

# ILGA-EUROPE

REPORT

ON

„TRANSSEXUALITY AND INTERNATIONAL PRIVATE  
LAW“

(Title of the legal opinion given by the Max-Planck-Institut in the  
proceedings of AZ. I BvL 1/ 04 of the Constitutional Court in Germany)

By Sheila Swatschek for ILGA-Europe  
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[www.ilga-europe.org](http://www.ilga-europe.org)  
Contact: Maxim Anmeghichean, [maxim@ilga-europe.org](mailto:maxim@ilga-europe.org)

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## **I. Introduction**

This report is based on the legal opinion given by the Max-Planck-Institut für Ausländisches und Internationales Privatrecht (Trans: Max-Planck-Institute for Foreign and International Private Law) in a constitutional court case<sup>1</sup> in Germany. In order to answer the question which had been raised by the Constitutional Court, the Max-Planck-Institut undertook a country-by-country survey on the legal situation of transsexuality in various countries within and outside Europe. Quite different in style and extent, the country reports name the most important legislation and case-law. Due to the aim of the legal Opinion, the survey focuses on the requirement of nationality for submitting an application for gender recognition in the respective country. The survey by the Max-Planck-Institut reflects the status of February 2004.

The Institute kindly allowed ILGA-Europe to translate the survey. ILGA-Europe decided to commission an explanatory summary as an internal paper which is to indicate relevant contents for IE's advocacy work on transgender issues. The information supplied by the Max-Planck-Institute helps enormously to gain a long searched overview about the different legislation and legal concepts concerning transsexuality.

The first chapter of this report is a comparative analysis and summary of the survey by the Max-Planck-Institut. It shows the most important legal schemes on transsexuality and already points out problematic aspects of the legal situation. Furthermore it also includes the legal framework under EU Law, the jurisdiction of the European Court of Human Rights and the law according to the International Commission on Civil Status.

The second chapter evaluates the major findings of the summary and indicates concrete areas where the legal situation is unsatisfactory. Furthermore it points out potential lines for legal argumentation and the relevant issues for future advocacy work.

The core part of the report is to be found in the annex: a table with a detailed country-by-country overview. This table has five columns which show legal criteria with which the situation in the countries can be described and compared. In the Annex II 1. "How to read this table?" the legal criteria are explained. The legal situation in the countries differs quite profoundly and follows also different legal traditions, e.g. common law as opposed to statute or code law. In this respect the table might lack certain finer points. For example, Germany being a country with statute law tradition, and the UK, being a country with a common law tradition, makes it sometimes difficult to translate German legal concepts into English legal language; sometimes the relevant German term does just not exist in the English language. Yet, despite these difficulties the table has proved a valuable tool to draw up the comparative summary and can function as a resource document in the future.

In order to clarify the various terms used to describe phenomena in the field of transsexuality the annex also includes a glossary. Though the political debate is rather

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<sup>1</sup> Suit brought before the FRG constitutional court (Trans: Bundesverfassungsgerichts) relating to the constitutionality of art. 8 para 1 and § 1 para 1 Nr.1 of the law concerning transsexual persons, (AZ.I BvL 1/ 04 des Bundesverfassungsgerichts).

heated concerning the concepts of transsexuality and transgender identity, it is quite important to understand the different concepts.

Annex III provides for various case law in different countries, by the European Court of Justice and by the European Court of Human Rights.

## **II. Comparative Analysis and summary**

This analysis does not only refer to the law in the various countries, but also includes EU law, the jurisdiction of the European Court of Human Rights (EctHR) and the law according to the International Commission on Civil Status (ICCS). European and International law in its nature does not follow the criteria of national law as it is displayed in the country-by-country overview (see Annex I 2.).

### **1) General observations concerning the legal situation in the different countries**

Twenty years ago only a few countries had laws on transsexuality. Nowadays many countries all over the world have rules and regulations concerning the recognition of the personal status after a sex change operation. An overall analysis of the state of law in the different countries comes to the conclusion that the rules applying to transsexuality are very different; yet, the various legislation can be summarised in rather definite categories.

Ireland<sup>2</sup> is the only country in this survey which refuses any kind of gender recognition. It appears that a gender recognition ruling will also be highly unlikely in Portugal. In the light of the *Goodwin v. United Kingdom*<sup>3</sup> decision of the EctHR this restrictive legal approach can not last. At least the 46 contracting states<sup>4</sup> of the ECHR under International Public Law are obliged to comply with the jurisdiction of the EctHR. The effects of the *Goodwin v UK* decision have led to the Gender Recognition Act 2004 in the UK. The Gender Recognition Act 2004 reflects some of the most recent scientific and legal debate on transsexuality.

Most of the countries fall mainly into two categories. One legal scheme provides special laws concerning transsexuality; the other legal scheme provides case law or decisions taken by the administration. The administrative decisions focus to a great extent on name change and/or the change of the registry. A separate procedure for the declaration of the sex change or for gender recognition is rather rare.

European countries with special legislation include: Finland, Germany, Italy, the Netherlands, Sweden Turkey and the UK. Among third countries, the Canadian province of Quebec and two federal states of Australia -South Australia and Western Australia- provide for specific legislation on transsexuality.

Brazil and Spain are preparing respective legislation (status: 2004). In Quebec, Sweden and Germany gender recognition is linked to nationality, other counties (e.g. Finland) require a place of residence or a certain time of residence (e.g. the Netherlands). Sweden was the first country in the world which introduced legislation on transsexuality in 1972. The Swedish reference to nationality was regarded inevitable to avoid „tourism“ resulting from transsexual persons seeking gender recognition in Sweden. Given the existing legislation in various countries today, this consideration has no meaning anymore. The recent legislation more easily provides for recognition of foreign decisions. Where there

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<sup>2</sup> This applies to the Republic of Ireland. Northern Ireland has The Sex Discrimination (Gender Reassignment) Regulations 1999, which amend the Sex Discrimination Act 1975 to prevent discrimination on grounds of gender reassignment in the fields of employment and vocational training.

<sup>3</sup> *Goodwin v. United Kingdom*, Application no.28957/95, Court decision of 11.07.2002

<sup>4</sup> Status: October 2004, please see: [http://www.coe.int/T/e/com/about\\_coe/member\\_states/default.asp](http://www.coe.int/T/e/com/about_coe/member_states/default.asp)

are no rules for foreign nationals (e.g. in Italy), case law covers these gaps. Countries with gender recognition through registry laws or respective administrative practice often find it difficult to provide solutions for foreign nationals. Since generally speaking foreign nationals are not born in the countries of their residence, there is no birth register entry about them and/or they do not hold a birth certificate issued in this country that could be changed after gender recognition.

