

**Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the right to privacy; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; and the Special Rapporteur on violence against women, its causes and consequences**

REFERENCE:  
OL BGR 1/2021

27 September 2021

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the right to privacy; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; and Special Rapporteur on violence against women, its causes and consequences, pursuant to Human Rights Council resolutions 42/16, 46/16, 41/18 and 41/17.

The purpose of this letter is to set out the core obligations that States have under international human rights law in regard to trans and gender diverse people's right to legal gender recognition and provide the current state of international human rights law in relation to "sex" and "gender".

This letter is submitted in the context of a request from the Supreme Court of Cassation to the Constitutional Court for interpretation of "sex" under the Constitution, and the assessment as to whether trans and gender diverse persons have access to legal gender recognition.

The request was made with a view to avoid contradictory case-law on the matter as there are currently two streams of case-law in regard to the gender marker change under the Civil Registration Act. According to the first stream, the State must respect the right to self-determination of trans and gender diverse persons and should provide access to legal gender recognition, in line with Article 8 of the European Convention on Human Rights (right to respect for private and family life). According to the second stream of case-law, the Bulgarian Constitution only anticipates the biological characteristics of "sex", and therefore, does not regulate the prerequisites for the change of gender marker, nor the consequences of such a change.

*States' obligations under international human rights law*

*Gender in international human rights law*

In his report to the Human Rights Council, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity analyses the current state of international human rights law in relation to the recognition of gender and gender identity and expression (A/HRC/47/27).

He explains that analysis of the sources of international human rights law reveals a robust *corpus iuris* in which gender is the term used to describe the sociocultural constructs that assign roles, behaviours, forms of expression, activities and attributes according to the meaning given to biological sex characteristics. Such *corpus juris* includes cases and doctrinal work by international and regional human

rights bodies, including United Nations human rights mechanisms (Ibid., para. 17), the European Court of Human Rights (Ibid., para. 18), the European Court of Justice (Ibid., para. 19), the Inter-American Court of Human Rights (Ibid., para. 20), the Inter-American Commission on Human Rights (Ibid., para.20), and the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights (Ibid., para. 22)

Gender is used in international human rights law as concerning human persons who live in gendered societies, among preconceptions and power hierarchies that will create a context for the development of their personal identities and social interactions (Ibid, para. 14). Under this definition, gender and sex do not substitute each other, and gender identity and gender expression are inextricably linked to them (Ibid., para. 13). Also, nothing in the body of international law suggests that only trans or gender diverse persons have a gender identity. The evidence leads to the conclusion that all human beings live in gendered societies traversed by power hierarchies and preconception (Ibid., para.15).

In conclusion, he recognizes two fundamental duties of the State: (a) to prevent, prosecute and punish violence and discrimination on the basis of sexual orientation, gender identity and gender expression and, if relevant, provide reparation to the victims; and (b) to recognize every human being's freedom to determine the confines of their existence, including their gender identity and expression (Ibid., para. para. 77).

#### *Right to legal gender recognition*

International human rights acknowledge that everyone has the right to recognition as a person before the law, including persons of diverse gender identities. Such human treaties include article 6 of the Universal Declaration of Human Rights, article 16 of the International Covenant on Civil and Political Rights (ICCPR: ratified by Bulgaria on 21 September 1970), article 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW: ratified by Bulgaria on 8 February 1982), article 12 of the Convention on the Rights of Persons with Disabilities (ratified by Bulgaria on 22 March 2012), and article 8 of the Convention on the Rights to Child (CRC: ratified by Bulgaria on 3 June 1991). This right also encompasses the State obligation to protect, respect and fulfil the human rights of all persons regardless of their gender identity, including those who have non-binary gender identities.

The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity expressed concerns that trans and gender-diverse persons whose identity is not adequately recognized suffer denial of the right to health; discrimination, exclusion and bullying in education contexts; discrimination in employment, housing and access to social security; violations of the rights of the child; and arbitrary restrictions on the rights to freedom of expression, peaceful assembly and association, the right to freedom of movement and residence, and the right to leave any country including one's own (A/73/152, para. 23). Likewise, the Independent Expert has noted that trans persons are particularly vulnerable to human rights violations, including violence, when their name and sex details in official documents do not match their gender identity or expression; and that may make them more vulnerable when trying to access emergency care or services in emergencies, such as natural disasters or humanitarian crises (A/HRC/38/43, para.

43). In addition, he noted that equal recognition before the law is a basic element in a well-functioning framework for protection from arbitrary arrest and detention, torture and ill-treatment, as it is well established that in all situations of deprivation of liberty, the proper identification of the individual is the first guarantee of State accountability (A/73/152, para. 24).

Similarly, the United Nations High Commissioner for Human Rights has drawn attention to the fact that transgender persons face multiple challenges due to the lack of legal recognition of their preferred gender (including a change in recorded sex and first name on State-issued identity documents). Such challenges include employment and housing, applying for bank credit or State benefits, or when travelling abroad (A/HRC/29/23, para 69).

In her report on Bulgaria, the Special Rapporteur on violence against women reminded of directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime that all EU member States, including Bulgaria, were obliged to transpose into domestic legislation. The directive defines gender-based violence as “violence that is directed against a person because of that person’s gender, gender identity or gender expression”, and provides that victims must be treated without discrimination of any kind on any ground such as gender, gender expression, gender identity and sexual orientation. In her recommendations, the Special Rapporteur urged Bulgaria to expand the scope of the Protection against Discrimination Act to explicitly include gender identity as a ground of discrimination (A/HRC/44/52/Add.1, paras. 11 and 65.m).

