



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF Y v. FRANCE

(Application no. 76888/17)

JUDGMENT

Art 8 • Positive obligations • Refusal by national authorities to insert sex marker “neutral” or “intersex” instead of “male” on birth certificate of intersex individual • Discordance between applicant’s biological and legal identities a source of suffering and anxiety • No European consensus • Widened margin of appreciation • Importance of public-interest considerations • Choice of society left to discretion of respondent State, which must determine at what speed and to what extent to meet intersex people’s civil-status demands, given their difficult situation

STRASBOURG

31 January 2023

FINAL

26/06/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Y v. France,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Síofra O’Leary, *President*,
Arnfinn Bårdsen,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Lado Chanturia,
Mattias Guyomar,
Kateřina Šimáčková, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the application (no. 76888/17) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national (“the applicant”; since the applicant used masculine pronouns in his application and observations, the Court will do the same), on 31 October 2017;

the decision to give notice to the French Government (“the Government”) of the application;

the decision not to have the applicant’s name disclosed;

the observations submitted by the Government and the observations in reply submitted by the applicant;

the comments submitted by the International Federation for Human Rights (FIDH), the Ligue des Droits de l’Homme (“the LDH”) and Alter Corpus, jointly; Organisation Intersex International Europe (OII Europe), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and Collectif Intersexes et Allié.e.s (CIA), jointly; the Human Rights Centre of Ghent University and the Equality Law Clinic of the Université Libre de Bruxelles, jointly; and Chrétiens Carrefour Inclusif and the Saint-Guillaume Parish of Strasbourg, jointly, all of which were granted leave to intervene by the President of the Section;

Having deliberated in private on 14 June, 11 October and 13 December 2022,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The case concerns the refusal to grant an intersex individual’s request to have the sex marker “neutral” or “intersex” inserted on his birth certificate instead of “male”. The applicant complained of a violation of his right to respect for his private life under Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1951 and lives in Strasbourg. He was represented by Ms M. Petkova, a lawyer.

3. The Government were represented by their Agent, Mr F. Alabrune, Director of Legal Affairs at the Ministry of European and Foreign Affairs.

4. The applicant, whose birth certificate indicates that he is “male”, states that he is an intersex individual. He notes that intersex is a term used to refer to people who have variations in their primary and secondary sex characteristics and who therefore cannot be categorised as either “male” or “female”.

5. The applicant states that in his case, as with other intersex people, the sexual differentiation process did not occur *in utero* and that, at birth, it was impossible to determine whether he was a boy or a girl. He has neither testicles nor ovaries, meaning that his body has never produced sex hormones (testosterone or oestrogen) and has not developed either male or female characteristics, and he did not go through puberty when he reached adolescence. When he was 21 years old, his physical appearance was “undeniably female”, with a feminine gait, smooth skin, an indeterminate voice (or in any event not a deep one) and no hair on his arms or legs, and in the street he was perceived to be a girl even though he had been declared a boy at birth. He further states that, like other intersex people, he suffers from osteoporosis and that, because he had been “administratively assigned” the male sex, at the age of 40 he was prescribed a testosterone-based treatment for men, which artificially changed his appearance: he retained his feminine looks and slim figure and his external genitalia remained equally ambiguous, but he grew a beard and his voice broke. He submits that that forced change amounted and still amounts to both a violation of his bodily integrity and a genuine intrusion into his privacy and his gender identity, which he “experienced as a trauma, an inner rape”.

6. The applicant submitted medical certificates showing that his biological intersex status had been established shortly after his birth and had not changed when, at the age of 63, he instituted proceedings at domestic level as described below. In particular, his submissions included medical certificates drawn up by Dr R., Professor Ro. and Dr V., an endocrinologist, on 26 June 1970, 11 July 1973 and 22 April 2014 respectively, which were referred to by the President of the Tours *tribunal de grande instance* (see paragraph 14 below).

7. The first certificate attests to the fact that the applicant has a total lack of genitalia, whether male or female, and that many exploratory medical and surgical procedures have found that he has no gonads.

8. The certificate issued by Professor Ro. on 11 July 1973 contains the following information:

“[The applicant] presents with a problem of an intersex formation of the external genitalia, which comprise a small genital tubercle and an opening of the urogenital sinus.

[The applicant] was registered as a boy and was raised as such. He does not display any male secondary sex characteristics and his mammary glands have not developed.

Our observations concerning sex development are as follows: (1) the karyotype is male XY; it cannot, however, be ruled out that repeated or in-depth testing may reveal the existence of mosaicism; (2) the nature or the presence of gonads has not been established with certainty; we have not been provided with the details and results of the surgical intervention performed during childhood, which apparently found an absence of gonads. We have nothing in writing to confirm that information. However, the lack of secondary sex characteristics of either sex, the high urinary gonadotropin level above 50 SU and the relatively low level of urinary steroid hormone excretion suggest that the gonads are either anatomically absent or not functional, regardless of the direction of their development. A gonadotropin stimulation test was started, but [the applicant] did not consent to continuing it through to the end; (3) intersexuality is clear at the level of the external genitalia, and the urethrography established the existence of a rudimentary vagina and the possibility of a vaginoplasty, as confirmed by our surgeons; surgery to create male genitalia would be impossible; (4) lastly, the psychological testing performed by Dr [Ri.] seems to indicate more of a feminine leaning in terms of sexual attraction; however, [Dr Ri.] believes that psychological tests twice a month over a six- to eight-month period would be needed to provide a clear answer on this topic ...”

9. The certificate issued by Dr V. on 22 April 2014 reads:

“I, the undersigned Dr [V.], certify that I have been treating [the applicant] since 2002.

This patient was born with ambiguous sex characteristics, has a male XY karyotype and has hypogonadism with pubertal failure owing to gonadal agenesis (exploratory surgery during childhood found no gonads). He was treated with Androtardyl* for a few months when he was 22, then stopped taking this medication, before starting again at the age of 44.

The present examination shows the existence of a micropenis, hypospadias, full fusion of the pigmented labioscrotal folds and no palpable gonads.

This patient has had osteoporosis since 2002, which has been treated with Cacit D*, Fosamax*, one tablet per week. The hypogonadism is treated with Androtardyl, one vial per month.”

10. In addition to being “biologically intersex”, the applicant reported being “psychologically intersex” and “socially intersex”. First, he stated that, in spite of the male sex marker on his birth certificate, he had maintained an intersex gender identity, as neither male nor female, and that he had never thought of himself as being anything other than intersex. He produced copies of letters sent to his doctor in 1973, in which he had already expressed that feeling. Second, he submitted that “to other people [he could] not be reduced to his administratively assigned status as a man” and provided statements to the effect that he was recognised socially as intersex.

11. The applicant produced copies of statements that he had submitted as part of the domestic proceedings, including one from his psychotherapist dated 20 May 2014, the relevant parts of which read:

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“... I have difficulty characterising the identity of my patient. Should I write Mr, Ms or...? [Y] has no legal identity.

He has always been forced to hide his physiological reality from the other members of the community and to live sheltered behind a borrowed identity. To others, he is Mr [Y]. He himself suffers from ‘having to pretend to be a man’. While medicine, in the form of hormone treatment, and psychotherapy, which offers him a chance to speak about his situation, have undoubtedly brought him worthwhile and necessary support, it is scant relief given the extent of his suffering.

... [I]n antiquity, the worst punishment was not death, but exile, exclusion from the human community to which one belonged. While, admittedly, [the applicant] is not the only person in his situation, his community does not have the right to legally exist in France. For this reason, [the applicant] has always lived with the unspeakable suffering of being excluded, of never belonging in our society as what he is, a third gender.

I have been accompanying him through the psychotherapy process for several years now. He has made admirable progress in building his own identity, to the point of seeking recognition of his gender. He has drawn on his courage, his clear-sightedness and his demanding nature to cope increasingly well with this unbearable situation of not being able to say simply who he is.

For him and for all other people experiencing the same situation, the same tragedy, recognition of his identity would represent substantial redress for his identity trauma and the right to exist legally at long last.”

12. The applicant is married. He and his wife have an adopted child.

I. JUDGMENT OF 20 AUGUST 2015

13. On 12 January 2015 the applicant applied to the public prosecutor at the Tours *tribunal de grande instance* to request that the President of that court have the “male” sex marker on his birth certificate replaced by “neutral” or, failing that, “intersex”.

14. The President of the Tours *tribunal de grande instance* found for the applicant in a judgment of 20 August 2015, providing the following main reasons:

“... The facts

Although (i) [the applicant’s] birth certificate contains a male sex marker; (ii) it has been established that he was raised as male by his parents and broader family; and (iii) according to the medical documents produced, [the applicant] has a male XY karyotype, the evidence adduced during the proceedings shows that [the applicant] ‘was born with ambiguous sex characteristics’, in the words of the medical certificate drawn up by Dr [V.] on 22 April 2014.

That certificate further states that [the applicant] has ‘hypogonadism with pubertal failure’, that is, an absence of reproductive functions and more specifically of testicles or ovaries (absence of gonads) and an absence of sex development. In adulthood, his genitalia have retained female aspects (‘rudimentary vagina’ mentioned by [Professor Ro.]) and male aspects alike (‘micropenis’ according to Dr [V.]). He has never produced sex hormones, whether male (testosterone) or female (oestrogen). Professor [Ro.] refers to an ‘intersex formation’ and to ‘clear intersexuality at the level of the external genitalia’.

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From a psychological point of view, [the applicant] refers to the impossibility of defining himself sexually and claims to have an intersex identity. [A description of the testimony of the applicant's brother, one of his friends, his therapist and his wife follows.]

It must therefore be noted that neither [the applicant's] doctors nor his family, nor [the applicant] himself for that matter, can assert that the male sex indicated at his birth by the registrar corresponds to any reality whatsoever – any more than the female sex would have, moreover – or that either sex corresponds to his true identity, which must take precedence over any other definition, in particular one based on chromosomes. All the evidence in the present case shows (without there being any need for an expert's opinion, since the question appears now to be one of law rather than of medicine, where the uncertainty about [the applicant's] situation has been made sufficiently clear) that it is impossible to define [the applicant's] sex from a genital, hormonal or, above all, psychological point of view, whereas all the case-law, particularly in the area of transsexualism, has given this aspect of gender identity priority over all others.

The law

Article 57 of the Civil Code ... provides that 'the birth certificate shall state the date, time and place of birth [and] the sex of the child'.

The sole purpose of that provision is to have registrars collect the information they need to perform their duties, on the basis of a simple declaration. Such information is valid until evidence to the contrary is provided to the president of the *tribunal de grande instance*, who may order its rectification under Article 99 of the Civil Code. The president has jurisdiction in matters including mistakes concerning the sex of children.

