

IN THE EUROPEAN COURT OF HUMAN RIGHTS

R.L. against Russia
and P.O. against Russia
(Applications nos. 36253/13 and 52516/13)

WRITTEN COMMENTS
submitted jointly by

Transgender Europe
ILGA Europe
ILGA
Human Rights Centre “Memorial”

19 March 2018

1. These written comments are submitted on behalf of Transgender Europe (TGEU), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), ILGA (the International Lesbian, Gay, Bisexual, Trans and Intersex Association) and Human Rights Centre “Memorial”, pursuant to leave granted by the President of the Third Section.¹ The structure is as follows. The first part examines the manner in which gender identity has been construed in international and comparative law, as a fundamental aspect of human personality and an expression of fundamental values such as dignity, autonomy and equality. States have a corresponding obligation to provide trans people with quick, accessible and transparent legal gender recognition (LGR) procedures based on self-determination. Concomitantly, States have to abolish abusive and arbitrary requirements, including forced pathologisation and medical treatment. The second part describes the law and practice of LGR in Russia, with an emphasis on recent developments. The third part looks at the emergence of gender identity as a protected ground under international anti-discrimination law, with a focus on LGR cases, as well as referencing evidence showing that trans people qualify as “a particularly vulnerable group in society, whose members have suffered considerable discrimination in the past”, and should therefore be afforded strict protection under Article 14 of the Convention.

2. These written comments draw from a range of comparative and international law sources. An advisory opinion published by the Inter American Court of Human Rights (IACtHR) on 24 November 2017 offers an authoritative and binding interpretation of the relevant provisions of the American Convention on Human Rights insofar as LGR and discrimination based on gender identity and gender expression is concerned.² This Court has frequently relied on the jurisprudence of the IACtHR as a persuasive tool for interpreting the provisions of the Convention.³ The Yogyakarta Principles (YP) represent an authoritative articulation of human rights standards as applied to LGBTI people, referenced as trusted authority in the case-law of this Court and of the Court of Justice of the European Union (CJEU).⁴ These written comments also include an illustrative inventory of references to gender identity in the work of different United Nations agencies providing further support to the main contentions argued herein.

I. The right to gender self-determination

a) General principles

3. The YP define ‘gender identity’ 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 (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech

¹ The interveners gratefully acknowledge the contribution of Constantin Cojocariu in the preparation of this submission.

² *Corte interamericana de derechos humanos, Opinión consultativa OC-24/17 de 24 de noviembre de 2017 solicitada por la República de Costa Rica: Identidad de género, e igualdad y no discriminación a parejas del mismo sexo o obligaciones estatales en relación con el cambio de nombre, la identidad de género, y los derechos derivados de un vínculo entre parejas del mismo sexo (Interpretación y alcance de los artículos 1.1, 3, 7, 11.2, 13, 17, 18 y 24, en relación con el artículo 1 de la Convención americana sobre derechos humanos).*

³ *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.

⁴ *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity*, 2007 and the 2017 update, *The Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation in gender identity, gender expression, and sex characteristics to complement the Yogyakarta Principles*. The YP were mentioned by Judges Sajó, Keller and Lemmens in their dissenting opinion, §16, in *Hämäläinen v. Finland* [GC] and the CJEU in Case C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal* [2018], §62.

and mannerisms.”⁵ This Court has described gender identity as “one of the most intimate areas of a person’s private life”, as a free-standing “right”, as “a fundamental aspect of the right to respect for private life”⁶ and as “one of the most basic essentials of self-determination,”⁷ linking it to a “right to sexual self-determination,” itself an aspect of the right to respect for private life.⁸ The IACtHR connected gender identity to the free development of human personality and the right to privacy, to the right to identity, to human dignity, the right to life and the principle of autonomy of the person. In that sense, 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.”⁹

4. Gender identity is widely recorded in identity documents used in a variety of daily interactions. In that sense, personal documentation that accurately represents one’s gender is indispensable for the exercise of other human rights. Some of the findings in a EU Agency for Fundamental Rights (FRA) survey published in 2014 demonstrate the importance of accurate identity records.¹⁰ Thus, one in three trans respondents felt discriminated against when showing their identification card or other official document that identifies their sex. Almost nine in 10 (87 %) say that easier LGR procedures would help them to live a more comfortable life. Nearly one in three trans respondents felt discriminated against in the 12 months preceding the survey in a situation where they had to show their ID or an official document that identifies their sex. The judgments on discrimination based on gender reassignment of the CJEU illustrate the same point. While EU law does not cover LGR per se, absent or faulty LGR procedures may result in the loss of rights protected under EU law and coming under the jurisdiction of the CJEU.¹¹ The IACtHR has noted that “the recognition of gender identity by the State is of vital importance to guarantee the full enjoyment of the human rights of trans people, including protection against violence, torture, ill-treatment, right to health, education, employment, housing, access to social security, as well as the right to freedom of expression and association.”¹²