The question of foreign nationals and gender recognition in the country of residence is sometimes challenged if the transsexual person wishes to marry. Respective cases are known from Austria, France, and Italy. The very same question formed the background of the survey by the Max-Planck-Institut: the court had to decide how to legally deal with the gender resulting from a sex change operation when the domestic law in the country of origin does not provide for gender recognition. In all of these cases the French Cours d'appel Paris, the Italian Tribunale di Milano and the Austrian Verwaltungsgerichtshof ruled in favour of gender recognition. The ground of the judgements referred to the case-law of the EctHR, the ECJ and furthermore to art.8 and 12 of the ECHR. Additionally, it was argued that the lack of gender recognition under foreign law despite a sex change operation was a breach of the national (domestic) public order. In consequence, national law has to be applied which allows for gender recognition.

The survey shows that the requirement to hold the nationality of the country in which gender recognition shall be granted is to be found only rarely and in older laws, e.g. in Germany, Quebec and Sweden. The International Convention Nr.29 on the recognition of decisions recording a sex reassignment of 12.09.2000<sup>5</sup> is interesting in this respect. The International Commission on Civil Status (ICCS) has issued this convention which has been signed by Austria, Germany, Greece and the Netherlands. So far (status February 2004) none of these countries has ratified this convention. Yet, under art.1 of the convention, the contracting states are obliged to recognise final court or administrative decisions taken in a contracting state, if the transsexual person is a national or habitually resident in the state in which the decision was taken.

Many countries require sex change surgery before gender recognition, e.g. the Canadian provinces, Denmark, Finland, France, Germany, Italy, the Netherlands, Sweden, Switzerland, and Turkey. Some of these states also require infertility: Germany, Finland, France, the Netherlands, Sweden, Switzerland, and Turkey. There is no real justification for this requirement (please see III. Evaluation). It appears that the UK today is the only country which allows for gender recognition without any compulsory physical treatment.

Some countries require that the transsexual person must be unmarried or divorced before granting gender recognition: e.g. Germany, France, Finland, the Netherlands, Sweden and Turkey. A marriage between a man and a woman will become a "marriage" involving a same-sex couple if one of the spouses is granted gender recognition. In many countries the legal concept of same-sex marriage is unknown and therefore the marriage of an opposite-sex couple has to be dissolved in the context of the gender recognition of one of the spouses. The justification for the legal requirement of being divorced or unmarried will be more and more contested as the number of countries with same-sex marriage increase. In 2001 the Netherlands was the first country to introduce same-sex marriage in Europe. According to art.28 para 1 a) of the NBW (new civil code in the Netherlands), a transsexual person applying for gender recognition has to be unmarried. Given the fact that the

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<sup>5</sup> See: <http://perso.wanadoo.fr/ciec-sg/Conventions/Conv29Angl.pdf>

Netherlands has opened marriage to same-sex couples, the legal requirement of being unmarried is not justified.

## 2) European Convention on Human Rights (ECHR)

As stated above, in relation to transsexuality art.8 (right to respect for private and family life) and art.12 (right to marry) of the ECHR are relevant. Both articles have played an important role in numerous rulings of the EctHR (European Court on Human Rights)<sup>6</sup>. In its latest decision *Goodwin v United Kingdom*<sup>7</sup>, the Court gave up its previous opinion and made a very clear point concerning transsexuality. With this decision it certainly reduced the scope of infringements which are legally possible under art.8 ECHR.

*Goodwin v United Kingdom* refers to a case where the complainant was born in 1937 as a man and had married a woman, the couple had four children. Later the marriage was divorced and in the mid sixties the complainant had been diagnosed as transsexual. In 1985 the complainant started a therapy and lived as a woman. Five years later she underwent sex change surgery, the costs were covered by the National Health Service. The complainant argued, that she was discriminated in her everyday life and in her profession because the English law does not provide for gender recognition and she is still legally regarded as of the gender she was born. This leads to discrimination in relation to social security, pension rights and the right to marry.

The refusal to grant gender recognition violates art 8 and art.12 of the ECHR.

The EctHR ruled concerning art.8 ECHR:

*para 77 (...) The stress and alienation arising from a discordance between the position in society assumed by the post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience rising from formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.*

*para 91. (...)the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.*

The EctHR ruled concerning Art.12 ECHR:

*Para 101.(...) The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.*

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<sup>6</sup> See e.g. *Rees v. United Kingdom*, Application Number 9532/81, 1986, A 106; *Cossey v. United Kingdom*, Application Number 10843/84, A 184; *X, Y and Z v. UK* (1997) 24 EHRR 143; Case 22985/93, *Sheffield and Horsham v. United Kingdom*, 1998, ECR 1998-V, p2011.

<sup>7</sup> *Goodwin v. United Kingdom*, Application no.28957/95, Court decision of 11.07.2002.

Further to these ground breaking points the EctHR also refers to the obligation of Member States of the ECHR to recognise foreign sex changes. A discrimination on grounds of nationality is impossible, especially in relation to art.8 and art.12 EMRK. The EctHR so far has not decided about this yet, but it is regarded as valid that the ECHR applies not only to persons under the jurisdiction of the Member States of the ECHR but also to any other person. This results from art.1 ECHR, but also from the preamble, where the ECHR makes reference to the world-wide agreed minimal standards of the Declaration of Human Rights of 10.12.1948. According to this the ECHR is a legally binding European version of this world-wide minimal standard, which might differ from other regional Conventions of Human Rights. Nevertheless, the European standards are without doubt applicable to all persons under the jurisdiction of the Member States of the ECHR and to third country nationals.

### 3.) EU Law

The Treaty of the European Community and the Treaty of the European Union do not make explicit reference to Family Law. Thus, the European legislator has no competence in this field. One would therefore expect that EU Law is irrelevant in the context of gender recognition. Nevertheless, with the decision in *Konstandinis*<sup>8</sup> the European Court of Justice (ECJ) ruled, that national provisions on personal status or Family Law could be scrutinised under European Law if these provisions infringe the fundamental liberties of the EC Treaty. (e.g. freedom of movement for workers, freedom of establishment). Furthermore, the Charter of Fundamental Rights of the EU, though currently not legally binding, is often considered by national and European courts to derive general constitutional principles from the different traditions in the constitutions of the Member States.<sup>9</sup>

Art.7 of the Charter of Fundamental Rights was formed on the basis of art.8 EMRK (right to respect of private and family life. Art.9 (right to marry) is interesting in this context as it does not explicitly mention men and women (as does art.12 ECHR). Art.9 of the EU charter was created to protect also families which do not comply with the general understanding of a family that is based on a married couple, e.g. registered partnerships. This leaves scope for transsexuals despite the fact that transsexual persons were not part of the considerations when the convention drafted art.9 of the EU Charter.

Art.21 Para 1 EU Charter generally prohibits discrimination and is applicable to discrimination in the context of transsexuality.<sup>10</sup> There are two relevant cases of the European Court of Justice referring to transsexuality: *P.v.S. and Cornwall County Council* and *K.B. v. National Health Service pension agency*.<sup>11</sup>

*P.v.S and Cornwall City Council* referred to a discrimination on grounds of sex under Art.5 Para 1 of directive 76/207/EC. Directive 76/207 seeks to implement the principle of equal treatment for men and women as regards access to employment, vocational training, promotion, and working conditions. The plaintiff had been dismissed after her sex change operation. The Industrial Tribunal Truro ruled that discrimination on grounds of sex is not

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<sup>8</sup> Case 168/91, *Konstandinis*, judgement of 30.03.1993, ECR 1993, Page I-1191.