As regards the sex marker more specifically, the implementation of Article 57 of the Civil Code by registrars necessarily presupposes that the child's sex can be determined. This is not always the case, as expressly recognised in paragraph 55 of the circular of 28 October 2011 on special rules for various civil-status documents, which reproduces the provisions of the general instruction on civil status published in the Official Gazette of 28 July 1999, since that circular allows a child's sex not to be indicated at all on the birth certificate 'where, in certain exceptional cases, the doctor considers that no immediate indication of the newborn's probable sex can be given'. Surprisingly, the circular further makes this exception conditional on the assumption that 'the sex can be determined definitively within one or two years, following appropriate treatment', without mentioning the possibility that the sex of the person concerned might never be able to be determined, which is precisely the case for [the applicant]. This situation can therefore be described as a legal vacuum, and there is nothing in domestic law to prevent his request from being granted.

The sex assigned [to the applicant] at birth would appear to be purely fictitious and to have been imposed on him throughout his entire life without his ever having been able to express his innermost feelings. This contravenes the provisions of Article 8 § 1 of [the Convention], which takes precedence over any other provision of domestic law and which provides that '[e]veryone has the right to respect for his private ... life'. In this connection, [the Court] reiterated in a recent judgment of 10 March 2015 that it had 'previously stressed on numerous occasions that the concept of "private life" is a broad term not susceptible to exhaustive definition. It includes not only a person's physical and psychological integrity, but can sometimes also embrace aspects of an individual's physical and social identity. Elements such as gender identification ... fall within the personal sphere protected by Article 8 of [the Convention] The Court considers that the notion of personal autonomy is an important principle underlying the interpretation of

the Article 8 guarantees' [see *Y.Y. v. Turkey*, no. 14793/08, §§ 56-57, ECHR 2015 (extracts)].

Furthermore, [the applicant's] request does not face any legal obstacles on the grounds of public policy, since the known rarity of his situation does not call into question the age-old concept of the sex binary, and the court is in no way seeking to have the existence of any 'third sex' recognised – which would be beyond its jurisdiction – but merely to acknowledge the impossibility of assigning a particular sex to [the applicant] in the present case and to find that the sex marker on his birth certificate is simply incorrect.

For this reason, the 'male' sex marker on his birth certificate should be replaced by 'neutral', which may be defined as not belonging to either the male or the female gender. This marker is preferable to 'intersex', which would result in a categorisation that it would be preferable to avoid (since the aim is not to recognise a new gender) and that would appear more stigmatising ..."

II. JUDGMENT OF THE ORLÉANS COURT OF APPEAL OF 22 MARCH 2016

15. In a judgment of 22 March 2016, the Orléans Court of Appeal, ruling on an appeal by the Principal Public Prosecutor at the Tours *tribunal de grande instance*, set aside the judgment of 20 August 2015, providing the following reasons:

"... Article 57 of the Civil Code provides that the birth certificate must state ... the sex of the child ...

The medical documents produced by [the applicant] as part of the proceedings show that during foetal development sexual differentiation, which usually starts in the eighth week, failed ... with the result that from birth he displayed atypical development of chromosomal, gonadal and anatomical sex and that the markers of sexual differentiation were not all clearly male or female.

In the absence of sex hormone production ..., no male or female secondary sex characteristics ever appeared, since the embryonic genital tubercle never developed in one direction or the other, so that while [the applicant] has an XY, or male, karyotype ..., he indisputably was and still is sexually ambiguous ...

[The applicant] was recorded as male in the register of births, marriages and deaths.

While the principle of the inalienability of civil status entails that the components of civil status are imposed on individuals, the principle of respect for private life speaks in favour of allowing exceptions.

This must be the case where a person, such as [the applicant], displays a variation in sex development.

In such situations, genetic make-up (genotype) does not match physical appearance (phenotype), which in turn does not always clearly align with the female or male sex.

Accordingly, assigning such individuals at birth to one of the two sex categories, in contradiction with medical findings which do not enable sex to be determined unequivocally, exposes them to the risk of a conflict between their assigned sex and their gender identity as experienced in adulthood.

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In view of the margin of appreciation afforded to the national authorities in the implementation of their obligations under Article 8 of [the Convention], a fair balance must be struck between the protection of civil status, which is a matter of public policy, and respect for the private life of individuals with a variation in sex development.

That fair balance entails that such individuals should be allowed either to have their civil status indicate no sex category or to have the sex assigned to them changed, where it does not correspond to their physical appearance and their social behaviour.

In the present case [the applicant's] physical appearance is that of a male; he married in 1993 and he and his wife have adopted a child.

He has requested that the 'male' sex marker be replaced by 'neutral' or 'intersex'.

This request, which is in contradiction with his physical appearance and his social behaviour, cannot be granted.

Moreover, as laws and regulations currently stand, no provision is made for the permanent entry on civil-status documents of any sex marker other than that of male or female, even in the event of sexual ambiguity.

Granting [the applicant's] request would be tantamount to recognising the existence of another sex category under the guise of a mere rectification of civil status, which would exceed the ordinary courts' power to interpret legal rules and which is a matter for the legislature's assessment alone.

Such recognition constitutes a social issue that raises sensitive biological, moral and ethical questions, whereas individuals with variations in sex development need to be protected from stigmatisation while minors, including stigmatisation that could result from their being assigned to a new category ..."

III. JUDGMENT OF THE COURT OF CASSATION OF 4 MAY 2017

16. In a judgment of 4 May 2017, the Court of Cassation dismissed an appeal on points of law by the applicant, giving the following reasons:

"... French law does not permit a sex marker other than male or female to appear on civil-status documents.

While gender identity falls within the sphere protected by Article 8 of [the Convention], the binary nature of sex markers on civil-status documents pursues a legitimate aim, in that it is necessary for, and a cornerstone of, the social and legal arrangements in place. Recognition by the courts of a 'neutral' sex would have far-reaching consequences for the rules of French law, which are constructed on the basis of the sex binary, and would entail multiple coordinating legislative amendments.

The Court of Appeal noted that [the applicant] was regarded by others as having the appearance and social behaviour of a male individual, in line with the sex marker on his birth certificate. It was thus able to conclude, without being obliged to go into the finer details of his arguments, that the interference with his right to respect for his private life was not disproportionate to the legitimate aim pursued ..."

RELEVANT DOMESTIC LEGAL FRAMEWORK AND PRACTICE

17. At the relevant time Articles 57 and 99 of the Civil Code provided:

Article 57

“The birth certificate shall state the date, time and place of birth, the sex of the child, the forenames given and the surname, followed where appropriate by a reference to the joint declaration by the parents as to the choice thereof, along with the forenames, surnames, ages, occupations and addresses of the father and mother and, if applicable, those of the person registering the birth ...”

Article 99

“Rectification of civil-status documents shall be ordered by the president of the court.

Rectification of declaratory or supplementary judgments relating to civil-status documents shall be ordered by the court.

An application for rectification may be brought by any person concerned or by the public prosecutor; the latter shall be obliged to act of his or her own motion where the error or omission relates to an essential indication in the document or in the decision taking its place.

The public prosecutor having local jurisdiction may carry out administrative rectification of purely clerical errors and omissions in civil-status documents; for this purpose he or she shall give the relevant instructions directly to those having custody of the registers.”

18. Law no. 2021-1017 of 2 August 2021 on bioethics inserted the following paragraph after the first paragraph of Article 57 of the Civil Code:

“Where it has been medically certified that the child’s sex is impossible to determine on the date on which the [birth] certificate is drawn up, the public prosecutor may authorise the registrar not to indicate the sex immediately on the birth certificate. The medically certified sex shall be added at the request of the child’s legal representatives or the public prosecutor within a period which may not exceed three months from the date of the declaration of birth. The public prosecutor shall order that the sex be indicated in the margin of the birth certificate and, at the legal representatives’ request, that one or more of the child’s forenames be rectified.”

19. The same Law inserted the following paragraph after the first paragraph of Article 99 of the Civil Code:

“Rectification of the sex marker and, where appropriate, the forenames shall be ordered at the request of any individual with a variation in genital development or, if the individual is a minor, at the request of his or her legal representatives, if it has been medically certified that his or her sex does not correspond to that indicated on the birth certificate.”

20. Paragraph 55 of the circular of 28 October 2011 on special rules for various civil-status documents relating to birth and parentage (formerly paragraph 228 (b) of the general instruction of 21 September 1955 on civil status, as amended by an instruction of 19 February 1970) states as follows:

“55. Sex of the child

Where the sex of a newborn is uncertain, the sex marker ‘indeterminate’ should not be indicated on the birth certificate. The parents should be advised to seek guidance from their doctor as to which sex appears most probable given, where appropriate, the

expected outcome of medical treatment. This sex will be indicated on the certificate and, if necessary, will be rectified subsequently by the courts if incorrect.

Where, in certain exceptional cases, the doctor considers that no immediate indication of the newborn's probable sex can be given, but it is possible to determine the sex definitively within one or two years, following appropriate treatment, it may be acceptable, subject to the public prosecutor's approval, for the child's sex not to be indicated initially on the birth certificate. In such cases, all necessary measures should be taken to ensure that in due course, the birth certificate may be properly completed by means of a judicial decision.

In all cases of sexual ambiguity, the parents should be advised to choose a forename for the child that is suitable for either a girl or a boy."

RELEVANT DOMESTIC MATERIAL

I. OPINION OF THE *DÉFENSEUR DES DROITS*

21. In an opinion of 20 February 2017 on "respect for intersex people's rights" (no. 17-04) the *Défenseur des droits* (Defender of Rights) noted under the heading "Intersex: a multifaceted, easily misunderstood reality" that all human societies were based on the male/female sex binary and that scientific research had shown in that regard that there was no single criterion that could be used to define an individual's sex clearly; instead several characteristics came into play. Those characteristics, which reflected successive advances in scientific knowledge, were now analysed as parts of a whole, without any one being considered paramount in determining sex. They included anatomy and external genitalia (penis/vagina; early nineteenth century), gonads (testicles/ovaries; nineteenth century), hormones (testosterone/oestrogen; early twentieth century) and genetics (XY or XX chromosomes, or other combinations following the discovery of atypical chromosomes in 1959; then genes from the 1970s onwards). The *Défenseur des droits* further noted that there had always been individuals with so-called "ambiguous" sex characteristics and that, since the various male and female characteristics could interact on every level, determining the decisive amount of maleness or femaleness in a given individual could therefore prove to be an endless pursuit. In addition, such variations in sex development could be diagnosed at the prenatal stage, at birth, at puberty or even later in life.

22. The *Défenseur des droits* asserted that legally assigning the male or female sex to intersex children at birth could amount to an interference with their right to respect for their private life. Three possible measures could be taken, together or separately, to overcome that issue: removing the sex marker from civil-status documents; creating a third sex category for those documents; and/or making it easier to change the sex marker used on them. The *Défenseur des droits* considered that the first measure would be difficult to implement as positive law stood at the time, since some legal rules were based on sex in order to combat discrimination. He did not express an opinion

on the second measure, which he regarded as a matter for policy-makers to decide, but considered that if it were to be implemented a marker not perceived as stigmatising for the majority of intersex people would need to be chosen, and recommended “neutral”, “intersex” or no marker at all, rather than “non-specific” or “indeterminate”. He further considered that all people should have the right not to indicate their sex in everyday documents.

