

IN THE EUROPEAN COURT OF HUMAN RIGHTS

X. against Romania
and Y. against Romania

(Applications no. 2145/16 and 20607/16)

WRITTEN COMMENTS

submitted jointly by

Transgender Europe

ILGA Europe

26 June 2018

1. These written comments are submitted on behalf of Transgender Europe (TGEU) and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), pursuant to leave granted by the President of the Fourth Section. The structure is as follows. First, we would place the issue of legal gender recognition (LGR) in a wider international context of legal and policy developments that demonstrate a steady gaining of ground for the recognition of trans people's human rights and a move away from pathologisation of trans identities. Second, we would focus on the European legal landscape showing that medicalised and pathologizing legal gender recognition (LGR) procedures where the judiciary plays a substantial role are not in line with European human rights and equality law standards.

1 International legal standards on gender recognition

2. Gender identity is a fundamental aspect of personal identity and states are expected to recognise person's gender identity. Gender identity as a ground of discrimination is covered by the prohibition of discrimination in the Convention (Article 14)¹ and the International Covenant on Civil and Political Rights (Article 26) among other instruments of international law.

3. **The Human Rights Committee (HRCtee)** encouraged State parties to fully recognize the legal identity of transgender persons² and to put in place LGR procedures that are clear, consistent³ and compatible with the International Covenant on Civil and Political Rights (ICCPR).⁴ It persistently asked State parties to make sure that LGR is not conditioned upon restrictive or stringent requirements,⁵ such as medical treatment,⁶ surgery,⁷ sterilisation⁸ or divorce.⁹

4. **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.”¹⁰ It also noted that LGR should not be based on gender reassignment surgery.¹¹

5. **The Committee on the Elimination of Discrimination against Women (CEDAW)** criticised both the lack of any LGR procedures,¹² and such procedures that are lengthy or

¹ ECtHR, *Identoba and Others v. Georgia*, no. 73235/12, § 96, 12 May 2015 (“the prohibition of discrimination under Article 14 of the Convention duly covers questions related to sexual orientation and gender identity”).

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

³ HRCtee, CO Romania (2017), CCPR/C/ROU/CO/5, §. 16.

⁴ 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.

⁵ HRCtee, CO: Republic of Korea (2015), CCPR/C/KOR/CO/4, §. 14; Kazakhstan (2016), CCPR/C/KAZ/CO/2, §. 9.

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

⁷ HRCtee, CO: Australia (2017), CCPR/C/AUS/CO/6, §. 27; Serbia (2017), CCPR/C/SRB/CO/3, §. 12.

⁸ HRCtee, CO Slovakia (2016), CCPR/C/SVK/CO/4, §. 14.

⁹ 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).

¹⁰ CESCR, CO Costa Rica (2016), E/C.12/CRI/CO/5, §. 20.

¹¹ CESCR, CO Lithuania (2014), E/C.12/LTU/CO/2, §. 8.

¹² CEDAW, CO Kyrgyzstan (2015), CEDAW/C/KGZ/CO/4, §. 33.

burdensome,¹³ particularly when psychiatric assessment,¹⁴ expert reports,¹⁵ medical treatment,¹⁶ infertility,¹⁷ surgery¹⁸ or sterilisation¹⁹ are required. CEDAW called on State parties to ensure “expeditious, transparent and accessible” procedures²⁰ that would not be based on “stereotypical ideas of masculine or feminine appearance or behaviour.”²¹ On several occasions, it specifically noted that inadequate LGR procedures “exacerbates discrimination against transgender persons”²² and violate their freedom to control one’s body and to be free from non-consensual medical treatment.²³

6. **The Committee 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.”²⁴

7. **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 “forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures”²⁵ as abusive requirements for LGR.

8. **The UN Special Rapporteur on Extreme Poverty and Human Rights** has voiced that where the law on legal gender recognition requires gender reassignment treatment (which is expensive and not covered by health insurance plans) and mental illness diagnosis, this creates “huge and unwarranted barrier”, which, amongst other things, prevents trans people from undergoing LGR.²⁶

9. **The Yogyakarta Principles** suggest that States were duty bound to take “all necessary legislative, administrative and other measures” to ensure that LGR was available and that the procedure was “efficient, fair and non-discriminatory, and respected the dignity and privacy of the person concerned.”²⁷

10. The 2017 additional principles YP+10, adopted in the honour of 10th anniversary of the Yogyakarta Principles, stipulate that the states shall ensure “access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the

¹³ CEDAW, CO: Belgium (2014), CEDAW/C/BEL/CO/7, §. 44; Germany (2017), CEDAW/C/DEU/CO/7-8, §. 45.