<sup>9</sup> Despite of Art.51 Charter of Fundamental Rights of the European Union, under which only the authorities and institutions of the European Union are obliged to the charter and the Member States if they implement EU Law.

<sup>10</sup> This goes back to *P.v.S.* and *Cornwall County Council*, please see below

<sup>11</sup> Case 13/94, *P.v.S.* and *Cornwall County Council*, [1996] ECR I-02143; Case 117/01, *K.B. v. National Health Service Pension Agency*, [2004] ECR 541.



involved. For the purposes of the dismissal it does not make a difference whether a man or a woman undergoes sex change surgery. The ECJ ruled, that

*Para 20 (...) in view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.*

*Para 21 (...) Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.*

In *K.B. v. National Health Service Pension Agency* a transsexual person's (K.B.) partner was not entitled to a survivor's pension payable solely to a surviving spouse. This is held as discrimination on grounds of sex (here Article 141 EC - Equal pay for men and women): The ECJ ruled that,

*para 31 In the United Kingdom, by comparison with a heterosexual couple where neither partner's identity is the result of gender reassignment surgery and the couple are therefore able to marry and, as the case may be, have the benefit of a survivor's pension which forms part of the pay of one of them, a couple such as K.B. and R. are quite unable to satisfy the marriage requirement, as laid down by the NHS Pension Scheme for the purpose of the award of a survivor's pension.*

*para 34 Legislation, such as that at issue in the main proceedings, which, in breach of the ECHR [art.12 ECHR], prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141 EC.*

The ECJ explicitly referred to the *Goodwin v. UK*<sup>12</sup> decision by the European Court of Human Rights and underlined the breach of art. 12 ECHR (right to marry) also for *K.B. v National Health Service pension agency*.

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<sup>12</sup> *Goodwin v. United Kingdom*, Application no.28957/95, Court decision of 11.07.2002.

### III. Evaluation

The survey of the Max-Planck-Institut has shown that the legal situation of transsexual persons is unsatisfactory and most often discriminatory. This remains a fact, despite the ground breaking decision of *Goodwin v. United Kingdom*<sup>13</sup> of the European Court of Human Rights and *K.B. v. National Health Pension Service Agency*<sup>14</sup> of the European Court of Justice.

Ireland and Portugal still have no legal provisions for gender recognition at all and it is highly likely that an application for legal recognition of a gender re-assignment would be defeated. This is an unbearable situation and a clear breach of art.8 of ECHR (right to respect for private and family life), art.12 (right to marry) and art.14 (prohibition of discrimination).

Some countries like e.g. France, Austria, Ireland and Portugal don't provide for legislation concerning transsexuality. The ratio behind this fact shows similar considerations:

1. The scientific debate is not advanced and univocal enough to allow for substantial legislation.
2. The number of cases is far too small as to justify respective legislation.

On the contrary, it could be argued, that the number of cases is small, because there is no specific legislation. People affected might just not be aware that there could exist legal solutions to their everyday problem. The very same is true for all the administrative and counselling institutions, as long as respective legislation does not exist, the staff of these institutions will be hardly aware of transsexual persons' problems.

Other countries may allow for the legal recognition of gender re-assignment but do not allow transsexual persons to marry, which is a breach of Art.12 ECHR (right to marry).

The EctHR in its decision *Goodwin v. UK* named several fields where recognition of gender re-assignment plays a role:

*para 1 The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. However, as is made clear by the report of the Interdepartmental Working Group, these problems are far from insuperable, to the extent that the Working Group felt able to propose as one of the options full legal recognition of the new gender, subject to certain criteria and procedures.*

The assessment of the court shows the wide rang of legal effects gender recognition can have. Not all of the legal consequences and requirements are positive. Problems in the field of transsexuality arising from the fact that there is specific legislation which is not satisfactory or problems arising from the lack of legislation and acknowledgement of transsexuality are:

- Compulsory surgery (often irreversible, including the compulsion for irreversible infertility)

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<sup>13</sup> *Goodwin v. United Kingdom*, Application no.28957/95, Court decision of 11.07.2002

<sup>14</sup> Case 168/91, Konstandinis, judgement of 30.03.1993, ECR 1993, Page I-1191.

- Psychiatric assessment, examination and testing, often with dehumiliating procedures
- Health insurance (access to medical funding/ cost for medical treatment)
- E.g. in Germany: having a changed name, but at same time belonging legally to the sex at birth causes problems in daily life: e.g. travelling with a passport which shows the sex at birth, but having the physical appearance and name of the opposite sex, the same is true for bank and credit cards if name and physical appearance do not correspond
- Work life (*the freedom to enjoy a job without fear of dismissal or harassment because of the gender role change*<sup>15</sup>)
- Right to marry (if there is discrimination in access to marriage, then having rights conditional on marriage results in further discrimination on grounds of gender identity, e.g. pension rights)
- Adoption of children
- Requirement of being unmarried or the requirement of being divorced
- Mutual recognition of gender recognition decisions obtained in another country
- Ex-nunc (from now on) and ex-tunc (retroactive) legal effect of gender recognition with different implications for the person affected
- Parental role (the freedom to take a parental social role in their new gender role)
- Data protection (*the freedom not to have to disclose details of the gender role re-assignment unnecessarily*<sup>16</sup>)
- Social security
- Pension rights
- Funding for research on medical treatment of transsexual persons
- Death/ succession (*the freedom to be acknowledged at death as being a member of the new gender group*<sup>17</sup>)

The situation of foreign nationals applying for a legal recognition of gender re-assignment is even more complicated, especially if their country of origin does not provide for gender recognition. If they apply for gender recognition outside their country of origin, they might face the problem, that the gender recognition procedure of their country of residence is not open for foreign nationals. Another problem could be that in many countries gender recognition is effected by the rectification of the civil status registries. Yet, foreign persons, who are not born in the country, are not entitled to change of the birth registry because there is no entry about them which could be changed.

### **Scope for development.**

1. The case of *Konstandinitis*<sup>18</sup> showed that an infringement of the fundamental freedoms of the Treaty of the European community (TEC), e.g. freedom of movement for workers, or freedom of establishment could result from certain provisions in the personal status or family law of the Member States. The national provisions could thus be subject to control by the European Court of Justice. For example, if gender recognition can only be applied for in the country of origin, the transsexual person who resides in another country is affected in his/her freedom of movement when he/she has to return back to his/her home country to obtain gender recognition. This could be an example of a legal challenge.

<sup>15</sup> See Stephen Whittle, Legislating for Transsexual Rights: a prescriptive form, 17 th May 1996, [www.pfc.org.uk/legal/whittle3.htm](http://www.pfc.org.uk/legal/whittle3.htm)

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Case 168/91, Konstandinis [1993], ECR I-1191.