II. REPORT ON “VARIATIONS IN SEX DEVELOPMENT: BREAKING A TABOO, COMBATING STIGMA AND EXCLUSION”

23. An information report entitled “Variations in sex development: breaking a taboo, combating stigma and exclusion”, which was registered with the Presidency of the Senate on 23 February 2017, notes that the adjective “intersex” is an umbrella term covering many variations in sex characteristics that do not all have the same consequences for the individuals concerned. It refers to the definition of “intersex” given by the Council of Europe Commissioner for Human Rights, according to which “[i]ntersex individuals are persons who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex”, which became “evident, for example, in secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure”. The report nevertheless recommends retaining “variation in sex development” as the official term.

24. In particular, the report examines “the issues and challenges that would arise for the French legal system if a ‘neutral’ or ‘indeterminate’ sex were recognised”. The relevant parts read:

“... The various interviews highlighted the consensus among those spoken to on the far-reaching consequences that the recognition of a ‘neutral’ sex in French law would have for our legal rules, which have been developed in the light of the sex binary.

As Astrid Marais, a professor of law at the University of Western Brittany, and Philippe Reigné, a professor at the *Conservatoire national des arts et métiers* (CNAM), pointed out, some of these rules are becoming less relevant today – particularly on account of same-sex marriage – but others endure, such as those concerning legal parent-child relationships and artificial procreation.

As stated by the Ministry of Justice, ‘[t]he sex indicated on civil-status documents is ... a necessary component of our social and legal arrangements, particularly on account of its implications for the laws governing family, legal parent-child relationships and procreation’. Recognising a ‘neutral’ sex would thus give rise to ‘far-reaching changes in our system for recording civil status, which is based on the premise that all individuals have a defined sex, even though there is some tolerance as to the time-limit for registering that sex.’

Professor Astrid Marais agreed with that assessment. Moreover, in her interview on 13 December 2016, she emphasised that allowing a neutral sex would also have an impact on the future family life of any ‘intersex’ individuals who wished to have

children after having their sex changed to neutral, since it would then be impossible for them to establish the legal parent-child relationship.

She also asked whether artificial procreation, which is currently reserved for heterosexual couples, should then not also be open to individuals of the neutral sex.

Lastly, she stressed that other legal rules could also be disrupted should a neutral sex be allowed, in particular those aimed at imposing quotas to guarantee gender equality: ‘Does this mean that, if intersex people face the same discrimination on grounds of sex as women, then quotas should be extended to them too? If so, how would these quotas be implemented?’

This issue was also highlighted by the Civil Affairs Department of the Ministry of Justice, which took the opportunity to point out that ‘[i]t would be hard to maintain the various mechanisms intended to combat sex discrimination (particularly those designed to promote gender balance) if a “neutral”, “other” or “indeterminate” category of sex were to be introduced’.

The implications are therefore substantial.

In conclusion, the co-rapporteurs consider that, while it is essential to ensure that ‘intersex’ people can enjoy the right to respect for their private life, any reform of their legal status should be preceded by very careful reflection.

This leads us once again back to the need to compile reliable statistics on the people potentially concerned, so that the impact of such a far-reaching change may be assessed in advance ...”

III. REPORT ON “TOMORROW’S CIVIL STATUS AND TRANSIDENTITY”

25. A report entitled “Tomorrow’s civil status and transidentity” (May 2018; prepared as part of a call for proposals by the Law & Justice research project) assesses the implementation of paragraph 55 of the circular of 28 October 2011 on special rules for various civil-status documents relating to birth and parentage (see paragraph 20 above). On the basis of data in the national identity register kept by the National Institute for Statistics and Economic Studies (*Institut national de la statistique et des études économiques* – “INSEE”), the report states that twenty-eight people born between 1 January 2013 and 27 February 2017 were registered as of the latter date with the marker “i” (indeterminate) and that a further twenty-five people born in the same period had been registered at birth with that marker but had since had it changed. Thus, between 2013 and 2017, fifty-three people in total had their civil status registered with no sex marker or with a marker other than male or female and had their sex listed as “i” in the national identity register. The report specifies in particular that those figures, which do not imply that only fifty-four people were born intersex in France in that period, confirm that all intersex children are eventually assigned the male or female sex, since no such individual born before 2013 is to be found in the register.

IV. STUDY BY THE *CONSEIL D'ÉTAT*

26. In a study commissioned by the Prime Minister, entitled “Revising the Bioethics Act: what are the options going forward?” (28 June 2018), the *Conseil d'État* examined the medical-care arrangements in place for children with variations in genital development. The study includes the following relevant explanations:

“... Variations in genital development refer to congenital medical situations characterised by atypical development of the chromosomal (or genetic) sex, the gonadal sex (i.e. the sex glands, the testicles or ovaries) or the anatomical sex (i.e. the visible morphological sex). People born with such variations in sex characteristics are sometimes referred to as ‘intersex’.

The causes and manifestations of these variations vary widely. For the purposes of simplification, three main categories may be identified [Footnote: Two other categories deserve to be mentioned, although they comprise very few cases: children with ovotesticular DSD, who have both male and female structures; and children whose hormonal and chromosomal configurations are ‘normal’ but who have significant lesions in the lower part of the body (bladder exstrophy, cloacal exstrophy, aphallia)].

The first category encompasses XX children who unquestionably belong to the female sex but who are born with anatomically atypical genitalia (atypical development of the clitoris and no opening of the vagina into the perineum) and who most often have congenital adrenal hyperplasia (CAH).

The second, far more diverse category is XY children who have a boy’s genetic formula but anomalies – mainly of a hormonal nature – that result in atypical formation of the genitalia (hypospadias, undescended testicles, micropenis).

The third category concerns children who have what is known as a ‘mosaic’ chromosomal formula. The most common variation of this type – although still rare – is 45,X/46,XY mosaicism, which spans children who have several groups of chromosomes and display atypical genitalia ...”

V. OPINION OF THE NATIONAL ETHICS ADVISORY COMMITTEE

27. In its opinion no. 132 of 19 September 2019 on “Ethical questions raised by the situation of people with differences of sex development”, which does not address the matter of civil status, the National Ethics Advisory Committee referred in particular to the definition adopted by the Office of the United Nations High Commissioner for Human Rights (OHCHR), according to which “[i]ntersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies”. The Committee, for its part, spoke in terms of people with “differences of sex development”, an expression “which [did] not involve the future sexual identity and exclude[d] the notion of disease, but impl[ie]d the existence of atypical sexual development”.

RELEVANT INTERNATIONAL MATERIAL

I. COUNCIL OF EUROPE

A. Council of Europe Commissioner for Human Rights

28. In an issue paper entitled “Human rights and intersex people” (June 2015) the Council of Europe Commissioner for Human Rights drew attention to the following items in particular (footnotes omitted):

“...

The Commissioner’s recommendations

...

4. 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.

...

Chapter 1 – Introduction

1.1. Understanding intersex people

When a newborn is welcomed into this world, the same question is repeatedly posed: ‘Is it a boy or a girl?’ While at face value that question is innocent, it indicates just how fundamental sex and gender classifications are to our society, as well as the binary manner in which the human sexes are categorised. It also demonstrates our limited understanding of sex, given that the rigid line with which we separate the sexes into two mutually exclusive categories does not have a parallel in nature.

The sex assigned at birth will subsequently become a legal and a social fact for the newborn and will accompany them throughout the rest of their life. As they grow, go through adolescence, and become an adult, certain mannerisms, behaviours and interests will be expected to develop as ‘normal’ manifestations of the person’s assigned sex. Additionally, that sex will be clearly designated on identification documents as an ‘F’ or an ‘M’, and in some countries with an even or odd digit in personal social security numbers. Gendered symbols will also indicate which sex-segregated facilities are available to that person, and which are not. Likewise, various forms and documents throughout people’s lives will oblige them to tick F or M as part of the personal data set required before the provision of the service or entitlement in question.

While the importance conferred to sex as a classifier does not pose difficulties for most people, it does create serious problems for those who do not neatly fit within the ‘female’/‘male’ dichotomy. This is because society does not usually recognise a person without reference to their sex, and as a result, the ability of intersex and trans people to enjoy their human rights is especially impacted by the current normative confines of sex and gender.

It is important to note the distinction between intersex and trans people:

Y v. FRANCE JUDGMENT

Intersex individuals are persons who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex. The latter becomes evident, for example, in secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure.

Differences can include the number of sex chromosomes and patterns (e.g. XXY or XO), different tissue responses to sex hormones (e.g. having one ovary and one testis, or gonads that contain both ovarian and testicular tissue) or a different hormone balance. The genitalia of some intersex persons may not be clearly identifiable as male or female, and are hence easily identifiable as intersex at birth; however, for others the detection only occurs later in life during puberty or sometimes even later (e.g. due to the absence of menstruation or physical development that is not in line with the assigned sex). Although they do not usually face actual health problems due to their status, intersex people are routinely subjected to medical and surgical treatments – often while very young – to align their physical appearance with either of the binary sexes without their prior and fully informed consent.

Conversely, trans people externalise an innate gender identity which does not correspond with society's gender expectations in relation to their assigned sex, and often encounter various forms of discrimination, especially following their decision to undertake a process of transition to align their body, appearance and mannerisms with their gender identity.

In essence, as a result of surgeries or other sex-altering medical interventions, intersex people are denied their right to physical integrity as well as their ability to develop their own gender identity, as an a priori choice is made for them. Additionally, these interventions often disrupt their physical and psychological well-being, producing negative impacts with lifelong consequences, which include sterilisation, severe scarring, infections in the urinary tract, reduced or complete loss of sexual sensation, removal of natural hormones, dependency on medication, and a deep feeling of violation of their person.

The invisibility of intersex people in society is another serious problem. Their life experience is often shrouded in secrecy and shame, also as a result of their frequently being unaware of the surgeries or treatments that were performed on them early on in their life. Access to medical records is often rendered very difficult, as is access to personal history, including childhood pictures and other memories. Intersex individuals who are discovered later on in life may experience the same invasive treatment – without their free and informed consent – as intersex individuals who are identified during childhood.

A strong fear of stigmatisation and social exclusion forces most intersex people to stay 'in the closet', even when they become aware of their sex. Moreover, society remains largely ignorant about the existence of intersex people since hardly any information is made available to the public about the matter. Consequently, for many years, the human rights problems affecting intersex people's well-being were either unknown or ignored. Awareness about their suffering has only recently risen to the fore in a number of human rights fora, and is yet to be recognised by the wider human rights community as a pressing concern.

This new awareness can be attributed in part to pioneering work led by intersex human rights activists, self-help and patients' support organisations, some of which originated in the 1990s, and the growing interest by the lesbian, gay, bisexual and trans (LGBT) movement in intersex issues. For example, the mandate of the International Lesbian,

Gay, Bisexual, Trans and Intersex Association (ILGA) was extended to cover intersex issues during its general assembly in 2009. Following that, an annual International Intersex Forum was organised jointly with ILGA-Europe and intersex organisations and has, since 2011, provided a safe space for intersex activists from around the world to discuss their issues and build the movement's goals and demands. A number of national or local intersex (or intersex inclusive) organisations do exist, and such groups have grown in number and membership over recent years.