¹⁴ CEDAW, CO Belgium (2014), CEDAW/C/BEL/CO/7, §. 44-45.

¹⁵ CEDAW, CO Germany (2017), CEDAW/C/DEU/CO/7-8, §. 45.

¹⁶ CEDAW, CO: Slovakia (2015), CEDAW/C/SVK/CO/5-6, §. 36; Switzerland (2016), CEDAW/C/CHE/CO/4-5, §. 38-39.

¹⁷ CEDAW, CO Finland (2014), CEDAW/C/FIN/CO/7, §. 28.

¹⁸ 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.

¹⁹ 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.

²⁰ CEDAW, CO: Belgium (2014), CEDAW/C/BEL/CO/7, §. 44; Kyrgyzstan (2015), CEDAW/C/KGZ/CO/4, §. 34.

²¹ CEDAW, CO: Finland (2014), CEDAW/C/FIN/CO/7, §. 29; Georgia (2014), CEDAW/C/GEO/CO/4-5, §. 35.

²² CEDAW, CO Kyrgyzstan (2015), CEDAW/C/KGZ/CO/4, §. 33.

²³ CEDAW, CO Slovakia (2015), CEDAW/C/SVK/CO/5-6, §§. 36-37.

²⁴ CAT, CO China (Hong Kong) (2015), CAT/C/CHN-HKG/CO/5, §§. 28-29.

²⁵ Human Rights Council, 31st session, A/HRC/31/57, 5 January 2016, §. 49.

²⁶ UN Special Rapporteur on Extreme Poverty and Human Rights country report on the mission to China, 28 March, 2017. A/HRC/35/26/Add.2 at para. 41.

²⁷ Principle 3. The *Yogyakarta Principles* were mentioned as persuasive authority by Judges Sajó, Keller and Lemmens in their dissenting opinion, §16, in *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.

self-determination of the person”²⁸. The principle furthermore stipulates that states shall ensure that “no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis,” or any other third party opinion, shall be a prerequisite to change one’s name, legal sex or gender.

11. **The Inter-American Court of Human Rights (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.”²⁹ The IACtHR noted also that medical or psychological certification runs counter to the principles that LGR procedures ought to be based on self-determination and that of the free development of one’s personality.³⁰ 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.

12. **The World Professional Association for Transgender Health (WPATH)** recommended LGR as a measure capable of alleviating discomfort and distress related to the discrepancy of a person’s gender identity and the gender assigned at birth.³¹ The WPATH emphasized that “legally recognized documents matching self-identity are essential to the ability of all people to find employment, to navigate everyday transactions, to obtain health care, and to travel safely,” and that barriers to LGR may harm the physical and mental health of the person in question. The WPATH asked states “to eliminate unnecessary barriers, and to institute simple and accessible administrative procedures for transgender people to obtain legal recognition of gender, consonant with each individual’s identity.”³²

13. The first report of the U.N. **Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity**, outlining the nature of the problems his mandate was designed to address and setting out a programme of work.³³ linked the absence of LGR procedures with an environment that leads to lifelong violence and discrimination.³⁴ In 2018 the Independent Expert put forward a recommendation to “enact gender recognition laws concerning the rights of trans persons to change their name and gender markers on identification documents.” Such procedures should be, according to the Independent Expert, “quick, transparent and accessible, without abusive conditions, and respectful of the principle of free and informed choice, and of personal integrity.”³⁵

14. On 17 May 2016, different United Nations and international human rights experts, including the Council of Europe Human Rights Commissioner, issued a statement calling for

²⁸ THE YOGYAKARTA PRINCIPLES plus 10. Principle 31. http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf (21.06.2018).

²⁹ IACtHR Advisory Opinion *OC-24/17*, §98.

³⁰ IACtHR Advisory Opinion *OC-24/17*, §130.

³¹ WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (SoC), p.10. The SoC outline the treatment protocols for gender reassignment treatment, “based on the best available science and expert professional consensus”. The latest version dates from 2011 and is available here: <http://www.wpath.org/>.

³² WPATH *Statement on Legal Recognition of Gender Identity*, 19 January 2015, <http://tinyurl.com/hsja25m>.

³³ *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/35/36, 19 April 2017.

³⁴ *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/35/36, 19 April 2017, §57.