5. It follows that the right to the recognition of gender identity is an aspect of the basic principle of equality before the law recognized under the Universal Declaration of Human Rights and other core international and regional human rights treaties. In that sense, the YP construe LGR as an aspect of “the right to recognition before the law,” specifying that “everyone has the right to recognition everywhere as a person before the law.”¹³ Self-determination is a core feature of gender identity. At the European level, the right to gender self-determination has been affirmed by the Parliamentary Assembly¹⁴ and the Commissioner for Human Rights.¹⁵ National legislation based on self-determination, a relatively recently phenomenon, has already been adopted in seven Council of Europe

⁵ The YP 2007, *Preamble*.

⁶ *Van Küçk v. Germany*, no. 35968/97, §56 and 75, ECHR 2003-VII.

⁷ *Y.Y. v. Turkey*, no. 14793/08, §102, 10 March 2015 (extracts).

⁸ *Idem*, §78.

⁹ IACtHR Advisory Opinion *OC-24/17*, §85-101 and particularly §93.

¹⁰ EU FRA, *Being Trans in the European Union: Comparative analysis of EU LGBT survey data - Summary*, 2014, p. 11.

¹¹ See CJEU, Case C-13/94 *P. v S. and Cornwall County Council* [1996] (on the loss of employment); CJEU, Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] (on the loss of an occupational pension); CJEU, Case C-423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] (on the loss of a retirement pension); CJEU, Case C-451/16 *MB v Secretary of State for Work and Pensions* [pending] (on the loss of a retirement pension).

¹² IACtHR Advisory Opinion *OC-24/17*, §98.

¹³ The YP 2007, *Principle 3*.

¹⁴ Resolution 2048 (2015), *Discrimination against transgender people in Europe*, §6.2.1.

¹⁵ See for example the Commissioner’s statement of 22 October 2015, in which he “encouraged member states to follow the current European trend towards recognising the self-determination of trans people regarding their gender,” Annual Activity Report 2015, 14 March 2016, p. 30.

Member States.¹⁶ Legislation adopted in Malta provides a typical example. Thus, all citizens have the right to “the recognition of their gender identity”.¹⁷ An applicant for LGR need only provide a notary public with a “clear, unequivocal and informed declaration...that one’s gender identity does not correspond to the assigned sex in the act of birth”.

b) *The pathologisation of trans people*

6. Currently, 36 Council of Europe State Parties make LGR contingent on a mental health diagnosis (alternatively labelled as ‘transsexualism’ or ‘gender identity disorder’ among others).¹⁸ This Court ruled this requirement to be valid in the case *A.P., Garçon and Nicot v. France*, based on European consensus, on the fact that “transsexuality” is a diagnosis included in the current version of the International Classification of Diseases (ICD-10), on the fact that it does not directly engage a person’s physical integrity and on the comparative lack of authoritative pronouncements on this matter from European and international human rights bodies.¹⁹ The Court also reasoned that the diagnosis requirement aims to protect the interests of the persons concerned by preventing them from engaging in the process of changing their gender markers “accidentally,” as well as based on the principle of legal security.

7. Pathologisation subverts an essential aspect of human personality and leads to serious human rights violations. As a matter of principle, medical treatment without consent, however slight the intervention, raises serious issues falling within the scope of the right to respect for private life under Article 8 of the Convention, demanding an adequate justification.²⁰ On a principled level, the margin of appreciation cannot be available as an excuse for overriding fundamental human rights such as the right to physical and psychological integrity. Furthermore, the justification based on the alleged need to protect people from recklessly engaging in LGR is misguided and unsubstantiated. People take life-changing decisions that sometime turn out to be mistaken (for example getting married or moving to a different country). Such outcomes cannot be interpreted as legitimising interference or screening by a third party. Furthermore, the practice in those countries that have recently adopted legislation based on self-declaration does not confirm these concerns. That experience also shows that any impact on legal security resulting from self-determination may be addressed through adequate regulatory measures.