2. Art.9 (right to marry and found a family) of the Charter of Fundamental Rights of the European Union <sup>19</sup>is much wider than the corresponding Art.12 of the European Convention of Human Rights (ECHR). Art.9 is not limited to couples consisting of man and woman. The wording of art.9 results from a long discussion in the convention and is based on the consideration that art.9 should protect also different forms of partnerships, e.g. registered partnerships (same-sex and opposite sex).<sup>20</sup> Though the charter of fundamental rights of the EU is currently not legally binding, it is often considered by national and European courts to derive general constitutional principles from the different traditions in the constitutions of the Member States. Extending the scope of art.9 to include also transsexual persons could also be part of a legal challenge.
3. Making usage of the case *P.v.S and Cornwall County Council*<sup>21</sup>: Art.21 para 1 of the Charter of fundamental rights is held to generally prohibit discrimination. Tough discrimination on grounds of gender identity is not explicitly included; according to the literature mentioned in the Max-Planck-Survey art.21 includes also discrimination on grounds of transsexuality.<sup>22</sup> The case *P.v. S and Cornwall County Council* is basis for this argumentation. The European Court of Justice explained in

*Para 21: Such discrimination [discrimination arising from gender reassignment] is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.*

If art.21 of the Charter of Fundamental Rights includes (via discrimination on grounds of sex) discrimination on grounds of gender identity, then this could be used for lobby work on many aspects, not only employment law, but in fields of law where discrimination on grounds of gender identity is relevant.

4. Some countries require sterility for the legal recognition of gender re-assignment. This requirement of sterility could violate art.3 ECHR (inhuman treatment) and possibly also art.8 ECHR (right to private life) as the requirement leaves no option of how a transsexual person chooses to go about physical changes in the process of gender re-assignment, a principal private matter. Stephen Whittle rightly pointed out that the requirement of sterility “smacks of eugenics” and he rightly asks who else does require sterilisation before he/she is allowed full citizenship before the law<sup>23</sup>. Serious reasons for a justification of this requirement are difficult to conceive, public order could be a possible argument. The clear differentiation of sexes or to avoid transsexual persons to procreate could be reasons in the context of public order. However, they hardly seem to justify an infringement of physical integrity to the extent compulsory sterilisation involves.

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<sup>19</sup> Article 9 (Right to marry and right to found a family): The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

<sup>20</sup> Bernsdorff Margin n°6 of art.9, in Meyer (ed.), Kommentar zur Charta der Grundrechte in der Europäischen Union, 2003.

<sup>21</sup> Case C-13/94, *P.v. S and Cornwall County Council*, [1996], ECR I-2143

<sup>22</sup> Max-Planck-Survey, P. 101: Hölscheidt, Margin n°33 of art.21, in Meyer (ed.), Kommentar zur Charta der Grundrechte der Europäischen Union, 2003; Streinz, EUV, EGV, 2003, Margin n°4 of art.21.

<sup>23</sup> Ibid.

## **Annex I 1. Table with detailed overview country-by country:**

### **HOW TO READ THIS TABLE?**

The Table shows the relevant national law on Transsexuality country- by- country. It starts with Australia and ends with United Kingdom.

Under the column „**Law**“, you will find the respective legal provisions of statute law and/or the relevant case law in relation to transsexuality, e.g. personal status, sex change surgery, marriage, etc.

Under „**Requirements / Procedure**“, you will find

- Requirements: the relevant facts which need to be fulfilled to make a law applicable or to cause a certain legal effect
- Procedure refers to the way a court or an administrative body handles the claim of an applicant/petitioner.

Under „**Effect**“, you will find the legal effect of a certain procedure or in other words the result of a legal procedure.

Under „**Right to apply**“, you will find information which criteria an applicant/petitioner has to fulfil to make his/her claim; e.g. the fact that he/she is unmarried, the fact that he/she has a certain age. This column is partly overlapping with the column „ Requirements / Procedure“; whereas the „Right to apply“ refers more to the formal criteria of handing in an application/petition, the „Requirements / Procedure“ refer more to substantial requirements of the law.

Under „**Recognition**“, you will find information about how a state legally deals with foreign nationals who wish to undergo gender reassignment. The column also provides information about whether and under which conditions a state recognises the gender reassignment decision of another state.

## Annex I

## 2. Overview country-by-country

### Transsexuality and International Private Law

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
AUSTRALIA	<p><b>1. Federal state law</b> cases: <i>Re Kevin</i> (Validity of marriage),<sup>1</sup> also valid for pension rights: <i>Secretary of Department of Social Security v. SRA</i> (1993) 118,<sup>2</sup></p> <p><b>2. Federal states:</b> special legislation for recognition of sex change</p> <p>a) <u>Western Australia (WA):</u> Gender Reassignment Act 2000</p>	<p>Postoperative transsexuals are normally regarded as members of the acquired sex. The legal procedure takes into consideration: psychological and neurological aspects, social role, Physical appearance. These criteria are an open list.</p> <p>Sec. 15 (1) b) Gender Reassignment Act 2000 (Western Australia = WA) corresponds with Sexual Reassignment Act 1998 of South Australia (South Australia = SA)</p>	<p>&gt;Marriage is possible &gt;Pension rights</p> <p>Sec.16 Gender Reassign. Act 2000 (WA): <u>recognition certificate:</u> &gt;documents sex change and affiliation to the sex shown in the document</p>	<p>Sec.15 (1) Gender Reassignment Act 2000 (WA) &gt; sex change was Undertaken in WA <b>or</b> &gt;Birth of applicant was Registered in WA <b>or</b> &gt;Applicant must have had his/her residence in</p>	<p>Recognition of equal documents issued by another state</p>

<sup>1</sup> Re Kevin, (Validity of marriage), [2001] FamCA 1074 ff, No.329.

<sup>2</sup> Secretary of Department of Social Security v. SRA (1993) 118, Australian Law Reports, Reports (A.L.R) 467.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
AUSTRALIA	<p>b) <u>South Australia (SA):</u> Sexual Reassignment Act 1998</p> <p><b><u>3.Rules for recognition of sex changes in the register laws, Fn.31</u></b></p> <p>as example - pars pro toto: Births, Deaths and Marriages Registration Act 1995 of New South Wales (BDMR-Act 1995 NSW)</p>	<p>&gt; Applicant holds the view that the chosen sex is his/her true sex</p> <p>&gt; Applicant leads life style of the and shows gender specific features of the acquired sex</p> <p>&gt; Applicant had had appropriate/adequate consultation on his/her gender identity</p> <p>&gt; Operation for sex change</p> <p>&gt; Beforehand the applicant belonged legally to the different sex</p> <p>&gt; Evidence: binding declarations from two doctors that applicant underwent operation for sex change</p>	<p>South Australia Sec.6 - additional requirement:</p> <p>&gt;Reassignment procedures are only to be undertaken in specialised hospitals authorised through ministerial order. Hospitals will only be authorised if they have employed specialised staff so appropriate advice and treatment is guaranteed.</p>	<p><b>Nationality is irrelevant</b></p> <p>Sec. 7 (8) (a) Sexual Reassignment Act 1998</p> <p>&gt; sex change or birth must have been in SA; residence alone is not sufficient</p> <p><b>Nationality is irrelevant</b></p> <p>Sec.31B (1) (BDMR-Act 1995 NSW)</p> <p>&gt;Applicant must be registered in birth register in New South Wales</p> <p>&gt;Applicant has undertaken operation for sex change</p> <p>&gt;Applicant is unmarried</p>	