³⁵ *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, a/HRC/38/43, 11 May 2018, §98. In web: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/132/12/PDF/G1813212.pdf?OpenElement> (25.06.2018).

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.³⁶ The statement noted that pathologisation of trans identities was one of the root causes behind widespread human rights violations and an obstacle to overcoming negative attitudes, stereotypes, and the barriers preventing trans people from realising 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.

15. **The World Health Organisation** (WHO) published on 18 June 2018 the International Classification of Diseases 11 (ICD-11) online version.³⁷ The announcement marks the beginning of an implementation and assessment phase of the ICD-11 at the country level. The new ICD version will be presented for final approval at World Health Assembly in May 2019. As anticipated, all trans-related categories have been deleted from the ICD Chapter on Mental and Behavioural Disorders, thereby stating that being a trans or gender diverse person does not mean to suffer a mental disorder. These changes in the ICD have sent the ‘scientific’ justification of pathologisation of trans identities in the dustbin of history. A practice of pathologization, institutionalization, “conversion” and sterilization of trans people is nearing its end. The diagnosis “Gender Incongruence” has been introduced in the new chapter “Conditions related to Sexual Health” to ensure stigma-free access to trans-specific healthcare. The new diagnosis however cannot be used to assess a person’s gender identity.

II European legal instruments on legal gender recognition

16. **The European Court of Human Rights** has described gender identity as “one of the most intimate areas of a person’s private life”,³⁸ a free-standing “right”,³⁹ “a fundamental aspect of the right to respect for private life”⁴⁰ and as “one of the most basic essentials of self-determination,”⁴¹ linked to the “right to sexual self-determination,” itself an aspect of the right to respect for private life.⁴² These pronouncements benefit all individuals, regardless of whether they had undergone gender reassignment treatment or not.⁴³

17. **The European Union** gender equality law covers trans people who underwent, are undergoing or are planning to undergo “gender reassignment.” Notably, the European Commission stated it would treat discrimination related to “gender identity” similar to “gender

³⁶ “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.

³⁷ <https://icd.who.int/browse11/l-m/en> (25.06.2018).

³⁸ *Van Kück v. Germany*, no. 35968/97, §56, ECHR 2003-VII.

³⁹ *Idem*, §75.

⁴⁰ *Idem*, §75.

⁴¹ *Y.Y. v. Turkey*, no. 14793/08, §102, 10 March 2015 (extracts).

⁴² *Idem*, §78.

⁴³ *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §94-95, ECHR 2017.

reassignment”.⁴⁴ The Court of Justice of the European Union (CJUE) clarified in *K.B. v. National Health Service Pensions Agency* that discrimination also exists when the person in question is unable to fulfil a necessary precondition for the accessing of rights covered by equality legislation. In this case, K.B. was not able to marry her trans male partner, due to inexistent legal gender recognition, which was a precondition for him being able to access a widower’s pension.⁴⁵ In the *MB v Secretary of State for Work and Pensions*, the Court ruled that even if the Member States may establish the conditions for legal gender recognition, for the purposes of the application of Directive 79/7, persons who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender. If such person finds themselves in less favourable situation because of their “gender change” in the domain covered by the EU equality law this must be considered a direct discrimination on ground of sex.⁴⁶

A. The obligation to have in place a functional legal gender recognition procedure

18. The State Parties have a positive obligation under Article 8 to adopt LGR procedures⁴⁷ that are “effective and accessible.”⁴⁸ The Court found violations of the Convention in several cases on account of LGR schemes that were misconceived or incomplete, giving rise to arbitrary or unfair outcomes. Thus, the violation of Article 8 in *L. v. Lithuania* was predicated on the failure to adopt enabling legislation facilitating access to LGR, although the right to gender reassignment surgery (a precondition to LGR) as well as the right to change civil status were already embedded in national law. In finding against Lithuania, the Court referred specifically to “the limited legislative gap” which the Government failed to address.⁴⁹ In *Y.Y. v Turkey*, the Court found the feature of Turkish law making access to genital surgery conditional on the infertility of the person in question highly unusual, impractical and in any event unjustified.⁵⁰ This legal requirement, applied strictly by national courts, rendered impossible in practice the access to LGR, conditioned in turn on the obligation to undergo genital surgery.