1.2. Diversity of intersex people

It is important not to lump all intersex people into one new collective category, such as a 'third sex', perhaps running in parallel to female and male. Such a classification would be incorrect due to the great diversity among intersex people and the fact that many intersex individuals do identify as women or men, while others identify as both or neither. In effect, intersex is an umbrella term including people with 'variations in sex characteristics', rather than a type *per se*. This diversity is not unique to intersex people, as – unsurprisingly – a range of variations in sexual anatomy is also found in women and men that meet the medical norms of their respective categories.

The term 'hermaphrodite' was widely used by medical practitioners during the 18th and 19th centuries before 'intersex' was coined as a scientific and medical term in the early 20th century. Before the current medical classification of the disorder of sex development (DSD) was developed, variations in intersex sex characteristics were classified under different categories, the most common being: congenital adrenal hyperplasia (CAH), androgen insensitivity syndrome (AIS), gonadal dysgenesis, hypospadias, and unusual chromosome compositions such as XXY (Klinefelter Syndrome) or XO (Turner Syndrome). The so-called 'true hermaphrodites' referred to those who had a combination of ovaries and testes.

Importantly, variations in sex characteristics are different than sexual orientation and gender identity, even though the three layers interact in the formation of a person's personality. The Office of the United Nations High Commissioner for Human Rights' (OHCHR) *Free & Equal* campaign points out that: 'Intersex people experience the same range of sexual orientations and gender identities as non-intersex people.' In this vein, reference to intersex people as 'intersexuals' is wrong since intersex sex characteristics are unrelated to sexual orientation. Similarly, reference to 'intersex identity' is also incorrect as intersex is not necessarily a matter of identity or self-perception but mostly refers to physical aspects of the body.

...

Chapter 4 – Legal recognition of sex and gender

Across Europe, an indication of sex is required for the official registration of births, which limits the recognised sexes to the 'F' and 'M' dichotomy. This requirement is based on the belief that sex is 'one of the essential features of a person's identity' and that all people can be clearly designated as belonging to either of the provided categories.

In turn, this requirement puts pressure on parents to render their child not only 'legally unambiguous', but physically unambiguous too'. In most countries, once the sex is recorded, it becomes difficult to amend such a record (if it is legally possible at all), thus entailing 'significant disadvantages for the person concerned'.

4.1. Registration of sex on birth certificates

The intertwining between legal requirements and medical pressure following the birth of an intersex baby traps both the parents and their children between a rock and a hard place. ...

Currently, some countries allow for the registration of the sex of the child to be delayed in the event that the sex of a newborn cannot be immediately determined at birth. Nonetheless, this measure is usually temporary, even in the case of an intersex child. ...

4.3. Non-binary sex/gender marker on identification documents

Currently, the sex/gender on identification documents in Europe is required and limited to 'F' or 'M' only. The sole exception is Germany, as it omits any reference to sex/gender on its identity cards. When it comes to passports, the International Civil Aviation Organisation (ICAO) has allowed for sex to be registered as 'F', 'M' or 'X' (i.e. 'unspecified') since 1945. However, following EU harmonised rules regarding the passports' information page, the sex entry included on the passports of all EU-28 member states has remained limited to 'F' or 'M' alone.

This contrasts with countries such as Australia, Malaysia, Nepal, New Zealand and South Africa that already allow for 'X' as another sex entry on passports, while the Indian passport application form allows for three gender categories: 'Female', 'Male' and 'Others'. ..."

B. Parliamentary Assembly of the Council of Europe

29. On 12 October 2017 the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 2191 (2017) on promoting the human rights of and eliminating discrimination against intersex people, in which it emphasised the following matters:

"1. Intersex people are born with biological sex characteristics that do not fit societal norms or medical definitions of what makes a person male or female. Sometimes a person's intersex status is detected at birth; sometimes it only becomes apparent later in life, notably during puberty. ...

4. Understanding of these issues is gradually increasing, but concerted efforts are still needed to raise public awareness as to the situation and rights of intersex people so as to ensure that they are fully accepted in society, without stigmatisation or discrimination.

5. The Assembly emphasises that it is crucial to ensure that the law does not create or perpetuate barriers to equality for intersex people. This includes ensuring that intersex people who do not identify as male or female have access to legal recognition of their gender identity, and that where their gender has not been correctly recorded at birth, the procedure for rectifying this is simple and based on self-identification only, as set out in Assembly Resolution 2048 (2015) on discrimination against transgender people in Europe. Anti-discrimination laws may also need to be amended to ensure that the situation of intersex people is effectively covered.

...

7. ... [T]he Assembly calls on Council of Europe member States to:

...

7.3. with regard to civil status and legal gender recognition:

7.3.1. ensure that laws and practices governing the registration of births, in particular as regards the recording of a newborn's sex, duly respect the right to private life by allowing sufficient flexibility to deal with the situation of intersex children without forcing parents or medical professionals to reveal a child's intersex status unnecessarily;

7.3.2. simplify legal gender recognition procedures in line with the recommendations adopted by the Assembly in Resolution 2048 (2015) and ensure in particular that these procedures are quick, transparent and accessible to all and based on self-determination;

7.3.3. ensure, wherever gender classifications are in use by public authorities, that a range of options are available for all people, including those intersex people who do not identify as either male or female;

7.3.4. consider making the registration of sex on birth certificates and other identity documents optional for everyone;

7.3.5. ensure that, in accordance with the right to respect for private life, intersex people are not prevented from entering into a civil partnership or marriage or from remaining in such a partnership or marriage as a result of the legal recognition of their gender;

..."

II. EUROPEAN UNION

30. On 14 February 2019 the European Parliament adopted a resolution on the rights of intersex people (2018/2878(RSP)), the relevant parts of which read:

"The European Parliament,

...

A. whereas intersex individuals are born with physical sex characteristics that do not fit medical or social norms for female or male bodies, and these variations in sex characteristics may manifest themselves in primary characteristics (such as the inner and outer genitalia and the chromosomal and hormonal structure) and/or secondary characteristics (such as muscle mass, hair distribution and stature);

...

J. whereas some intersex people will not identify with the gender they are medically assigned at birth; whereas legal gender recognition based on self-determination is only possible in six Member States; whereas many Member States still require sterilisation for legal gender recognition;

...

Identity documents

9. Stresses the importance of flexible birth registration procedures; welcomes the laws adopted in some Member States that allow legal gender recognition on the basis of self-determination; encourages other Member States to adopt similar legislation, including flexible procedures to change gender markers, as long as they continue to be registered, as well as names on birth certificates and identity documents (including the possibility of gender-neutral names);

..."

31. In its “Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons” (24 June 2013; 11153/13 COHOM 125 COPS 240 PESC 728) the Council of the European Union stated that “[t]he term intersex covers bodily variations in regard to culturally established standards of maleness and femaleness, including variations at the level of chromosomes, gonads and genitals”.

32. A paper by the European Union Agency for Fundamental Rights (FRA) entitled “The fundamental rights situation of intersex people” (April 2015) notes that “[i]ntersex people will remain vulnerable to discrimination as long as birth, and other, registries do not record sex identities appropriately, and as long as they are medically diagnosed as men or women with a health disorder”. It further states that “[a]lternatives to gender markers in identity documents should be considered to protect intersex people” and that “[t]he possibility of including a gender-neutral marker could also be considered”, pointing out that “[t]his is particularly important for birth registration/certificates in situations where the new-born child’s sex is unclear”. The FRA paper specifies that “[i]ntersex’ is used ... as an umbrella term to denote a number of different variations in a person’s bodily characteristics that do not match strict medical definitions of male or female” and that “[t]hese characteristics may be chromosomal, hormonal and/or anatomical and may be present to differing degrees”.

III. UNITED NATIONS

33. OHCHR published a factsheet in 2015 entitled “Intersex”, which includes the following information:

“What does ‘intersex’ mean?

Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.

Intersex is an umbrella term used to describe a wide range of natural bodily variations. In some cases, intersex traits are visible at birth while in others, they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all.

According to experts, between 0.05% and 1.7% of the population is born with intersex traits – the upper estimate is similar to the number of red haired people.

Being intersex relates to biological sex characteristics, and is distinct from a person’s sexual orientation or gender identity. An intersex person may be straight, gay, lesbian, bisexual or asexual, and may identify as female, male, both or neither.

Because their bodies are seen as different, intersex children and adults are often stigmatized and subjected to multiple human rights violations, including violations of their rights to health and physical integrity, to be free from torture and ill-treatment, and to equality and non-discrimination.

...

Discrimination

...

Some intersex people also face barriers and discrimination if they wish to or need to amend sex markers on birth certificates and official documents.

...

Action points

States:

...

Enact laws to provide for facilitated procedures to amend sex markers on the birth certificates and official documents of intersex people.

...”

COMPARATIVE-LAW MATERIAL

34. The Court conducted a comparative-law survey covering thirty-seven States Parties to the Convention other than France (Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, the Republic of Moldova, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Türkiye, Ukraine and the United Kingdom).

35. The survey shows that thirty-one of these States do not provide for the possibility of opting for a gender marker other than “male” or “female” on birth certificates and other official documents. It should, however, be noted that Armenia permits “uncertain” to be indicated in respect of sex on birth certificates and subsequent identity documents if such status is supported by a medical certificate.

36. With regard to the United Kingdom in particular, the Court of Appeal of England and Wales, hearing an appeal against a judgment which had found that the refusal to allow a non-gendered person to be issued with a passport indicating gender “unspecified” did not amount to a violation of Articles 8 and 14 of the Convention, upheld the first-instance court’s finding on 10 March 2020 but conceded that a positive obligation to recognise non-binary identity might arise in the future under those provisions (*Elan-Cane, R (on the application of) v. The Secretary of State for the Home Department & Anor* [2020] EWCA Civ 363). The Supreme Court rejected that approach while likewise finding against the appellant on 15 December 2021, having regard, in particular, to the wide margin of appreciation afforded to the States Parties in the absence of any consensus, the complexity and sensitivity of the issue and the need for a balance to be struck between competing private and public interests (*R (on the application of Elan-Cane) (Appellant) v. Secretary of State for the Home Department (Respondent)* [2021] UKSC 56).

37. Five countries – Austria, Germany, Iceland, Malta and the Netherlands – have made it possible to obtain a sex marker other than “male” or “female”. In Germany the Federal Constitutional Court ruled on 10 October 2017 that the refusal of an intersex person’s request to have the “female” sex marker replaced by “inter/diverse” in the register of births amounted to a violation of that individual’s rights to protection of personality and to discrimination on grounds of sex. The Civil Status Act was amended accordingly in 2018, and the marker “diverse” can now be entered in the register of births, either at the time of postnatal registration at the request of the parents or subsequently at the request of the person concerned. In Austria intersex people can obtain the sex marker “diverse”, “inter” or “open”, or opt for no sex marker at all, on their birth certificates, which serve as the basis for identity documents such as passports and driving licences. In Iceland “neutral” can be indicated on birth certificates and “X” on passports. In the Netherlands several court decisions have allowed intersex people to have the “male” or “female” sex marker on their birth certificates replaced by the words “sex could not be determined”, which then enables “X” to appear on their passports instead of “M” or “F”. In Malta “undeclared” may be indicated on birth certificates and “X” on passports in respect of gender.