8. The CJEU has recently examined the validity under EU law of subjecting an asylum seeker to a psychological examination to determine his sexual orientation. The individual in question had previously claimed asylum in Hungary on the grounds of a well-founded fear of being persecuted in his country of origin on account of his homosexuality. Insofar as relevant to the present cases, the CJEU ruled that a psychological test carried out in these circumstances is de facto imposed under the

¹⁶ Denmark (2014), Malta (2015), Ireland (2015), Norway (2016), Belgium (2017) have legislation based purely on self-determination. 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/. In Latin America, Brazil is the latest country to introduce self-determination following a recent Supreme Court ruling, see Human Rights Watch, *Brazil boosts transgender legal recognition: Supreme Court removes medical and judicial criteria to changing legal gender*, 14 March 2018, available here: <https://www.hrw.org/news/2018/03/14/brazil-boosts-transgender-legal-recognition>.

¹⁷ *Gender Identity, Gender Expression and Sex Characteristics Act* (2015).

¹⁸ For more information see <https://tgeu.org/trans-rights-map-2017/>.

¹⁹ *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §138-144, 6 April 2017.

²⁰ See for example *M.A.K. and R.K. v. the United Kingdom*, nos. 45901/05 and 40146/06, §75, 23 March 2010 (involving a blood test), *Y.F. v. Turkey*, no. 24209/94, §33, ECHR 2003-IX (forced gynecological examination); *Peters v. the Netherlands*, no. 21132/93 (dec.) (urine test).

pressure of the circumstances that applicants for international protection find themselves in.²¹ Besides being unreliable, the test was an excessive interference with the right to respect for private life, purporting to establish an essential, and intimate, element of personal identity. The CJEU held that such a test was at odds with the Asylum Qualification Directive and the Charter of Fundamental Rights. Similar arguments as those deployed by the CJEU apply *mutatis mutandis* to testing aimed at diagnosing “gender identity disorder” in the context of LGR. In fact, the CJEU specifically called attention to Principle 18 of the YP “which states, inter alia, that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity.”

9. On 17 May 2016, a group of United Nations and international human rights experts issued a statement calling for an urgent end to the pathologisation of trans adults and children (among others), by reforming medical classifications and adopting measures to prevent all forms of forced treatment and procedures affecting the people in question.²² The group noted that pathologisation was one of the root causes behind widespread human rights violations and an obstacle to overcoming negative attitudes, stereotypes, and the barriers preventing the realisation of their rights. In particular, pathologisation served as a justification for imposing unwanted medical treatments, hindered access to gender-affirming treatments and to LGR, contributed to marginalisation and exclusion in education, health, employment and housing among other areas, and was conducive to violence. For its part, the IACtHR noted that medical or psychological certification runs counter to the principles that LGR procedures be based on self-determination and that of the free development of one’s personality.²³ In particular, certification pre-requisites are invasive and call into question the person’s identity, while resting on the assumption that having an identity contrary to the sex assigned at birth is inherently pathological. As such, gender identity certification perpetuates the prejudices associated with the gender binary.

10. The World Health Organisation (WHO) proposes to remove all trans-related diagnoses from the Mental Health Chapter in the next version of the International Classification of Diseases (ICD-11).²⁴ Instead, a new chapter “Conditions related to Sexual Health” is proposed with the placement of two new diagnoses Gender Incongruence in Adolescence/adulthood (GIAA) and Gender Incongruence in Childhood (GIC). The new chapter/ diagnoses shall facilitate access to medical treatment and cost coverage for those trans people who wish to undergo such therapies, while recognising that being transgender is not pathologic. ICD-11 is due for approval at the World Health Assembly in May 2018 and to be implemented at the national level from January 2019.²⁵ These changes would deprive pathologisation of gender identity of its ‘scientific’ justification.

c) *Medical treatment as an obstacle to legal gender recognition*

²¹ 47-71.

²² “Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness” For International Day against Homophobia, Transphobia and Biphobia - Tuesday 17 May 2016, available here <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>. The statement was signed by the UN Committee on the Rights of the Child (CRC), the Special Rapporteur on extreme poverty and human rights, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, the Special Rapporteur on violence against women, its causes and consequences, the Inter-American Commission on Human Rights (IACHR), African Commission on Human and Peoples’ Rights (ACHPR), the Council of Europe Commissioner for Human Rights.

²³ IACtHR Advisory Opinion *OC-24/17*, §130.

²⁴ World Health Organisation. ICD-11 Beta Draft (Joint Linearization for Mortality and Morbidity Statistics). 2017; <http://apps.who.int/classifications/icd11/browse/l-m/en> (20.04.2017).

²⁵ WHO, ICD-11 *Revision Conference Report Tokyo*, Japan, 12-14 October, 2016.