19. The right to gender self-determination is firmly entrenched in the Council of Europe’s law and professional guidelines. **The Committee of Ministers**⁵¹ and the **Parliamentary Assembly**⁵² demanded “quick, transparent and accessible” LGR procedures “based on self-determination”⁵³, whereas **the Commissioner for Human Rights** recommended “expeditious and transparent procedures for changing the name and sex of a transgender person on birth

⁴⁴ European Commission, *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services* (COM(2015) 190 final), 05 May 2015, p. 4

⁴⁵ “[t]he decision to restrict certain benefits to married couples while excluding all persons who live together without being married is either a matter for the legislature to decide or a matter for the national courts as to the interpretation of domestic legal rules [...] there is inequality of treatment which [...] affects one of the conditions for the [...] necessary precondition for the grant of such a pension: namely, the capacity to marry”

⁴⁶ *MB v Secretary of State for Work and Pensions*, C-451-16, Paragraphs 35-38.

⁴⁷ *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 78, ECHR 2002-VI.

⁴⁸ *Hämäläinen v. Finland* [GC], no. 37359/09, §64, ECHR 2014.

⁴⁹ *L. v. Lithuania*, no. 27527/03 (Sect. 2), ECHR 2007-IV – (11.9.07), §59.

⁵⁰ *Y.Y. v. Turkey*, no. 14793/08, § 112-122, ECHR 2015 (extracts).

⁵¹ *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, §21.

⁵² Resolution 2048 (2015), *Discrimination against transgender people in Europe*, §6.2.1.

⁵³ *Idem*.

certificates, identity cards, passports, educational certificates and other similar documents.”⁵⁴ It is clear from these standard setting documents that the legal gender recognition procedure that takes place in courts cannot be viewed as quick and accessible.

20. National legislation based on self-determination has already been adopted in five Council of Europe Member States.⁵⁵ Legislation adopted in Malta provides still the benchmark: Thus, all citizens have the right to “the recognition of their gender identity”.⁵⁶ 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. Medical treatment as an obstacle to legal gender recognition based on self-determination

21. 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 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.⁵⁷

The consensus against mandatory medical requirements has consolidated steadily, although fourteen European countries still subject trans people to sterilisation before having their gender identity legally recognised.⁵⁸ Several developments that took place since *A.P., Garçon and Nicot v. France* point in the same direction. Belgium⁵⁹, Russia⁶⁰, Hungary⁶¹, and Greece adopted legislative and regulatory changes that considerably facilitate access to LGR,

⁵⁴ *Human Rights and Gender Identity*, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2009, Recommendation §5.

⁵⁵ 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>.

⁵⁶ *Gender Identity, Gender Expression and Sex Characteristics Act* (2015).

⁵⁷ “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.

⁵⁸ For more information see: <https://tgeu.org/trans-rights-map-2018/> (25.06.2018).

⁵⁹ At: <https://tgeu.org/belgium-new-gender-recognition-law-with-obstacles/> (25.06.2018).

⁶⁰ Order of the Ministry of Health of the Russian Federation of October 23, 2017 No. 850n "On the approval of the form and procedure for the issuance by a medical organization of a document on sex change" (Registered 19/01/2018 No. 49695); <http://publication.pravo.gov.ru/Document/View/0001201801220016?index=0&rangeSize=1> (Russian); Information in English: <http://pravo-trans.eu/the-russian-ministry-of-health-approved-the-legal-gender-recognition-procedure/> (25.06.2018).

⁶¹ At: <https://tgeu.org/hungary-legal-gender-recognition-gets-legal-basis-for-the-first-time/> (26.06.2018).

removing obstacles previously in place as discussed elsewhere in this brief. Lithuanian⁶² courts have consistently ruled positively on LGR cases without requesting sterility, referring to the *A.P., Garçon and Nicot v France* judgement. Slovenian authorities clarified in 2017 that sterilisation and surgeries are not required for LGR.⁶³ The Portuguese parliament approved a reform to the gender recognition law basing it on self-determination, although it was vetoed by the President and is currently back at the Parliament.⁶⁴ Sweden introduced a compensation scheme for trans people who had been forcefully sterilised under legislation in force until 2013.⁶⁵ Constitutional Courts in Germany⁶⁶ and Austria⁶⁷ found the lack of a positive option for gender recognition for persons not identifying as female or male as unconstitutional, requiring the respective legislator to fill this legal gap.

22. 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. In the context where there are no medical protocols on trans-specific healthcare available and there is lack of medical professionals trained to treat trans people the requirement of the surgery or any other medical treatment poses serious concerns regarding the respect of the dignity of trans people under Article 3 of the Convention. According to a TGEU study on insurance coverage for trans specific healthcare in seventeen European countries,⁶⁸ 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.