Country	Law		Effects	Right to apply	Recognition / IPR
AUSTRIA	<p>No specific law on transsexuality exists, There is a ministerial order by the ministry for home affairs from 27.11.1996 called the “<u>Transsexuellen Erlaß</u>”, which proposes legal requirements and procedures, yet it is <u>not binding law</u>.<sup>3</sup></p> <p><u>Relevant law is to be found:</u>  1. <u>In § 16 of the Personenstandsgesetz</u><sup>4</sup>- PStG (trans.: Law concerning the personal status).  The Constitutional Court of</p>	<p>The case law of the administration Court of appeal does not refer to the “<u>Transsexuellen Erlaß</u>”. Without further reasoning it simply requires an expertise about the gender assignment of the affected person.<sup>5</sup></p>	<p>§16 PStG:  “The registrar can change an acknowledgement if after the registration the facts are no longer applicable.”</p>	<p>The PStG is applicable according to the principle of locality (§ 2 PStG)  During the 1990s the change of the registry</p>	<p>Austrian case law exists concerning the right to marry (in relation to transsexual persons with foreign nationality)</p>

<sup>3</sup> Ministerial Order, Number 36.250/66-IV/4/96, Österreichisches Standesamt (ÖstA) [Trans: Austrian registry office] 1997, P.1 f. This ministerial order changes a previous order, Ministerial order by the Ministry of Home affairs from 18.July 1983, Number 10.582/24-IV/4/83. The ministerial order from 27.11.1996 states, that the scientific research on transsexuality, the very divergent legislation of other countries and the small number of persons affected do not justify any legislation on transsexuality in Austria for the time being. Propositions of the “Transsexuellen Erlaß”: Point 2: The affected person has to make an application concerning the personal status (§ 16 PStG, please see column on law), in order to have the personal status changed to the chosen gender

>Point 2.1: The authority has to commission an expertise from the medico-legal institute of the University in Vienna.

>Point 2.2: The expertise has to come to the conclusion, that the applicant is obsessed by the idea of belonging to the other sex for a considerable time which motivated him/her to undergo medical treatment, that this treatment has led to a visual approximation towards the appearance of the other sex, and that there is a high probability that his/her feeling of belonging to the other sex will not change any more.

>Point 2.3. The cost for the expertise can be claimed from the applicant, he/she can be asked by the authority to pay an adequate advance (§ 76 Para 1 second sentence AVG)

>Point 2.4: The transsexual person must not be married

>Point 4: The legal procedure allows for consultation of the Ministry of Home affairs to the authorities; therefore, after the expertise, the file of the authority has to be submitted to the Ministry of Home affairs.

<sup>4</sup> Bundesgesetz (Trans: Federal law) vom 19.Jänner 1983 über die Regelung der Personenstandsangelegenheit einschließlich des Matrikenwesens).

<sup>5</sup> VwGH of 30.09.1997, file number 95/01/0061, ZfRV 1999, 185.



Country	Law		Effects	Right to apply	Recognition / IPR
<b>AUSTRIA</b>	<p>Austria has ruled in 1978, that the change of sex is to be recognised in terms of the personal Status.<sup>7</sup></p> <p>2. <u>In § 2 Para 2 Nr.3 of the <i>Namenänderungsgesetz</i><sup>8</sup> -NÄG</u> (trans: Law concerning the change of name)</p> <p>The Austrian administration Court of appeal refers to the ECHR and to a court decision by the ECJ concerning the Equality between women.<sup>12</sup> and men.</p>	<p>The other requirements proposed in the <i>Transsexuellen Erlaß</i> (please see Footnote 3) do not have to be Fulfilled.</p>	<p>§ 2 Para 2 Nr.3 NÄG: allows for changes of the first name if the first name does not correspond with the gender of the applicant. An respective approval is only required for this special case. In other cases the name is changed without previous approval.<sup>11</sup></p>	<p>demanded a proof of the applicant's nationality.<sup>6</sup></p> <p>The NÄG is applicable To persons with Austrian nationality or Persons with an Austrian Personal status (stateless persons or refugees with domicile or habitual abode in Austria (§ 1 NÄG)</p>	<p>The competent administration court of appeal grants transsexual persons who have undergone sex change surgery the right to marry. In this reasoning it refers to Art. 8 and 12 ECHR. Furthermore it refers to the decision of <i>B v. France</i><sup>9</sup> of the EctHR and <i>P.v.S and Cornwall County Council</i><sup>10</sup> by the ECJ</p>

<sup>6</sup> Hezer, die Änderung des Geschlechts in den Personenstandsbüchern, ÖstA 1995, 49. It referred to the registration in the birth register, see Köne, Transsexualismus im österreichischen Recht, Diss. Wien, 1997.

<sup>7</sup> BverfG 11.10.1978, NJW 1979, 595 = StAZ 1979, S.9.

<sup>8</sup> Bundesgesetz (Trans: Federal law) of 22.März 1988, BGL.195 über die Änderung von Familiennamen und Vornamen (*Namensänderungsgesetz-NÄG*), idF des Bundesgesetzblatts 1996/225.

<sup>9</sup> Case 57/1990/248/319, *B. v. France*, Application no.13343/87, A232-C; The Austrian Administration Court of Appeal takes into account that in its view the ECTHR appears to have developed its jurisdiction. It appears, that the legal effect of a new gender identity caused by medical surgery has to have much more weight than the legal effect of the sex determined at the time of birth.

<sup>10</sup> Case C-13/94, *P.v. S and Cornwall County Council*, [1996], ECR I-2143: the Directive 76/207/ EEC from 9.February 1976 prohibits the dismissal of a transsexual person who had been dismissed on grounds of her gender reassignment. This dismissal is to be considered as discrimination on grounds of sex. The Austrian Administration court of appeal found that the ECJ at the same time ruled that a post-operative transsexual person is to be regarded as member of the opposite sex (in relation to his/her sex at the time of birth).

<sup>11</sup> Other cases could be: if the sex had been registered incorrect from the very beginning on or if the first name by mistake does not correspond with the respective gender.