11. The Court has ruled in *A.P., Garçon and Nicot v. France* that the requirement to undergo sterilisation or treatment involving a very high probability of sterility in as a precondition to LGR was in breach of the right to respect for private life under Article 8. The Court noted that consent given to medical treatment in these circumstances was invalid, as it forced trans people to choose between their right to bodily integrity and their right to gender identity recognition. In our view, the Court’s reasoning extends *mutatis mutandis* to all gender reassignment procedures imposed as a mandatory precondition to LGR, as long as carried out without the full and informed consent of the person concerned.²⁶

12. The consensus against mandatory medical requirements has consolidated steadily, although twenty European countries still subject trans people to sterilisation before having their gender identity legally recognised.²⁷ Several developments that took place since *A.P., Garçon and Nicot v. France* was decided less than a year ago point in the same direction. Russia and Greece²⁸ adopted legislative and regulatory changes that considerably facilitate access to LGR, removing obstacles previously in place as discussed elsewhere in this brief. Sweden introduced a compensation scheme for trans people who had been forcefully sterilised under legislation in force until 2013.²⁹ Hungary codified for the first time its relatively liberal practice on LGR, which does not involve any medical requirements.³⁰

13. In some countries, medical treatment required as a precondition to LGR may be unavailable in practice, rendering LGR exceedingly hard or even impossible to achieve. According to a TGEU study on insurance coverage for trans specific healthcare in seventeen European countries,³¹ only a handful of European countries, such as the UK, the Netherlands, Germany, or Belgium, have public health insurance in place that covers most trans specific healthcare costs. In most other countries, public insurance only covers a limited number of procedures, and in some, such as Georgia, Russia, or Poland virtually nothing is covered. Further, even in countries where insurance coverage is available, trans people routinely face excruciatingly long waiting periods and humiliating treatment. Across the board, they are subjected to pathologisation and find themselves at the mercy of doctors, who routinely act as gatekeepers between them and the healthcare they want to access. Insurance coverage is subject to discriminatory limitations and often provided on an ad hoc basis. Trans people who are poor, live outside big cities, non-binary people, and trans people with disabilities face additional barriers in accessing affordable care. While going private might mean better quality services, accessing private doctors is unaffordable for the vast majority of trans people. The same applies for private insurance, which is usually expensive and often excludes trans specific healthcare from coverage.

d) *UN standards on legal gender recognition*

14. Several United Nations Treaty Bodies and Special Procedures examined the issue of access to LGR. Notably, the Russian Federation is a party to all major international treaties mentioned in this section. The Human Rights Committee (HRCttee) encouraged State parties to fully recognize the legal

²⁶ “Gender reassignment treatment” is an umbrella term usually understood as comprising a variety of hormonal and surgical treatments, such as bilateral mastectomy and reconstruction (“top surgery”), hysterectomy (removal of uterus and other internal pelvic organs) and phalloplasty (creation of a penis) for trans men and breast augmentation, penectomy (removal of penis), orchiectomy (removal of the testicles) or vaginoplasty (creation of a vagina) for trans women.

²⁷ For more information see <https://tgeu.org/trans-rights-map-2017/>

²⁸ See supra fn. 16.

²⁹ <http://tgeu.org/sweden-announces-to-pay-compensation-to-trans-people/>.

³⁰ <https://tgeu.org/hungary-legal-gender-recognition-gets-legal-basis-for-the-first-time/>

³¹ TGEU, *Trans healthcare lottery: insurance coverage for trans specific healthcare: An overview on the basis of 17 countries in Europe*, advance pre-publication copy, available upon request.

identity of transgender persons³² and to put in place LGR procedures that are clear, consistent³³ and compatible with the International Covenant on Civil and Political Rights (ICCPR).³⁴ It persistently asked State parties to make sure that LGR is not conditioned upon restrictive or stringent requirements,³⁵ such as medical treatment,³⁶ surgery,³⁷ sterilisation³⁸ or divorce.³⁹ Furthermore, the HRCtee made it clear that the protection of a person’s identity, including their gender identity, is covered by the notion of “privacy” protected under article 17 of the ICCPR.⁴⁰ The Committee on Economic, Social and Cultural Rights (CESCR) recognised that the lack of LGR procedure may constitute a “barrier to transgender persons having effective access to work, education and health services.”⁴¹ It also noted that LGR should not be based on gender reassignment surgery.⁴² In 2017, the CESCR specifically called on the Russian Federation to develop a “quick, transparent and accessible procedure of LGR.”⁴³