38. Lastly, the issue of non-binary gender recognition has recently been or is currently under consideration at governmental or parliamentary level in several countries, including Belgium, Cyprus, Ireland, Norway and Spain.

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

39. The applicant, who stated that he was an intersex individual, complained about the refusal to grant his request to have the sex marker “neutral” or “intersex” inserted on his birth certificate instead of “male”. He relied on Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Preliminary remarks

40. The applicant stated that he was an intersex individual (see paragraphs 4-11 above), which the Government confirmed. Referring to the expression used by the National Ethics Advisory Committee in its opinion

no. 132 (see paragraph 27 above), the Government acknowledged that the applicant was a person “with differences of sex development”, that is to say, an “intersex” person (see paragraph 55 below). In addition, the Orléans Court of Appeal, like the Tours *tribunal de grande instance* before it (see paragraph 14 above), noted that the applicant “indisputably [had been] and still [was] sexually ambiguous” (see paragraph 15 above). The Court of Appeal’s judgment specified that during foetal development sexual differentiation had failed, with the result that from birth the applicant had displayed atypical development of chromosomal, gonadal and anatomical sex and that the markers of sexual differentiation were not all clearly male or female.

41. In that connection, the applicant submitted medical certificates to the Court (see paragraphs 6-9 above) showing that his intersex biological status, characterised in particular by the fact that he had neither testicles nor ovaries, had been established shortly after his birth and had not changed when, at the age of 63, he had applied to the domestic courts to have the “male” sex marker on his birth certificate replaced by “neutral” or, failing that, “intersex”.

42. On the basis of all the above-mentioned evidence, the Court concludes that it has been established that, biologically, the applicant falls into neither the “male” nor the “female” category.

43. The Court is thus satisfied that there is a discordance between his biological identity, for which he claims recognition, and his legal identity.

44. It follows that the present application, which does not concern the question of gender self-determination, raises the sole issue of the consequences, in terms of the right to respect for private life under Article 8 of the Convention, of assigning the male or female sex to an individual who, being biologically intersex, falls into neither of these categories.

B. Admissibility

45. The Court notes that the Government did not challenge the admissibility of the application or the applicability of Article 8 in particular.

46. The applicant referred to his “undisputedly intersex nature, both biologically (sex characteristics) and psychologically (gender identity)”, and argued that those two aspects of his private life fell within the sphere protected by Article 8.

47. With regard to the applicability of Article 8, it is sufficient for the Court to reiterate that personal identity – of which gender identity is one component – comes within the scope of the right to respect for private life enshrined in that provision (see, for example, *mutatis mutandis*, *X and Y v. Romania*, nos. 2145/16 and 20607/16, § 106, 19 January 2021; *Y.T. v. Bulgaria*, no. 41701/16, § 38, 9 July 2020; and *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §§ 92-95, 6 April 2017, and the authorities cited therein).

48. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

C. Merits

1. *The parties' submissions*

(a) **The applicant**

49. The applicant submitted that refusing to grant his request was tantamount to denying the reality of his sex and undermined his gender identity. He referred to the Court's case-law on transgender persons, according to which gender identity or identification fell within the personal sphere protected by Article 8 and the notion of personal autonomy included the freedom to define one's gender identity.

50. The applicant submitted that there had been an interference with his right to private life and that his case should therefore be examined in the light of the State's negative obligation not to interfere rather than in the light of its positive obligations. He contended that the use of the male sex marker on his birth certificate was indeed an act attributable to the State. Referring to the judgments in *Sinan Işık v. Turkey* (no. 21924/05, ECHR 2010) and *Tasev v. North Macedonia* (no. 9825/13, 16 May 2019), he pointed out that the Court had found that there had been interferences with individuals' rights in cases where they had been required to indicate their ethnicity or religion in the civil register. The applicant also referred to the judgment in *Y.Y. v. Turkey* (no. 14793/08, ECHR 2015 (extracts)). In addition, he asserted that the sole purpose of his application was to obtain recognition that the sex marker on his civil-status documents was incorrect and to have it replaced by a marker that reflected reality. He was seeking neither the creation of a special right – pointing out that Article 57 of the Civil Code, concerning the content of birth certificates, did not provide that those documents had to include the marker “male” or “female” – nor the recognition of the principle of a third category of sex or gender. He contended, moreover, that such a category already existed, referring to paragraph 55 of the circular of 28 October 2011 on special rules for various civil-status documents relating to birth and parentage and to the International Civil Aviation Organization's Doc 9303 on machine readable travel documents (part 4), which allowed a third gender category to be included on passports and was applicable in France through Council Regulation (EC) No. 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (Annex, section 2). He pointed out that he was merely seeking recognition of his identity. An examination of his complaint from the standpoint of negative obligations was justified by the principle of subsidiarity, which required the Court to confine itself to the domestic courts'

assessment of the facts. The French courts had examined his case from the perspective of the negative obligation not to interfere. He submitted that such an approach to his case was also justified by the principle of effectiveness, which required that, where a complaint could be examined in terms of either positive or negative obligations, it should be examined in terms of negative obligations since this allowed for a more comprehensive review. In that connection, he referred to the judgments in *Demir and Baykara v. Turkey* ([GC], no. 34503/97, § 116, ECHR 2008) and *Keegan v. Ireland* (26 May 1994, §§ 51-52, Series A no. 290).

51. The applicant further argued that the refusal he had received had had no legal basis. No legislation expressly prohibited the sex marker “neutral” and, in his view, there was no foreseeable implied legal basis.

52. As to the aim of the interference, the applicant first noted that the Court of Cassation had found that the binary nature of sex markers on civil-status documents pursued a legitimate aim, in that it was necessary for the social and legal arrangements in place. In the applicant’s view, however, such a purpose could not be linked to any of the legitimate aims listed exhaustively in Article 8 § 2. He then pointed out that the Government had cited the need to protect the rights of others. He asked the Court to examine that argument in depth, as in *Y.Y. v. Turkey* (cited above) and *Taddeucci and McCall v. Italy* (no. 51362/09, 30 June 2016), submitting that it would not withstand such scrutiny. He emphasised that he was not seeking to have other people’s documents altered, nor did he want to jeopardise the civil-status system – which he was not asking to be reformed – or to have its rules overhauled. All that was needed to satisfy his request was to insert a marker on his civil-status documents corresponding to his sex. He added that such a change would have no effect on the rights of his wife or child.

53. Turning to the necessity of the interference in a democratic society, the applicant first pointed out that the impossibility of having a “neutral” sex marker inserted on his civil-status documents disadvantaged him more than it benefited society. He submitted that recognition of a neutral sex or gender identity would enable him to put an end to the discrimination and mental suffering he endured. In the latter connection, he referred to the “conflict between social reality and law ... which place[d] the [individual concerned] in an anomalous position, in which he or she [might] experience feelings of vulnerability, humiliation and anxiety” that the Court had identified in *Christine Goodwin v. the United Kingdom* ([GC], no. 28957/95, § 77, ECHR 2002-VI), and he explained that the only means of resolving that conflict was to play a role in the public sphere that did not fit him. The consequences for society would be marginal, since he was not seeking general recognition of a neutral sex but rather a solution to his individual situation, and there would be no technical obstacle – relating to information technology, for example – to changing the “male” sex marker to “neutral”, which could, in any event, be done by hand. He submitted in that regard that, according to INSEE, in

February 2017 there were twenty-eight people recorded in the national identity register in a category other than “male” or “female”, in accordance with paragraph 55 of the above-mentioned circular of 28 October 2011 (see paragraph 20 above). Such recognition would, on the contrary, have the advantage for the State of restoring the identification function of civil-status documents. The applicant conceded that the recognition of a neutral sex on civil-status documents could require legislative coordination, but argued that it would not be substantial work since there were few sex-based rules in French law and an interpretation would suffice to adapt them in some cases, such as for gender balance and legal parent-child relationships.

54. Lastly, the applicant submitted that, since the interests at stake – his own and those of society – converged, the State’s margin of appreciation should not be taken into account. Even assuming that the State did have to be afforded a margin of appreciation, it should be a narrow one since, as the Court had held in *A.P., Garçon and Nicot* (cited above, § 123), recognition of sex or gender concerned an essential aspect of individuals’ intimate identity, not to say of their very existence, and, furthermore, the interference complained of was serious because it denied that very identity and pursued no legitimate aim. In support of his argument for a narrow margin of appreciation, the applicant affirmed that a “clear trend” towards recognition of the non-binary identity of intersex people could be observed in several States (mentioning Malta, Germany, the United Kingdom, India and Australia) and that various international bodies were calling for such recognition (citing the Parliamentary Assembly of the Council of Europe, the Council of Europe Commissioner for Human Rights, the European Union Agency for Fundamental Rights, the United Nations High Commissioner for Human Rights and the International Commission on Civil Status). He also disputed the Government’s assertion that the case fell within the scope of ethics and morals, which would entail a wide margin of appreciation for the State.

(b) The Government

55. The Government acknowledged that the applicant was “a person with differences of sex development [they specified in a footnote that this was the expression used by the National Ethics Advisory Committee in its opinion no. 132 of 19 September 2019], that is to say, an ‘intersex’ person”.

56. Contrary to the applicant, the Government maintained that the refusal to grant his request did not amount to an interference with his private life. They referred in that connection to the judgment in *Hämäläinen v. Finland* ([GC], no. 37359/09, ECHR 2014) and submitted that the applicant was complaining in substance not about an act but rather about a failure to act by the State, whose legal system allegedly did not allow his civil status to be brought into line with his intersex reality. In the Government’s view, the case should therefore be examined from the standpoint of positive obligations.

57. Adopting that approach, the Government first submitted that the respondent State enjoyed a wide margin of appreciation in the present case, since it raised sensitive moral and ethical issues on which there was no consensus among the States Parties to the Convention. In the latter connection, they pointed out that most of those States' legal systems did not provide either for a "neutral" sex marker or for no sex marker at all on civil-status documents. The Government further submitted that a fair balance had been struck between the interests at stake, namely the applicant's interest in having an "intersex" or "neutral" sex marker indicated on his birth certificate, on the one hand; and the principle of the inalienability of civil status, the consistency and reliability of civil-status documents and the social and legal arrangements in place in France, which were based on the sex binary, on the other. They emphasised, in particular, that an individual's sex, in the same way as a forename, surname, and date and place of birth, was used to identify that person in society and in the family sphere, and that the sex indicated on civil-status documents was a necessary component of the social and legal arrangements in place in France, particularly on account of its implications for the laws governing family, legal parent-child relationships and procreation. They further stated that the recognition of a third category of sex would have far-reaching consequences for the structural role of civil status and the rules of French law, which were based on the sex binary. The Government then observed that the Court of Appeal had found that the applicant's physical appearance was that of a male and he was therefore able to be regarded socially as a person of that sex, that the discrepancy between the male sex marker on his civil-status documents and his reality as an intersex person had not negatively impacted his ability to marry and to adopt a child, and that the domestic courts had duly weighed up the interests at stake. Regarding the last-mentioned point, the Government referred *mutatis mutandis* to the judgment in *Von Hannover v. Germany (no. 2)* ([GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012) to point out that the recognition of a margin of appreciation entailed that it was not for the Court to substitute its own assessment for that of the competent domestic courts, where those courts had carefully, independently and impartially examined the facts, applying the relevant human rights standards consistently with the Convention and the Court's case-law, and had adequately balanced the applicant's personal interests against the more general public interest in the case.