<sup>12</sup> VwGH (Administration court of appeal), of 30.09.1997, file number 95/01/0061, ZfRV 1999, 185.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
BELGIUM	no specific legislation, prevailing case law: <i>Van Oosterwijck</i> , lawsuit concerning application for appeal, <sup>14</sup> and following lawsuit concerning legal action concerning status.	<p>&gt; Contradiction between legal and acquired gender, evidence through medical and psychological expertise which establishes that the surgery refers to grave psychological constraints where medical treatment and surgery is the therapeutic answer.</p> <p>&gt; The sex change must be irreversible</p> <p>&gt; Up to date the petitioner had to be unmarried; with the possibility of marriage also for same-sex couples this necessity should be obsolete.</p> <p>&gt; Due to a majority doctrine the applicant must not have children. Otherwise the children would have two fathers or mothers. There is yet no clear Opinion in the case law on this subject matter.</p>	<p>competence for legal action: Court of first instance as there is no opponent the legal action should be undertaken in form of a one-sided written application, following the rules of one-sided written applications due to Art.1025 ff. of the Belgian civil procedure code.</p> <p>At the request of the applicant the court office transmits a copy of the court decision's tenor to the registrar. The registrar makes an entry in the register (Art.781 BGB). He then affixes a marginalia to the birth certificate.</p> <p>The court decision concerning the status has constitutive effect. It states the new personal status ex-nunc which is valid after finality of the court's decision.</p>	nationality is presumably irrelevant, see column Recognition/IPR	In one case <sup>13</sup> a French Judgement concerning gender recognition has been acknowledged in Belgium: the (Belgian) court ruled that status and legal capacity of a foreigner is determined by the law of his/her home country (Art.3 par.3 Belgian Civil Code). The French court decision did not violate the "ordre publique international". There is no case law whether a foreigner can have his/her sex change legally recognised if his/her personal status does not allow for a sex change. Yet, due to Art.3 Para 3 Belgian civil code, recognition was impossible if the personal status of the applicant does not allow for a sex change. On the

<sup>13</sup> Court of Mons, Belgisches Staatsblatt, 10.07.1997

<sup>14</sup> Appellationshof Brussel, 7.5.1974, Journal des Tribunaux 1974, 713.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
BELGIUM			<p>Hereafter the person is entitled to all the rights attached to the assigned sex, including marriage. Some court decisions concerning the status have also effect concerning the first name. The change of the first name is part of the minister's of justice competence (Art.2 of the law concerning names and first names from 15.05.1987) Today any kind of first name is eligible whereas beforehand only gender neutral names were accepted.</p>		<p>other hand, this would be regarded as violation of the "ordre public international". Due to the Goodwin decision, the right to have a sex change recognised is a Personal- and Human Right. Therefore, theoretically, a Belgian court would apply Belgian Law and decide in favour of the sex change.</p>

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<b>BRAZIL</b>	<p>No specific legislation, neither for sex change nor for change of first name.</p> <p>Until 1996 the operation for sex change was illegal and considered as a criminal act of bodily injury, Art.129 of the Brazilian penal code; only in 2002 Resolution CFM n°1.652/2002 allows to perform a sex change from male to female sex, a sex change from female to male is still only allowed in University clinics.</p> <p>There have been different proposals for a gender recognition bill, the latest dating from 1995, with additions from 1997; it is not clear whether and when the bill might become part of the legislation, the last debate in the house of parliament dates November 2003.</p> <p>The Brazilian case law more and more allows changes of name and changes of sex in the</p>	<p>The resolution names the requirements for a transsexual person to obtain an operation for sex change (not given in the survey)</p> <p>&gt;The claim for the change of name is argued under the Provision of ridicule foreseen under Art.58 i.c.w Art.56 LEI 6.015/73</p>	<p>Right to marry: only few Decisions exist (FN 83); Tribunal de Justiça do Rio Grande do Sul,</p>	<p>No procedural law.</p> <p>As there are no provisions for sex change, there is also no respective specific procedural law. The</p>	<p>Without positive substantive law, rules of IPR are missing. Theoretically two</p>

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BRAZIL	birth certificate.	<p>arguing that the applicant is ridiculed by his/her first name.</p> <p>&gt;Otherwise (for purposes of sex change and name change) it is possible to argue with Fundamental Rights: right of Personality (Art. 5 X of Brazilian Federal Constitution (cF)), rule of non-discrimination (Art.3 IV CF) and human dignity (Art.1 III CF).</p> <p>&gt;Other argumentation: it is the duty of the state to arrange for health care provisions; the legal change of sex is the last step of all the therapeutic measures of a sex change<sup>15</sup>.</p>	AC 598.404.887 from 10.03.1999; it rules that the registration of the acquired sex implies also the possibility to marry.	<p>provision to be utilised is the general rectification of register claim (Art.110 ff. Registry law). It will result in a judge's decision. The rectification of register claim follows the procedure of the "Justificação" (Art.861 ff. Brazilian civil procedure Code). It involves the special provisions of Art. 110 ff. Registry law, e.g. the participation of "Ministério Público" as representative of the state (otherwise not possible within the procedure of the "Justificação").</p> <p>Furthermore the possibility to lodge an appeal against the decision exists.</p>	<p>scenarios are possible:</p> <p>&gt;Change of the register of foreigners which is run by the ministry of justice. On its information identification cards for foreigners are issued. Normally the personal data of a foreigner is taken from his/her passport. Due to Art.42 Para 2 of the law concerning foreigners (Lei 6815/80) a name change is possible on grounds of ridicule of the name (similar as in the registry law). A sex change is not provided within the provisions of this law.</p> <p>The same reasons of argumentation as for a name change due to registry law should be applicable here. The competence for the name</p>

<sup>15</sup> Tribunal de Justiça de São Paulo, AC 165.157.4/5 of 22.3.2001; Chaves, Operações cirúrgicas de mudança de sexo, Revista dos Tribunais 679 (1992) p.7; d'Agostini, A questão sexual nos tribunais: o transexual, Kap.3.1.2, please see: <http://hosting.pop.com.br/glx/casadamaite/sexualidade/trans/direito/dir16.html>.

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BRAZIL					<p>change rests not with the judge (registry law), but with the ministry of Justice (Art.43 of the law concerning foreigners). Definite statements concerning the effects of such a name change on the right to marriage would be highly speculative.</p> <p>&gt; Second scenario: apply for a certificate that states that its owner belongs to the chosen sex. This could be done under the procedure of the "Justificação" (Art.861 ff. Brazilian civil procedure Code). Yet, there is no possibility to lodge an appeal against a possible decision. Furthermore, there does not exist any case law or literature referring to this question.</p>

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CANADA	<p>The Canadian competence for legislation is regulated similar to the one in Australia:</p> <p>The federal state has the competence in the field of marriage and divorce (Sec.91 Nr.26 Constitution Acts 1967 and 1982), the provinces have the competence in the field of personal status and registers.</p> <p><u>1. Federal Law</u></p> <p>According to the Canadian order of competencies The question, whether post-operative transsexual persons are able to marry is a question of federal law. There is no explicit case law.</p> <p>The case of <i>M. v. M. (A.)</i><sup>16</sup> has certain relevance. In this case one of the parties has undergone sex change after a</p>				