15. The Committee on the Elimination of Discrimination against Women (CEDAW) criticised both the lack of any LGR procedures,⁴⁴ and such procedures that are lengthy or burdensome,⁴⁵ particularly when psychiatric assessment,⁴⁶ experts reports,⁴⁷ medical treatment,⁴⁸ infertility,⁴⁹ surgery⁵⁰ or sterilisation⁵¹ are required. CEDAW called on State parties to ensure “expeditious, transparent and accessible” procedures⁵² that would not be based on “stereotypical ideas of masculine or feminine appearance or behaviour.”⁵³ On several occasions, it specifically noted that inadequate LGR procedures “exacerbates discrimination against transgender persons”⁵⁴ and violate their freedom to control one’s body and to be free from non-consensual medical treatment.⁵⁵ The Committee on the Rights of the Child called for recognition of trans children’s gender identity,⁵⁶ while the Committee

³² HRCtee, Concluding observations [hereinafter – “CO”]: Dominican Republic (2017), CCPR/C/DOM/CO/6, §. 10; Honduras (2017), CCPR/C/HND/CO/2, §. 11.

³³ HRCtee, CO Romania (2017), CCPR/C/ROU/CO/5, §. 16.

³⁴ HRCtee, CO: Kazakhstan (2016), CCPR/C/KAZ/CO/2, §. 10; Slovakia (2016), CCPR/C/SVK/CO/4, §. 15; Romania (2017), CCPR/C/ROU/CO/5, §. 16.

³⁵ HRCtee, CO: Republic of Korea (2015), CCPR/C/KOR/CO/4, §. 14; Kazakhstan (2016), CCPR/C/KAZ/CO/2, §. 9.

³⁶ HRCtee, CO Australia (2017), CCPR/C/AUS/CO/6, §. 27.

³⁷ HRCtee, CO: Australia (2017), CCPR/C/AUS/CO/6, §. 27; Serbia (2017), CCPR/C/SRB/CO/3, §. 12.

³⁸ HRCtee, CO Slovakia (2016), CCPR/C/SVK/CO/4, §. 14.

³⁹ HRCtee, CO: Ireland (2014), CCPR/C/IRL/CO/4, §. 7; Australia (2017), CCPR/C/AUS/CO/6, §. 27. See also the Committee’s views on the case *G v. Australia* (Communication No. 2172/2012, views of 17 March 2017, CCPR/C/119/D/2172/2012).

⁴⁰ *G v. Australia*, §. 7.2 (“privacy” refers to the “sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone”).

⁴¹ CESCR, CO Costa Rica (2016), E/C.12/CRI/CO/5, §. 20.

⁴² CESCR, CO Lithuania (2014), E/C.12/LTU/CO/2, §. 8.

⁴³ CESCR, CO Russian Federation (2017), E/C.12/RUS/CO/6, §. 23.

⁴⁴ CEDAW, CO Kyrgyzstan (2015), CEDAW/C/KGZ/CO/4, §. 33.

⁴⁵ CEDAW, CO: Belgium (2014), CEDAW/C/BEL/CO/7, §. 44; Germany (2017), CEDAW/C/DEU/CO/7-8, §. 45.

⁴⁶ CEDAW, CO Belgium (2014), CEDAW/C/BEL/CO/7, §. 44-45.

⁴⁷ CEDAW, CO Germany (2017), CEDAW/C/DEU/CO/7-8, §. 45.

⁴⁸ CEDAW, CO: Slovakia (2015), CEDAW/C/SVK/CO/5-6, §. 36; Switzerland (2016), CEDAW/C/CHE/CO/4-5, §. 38-39.

⁴⁹ CEDAW, CO Finland (2014), CEDAW/C/FIN/CO/7, §. 28.

⁵⁰ CEDAW, CO: Belgium (2014), CEDAW/C/BEL/CO/7, §. 44-45; Slovakia (2015), CEDAW/C/SVK/CO/5-6, §. 37; Switzerland (2016), CEDAW/C/CHE/CO/4-5, §. 39; Montenegro (2017), CEDAW/C/MNE/CO/2, §. 46.

⁵¹ CEDAW, CO: Belgium (2014), CEDAW/C/BEL/CO/7, §. 44-45; Finland (2014), CEDAW/C/FIN/CO/7, §. 28; Slovakia (2015), CEDAW/C/SVK/CO/5-6, §. 37; Switzerland (2016), CEDAW/C/CHE/CO/4-5, §. 38; Montenegro (2017), CEDAW/C/MNE/CO/2, §. 47.