58. In the alternative, should the Court find that the refusal to grant the applicant's request amounted to an interference with his right to respect for his private life and that the complaint should be examined from the standpoint of negative obligations, the Government submitted that that interference had been in accordance with the law, since French law had consistently over time recognised only two sexes – male and female – and all the substantive provisions on gender referred to those two sexes to the exclusion of all others.

They further argued that paragraph 55 of the circular of 28 October 2011 on special rules for various civil-status documents relating to birth and parentage provided that “[w]here the sex of a newborn [was] uncertain, the sex marker ‘indeterminate’ should not be indicated on the birth certificate. The parents should ... seek guidance from their doctor as to which sex appear[ed] most probable given, where appropriate, the expected outcome of medical treatment”. They also referred to the judgment of 4 May 2017, in which the Court of Cassation had pointed out that French law did not permit a sex marker other than male or female to appear on civil-status documents and that, as domestic law stood, there was no provision to indicate any sex marker other than “male” or “female” permanently on civil-status documents. In addition, the Government submitted that the interference complained of had the legitimate aim of protecting the rights and freedoms of others, within the meaning of Article 8 § 2 of the Convention. They emphasised in that connection that civil status contributed not only to legal certainty but also to the protection of third parties’ rights in so far as it enabled them to be informed of people’s identity. They added that sex was taken into account as a decisive factor in a number of legal situations, particularly when determining legal parent-child relationships. Lastly, with regard to the necessity of the interference, the Government referred to the arguments they had put forward from the standpoint of positive obligations, and submitted that the domestic courts had struck a fair balance between the need to ensure the consistency and reliability of the French civil-status system and the applicant’s right to respect for his gender identity and private life.

2. *Third-party submissions*

(a) **The FIDH, the LDH and Alter Corpus, jointly**

59. The interveners pointed out the inconsistency of the Court’s case-law on LGBTI rights in relation to the concepts in issue, and recommended the use of the terms “gender identity” and “sex characteristics” rather than “sexual identity” and “sex”. In situations such as in the present case, they advised adopting the terms used by those concerned – namely, in French, “*personnes intersexes*” to refer to individuals who identified with the intersex movement and “*personnes intersexuées*” to refer to individuals with intersex characteristics regardless of their identification with that movement – and abstaining from all pathologising expressions such as “sexual ambiguity”, “disorder/difference/variation in sex development”, “intersexual” and “abnormal genital development”. The interveners also asked the Court to avoid using grammatical genders when referring to such individuals and to employ gender-neutral language developed by gender minorities, linguists and French-speaking public institutions.

60. The interveners further observed that the Court examined gender-identity cases either from the standpoint of negative obligations or from that

of positive obligations – which afforded far less protection – without any clear criteria for demarcating the two. In their view, it was perfectly conceivable that States had both a positive and a negative obligation. They therefore asked the Court to review, in turn, the conditions for compliance with the negative obligations alone and then the condition common to both, namely whether a fair balance had been struck.

61. Regarding the last-mentioned point, the interveners submitted that the States’ margin of appreciation was restricted in the present case, given that a particularly important facet of an individual’s identity was at stake, that the fundamental rights of a particularly vulnerable group had been restricted, that neither an ethical issue (since no medical matter was involved) nor a “sensitive” moral issue had been raised, and that there was a clear ongoing international trend towards the recognition of intersex people, particularly in terms of civil status. They referred in that connection to “all leading human rights organisations” (the European Agency for Fundamental Rights, the European Parliament, the Commissioner for Human Rights and the Parliamentary Assembly of the Council of Europe, and the Office of the United Nations High Commissioner for Human Rights) and to “all Council of Europe member States in which the issue [had] been examined” (in particular Germany, the Netherlands, Austria and Belgium).

62. The interveners further submitted that, when weighing up the competing interests at stake, consideration should be given, *inter alia*, to the fact that since 1804 many intersex people in France had been registered as neither a man nor a woman at birth on account of what was known as hermaphroditism; to the fact that that practice had been codified in 1970 by an instruction, which had become paragraph 55 of the circular of 28 October 2011; and to the fact that research carried out with the support of the Law & Justice research project had found that, according to the national identity register, more than fifty-three individuals born between January 2013 and February 2017 had been registered in France as neither male nor female (see paragraph 25 above).

(b) OII Europe, ILGA-Europe and CIA, jointly

63. The interveners submitted that intersex people were individuals born with sex characteristics – anatomy, reproductive organs, hormonal structure and/or levels, and/or chromosomal patterns – that did not fit the typical definition of male or female, and that the term “intersex” acknowledged the fact that people with sex characteristics which fell outside those two categories existed. The interveners further stated that, according to the Office of the United Nations High Commissioner for Human Rights (“Intersex” factsheet (2015)), 1.7% of the population were born with intersex traits and that the term “disorder of sex development (DSD)” did not align with human rights standards. In addition, they emphasised the violence, discrimination and violation of the right to self-determination faced by intersex people owing

to the false notion that only two sexes existed. In particular, they submitted that that binary approach was the basis of “sex-normalising” surgery and medical procedures performed on intersex infants and children, which were still common despite being often irreversible and medically unnecessary or non-urgent. They argued that the protection of children’s fundamental rights required, as a minimum, that a non-binary gender marker should be available when registering a birth, and that intersex people should be given the option to adjust their gender marker on the basis of the principle of self-determination.

64. The interveners also produced comparative-law material, from which they concluded that there was an increasing trend in Europe towards gender self-determination, observing that this model was the norm in Iceland, Belgium, Denmark, Ireland, Norway, Malta, Portugal and ten regions of Spain, that it was partly in place in the French, Greek and Luxembourg systems, and that it was being discussed at governmental or parliamentary level in Germany, Switzerland and the Netherlands. They also concluded that there was a growing trend towards recognition of a third gender marker, pointing out that this was the case in Austria, Germany, Iceland, Belgium and the Netherlands, and that the issue was under examination in Ireland, Switzerland and Luxembourg. They further referred to the positions taken to that effect by the Parliamentary Assembly of the Council of Europe, the Council of Europe Commissioner for Human Rights, the European Parliament, the European Commission and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, and to the case-law of the institutions of the American Convention on Human Rights.

(c) The Human Rights Centre of Ghent University and the Equality Law Clinic of the Université Libre de Bruxelles, jointly

65. The interveners submitted that the case offered the Court the opportunity, for the first time, to adjudicate on the issue of States Parties’ obligation to provide for sex/gender registration beyond the male/female binary. According to them, the issue had to be assessed against its legal and societal backdrop. In that connection, they stated that between 1% and 1.7% of the population were born with one or more variations in sex characteristics and that sex was much more nuanced than the binary male/female categories, while pointing out that binary classification was reflected in the majority of legal systems. When birth certificates included a sex marker, such classification had the effect of codifying the sex of a newborn as male or female, thus conferring an aura of truth and permanence as a characteristic of the child’s identity.

66. The interveners further observed that there was a trend towards recognition of legal sex/gender registration as a matter of personal autonomy and self-determination, referring to the positions taken by the Council of

Europe Commissioner for Human Rights and the Parliamentary Assembly of the Council of Europe, to the case-law of the Inter-American Court of Human Rights and to the Yogyakarta Principles plus 10, as well as to developments in positive law in several States, including Austria, Belgium and Germany, all of whose constitutional courts had ruled to the opposite effect of the Court of Cassation in the present case. Stressing that binary registration systems increased the risk of intersex infants being subjected to “normalising” genital surgery, and that the introduction of a third marker could entail problems of its own, the interveners submitted that the best option was to allow for the possibility of non-binary gender registration for all individuals, or to abolish sex/gender registration altogether.

67. The interveners also urged the Court to extend States’ positive obligation concerning legal gender recognition under Article 8 in order to include persons whose gender identity did not match the binary options, emphasising in particular the lack of pertinence in maintaining non-binary individuals in a binary registration system. They submitted that States’ margin of appreciation needed to be narrow where the right to gender identity was in issue and given the international trend towards self-determination in procedures for legal gender recognition. According to the interveners, mandatory binary registration also needed to be examined from the standpoint of the negative obligations stemming from Article 8, since it too amounted to an unjustified interference with the right to gender autonomy. That interference, they argued, had no legitimate aim, since the argument of protecting the consistency and reliability of civil-status records made no sense when the (binary) civil status registered in the system failed to correspond to the complex reality of non-binary persons. They submitted that the interference was disproportionate in any event.

(d) Chrétiens Carrefour Inclusif and the Saint-Guillaume Parish of Strasbourg, jointly

68. The interveners submitted that Christian religious texts and Christian tradition did not preclude recognition of a neutral sex. They thus criticised as flawed and invalid the argument that the right to such a marker on civil-status documents should be denied because of alleged fundamental anthropological and religious criteria underpinning society. In their view, the male/female binary was a social construct that was neither essential nor insurmountable and was contrary to religious texts.

3. The Court’s assessment

(a) Whether the case concerns a negative obligation or a positive obligation

69. The Court, like the Government, considers it appropriate to examine the case from the standpoint of the positive obligation for the States Parties to the Convention to secure to individuals within their jurisdiction effective

respect for their private life, rather than from the standpoint of their obligation not to interfere with that right. It observes that the applicant's complaint under Article 8 did not concern an act against him by a public authority but rather a shortcoming in French law which had allegedly given rise to a situation breaching his right to respect for his private life.

70. In this connection, the Court points out, *mutatis mutandis*, that it followed a similar approach in several cases concerning the gender identity of transgender persons (see *X and Y v. Romania*, cited above, § 145; *Y.T. v. Bulgaria*, cited above, § 61; *X v. the former Yugoslav Republic of Macedonia*, no. 29683/16, § 65, 17 January 2019; *S.V. v. Italy*, no. 55216/08, § 60, 11 October 2018; *A.P., Garçon and Nicot*, cited above, § 99; *Hämäläinen*, cited above, § 64; *Christine Goodwin*, cited above, § 71; and *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, § 51, *Reports of Judgments and Decisions* 1998-V).

(b) General principles applicable to assessing a State's positive obligations

71. The principles applicable to assessing a State's positive and negative obligations under Article 8 of the Convention are similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance (see, for example, *Hämäläinen*, cited above, § 65, and the authorities cited therein).