*Gender identity; legal recognition and the right to privacy*

We would like to draw your attention to the right to privacy, which is enshrined in article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights, which state that no one should be subjected to “arbitrary or unlawful interference with his privacy, family, home or correspondence”, which Bulgaria ratified in 1970.

The Special Rapporteur on the right to privacy has outlined detailed recommendations on gender identity and legal recognition including for children (A/HRC/46/37). In his gender report to the Human Rights Council, (A/HRC/43/52, paras. 35 and 36) he stated States should:

- (a) Facilitate formal recognition of identity, regardless of an individual’s gender, by ensuring that:
  - (i) Requirements for information on sex or gender are relevant, reasonable and necessary, as required by law for a legitimate purpose in the circumstances in which it is sought, and that they respect everyone’s right to self-determine their name and gender;
  - (ii) Changes to the name or gender marker are not disclosed without the prior, free and informed consent of the person concerned, unless ordered by a court;

- (b) Protect the data of individuals who have changed their sex and/or gender on official records by:
  - (i) Protecting their history of changes of sex and/or gender or name from interference;
  - (ii) Ensuring that such data are recorded and accessed only when the history is relevant to decision-making;
  - (iii) Requiring robust security controls;
  - (iv) De-identifying or destroying such information when no longer required.

The Special Rapporteur on the right to privacy has emphasised the importance of gender recognition to the development of the individual. He has also noted (see A/HRC/40/63, Annex 2 footnote 54) that the European Court of Human Rights has found States in violation of Article 8 of the European Convention on Human Rights for lacking legal gender recognition procedures that avoid violating the right to privacy of transgender people (*L. v Lithuania*; A.P. (2008), *Garçon and Nicot v France* (2017)).

Most recently, the Court reaffirmed its jurisprudence in a case against Romania (*X et Y c. Roumanie* (2021)) in which it found a violation of Article 8 of the European Convention on Human Rights due to the lack of a clear and predictable procedure for the legal recognition of gender identity allowing for the change of sex, and thus of name or personal numerical code, in official documents in a quick, transparent and accessible manner.

#### *Depathologization of the gender recognition systems*

Imposing lengthy and costly proceedings and abusive requirements as a precondition of recognition of gender identity is in violation of these international human rights standards. To this respect, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity expressed concern that some States impose lengthy, costly and abusive requirements as a precondition of recognition of gender identity, such as undergoing medical diagnosis, psychological appraisals or other medical procedures, as well as a third-party consent for adults (A/73/152, paras. 28-32). In light of this, he urged States to adopt all measures conducive to eradicating the conception of gender diversity as a pathology from all aspects of everyday life (*Ibid.*, para. 77 (a)). He further urged that States set up simple gender recognition systems which should (i) be based on self-determination by the applicant, (ii) be a simple administrative process, (iii) be confidential, (iv) be based solely on the free and informed consent of the applicant without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing, (v) acknowledge and recognize non-binary identities, such as gender identities that are neither “man” nor “woman” and offer a multiplicity of gender marker options, and (vi) be accessible and, to the extent possible, cost-free (*Ibid.*, paras. 81 (d)). It is relevant to note in this context, that transgender health issues are no longer classified as mental and behavioural disorders in the World Health Organization's global manual of diagnoses (ICD-11).

The United Nations High Commissioner for Human Rights also showed concern regarding State regulations that allow changes in gender under abusive requirements (A/HRC/29/23, para. 70). Therefore, he recommended that States issue legal identity documents, upon request, that reflect preferred gender and eliminate abusive preconditions (Ibid., para. 79 (i)). Also, the Office of the United Nations High Commissioner for Human Rights recommended that the process of recognition acknowledge and recognize non-binary identities, such as gender identities that are neither “man” nor “woman” (OHCHR, “Living Free and Equal”, 2016, pages 97-98).

It then follows that States have an obligation to provide for a simple administrative gender recognition system that is based on self-determination by the applicant. In recognition of this conclusion, the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (“the Yogyakarta Principles”) reaffirm that everyone has the right to recognition, and no one shall be forced to undergo medical procedures as a requirement for legal recognition of their gender identity (Principle 3). In light of this, States shall take all necessary legislative, administrative and other measures to fully respect and legally recognize each person’s self-defined gender identity, and ensure that such procedures are efficient, fair and non-discriminatory (Principle 3 (B) and (D)).

We wish to draw attention to the Concluding Observations of 15 November 2018 of the Human Rights Committee, in which the Committee was concerned at the obstacles to changing legal recognition of gender, including reports that courts condition such changes on undergoing hormonal therapy (CCPR/C/BGR/CO/4, para. 11). In light of this, the Committee recommended that Bulgaria establish a simple and accessible administrative procedure for change of civil status with respect to gender identity that is in accordance with the Covenant (Ibid., para. 12 (c)).

In view of the aforementioned observations, we respectfully urge the Supreme Court of Cassation to take into account that the right to legal gender recognition is protected under international human rights law and that the process is required to be simple and based on self-determination.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above.
2. Please explain how your Excellency’s Government protects trans and gender-diverse people’s right to recognition as a person before the law, including persons of diverse gender identities, in line with your Excellency’s Government’s obligations under the international legal framework of human rights law and standards.
3. Please indicate what measures have been taken or are envisaged to ensure trans and gender-diverse persons in Bulgaria are not discriminated against based on their right to legal gender recognition and to guarantee their legitimate right to privacy.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we would appreciate it if your Excellency's Government could bring this letter to the attention of the Supreme Court of Cassation. You will also find attached a summary of the report on legal recognition of gender identity and depathologization by the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.

Please accept, Excellency, the assurances of our highest consideration.

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