⁵² CEDAW, CO: Belgium (2014), CEDAW/C/BEL/CO/7, §. 44; Kyrgyzstan (2015), CEDAW/C/KGZ/CO/4, §. 34.

⁵³ CEDAW, CO: Finland (2014), CEDAW/C/FIN/CO/7, §. 29; Georgia (2014), CEDAW/C/GEO/CO/4-5, §. 35.

⁵⁴ CEDAW, CO Kyrgyzstan (2015), CEDAW/C/KGZ/CO/4, §. 33.

⁵⁵ CEDAW, CO Slovakia (2015), CEDAW/C/SVK/CO/5-6, §§. 36-37.

⁵⁶ CRC, CO Chile (2015), CRC/C/CHL/CO/4-5, §. 35.

against Torture expressed concern about the requirement “to have completed sex-reassignment surgery, which includes the removal of reproductive organs, sterilisation and genital reconstruction, in order to obtain legal recognition of their gender identity.”⁵⁷

16. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that the refusal to change one’s gender marker may lead to “grave consequences for the enjoyment of their human rights, including obstacles to accessing education, employment, health care and other essential services.” He also criticised such abusive requirements for LGR as “forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures.”⁵⁸ The Working Group on the issue of discrimination against women in law and in practice expressed similar concerns.⁵⁹

17. Both the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,⁶⁰ and the Special Rapporteur on extreme poverty and human rights⁶¹ recommended States to ensure transgender persons’ access to LGR following their country visits. Last but not least, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity singled out LGR among six core underpinnings requiring specific attention to help prevent and overcome negative elements fuelling violence and discrimination. The Independent Expert identified specific problems in this field, including non-recognition of transgender persons’ self-identified gender by the State, as well as such abusive requirements as surgery, psychological assessment, conversion therapy, sterilization and divorce, bureaucratic hurdles and difficulties in accessing medical care, education, housing, a decent standard of living and employment opportunities.⁶²

II. Russian legislation and practice on legal gender recognition

18. Article 70 of the Federal Law “On Acts of Civil Status”⁶³ provides that a person seeking a legal gender marker change should provide the civil registry office with a “sex change certificate issued by a medical organization in the form and under procedure established by the federal executive body that exercises functions for the development and implementation of public policy and legal regulation in the field of health service”. Although the Ministry of Health was charged to develop and approve as early as 1998⁶⁴, the form in question was only adopted on 23 October 2017.⁶⁵

19. Between 1998 and 2 February 2018, trans people wishing to change their legal gender marker had no option but to submit to Civil Registry Offices a non-standard form certificate, produced by their healthcare professional. In no less than 22 of the 83 regions of the Russian Federation,⁶⁶ the Civil

⁵⁷ CAT, CO China (Hong Kong) (2015), CAT/C/CHN-HKG/CO/5, §§. 28-29.

⁵⁸ Human Rights Council, 31st session, A/HRC/31/57, 5 January 2016, §. 49.

⁵⁹ Human Rights Council, 32nd session, A/HRC/32/44, 8 April 2016, §. 58.

⁶⁰ Human Rights Council, 29th session, A/HRC/29/33/Add.1, 1 May 2015, §§. 84 & 111 (Visit to Malaysia).

⁶¹ Human Rights Council, 35th session, A/HRC/35/26/Add.2, 28 March 2017, §. 41 (Visit to China).

⁶² Human Rights Council, 35th session, A/HRC/35/36, 19 April 2017, §. 57.

⁶³ Federal Law of the Russian Federation No. 143-FZ of 15 November 1997 “On Acts of Civil Status”.

⁶⁴ Government Decree of 6 July 1998 No. 709 “On Measures for Implementation of the Federal Law “On Acts of Civil Status”.

⁶⁵ Ministry of Health Order of 23 October 2017 No. 850n “On Approval of the Form and Procedure for Issue of the Sex Change Certificate by a Medical Organization”, officially published on 22 January 2018 and entered into force on 2 February 2018 (hereinafter – the Order No. 850n).

