equality and non-discrimination (supra Chapter VI), it is unreasonable to establish a differentiated treatment between cisgender and [sex/gender non-conforming persons] persons who wish to amend their records and identity documents. Indeed,

level. Indeed, in Argentina, judicial rulings have applied the domestic Gender Recognition Act to non-binary persons,[54] and Uruguay has made non-binary sex/gender registration possible with its 2018 law on trans rights.[55]

In order to be justified, a differential treatment must have an objective and reasonable justification, which requires it to pursue a legitimate purpose, as well as to satisfy the proportionality test. In the case of sex/gender recognition, and indeed in the present case, the accuracy of public records is often used as a legitimate aim for the limitations of the rights of persons seeking access to legal gender recognition, and especially of sex/gender non-conforming persons. This is, however, a questionable argument. Whether the accuracy of public records is a legitimate purpose depends on how one defines "accuracy". It is often taken to mean that everyone is either unquestionably a male/man or unquestionably a female/woman, and that this assigned category remains correct for the rest of their lives. This idea is informed by the views of a cisgender majority on what is "normal", but that does not make it "accurate". The existence of intersex persons directly questions the sex binarity: sex characteristics among human beings are too varied to be reliably classified into two distinct categories. Similarly, the existence of gender non-conforming people shows us that gender is not binary either. Consequently, insisting on enshrining binary expectations of sex and gender in law and in public records actually jeopardises the accuracy of these records in the face of a reality that resolutely resists being classified into binary categories.

Even if this is still considered a legitimate aim, there is still the question of proportionality. In the case of sex/gender non-conforming persons, it is essential to keep in mind that the Court ruled that restrictions of the fundamental rights of a particularly vulnerable group require very weighty reasons in order to be justified.[56] In his report on 'Human Rights and Gender Identity', the former Human Rights Commissioner for the Council of Europe, Thomas Hammarberg, held that *"many transgender people live in fear and face violence in the course of their lives. This violence ranges from harassment, bullying, verbal abuse, physical violence and sexual assault, to hate crimes resulting in murder*."[57] In his report on intersex persons, Human Rights Commissioner Muižnieks pointed to the stigma, prejudice and abuse suffered by intersex persons, specifically because they do not correspond to binary ideas of sex and gender.[58] Since prejudice and stigma towards a particular group in society have been indicators that have crucially informed the Court's assessment of group vulnerability, we respectfully invite the Court to apply the concept of vulnerable groups[59], which it already used in relation to Roma,[60] people with disabilities,[61] people living with HIV[62] and asylum seekers,[63] to sex/gender non-conforming people.

If the Court follows this reasoning, the principle of "very weighty reasons" should be applied to the present proportionality test. In the past, the Court has found that those "very weighty reasons" may be connected to the protection of the rights of a third party (particularly the rights of children),[64] but in this case, only public interests have been invoked as counter-argument. Therefore, the proportionality test with regards to differential treatment of sex/gender non-conforming persons requires particular scrutiny. We respectfully submit that, especially given sex/gender non-conforming persons' vulnerability, the accuracy of public records is not proportionally weighty enough to justify denying sex/gender non-conforming persons the legal recognition of such a core aspect of their personality under Article 8 as their sex/gender.

in the case of cisgender persons, the sex assigned at birth and entered into the records corresponds to the gender identity that they assume autonomously throughout their life, while in the case of [sex/gender non-conforming persons], the identity assigned by third parties (generally their parents) differs from the one they have developed autonomously. Thus, [sex/gender non-conforming persons] encounter obstacles to achieving recognition of and respect for their gender identity that cisgender persons do not have to face".

[54] Argentina Reports, 'Male, Female, X: First Argentinian allowed 'blank' gender on ID' (5 November 2018), <https://argentinareports.com/first-argentinian-blank-gender-id/2006/>

[55] Ley Integral Para Personas Trans, 2018.

[56] ECtHR, 38832/06, Alajos Kiss v. Hungary, para 42.

[57] Council of Europe Commissioner for Human Rights, Human Rights and Gender Identity, 2009, p. 14.

[58] *Supra* n 9, pp. 15, 32, 29. See also: EU Agency for Fundamental Rights (FRA), A long way to go for LGBTI equality, note 48.

[59] O. Arnadóttir, "Vulnerability under Article 14 of the European Convention on Human Rights - Innovation or Business as Usual ?", *Oslo Law Review*, Vol. 4, 2017/3, pp. 150-171.

[60] ECtHR, 57325/00D.H. and others v. Czech Republic.

[61] ECtHR, 38832/06, Alajos Kiss v. Hungary.

[62] ECtHR, 2700/10, Kiyutin v. Russia.

[63] ECtHR, 30696/09, M.S.S. v. Belgium and Greece.

[64] ECtHR, 36515/97, Fretté v. France.