



The authorities' refusal to replace the term "male" by the term "neutral" or "intersex" on the applicant's birth certificate did not breach Article 8 of the Convention

In today's **Chamber judgment**¹ in the case of [Y v. France](#) (application no. 76888/17) the European Court of Human Rights held, by six votes to one, that there had been:

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The applicant, who is a biologically intersex person, complains about the domestic courts' refusal to grant his request to have the word "neutral" or "intersex" entered on his birth certificate instead of "male".

In examining the case in the light of the respondent State's positive obligation to secure to the applicant effective respect for his private life, the Court ascertained whether the general interest had been duly weighed against the applicant's interests.

The Court noted, firstly, that an essential aspect of individual intimate identity was central to the present case, in that gender identity was in issue, and acknowledged that the discrepancy between the applicant's biological identity and his legal identity was liable to cause him suffering and anxiety.

The Court then acknowledged that the arguments put forward by the national authorities in refusing the applicant's request, based on respect for the principle of the inalienability of civil status and the need to preserve the consistency and reliability of civil status records and of the social and legal arrangements in place in France, were relevant. It also took into consideration the Court of Cassation's reasoning to the effect that judicial recognition of a "neutral" gender would have far-reaching consequences for the rules of French law, constructed on the basis of two genders, and would imply multiple coordinating legislative amendments.

After noting that the Orléans Court of Appeal had held that granting the applicant's request would amount to recognising the existence of another gender category and therefore to exercising a normative function, which was in principle a matter for the legislature and not for the judiciary, the Court pointed out that respect for the principle of the separation of powers, without which there was no democracy, had thus been at the heart of the domestic courts' considerations.

Recognising that although the applicant stated that he was not asking for the enshrinement of a general right to recognition of a third gender, but only for rectification of his civil status, the Court noted that if it were to uphold the applicant's claim 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 national law to that effect; in consequence, the Court considered that it too was required to exercise restraint.

In matters of general policy on which opinions within a democratic society could reasonably differ widely, a special weight had to be accorded to the role of the domestic policy-maker. This was particularly true where, as in the present case, the question was one on which society would have to

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

make a choice. In the absence of a European consensus in this area, it was therefore appropriate to leave it to the respondent State to determine at what speed and to what extent it could meet the demands of intersex persons, such as the applicant, with regard to civil status, giving due consideration to the difficult situation in which they found themselves in terms of the right to respect for private life, especially the discrepancy between the legal position and their biological reality.

The Court concluded that, having regard to the discretion (“margin of appreciation”) enjoyed by the respondent State, France had not failed in its positive obligation to secure effective respect for the applicant’s private life; it followed that there had been no violation of Article 8 of the Convention.

A legal summary of this case will be available in the Court’s database HUDOC ([link](#)).

Principal facts

The applicant is a French national who was born in 1951 and lives in Strasbourg (France). He is married, and he and his wife have an adopted child.

The applicant, whose birth certificate indicates that he is “male”, states that he is an intersex person. He submitted medical certificates showing that his biological intersex status was established shortly after his birth and that it had not changed when, at the age of 63, he instituted proceedings at national level requesting that, in the section indicating gender on his birth certificate, the term “male” be replaced by the term “neutral” or, if that were impossible, by the term “intersex”.

In addition to his “biological intersexuality”, the applicant described his “psychological intersexuality” and his “social intersexuality”. He stated that in spite of the indication on his birth certificate that he was male, 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.

By an application of 12 January 2015, the applicant asked the public prosecutor at the Tours *tribunal de grande instance* to request the president of that court to order that the term “male” on the applicant’s birth certificate be replaced by the term “neutral” or, if that were not possible, “intersex”. The president of the Tours *tribunal de grande instance* found for the applicant in a judgment of 20 August 2015.

In a judgment of 22 March 2016, and ruling on an appeal by the Principal Public Prosecutor at the Tours *tribunal de grande instance*, the Orléans Court of Appeal set aside the judgment of 20 August 2015. On 4 May 2017 the Court of Cassation dismissed an appeal on points of law lodged by the applicant.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life) of the Convention, the applicant complained about the refusal to grant his request that the gender indication “neutral” or intersex” be inserted on his birth certificate in place of the term “male”.

The application was lodged with the European Court of Human Rights on 31 October 2017.

Judgment was given by a Chamber of seven judges, composed as follows:

Síofra O’Leary (Ireland), *President*,
Arntfinn Bårdsen (Norway),
Mārtiņš Mits (Latvia),
Stéphanie Mourou-Vikström (Monaco),
Lado Chanturia (Georgia),
Mattias Guyomar (France),

Kateřina Šimáčková (the Czech Republic),

and also Victor Soloveytchik, *Section Registrar*.

Decision of the Court

Article 8

The issue which arose in this case was whether, in refusing the applicant's request for a change in his civil status on the grounds of the need to safeguard the principle of the inalienability of civil status and to ensure the consistency and reliability of civil-status records and the social and legal organisation of the French system, the respondent State had fulfilled its positive obligation to secure the applicant's right to effective respect for his private life.