⁶⁶ According to data collected by Transgender Legal Defense Project (hereinafter – TLDP) since 2012, a court judgment is the only ground for legal gender marker change in Moscow, St. Petersburg, Moscow Region, Leningrad Region, Novosibirsk Region, Khabarovsk Krai, Rostov Region, Krasnodar Krai, Yaroslavl Region, Ivanovo Region, Omsk

Registry Offices refused to recognise such certificates on the sole ground that they did not meet the “established form” required by the legislation. In these regions trans people could change their legal gender marker only through court proceedings. In no less than 12 of the 83 regions,⁶⁷ the Civil Registry Office granted applications for legal gender marker change only if the applicant provided a medical certificate confirming that they had undergone gender reassignment surgery. Courts often followed the same approach.⁶⁸ Moreover, in some cases, national courts dismissed the applications of trans people who had undergone gender reassignment surgeries on the grounds that the surgeries performed were insufficient to support a legal gender marker change.⁶⁹

20. The Order No. 850n provides that in order to obtain LGR, one must be diagnosed with “transsexualism” and referred to a medical commission authorized to establish “sexual reorientation”. The commission is composed of a psychiatrist, a sexologist, a medical psychologist and the head of the commission. Once the commission establishes one’s “sexual reorientation”, it issues a “sex change certificate”. This certificate may be used for obtaining LGR within a year after it was issued. Thus, the Order No. 850n does not require trans persons to undergo any medical interventions in order to change their legal gender marker. However, trans people still remain pathologised in Russia.

21. According to the Ministry of Health, “sexual reorientation” is *per se* a synonym of the “transsexualism” diagnosis.⁷⁰ However, no procedure for exchanging certificates confirming that a person was diagnosed with transsexualism for “sex change certificates” of a standard form was established. By the date of submitting these written comments medical commissions authorized to establish “sexual reorientation” were formed only in two medical organisations across Russia (one in Moscow, one in St. Petersburg). Both of these medical organisations are private, so obtaining a “sex change certificate” in such an organisation is not covered by state-provided health insurance. Moreover, public healthcare providers are not obliged to form medical commissions authorized to establish “sexual reorientation”. Thus, although the form of the “sex change certificate” was approved, trans persons still face considerable difficulties in access to LGR.

22. Transgender people in Russia who are unable to obtain documents reflecting their gender identity face considerable inconvenience in their daily lives. According to a study conducted by the LGBT Organization “Coming Out” in Russia, in 2011–2012,⁷¹ 43% of respondents who identified themselves as transgender experienced discrimination due to the mismatch between their gender

Region, Chelyabinsk Region, Ulyanovsk Region, Ryazan Region, Chukotka Autonomous Region, Samara Region, Republic of Bashkortostan, Kostroma Region, Kaluga Region, Voronezh Region, Krasnoyarsk Krai, and Penza Region.

⁶⁷ According to the data collected by TLDP since 2011 these are Perm Region, Sverdlovsk Region, Tver Region, Kemerovo Region, Orenburg Region, Irkutsk Region, Republic of Karelia, Komi Republic, Magadan Region, Oryol Region, Kamchatka Region, and Tyumen Region.

⁶⁸ See, for example: judgment of the Zheleznodorozhnyy District Court of Krasnoyarsk of 9 April 2015, case No. 2-2290/2015 and appeal judgment of the Krasnoyarskiy Regional Court of 21 December 2015, case No. 33-6733/2015; judgment of the Zamoskvoretskiy District Court of Moscow of 14 July 2015, case No. 2-5101/2015; judgment of the Golovinskiy District Court of Moscow of 29 November 2016, case No. 2-0667/2016; judgment of the Chkalovskiy District Court of Yekaterinburg of 25 March 2016, case No. 2-1276/2016 and appeal judgment of the Sverdlovsk Regional Court of 28 June 2016, case No. 33-10958/2016; judgment of the Artemovskiy City Court of the Sverdlovsk Region of 10 August 2016, case No. 2-1265/2016 and appeal judgment of the Sverdlovsk Regional Court of 15 November 2016, case No. 33-19050/2016

⁶⁹ In 2013–2017, TLDP came across in its work of 6 cases in which Russian courts dismissed applications for legal gender change of transgender persons who had undergone sex reassignment surgeries.

⁷⁰ See the reply of the Ministry of Health to a request of a trans activist: <http://pravo-trans.eu/kommentarij-yurista-k-otvetu-minzdrava-o-novoj-spravke/> (accessed on 16 March 2018).