72. The notion of "respect" in Article 8 is not clear cut, especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Nonetheless, certain factors have been considered relevant for the assessment of the content of those positive obligations on States. Some of them relate to the applicant. They concern the importance of the interest at stake and whether "fundamental values" or "essential aspects" of private life are in issue, or the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8. Other factors relate to the impact of the alleged positive obligation at stake on the State concerned. The question here is whether the alleged obligation is narrow and precise or broad and indeterminate, or about the extent of any burden the obligation would impose on the State (see, for example, *Hämäläinen*, cited above, § 66, and the authorities cited therein).

73. In implementing their positive obligations under Article 8, the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is

no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. There will also usually be a wide margin of appreciation if the State is required to strike a balance between competing private and public interests or Convention rights (see, for example, *Hämäläinen*, cited above, § 67, and the authorities cited therein).

74. It is important to emphasise the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see, for example, *Maurice v. France* [GC], no. 11810/03, § 117, ECHR 2005-IX).

(c) Application of the general principles to the present case

(i) The national margin of appreciation

75. The Court first notes that an essential aspect of an individual's intimate identity – namely gender identity – is at the very core of the present case, since the applicant complained of a discordance between his biological identity and his legal identity. In this connection, the Court has previously observed in other contexts that “the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8” (see *A.P., Garçon and Nicot*, cited above, § 123; *Schlumpf v. Switzerland*, no. 29002/06, § 100, 8 January 2009; *Van Kück v. Germany*, no. 35968/97, § 69, ECHR 2003-VII; and *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III) and that the right to gender identity and personal development is a fundamental aspect of the right to respect for private life (see *A.P., Garçon and Nicot*, § 123, and *Van Kück*, § 75, both cited above).

76. These factors speak in favour of a narrow margin of appreciation (compare, *mutatis mutandis*, *A.P., Garçon and Nicot*, cited above, §§ 122-25).

77. The Court also observes, however, that the matters in dispute concern a debatable – if not controversial – social issue on which opinions within a democratic society may differ widely. Furthermore, it notes that the comparative-law survey that it has conducted, covering thirty-seven States Parties other than France, shows that the vast majority of these States provide for gender specification on birth certificates or identity documents, with no possibility of opting for a gender marker other than “male” or “female” (see paragraphs 34-37 above). Although it appears that the issue of non-binary gender recognition has recently been or is currently under consideration in

certain States (see paragraph 38 above), there is no European consensus on the matter at the date of the present judgment.

78. In addition, the Court acknowledges that public interests are at stake. It notes in this connection that along with the need, as highlighted by the Court of Cassation, to preserve the social and legal arrangements in place in France, the Government submitted that there was a need to safeguard the principle of the inalienability of civil status and to ensure the consistency and reliability of civil-status documents. The Court reiterates that it fully accepts that safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and, more generally, ensuring legal certainty, are in the general interest (see, in particular, *A.P., Garçon and Nicot*, cited above, § 132).

79. Lastly, in determining the width of the respondent State's margin of appreciation, regard must be had to the fact that positive obligations are in issue in the present case and that, accordingly, it is not a question of assessing whether an interference with a right or freedom was "necessary in a democratic society" but rather of taking measures to ensure effective compliance with those obligations in the light of the domestic context.

80. Having regard to all the foregoing considerations, the Court concludes that, in the circumstances of the present case, the respondent State enjoyed a widened margin of appreciation in implementing its positive obligation to secure to the applicant effective respect for his private life.

(ii) Balancing the interests at stake

81. The issue which arises in the present case is whether or not, in refusing to grant the applicant's request for a change in his civil status, on the grounds of the principle of the inalienability of civil status and the need to safeguard the consistency and reliability of civil-status documents and the social and legal arrangements in place in France, the respondent State, given its widened margin of appreciation, failed to fulfil its positive obligation to secure to the applicant effective respect for his private life. In this connection, the Court must consider whether, having regard to the reasons given by the domestic courts and those put forward by the Government, the respondent State adequately balanced the public interest and the applicant's interests.

82. As regards the applicant's interests, on the one hand, the Court notes that, as indicated above, there is a discordance between his biological identity, for which he claims recognition, and the legal identity as a male that has been assigned to him (see paragraphs 42-43 above).

83. The Court does not doubt that this discordance between the applicant's biological identity and his legal identity is such as to cause him suffering and anxiety, as can be seen not only from his submissions but also from the witness statements he produced. It takes particular note of the statement given by the applicant's psychotherapist who, referring to an "identity trauma", stated that the applicant had "always been forced to hide

his physiological reality from the other members of the community and to live sheltered behind a borrowed identity”, that he suffered from “having to pretend to be a man” and that for that reason he had “always lived with the unspeakable suffering of being excluded, of never belonging in our society as what he is, a third gender” (see paragraph 11 above).

84. Regarding the public interest relied on by the Government, on the other hand, the Court notes that the Court of Cassation found that the binary nature of sex markers on civil-status documents was a cornerstone of the social and legal arrangements in place in France and that recognition by the courts of a “neutral” sex would have far-reaching consequences for the rules of French law – which were constructed on the basis of the sex binary – and would entail multiple coordinating legislative amendments (see paragraph 16 above). The Government also referred to the need to safeguard the principle of the inalienability of civil status and to ensure the consistency and reliability of civil-status documents (see paragraph 57 above).

85. With regard to the balancing of the public interest and the applicant’s interests, the Court first observes that the Orléans Court of Appeal, having noted that biologically the applicant had been sexually ambiguous since birth, pointed out that assigning the male or female sex to newborns who displayed such ambiguity, in contradiction with medical findings that sex could not be determined unequivocally, exposed them to the risk of a conflict between their assigned sex and their gender identity as experienced in adulthood. The Court of Appeal further stated that the fair balance required by Article 8 of the Convention “between the protection of civil status, which [was] a matter of public policy, and respect for the private life of individuals with a variation in sex development” entailed that such individuals should be allowed either to have their civil status indicate no sex category or to have the sex assigned to them changed. It specified, however, that that was only the case where the assigned sex did “not correspond to their physical appearance and their social behaviour”. It went on to refuse to grant the applicant’s request on the grounds that that final condition had not been fulfilled, after observing that his physical appearance was that of a male, that he was married and that he and his wife had adopted a child.

86. Second, the Court notes that the Orléans Court of Appeal held “moreover” that, as French law stood at the time, granting the applicant’s request would be tantamount to recognising the existence of a sex category other than “male” or “female”, which would be a matter for assessment by the legislature rather than by the courts, given that such recognition raised sensitive biological, moral and ethical questions and that “individuals with variations in sex development need[ed] to be protected from stigmatisation while minors, including stigmatisation that could result from their being assigned to a new category”.

87. For its part, the Court of Cassation, as indicated above, specified that the binary nature of sex markers on civil-status documents pursued a

legitimate aim, in that it was necessary for, and a cornerstone of, the social and legal arrangements in place and that recognition by the courts of a “neutral” sex would have far-reaching consequences for the rules of French law, which were constructed on the basis of the sex binary, and would entail multiple coordinating legislative amendments. It went on to find that the Court of Appeal had rightly concluded from the fact that the applicant was regarded by others as having the appearance and social behaviour of a male individual, in line with the sex marker on his birth certificate, that the interference with his right to respect for his private life was not disproportionate to the legitimate aim pursued.

88. The Court cannot accept this reasoning, since it amounts to prioritising physical and social appearance over the applicant’s biological intersex reality. In doing so, it creates a confusion between the concept of identity and the concept of appearance, whereas an individual’s identity is an element of private life and, as such, cannot be reduced to the appearance that that person is regarded as having by others. In the present case, such reasoning also ignores the reality of the applicant’s life experience: having been assigned the male sex at birth and having thus been regarded socially as male, he had no other option, in the words of his psychotherapist, but “to pretend to be a man”, and the partial, delayed masculinisation of his physical appearance was not the result of his own choice but arose from the fact that he suffered from osteoporosis and, in view of the fact he had been assigned the male sex, was prescribed a testosterone-based treatment intended for men (see paragraph 5 above).

89. Nonetheless, it is apparent from the other reasons given by the domestic courts that they fully acknowledged that the fact of assigning the male or female sex to individuals, such as the applicant, who were biologically intersex affected their right to respect for their private life. Although those authorities found that, as French law stood at the time, a court could not authorise intersex people to have their civil status registered under a category other than “male” or “female”, as the applicant had requested, this was on account of the importance of the public-interest considerations at stake. In this connection, the Court acknowledges the relevance of the reasons put forward by the national authorities concerning respect for the principle of the inalienability of civil status and the need to safeguard the consistency and reliability of civil-status documents and the social and legal arrangements in place in France (see, in particular, *A.P., Garçon and Nicot*, cited above, § 132). The Court also takes into consideration the Court of Cassation’s reasoning to the effect that recognition by the courts of a “neutral” sex would have far-reaching consequences for the rules of French law, which are constructed on the basis of the sex binary, and would entail multiple coordinating legislative amendments. It notes in this connection that the Senate information report entitled “Variations in sex development: breaking a taboo, combating stigma and exclusion”, which examines, in particular, “the

issues and challenges that would arise for the French legal system if a ‘neutral’ or ‘indeterminate’ sex were recognised”, points out that such recognition would have far-reaching legal consequences for the laws governing family, legal parent-child relationships, procreation and gender equality. The report concludes that while it is essential to ensure that intersex people can enjoy the right to respect for their private life, any reform of their legal status should be preceded by careful reflection (see paragraph 24 above). The Court also notes that the Orléans Court of Appeal found that granting the applicant’s request would be tantamount to recognising the existence of another sex category and therefore to exercising a law-making function, which in principle fell within the remit of the legislature and not of the judiciary. Respect for the principle of the separation of powers, without which there is no democracy, was therefore central to the domestic courts’ considerations.

90. The Court, for its part, considers that it too is required to exercise restraint in the present case. It acknowledges that the applicant stated that he was not seeking the enshrinement of a general right to recognition of a third gender but merely the rectification of his civil status so that it would reflect the reality of his identity (see paragraph 50 above). However, if the Court were to uphold his claim and find that the refusal to insert the sex marker “neutral” or “intersex” on his birth certificate instead of “male” amounted to a violation of Article 8, this would necessarily mean that the respondent State would be required, in order to discharge its obligations under Article 46 of the Convention, to amend its domestic legislation accordingly. As the Court has reiterated in paragraph 74 above, in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight. This is particularly true where, as in the present case, the question constitutes a choice of society (compare, *mutatis mutandis*, *S.A.S. v. France* [GC], no. 43835/11, §§ 153-54, ECHR 2014 (extracts)).

91. Particularly in the absence of a European consensus in this area, it is therefore appropriate to leave it to the respondent State to determine at what speed and to what extent it can meet the demands of intersex people, such as the applicant, with regard to civil status, giving due consideration to the difficult situation in which they find themselves in terms of the right to respect for their private life, especially on account of the discrepancy between the legal framework and their biological reality. In this connection, it reiterates that the Convention is a living instrument which has always to be interpreted and applied in the light of current circumstances, and that the need for appropriate legal measures should therefore be kept under review having regard particularly to changes in society and attitudes (compare *Rees v. the United Kingdom*, 17 October 1986, § 47, Series A no. 106).