C. The pathologisation of trans people in LGR procedures as discrimination on ground of gender identity

⁶² Lithuanian LGBT Organisation LGL reports about two successful cases, which have since then been followed by about ten more LGR cases not requesting medical interventions: <http://www.lgl.lt/en/?p=17550>

⁶³ Intervention by Linn Koletnik at Conference „*TransMisija IV, Povezovanje delovanja akterk_jev na področju transspolnosti in cisspolne nenormativnosti*“ on 14 November 2017 in Ljubljana, Slovenia.

⁶⁴ At: <https://tgeu.org/veto-portugal-can-still-be-innovators/> (26.06.2018).

⁶⁵ At: <http://tgeu.org/sweden-announces-to-pay-compensation-to-trans-people/> (26.06.2018).

⁶⁶ German Constitutional Court: Case: 1 BvR 2019/16, decision of 10 October 2017 http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/10/rs20171010_1bvr201916.html (26.06.2018).

⁶⁷ Austrian Constitutional Court, Prüfungsbeschluss E 2918/2016, decision of 14 March 2018, delivered on 19 March 2018; for more information see: <https://tgeu.org/austrian-constitutional-court-paves-the-way-for-third-gender/>; the decision is not final.

⁶⁸ 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.

23. Currently, 34 Council of Europe State Parties make LGR contingent on a mental health diagnosis (alternatively labelled as ‘transsexualism’ or ‘gender identity disorder’ among others) or diagnostic assessment.⁶⁹ This Court ruled in *A.P., Garçon and Nicot v. France*, this requirement is valid as it is based on European consensus, on the fact that “transsexuality” is a diagnosis included in the soon to be invalid 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.⁷⁰ 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.

24. Pathologisation subverts an essential aspect of a human person 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.⁷¹ 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, having children or moving to a different country). Such outcomes cannot be interpreted as legitimising interference or screening by a third party. Experience shows that those seeking gender recognition take such a decision after long years of internal process of careful consideration. Social costs and transphobic stigma remain high for the individual and make it unlikely that legal gender recognition procedures are abused for illicit purposes.

25. Furthermore, the practice in those countries that have recently adopted legislation based on self-declaration does not confirm these concerns. TGEU research in Ireland, Denmark, Norway and Malta confirmed that there have been no replicate requests for legal gender recognition since the introduction of the gender recognition laws in 2015 respectively.⁷² That experience also shows that any impact on legal security resulting from self-determination may be addressed through adequate regulatory measures.

26. The Court of Justice of European Union (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 pressure of the circumstances that applicants for international protection find themselves in.⁷³ 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

⁶⁹ For more information see <https://tgeu.org/trans-rights-map-2018/> (26.06.2018).

⁷⁰ *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §138-144, 6 April 2017.

⁷¹ 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).

⁷² TGEU, Implementation of Legal Gender Recognition Procedures based on self-determination in Malta, Norway, Denmark, Ireland with a focus on fraudulent intents and repeated decisions, 2017.

⁷³ *F v. Bevándorlási és Állampolgársági Hivatal*, C-473/16, paragr: 47-71.

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 Yogyakarta Principles “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.”

27. Gender markers, such as gendered social security numbers or the F/M/X gender marker in person’s documents or civil records, carry information on person’s civic status as well as identity, as do their name or marital status. All people, whether transgender or not, have a gender identity and are at some point in their life in contact with an administration that either documents or acknowledges their gender. In the absence of quick, transparent and accessible procedures based on self-determination to rectify the gender markers, transgender people find themselves in a disadvantaged position because of their gender identity, compared to other populations.⁷⁴

28. Moreover, submitting a person to a medical procedure and/or a diagnosis without a medical necessity solely for the purpose of documenting or recognising their gender or to provide identification documents that correspond to the holder’s gender identity and/or expression, because their gender identity differs from dominant gender roles and expectations, discriminates this person on ground of their gender identity. When LGR procedures consist of requirements that are used only in case of transgender people (e.g. forensic examination, diagnosing with a mental disorder or requirement to undergo medical treatments), transgender people’s right to private life cannot be enjoyed to the same extent as persons whose gender corresponds to their gender assigned at birth, putting trans people in a disadvantaged position because of their gender identity.

⁷⁴ Population groups of undefined number or so called hypothetical persons have been deemed comparable by the CJEU in the judgement of *MB v Secretary of State for Work and Pensions* when analysing whether retirement pension and the conditions under which it is granted, treats equally a person who changed gender after marrying and a person who has kept their birth gender and is married. See paragraphs 42-46 of the judgement.