

The European Court of Human Rights did not find a violation of Art. 8 ECHR in a case about access to neutral gender marker

On 31 January 2023, the European Court of Human Rights released its judgement in the case of *Y v. France* (application no. 76888/17). The case concerned the French authorities' refusal to allow for the "male" gender marker of the applicant, an intersex person, to be replaced by "neutral" or "intersex" on the person's birth certificate. The Court held, by six votes to one, that there had been no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR).

The Court argues that the French judges' refusal to authorise a change to the applicant's birth certificate was based on the "consideration of the importance of the general interests at stake". It upholds that the arguments "concerning respect for the principle of the inalienability of civil status and the need to preserve the consistency and reliability of civil status records and of the social and legal arrangements in place in France", were "relevant". It also upholds the argument that "judicial recognition of a 'neutral' gender would have far-reaching consequences for the rules of French law, constructed on the basis of two genders", and that it would "imply multiple coordinating legislative amendments".

It further argues that there is still an "absence of a European consensus" in regards to third gender markers and that, hence, it is "appropriate to leave it to the respondent State to determine at what speed and to what extent it could meet the demands of intersex persons, such as the applicant, with regard to civil status".

The Court decided not to put the necessary weight on further arguments that should have led it to find that a violation of Article 8 had indeed occurred: As noted by the Austrian Constitutional Court in its 2018 judgement, "Article 8 ECHR [...] protects individuals with alternative gender identities against having their gender assigned by others". As the European Court itself acknowledges, "an essential aspect of individual intimate identity lies at the very heart of the present case insofar as gender identity is at issue". It notes that "such factors militate in favour of a limited margin of appreciation" (i.e. discretion), while unfortunately concluding that, for the reasons above, the State enjoyed a wide margin.

On a positive note, the Court rejects the argument of the *Cour de cassation* that, based on the "the fact that the applicant had, in the eyes of third parties, the appearance and social behaviour of a male person, in accordance with the indication in his birth certificate", the "breach of the applicant's right to respect for his private life" was not "disproportionate to the legitimate aim pursued" by the French authorities to preserve the duality of the legal gender recording system. The Court emphasises that such an argument, "confuses the concept of identity with the concept of appearance" and underlines that "as an element of private life, a person's identity cannot be reduced to the way that person looks to others". It goes on to say that such an argument "ignores the reality of the applicant's life course, who, having been assigned male at birth and consequently having been socially identified as such, had no option [...] but to 'pretend to be a man'".

We appreciate that the Court emphasises that a person's gender identity is an "essential aspect of individual intimate identity" and that, hence, the protection under Article 8 applies in general - even though the Court focuses on a mismatch between the intersex applicant's "biological identity" and their male "legal identity", which should not be used as an argument outside of this case to limit claims of access to neutral gender markers based only on self-identified gender. Aside from that, OII Europe strongly regrets the outcome of the judgement,

and its favouring of a broader margin of appreciation which severely limits the protection under Article 8.

A number of international bodies have called for the protection of the right to respect for one's identity and of the self-determination of intersex people who self-identify outside of the binary system. Among these bodies, as also recalled by the Court, the Commissioner for Human Rights of the Council of Europe, in its 2015 Issue Paper, stated: "Member states should facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons' right to self-determination. Flexible procedures should be observed in assigning and reassigning sex/gender in official documents while also providing for the possibility of not choosing a specified male or female gender marker. Member states should consider the proportionality of requiring gender markers in official documents".

This shows the importance and the high level of the right at stake and the urgency for Member States to ensure protection of it. Hence, from a human rights perspective, a lack of an established European consensus should not be used as an argument to violate an essential element of a person's identity.

In addition, the case can be made that there is indeed an increasing trend in Europe to establish self-determination as the model for legal gender recognition (LGR). Almost 20% of Council of Europe Member States have established such a model, and more countries are on their way. This reinforces the acceptance of the fact that the gender of a person can only be determined by the individual themselves. In parallel, an increasing recognition of the need to establish a third or multiple gender markers is developing. Already, as well noted by the Court, 5 CoE Member States have introduced a third or multiple gender markers, and that other Member States are taking first steps in this direction at the governmental level.

As the case shows, strict binarism in the legal gender system causes a huge amount of suffering and discrimination for those individuals, including intersex persons, who self-identify outside of it. For intersex persons, in particular, such binarism also reinforces the prejudices which underpin the harmful practice of Intersex Genital Mutilation (IGM).

This link between denial of LGR and the perpetuation of IGM is rightfully grasped by judge Šimáčková in her dissenting opinion attached to the judgement of the present case, where she notes that: "taking into account the fact that the existence of a necessary binarism in the legal system implies the performance of mutilating surgeries in childhood and lifelong medication (it was the obligation to take testosterone-based medication that caused the applicant significant damage to his health), the duty to recognise gender neutrality must be seen in this case as a duty not to interfere in the private life of the person concerned (similar to the cases of transgender persons)".

In a society where "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", 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.

In its recent judgement in the case *M v. France* the Court, while rejecting the application for non-exhaustion of domestic remedies, paved the way for the qualification of non-vital medical

interventions performed on intersex persons without their personal prior free and fully informed consent (IGM) as a form of torture under Article 3 ECHR.

Considering this additional impact of a lack of protection of an intersex person's identity we can only reiterate the words of judge Šimáčková: "And what are the State's arguments? You were not born male or female, but the law does not allow it. Therefore you must adapt your body (even if you will suffer) and your soul (even if you will feel humiliated) to correspond to the laws adopted by the State. I find this interference so serious that I believe it violates the applicant's right to respect for private life".

Footnote: The judgement can be found at <https://hudoc.echr.coe.int/eng?i=001-222780> . The judgement is only available in French. The quotations throughout this press release are translated into English, when possible using the translation used in Court's own press release in English.

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