<sup>16</sup> (1984) 42 Reports of Family Law (R.F.L.) 55 (Prince Edward Island, P.E.I). Judge McQuaid referred to *Corbett v. Corbett* ([1971] Probate Report 83) and argued that the transsexual person who had undergone sex change was not willing and able to have “natural heterosexual intercourse” anymore.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
<b>CANADA</b>	marriage. The other party applied for nullification of the marriage which the judge granted. Yet, the decision does not make any reference to the requirements of a gender recognition in general.				
<b><u>Canadian provinces</u></b> have a similar tradition as in English Common Law	<u>2. Laws concerning registers in the common-law-provinces</u>  There are provisions <sup>17</sup> about the rectification of the sex entered into the register of birth if a person has undergone a sex change.	A person who has had a sex change operation can apply to the register of his/her birth to have his/her sex changed.	Former birth certificates are to be rendered to the birth register. The birth certificates which are then issued must not make any reference to the fact that a sex change has taken place.	> The applicant has to be registered in the birth register in the respective province.  > The applicant has to be Canadian national <b>and</b> > has to have residence ( <i>domicile</i> ) in Québec.	
<b><u>Quebec</u></b>	<i>Règlement relatif au changement de nom et d'autres qualités de l'état civil, Code Civil du Québec</i> 1991, c.64, trans: regulation concerning the change of name and other characteristics of the civil status.				

<sup>17</sup> In Ontario: Vital Statistics Act, Revised Statutes of Ontario (R.S.O) 1990, C.V-4, Sec.36; Nova Scotia: Vital Statistics Act, Revised Statutes of Nova Scotia (R.S.N.S.) 1989, C.494 as am., Sec.25; Manitoba: Vital Statistics Act, Continuing Consolidation of Statutes of Manitoba (C.C.S.M.) c.V-60, Sec.25; British Columbia: Vital Statistics Act, Revised Statutes of British Columbia (R.S.B.C.) 1996 c. 479, Sec.27; Alberta: Vital Statistics Act, Revised Statutes of Alberta (R.S.A.) c.V-4, Sec.22.



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DENMARK	No specific provisions; The physical change of sex is covered by the Law on sterilisation and castration, e.g. Art.13 concerning castration.	> The Person has to be at least 21 years old. The sexual impulse must cause considerable psychological suffering or social discrimination. >Application is logged to the Civil Rights Directorate. Generally it requires observation and examination by the Sexological Clinic of the Rigshospital during several years. A resulting expertise has to affirm transsexuality. The application is accepted if the Rigshospital and the Council of Judicial Medicines approve.	>After the sex change surgery the Civil Rights Directorate will be informed. The Civil Rights Directorate acknowledges the sex change officially. The assigned gender is entered into the central register of persons, the applicant will receive a new number in this register which reflects the new gender. Afterwards it is possible to change the first name, get new papers, like passport or driver's license and also marry or have a partnership registered.	The person has to have residence in Denmark, nationality is irrelevant.	The Civil Rights Directorate also acknowledges sex changes undertaken abroad. There is no specific legal basis for this. The decision granting the acknowledgement requires an expertise by a doctor who has conducted a physical examination of the applicant. Due to the guidelines of the Rigshospital it is necessary: for male to female applicants to have their outer genitals removed (testicles and penis) and to have undergone hormone treatment. For female to male no respective guidelines exist. After the gender recognition the same provisions as for native citizens apply for the change of the register. Nationality or residence is irrelevant. Furthermore it is irrelevant whether the decision concerning the gender recognition

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DENMARK					<p>would be acknowledged abroad.</p> <p>Acknowledgement of sex change undertaken broad is interesting for persons who have a residence in Denmark, but who don't want to be subject to Danish requirements for the sex change surgery. It is also relevant for persons who have no residence in Denmark but who want to marry there. Marriages of transsexuals after the gender recognition are valid under Danish law without any restrictions.</p>

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<b>FINLAND</b>	<p>Since 01.01.2003 the Finnish Transsexual Law is in force. (Law Nr.563/2002 about the declaration of the gender assignment of transsexual Persons from 28.02.2003, Finnish: Laki Transseksuaalin Sukupuolen vahvistamistea Directive 1053/2002 of the Ministry for Social and Health for the regulation of the examination and treatment concerning a sex change and for the regulation concerning the medical expertise for the ascertainment of the gender assignment of transsexual persons.</p> <p>Parallel to the new law a Legal procedure was introduced to ascertain the gender assignment in front of the court. Previous to these laws there was no Specific legislation, just administrative decisions without clear guidelines,</p>	<p>§ 1 Finnish TSL (Transsexual Law):</p> <ul style="list-style-type: none"> <li>&gt;Medical expertise which states that the person considers him/herself as belonging permanently to the opposite sex and that this person lives according to this gender role, and that she/he is infertile through special operation or due to other circumstances</li> <li>&gt;Person must be of age;</li> <li>&gt;Is unmarried or lives in a registered Partnership<sup>18</sup>;</li> <li>&gt; Has Finnish nationality or residence in Finland</li> </ul> <p>&gt; Local competence: competent office of home/residence municipality; for Fins without residence, the magistrate in Helsinki is locally competent. ( § 3 TSL)</p> <p>&gt; The legal procedure results in a declaration by the court which ascertains the acquired gender.</p>	<p>Declaration by the court, that a persons belongs to the opposite sex to the one registered in the register of the population due to the Inhabitants Data Law (507/1993); Marriage is possible, please see Fn 3.</p>	<p>&gt;Finnish nationality or &gt;Residence in Finland (no minimum duration of residence necessary unlike the Netherlands (§ 1 Nr.4 TSL)</p>	<p>Foreign decisions concerning sex change /gender recognition are acknowledged, if the person has the nationality of the respective state or has had residence there (see § 7 Finnish TSL)</p>

<sup>18</sup> Exceptions due to § 2 Finnish TSL: with the consent of the husband/wife/partner a sex change can be acknowledged and the marriage can be transposed into a registered partnership or the registered partnership can be transposed into a marriage.