⁷¹ See: Семенова С. et al. (2014). *Гендерная идентичность в эпицентре дискриминации: жизнь транс* людей в России*. Санкт-Петербург. P. 34. Available at: http://issuu.com/coming_out_spb/docs/transgender (accessed on 16 March 2018).

identity and their legal name and legal gender marker. Further, monitoring research conducted by the Transgender Legal Defense Project in 2015-2016 found that 50% of respondents faced discrimination in employment, 31% in postal services, 24% in bank services, and 17% in public transportation services due to the inconsistency of their identity documents and their identity and appearance.⁷²

III. Gender identity as a protected ground in anti-discrimination law

23. Multiple studies, reports, position papers and other research, including by the Parliamentary Assembly,⁷³ the Commissioner for Human Rights,⁷⁴ the FRA,⁷⁵ as well as national and international NGOs,⁷⁶ consistently indicate that trans people suffer from disproportionately high levels of violence, harassment and discrimination in all fields of life. The TGEU Trans Murder Monitoring Project,⁷⁷ which documented thousands of murders across the world, concluded that trans and gender-diverse people are victims of horrifying hate violence, including extortion, physical and sexual assaults, and murder, which often go unreported. This data suggests that trans people should qualify for special protection under Article 14 of the Convention.

24. The parameters of the protection afforded to trans people under Article 14 of the Convention are not clear-cut. In *P.V. v. Spain* (2010), a child visitation case involving a trans parent, the Court stated that Article 14 “undoubtedly” covered “transsexuality”. In *Identoba and others v. Georgia*, concerning the homophobic harassment that took place during a LGBTI rights event, the Court mentioned in passing that Article 14 “duly covers questions related to sexual orientation and gender identity.” In *Hämäläinen v. Finland*, a LGR case, the Court appeared to suggest that gender identity should be encompassed within the grounds of “gender or sexual orientation”, with the consequence that strict scrutiny applied to the differential treatment alleged. Notably, the applicant’s Article 14 claim in that case was rejected on the grounds that her situation was not comparable to that of cisgender people, whom, she alleged, were not forced to comply with additional requirements in order to have their gender identity legally sanctioned. A minority of judges dissented on this point, arguing that the applicant and her wife’s situation was comparable to that of heterosexual couples, whose relationship was secure, as well as that of homosexual couples, who were treated in a similar manner despite their different circumstances.

25. The majority’s approach in *Hämäläinen* contrasts with that of other courts which consistently examined restrictions on LGR through an anti-discrimination lens.⁷⁸ The HRCtee dealt with the issue of discrimination based on gender identity in the case *G. v. Australia*, concerning the validity of provisions in Australian law that restricted access to LGR to people who were not married. On this occasion, the HRCtee stated that “the prohibition against discrimination under Article 26 [of the ICCPR] encompasses discrimination on the basis of marital status and gender identity, including transgender status.”⁷⁹ The HRCtee noted that the restriction in question differentiated between married and unmarried transgender persons without reasonable and objective justification, constituting discrimination on the basis of marital and transgender status.

⁷² See Проект правовой помощи трансгендерным людям. (2016). *Нарушения прав трансгендерных людей в России: результаты исследования*. Санкт-Петербург. Available at: http://pravo-trans.eu/files/violation_of_the_rights_of_transgender_people_in_Russia.pdf (accessed on 16 March 2018).

⁷³ Parliamentary Assembly, *Discrimination against transgender people in Europe: Report*, 2015.

⁷⁴ Commissioner for Human Rights, *Human Rights and Gender Identity*, CommDH/IssuePaper(2009)2, 29 July 2009.

⁷⁵ EU FRA, *Being Trans in the European Union: Comparative analysis of EU LGBT survey data - Summary*, 2014.

⁷⁶ A recent example is TGEU, *Overdiagnosed but underserved - Trans Healthcare in Georgia, Poland, Serbia, Spain and Sweden: Trans Health Survey*, 2017.

⁷⁷ According to date available on the website of the project, <http://transrespect.org/en/>.

⁷⁸ Also see Human Rights Tribunal of Ontario, *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726.

⁷⁹ HRC, *G. v. Australia*, Communication no. 2172/2012, 17 March 2017, §7.12-7.15.

26. The IACtHR noted that the relevant provisions on equality and non-discrimination in the American Convention on Human Rights also cover gender identity and gender expression. Differential treatment based on these grounds called for strict scrutiny and lack of consensus at the national level does not constitute a valid justification for discriminating on these grounds. The IACtHR also stated that it was discriminatory to impose supplementary hurdles restricting the access of trans people to LGR.⁸⁰ The IACtHR pointed out that as opposed to cisgender people, whose sex assigned at birth and recorded officially corresponds to the gender identity they readily identify with, trans people have their gender markers assigned by third parties, in disagreement with their “developing” gender identity. In that sense, “transgender people are subject to obstacles to achieve the recognition and respect of their gender identity that cisgender people do not face”.

⁸⁰ IACtHR Advisory Opinion *OC-24/17*, §131.