92. In the light of all the foregoing considerations, the Court concludes that the respondent State, regard being had to the margin of appreciation it

enjoyed, did not fail to comply with its positive obligation to secure to the applicant effective respect for his private life. Accordingly, there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by six votes to one, that there has been no violation of Article 8 of the Convention.

Done in French, and notified in writing on 31 January 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik
Registrar

Síofra O’Leary
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Mits;
- (b) dissenting opinion of Judge Šimáčková.

S.O.L.
V.S.

CONCURRING OPINION OF JUDGE MITS

1. I concur with the majority that, at this moment in time and on the basis of the facts of the case, the Court cannot find a violation of Article 8 of the Convention. However, the present case points to a discordance between the legal framework and biological reality which merits further comment.

2. What the applicant requested, in essence, was the recognition of a third option in addition to being registered as either male or female. The applicant is an “intersex” or “gender-neutral” person, who has been physically attested as such by medical certificates spanning from birth until the age of 63, when the applicant started legal proceedings. The applicant also claims to be “psychologically” and “socially” intersex. The French legal system is based on a binary model and, while it allows sex to be medically determined within three months if it is uncertain on the day the birth certificate is drawn up, either the male or the female gender must be entered on the certificate.

3. In thirty-one Council of Europe member States, as in France, a third option does not exist. Conversely, it is possible to acquire “non-recognition” of the male or female gender on records in some form or another in six of the thirty-seven member States surveyed (including Armenia). In at least five countries the possibility of non-binary gender recognition is being studied by the authorities (see paragraphs 34-38 of the judgment). Thus, the situation in France reflects that found in the vast majority of the member States.

4. When deciding on the margin of appreciation afforded to a State in relation to a specific question, one of the elements to be taken into account is whether or not a consensus exists among the member States. This is of particular importance when the Convention is interpreted so as to impose positive obligations on States in a new area. As a rule, the Court acknowledges the existence of a “wide” margin of appreciation with regard to delicate moral and ethical questions on which there is no consensus at European level (such as a combination of adoption, medically assisted reproduction and surrogate motherhood – see *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, §§ 182 and 194, 24 January 2017). When there is a clear trend among the member States and a European consensus is emerging, the States enjoy a margin of appreciation in the timing of the legislative changes (for example, in relation to the legal recognition of same-sex couples a decade ago – see *Schalk and Kopf v. Austria*, no. 30141/04, § 105, ECHR 2010). At the same time, when an essential aspect of an individual’s intimate identity is at stake, such as gender identity in the context of forced sterilisation, the margin of appreciation is narrow (see *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, § 123, 6 April 2017).

5. In the present case, the Court has acknowledged that the question of gender identity for the applicant involves an essential aspect of individual intimate identity (see paragraphs 75 and 83 of the judgment). When this

question is juxtaposed, however, with the moral and ethical nature of the issues involved and the complete lack of a European consensus, the margin of appreciation which France enjoys at present has been found by the Court to be “widened”, but not “wide” (see paragraph 80 of the judgment). Even though there is an undeniable trend among the member States towards tackling the question at issue, its relatively early stage, and the number of States – six – currently providing for the possibility of registering gender in a different way from entering a male or female marker, do not allow a different conclusion from that of the Court to be reached in respect of the margin of appreciation.

6. The fact that States only recently started paying attention to the question of a third option is surprising. What are at issue here are “intersex” or “gender-neutral” persons whose biological characteristics are medically attested. According to experts, between 0.05% and 1.7% of the world’s population are born with intersex traits (see paragraph 33 of the judgment). The vast majority of legal systems in States within the Council of Europe and worldwide ignore the biological reality and the essential aspect of the gender identity of those people.

7. Perhaps this discordance between the legal framework and the biological reality is so acute that it may trigger domestic developments through judiciaries rather than parliaments. In 2017 the German Federal Constitutional Court found that the system in place at the relevant time for registering gender at birth violated individuals’ constitutional rights and amounted to discrimination on grounds of sex (see paragraph 37 of the judgment). In 2018 the Austrian Constitutional Court interpreted constitutional provisions to allow a third option besides male or female gender to be registered. The French courts took a different approach, appealing to the powers of the legislature in this matter (see paragraph 89 of the judgment).

8. The Government and the courts strongly emphasised the public-interest aspect, namely the fact that French law is based on the gender binary and that recognition of a third option would have far-reaching consequences for the structural role of civil status and various other fields of law (see paragraphs 57, 78, 84, 87 and 89 of the judgment). The Court has recognised that these are matters of public interest (see paragraph 78). It must be added, however, that it is difficult to see how this argument on its own could outweigh what is at stake for the individual in a situation like that of the applicant. Instead, it speaks in support of legislative review and timing.

9. The Court has concluded that it must be left to France to determine at what speed and to what extent the demands of such persons as the applicant must be addressed, taking due account of the discordance between the legal framework and the biological reality (see paragraph 91 of the judgment). As the example of legal recognition of same-sex couples demonstrates, subject to developments in the member States, there will arrive a point in time when

none of the public-interest grounds relied on can prevail over the need to ensure that applicants' rights are adequately recognised and protected by law (see *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, §§ 175, 187 and 224, 17 January 2023). Though the situations in *Fedotova and Others* and in the present case are not identical, the discordance between the legal framework and the biological reality arguably calls for immediate action.

DISSENTING OPINION OF JUDGE ŠIMÁČKOVÁ

(Translation)

1. I regret that I am unable to subscribe to the majority's finding that there has been no violation of the applicant's rights. In my opinion, the specific situation of a specific human being – in this instance, the applicant and his living conditions – cannot be disregarded. The present case concerned the humiliation and physical suffering of a human being who was born with a body that has neither female nor male sex characteristics. For that reason, and in order to make his body appear more like a male body, the applicant was put on medication. And the State, through its regulations, impelled him to say that he was a man, even though neither his body nor his feelings corresponded to that situation. And what were the State's arguments? You were not born a man or a woman, but the law does not allow this, so you have to adapt your body (even if it causes you suffering) and your soul (even if you feel humiliated) to fit the laws passed by the State. I consider this interference to be so serious that it amounts to a violation of the applicant's right to respect for his private life.

2. I fully understand the reasons which led my colleagues not to accept the applicant's claims. In particular, I appreciate the argument that there is no European consensus on the matter and that no clear trend can be discerned in favour of non-binary people, and I therefore recognise the more general concerns about the legitimacy of such a decision. The argument that an international court has a duty of discretion, which reflects the domestic reasoning based on the separation of powers, is also very potent.

3. As regards the conclusion that it is not for the Court but for the legislature to regulate the rights of intersex people, my position is that greater consideration should be given to the specific personal history of the applicant and to the fact that the issue raised is a rare one and does not concern such a large group of people as to have any political relevance. It should also be emphasised that what was sought in the present case was not a comprehensive solution to the non-binary issue, but merely an answer to the question whether the public authorities had an obligation to respect a naturally created biological reality and the psychological well-being of a specific intersex individual.

4. Although the main argument in favour of the widely cited need for the sex binary in the legal system is that it aligns with nature and tradition, the present case shows precisely that such an alignment does not always exist. The applicant was naturally created as a person whose biological and psychological characteristics do not allow identification as either a man or a woman. The tradition of recognising intersex people goes back even to the distant past. In ancient Greek mythology, for example, Hermaphroditus was

the son of Hermes (Mercury in Roman mythology) and Aphrodite (Venus), and is also referred to by Ovid. In the twelfth century the *Decretum Gratiani* mentions the case of hermaphrodites. In the seventeenth century the English jurist and judge Sir Edward Coke wrote in his *Institutes of the Lawes of England* on the succession rights of so-called hermaphrodites or *androgyni*. There are famous intersex people in history who have addressed this issue, such as the Vietnamese general Lê Văn Duyệt (eighteenth/nineteenth centuries), who helped to unite Vietnam; Gottlieb Götlich, known in nineteenth-century Germany as a travelling medical case study; and Levi Suydam, an intersex person in the nineteenth century United States whose eligibility to vote in male-only elections was a topic of debate. In French philosophy the rights of intersex people have been dealt with by Michel Foucault (see *Abnormal: Lectures at the Collège de France, 1974-1975*, published in the original French in 1999). There is thus a historical tradition of recognising the needs, interests and rights of intersex people. Recently, we have been able to learn about the sad fate of people who were forced to conform to a binary perception of gender, even though neither their body nor their soul fitted that mould (see, for example, Davis, G., *Contesting Intersex: The Dubious Diagnosis*, New York University Press, 2015).

5. The present case originated not in an unnatural act but, on the contrary, in a mere reaction to reality as it was created – that of a person who possesses particular biological characteristics but who, at the same time, cannot, even psychologically, tolerate being placed in a single “box” built by law.

6. In the present case the Court should have confined itself to addressing the issue arising from the applicant’s specific situation in a specific country and the specific legal solution and arguments put forward by that country.

7. This narrower approach could be justified by an additional argument. In French law, I note that there is a possibility, for a short period, of indicating no sex on the birth certificate (see paragraphs 18-20 of the judgment). French law therefore accepts, to that limited extent, that there are individuals who do not have either sex indicated on their birth certificates.

8. The obligation to disclose a particular sex and gender touches on a central and sensitive aspect of the personal life of the applicant as a human being and makes this personal characteristic highly visible to the public. Consequently, the State must also ensure that the information concerning sex reflects people’s individual sex and gender identity, with their specific biological and psychological characteristics. In addition, in the case of intersex people, unnecessary suffering may still be experienced in childhood on account of numerous operations and constant medication with no real benefit for their quality of life (as we were recently informed in the context of *M v. France* (dec.), no. 42821/18, § 62, 26 April 2022). To prevent such ill-treatment and protect people from the practices described, intersexuality must therefore be recognised as an official option.

9. The legal argument centres on the question whether issuing intersex individuals with documents that correspond to their body and their psychological sense of self (that is, documents that do not lay emphasis on their identification as male or female) is a positive obligation for the State or whether, conversely, insisting that individuals have false documents that reflect neither reality nor the right to self-determination is a violation of a negative obligation for the State. Even considering that the binary classification underpinning the legal system entails mutilating surgery in childhood and lifelong medication (an obligation to take testosterone-based treatment caused significant damage to the applicant's health), the duty to recognise gender neutrality must be regarded in the present case as a duty not to interfere with the private life of the individual concerned (as in the case of transgender people). It is precisely because I do not share the conviction that the State here has a positive obligation, but instead I see it as a negative obligation not to interfere, that I likewise cannot agree with the conclusion that the State has a wide margin of appreciation in the present case.

10. In conclusion, I consider that in the present case the Court should not have allowed the perpetuation of the suffering of an individual whom the State has forced into a box which corresponds to neither his body nor his soul.