The Court noted, firstly, that an essential aspect of individual intimate identity was central to the present case, in that gender identity was in issue, and acknowledged that the discrepancy between the applicant's biological identity and his legal identity was liable to cause him suffering and anxiety.

The Court then considered whether, having regard to the reasons given by the national courts and those put forward by the Government, the respondent State had adequately balanced the general interest and the applicant's interests.

With regard to the balancing of the general interest and the applicant's interests, the Court noted first that the Orléans Court of Appeal had pointed out that, biologically, the applicant had shown ambiguous sexual characteristics since birth, before emphasising that attributing male or female gender to a new-born child who showed such ambiguity ran the risk of creating a conflict between this decision and his or her sexual identity as experienced when an adult. It added that the fair balance required by Article 8 of the Convention "between the protection of the status of individuals, which was a matter of public policy, and respect for the private life of individuals who had a variation of sexual development" meant that such persons ought to be able to have the opportunity either to ensure that their civil status did not mention any gender category, or that the gender that had been assigned to them could be changed. However, it had specified that this was only the case where the assigned sex "did not correspond to their physical appearance and their social behaviour". It had then dismissed the applicant's request, on the grounds that this last condition had not been fulfilled, in that his physical appearance was that of a male, that he had married and that he and his wife had adopted a child.

Secondly, the Court noted that the Orléans Court of Appeal had held "furthermore" that as French law currently stood, granting the applicant's request would have been tantamount to recognising the existence of another gender category in addition to "male" and "female", which was a matter for the legislature's assessment rather than for the courts, given that such recognition raised sensitive biological, moral and ethical questions.

The Court of Cassation, for its part, had specified that the dual system for referring to gender in civil status documents pursued a legitimate aim, necessary for social and legal arrangements, and that recognition by a judge of a "neutral sender" would have far-reaching repercussions for the rules of French law and would imply numerous legislative amendments. It had then held that the court of appeal had been correct in deducing from the fact that the applicant was perceived by others as having the appearance and social behaviour of a male person, corresponding to the term used in his birth certificate, that the breach of his right to respect for private life had not been disproportionate to the legitimate aim pursued.

The Court could not accept this reasoning, in so far as it amounted to giving priority to physical and social appearance over the applicant's biological intersex reality. As an element of private life, an individual's identity could not be reduced to the appearance that this person was perceived as

having by other persons. Nonetheless, it appeared from the other grounds given by the national courts that they had fully acknowledged that the fact of assigning male or female gender to persons, such as the applicant, who were biologically intersex, affected their right to respect for their private life. Although they had found that, as French law currently stood, it was not possible for a judge to authorise intersex persons to be registered in civil status documents under a category other than “male” or “female”, this had been on account of the importance of the general-interest stakes in issue.

The Court acknowledged that the arguments put forward by the national authorities, concerning respect for the principle of the inalienability of civil status and the need to preserve the consistency and reliability of civil status records and of the social and legal arrangements in place in France, were relevant. It also took into consideration the Court of Cassation’s reasoning to the effect that judicial recognition of a “neutral” gender would have far-reaching consequences for the rules of French law, constructed on the basis of two genders, and would imply multiple coordinating legislative amendments.

The Court also noted that the Orléans Court of Appeal had held that granting the applicant’s request would be tantamount to recognising the existence of another gender category and therefore to exercising a normative function, which was in principle a matter for the legislature and not for the judiciary. Respect for the principle of the separation of powers, without which there was no democracy, had thus been at the heart of the domestic courts’ considerations.

The Court considered that it too was required to exercise restraint in the present case. It recognised that, although the applicant stated that he was not asking for the enshrinement of a general right to recognition of a third gender, but only for rectification of his civil status so that it would reflect the reality of his identity, if it were to uphold his claim and find that the refusal to insert the term “neutral” or “intersex” on his birth certificate instead of “male” had 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 national law accordingly. However, a special weight had to be accorded to the role of the domestic policy-maker in matters of general policy on which opinions within a democratic society could reasonably differ widely. This was particularly true where, as in the present case, the question was one on which society would have to make a choice.

In addition, in the absence of a European consensus in this area, it was appropriate to leave it to the respondent State to determine at what speed and to what extent it could meet the demands of intersex persons, such as the applicant, with regard to civil status, giving due consideration to the difficult situation in which they found themselves in terms of the right to respect for private life. In this connection, it reiterated that the Convention was a living instrument which had 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.

Having regard to the discretion (“margin of appreciation”) enjoyed by the respondent State, the Court concluded that France had not failed in its positive obligation to secure effective respect for the applicant’s private life; it followed that there had been no violation of Article 8 of the Convention.

Separate opinions

Judge Mits expressed a concurring opinion, and Judge Šimáčková expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in French.

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Press contacts

echrpess@echr.coe.int | tel.: +33 3 90 21 42 08

We would encourage journalists to send their enquiries via email.

Denis Lambert (tel.: + 33 3 90 21 41 09)

Tracey Turner-Tretz (tel.: + 33 3 88 41 35 30)

Inci Ertekin (tel.: + 33 3 90 21 55 30)

Neil Connolly (tel.: + 33 3 90 21 48 05)

Jane Swift (tel.: + 33 3 88 41 29 04)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.