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FRANCE	<p>similar to the situation in Denmark or Norway.</p> <p>No specific legislation; only case law.</p> <p>Art.8 ECHR (right to respect for private and family life), Art.9 Code Civil (private life), Art.57 Code Civil (personal status) gives right to obtain gender recognition, in detail: the Right to have official French documents in conformity with the new gender appearance in order to end a Social discrimination in France.</p>	<p>Procedure: a special status action (action d'état) in front of the County Court (Tribunal de Grande instance, TGI) which sits in chamber quorum, the public prosecutor (Ministère Public) participates in the sitting. It is not clear whether the procedure is the same everywhere in France.</p> <p><u>Leading case</u><sup>19</sup> ruled: The principle of respect for private life justifies to have a personal status changed, if proof is given: &gt;of a medical-surgical treatment undertaken with therapeutic intention, a person with &gt; that the person who has a transsexual syndrome doesn't show all of the characteristics of his /her former sex anymore, has gained a physical appearance that resembles that of the other sex and that this new gender determines his/her social behaviour.</p> <p><u>Requirements:</u></p>	<p>With the change of the Civil Status Register follow other important changes for the applicant:</p> <p>&gt;Change of the first name in compliance with the new entry in the register &gt;Right to marry a person of the (now) opposite sex (due to majority opinion the transsexual person has to inform his/her spouse about the sex change before the marriage, otherwise the marriage could be nullified due to Art.180 Para 2 Code civil. &gt;Right to adopt children</p>	<p>&gt; Married persons can apply for gender recognition. As the right to have a sex change recognised is a human right, marriage is not regarded as an obstacle. Yet, the marriage has to be terminated as the French law does not allow for a same-sex marriage. &gt; Children borne in a marriage of the transsexual person are likewise no obstacle: their legal status remains the same, as the sex change has only ex-nunc effect. The separation of parental authority might be regulated differently.</p>	<p>Foreign nationals residing in France can apply for gender recognition even if their home country does not allow for it. Art.8 ECHR (right to respect for private life) applies also to foreigners even if their home country does not allow for gender recognition. Due to French jurisdiction a French court decision denying an otherwise justified gender recognition of a foreigner would violate Art.8 of ECHR, Art. 9 Code civil (private life) and Art.57 Code civil (personal status). Due to Art.1 ECHR the ECHR applies to all persons under the sovereign power of a Member State. Jurisdiction is seen as</p>

<sup>19</sup> Two connected cases: Cour de cassation, Assemblée plénière 11. December 1992, Bulletin civil n°13; Gazette du Palais. 1993, 180 concl. *Jéol*; Juris-Classeur Périodique (JCP) 1993.II.21991 concl. *Jéol*, note *Mémeteau*; Defrénois 1993, 431 note *Massip*; Revue trimestrielle de droit civil (RTDciv) 1993, 598 obs. *Hauser*.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
FRANCE		<p>&gt;"Authenticity" of transsexual syndrome, proofed by a medical-psychiatric expertise concluded by an interdisciplinary team. The syndrome has to be clearly defined and differentiated from similar disorders of gender deviations which which do not justify a sex change.</p> <p>&gt; Before the court decides there</p> <p>has to be a medical examination. The court's investigation takes place after the medical examination which itself takes place before the sex change surgery. For operations in France the medical examination has to follow the strict rules of the French Medical Chamber: there have to be three specialists, one endocrinologist, one surgeon and one neuro-psychiatrist. The examination period lasts at least one year, but often much longer than this.</p>			<p>as part of this sovereign power due to French legal understanding. Furthermore, the human rights guaranties of the ECHR applies also to foreigners whose home country is a non-member state. Human rights are</p> <p>part of the French "ordre publique", a contrary court ruling of the home country would be considered as irrelevant.</p>

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GERMANY <sup>20</sup>	The "Transsexuellengesetz" (Law concerning Transsexual persons - TSG) dates from 10.09.1980 <sup>21</sup> and deals with all questions related to personal status in the context of a sex Change e.g., the procedure to ascertain the new gender and the procedure to have the first name changed.	<p>There are two separate procedures:</p> <ol style="list-style-type: none"> <li>1. Procedure to change the first Name (§ 1 TSG)</li> <li>2. Procedure to "establish the belonging to a sex group"<sup>22</sup> (§ 8 TSG)</li> </ol> <p>The first procedure can be done without having to do the second for gender recognition). Yet, the gender recognition procedure requires to state the (new) first name in the application.</p> <p>The latter procedure, thus can combine both.</p> <p>The procedures share some of the requirements ( § 1 Para (1) – (3)):</p> <ul style="list-style-type: none"> <li>&gt; Due to a transsexual identity a person feels that he/she does not belong to the gender registered in the birth register but to the opposite gender and for at least three years he/she is under the coercion to live according to his/her feelings.</li> <li>&gt; The person has to be a German national, or a homeless foreigner who is stateless, or a foreign refugee</li> </ul>	<p>&gt; Procedure due to § 1 TSG: change of first name; a gender recognition is not included with. The person is legally still regarded as of the sex entered in the birth registration, whereas the new first name (and often the appearance) contradicts the legal gender.</p> <p>&gt; Procedure due to § 8 TSG</p>	§ 8 Para 1 (1) i.c.w. § 1 Para 1 (1) TSG: the right to apply is restricted to German nationals or to persons with German personal status	

<sup>20</sup> The German legislation on transsexuality has naturally not formed part of the chapter on International Development of Law in the Max-Planck-Study. However, in the chapter on the constitutional framework (of the opinion the Max-Planck-Institute gave) the German legislation is discussed. The following information is taken from there.

<sup>21</sup> Law concerning the change of the first name and the establishment of belonging to a sex group in certain cases, BGBl.I S.1654.

<sup>22</sup> This basically means the gender recognition procedure.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
GERMANY		<p>or asylum seeker who is resident in Germany</p> <ul style="list-style-type: none"> <li>&gt; The person is unlikely to change his/her feeling of belonging to the opposite gender with a high degree of probability.</li> <li>&gt; The person is at least 25 years old.<sup>23</sup></li> </ul> <p>Both procedures require to the state the (new) first name(s) in the application.</p> <p>Additionally to the requirements of § 1 Para 1 (1)-(3) the procedure for Gender recognition requires:</p> <ul style="list-style-type: none"> <li>&gt; The person is unmarried, § 8 Para 1 (2) TSG</li> <li>&gt; The person is continuously non-reproductive, § 8 Para 1 (3) <b>and</b></li> <li>&gt; The person has undergone an operation to alter his/her other sexual marks, so that a visible closeness to the appearance of the other sex has been achieved, (§ 8 Para 1 (4) TSG).</li> </ul>	<p>According to § 10 TSG, from the date of the decision the transsexual is to be regarded as belonging to the other sex; this is final and any rights and duties which depend on sex are to be governed by their new sex</p>		

<sup>23</sup> The age requirement due to § 1 Para 1 (3) is void because it violates the principle of equality due to Art.3 Para 1 of the Basic Law, so decided in the decree of the German Constitutional Court from 26.01.1993 – BvL 38/92 u.a. – (BGBl.I S.326).

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
IRELAND	<p>No specific legislation concerning gender Recognition.</p> <p>Leading case: <i>Foy v. An T-Ard Chlaraitheoir, Ireland and the Attorney General</i><sup>24</sup>.</p> <p>A gender recognition is not possible under Irish Law. The gender is determined at birth through biological characteristics which can not be changed. There is no violation of the right to private life and right to marry. Though <i>Goodwin v. UK</i><sup>25</sup> ruled the contrary on the very same day, the judge did not change his opinion; through continuous ignoring the ruling of the EctHR, Ireland does not fulfil its duty as a as a Member State of the ECHR due to International Public law.</p>				

<sup>24</sup> [2002] Irish High Court Decisions (IEHC) 116, Court decision of 11.07.2002.

<sup>25</sup> *Goodwin v. United Kingdom*, Application no.28957/95, Court decision of 11.07.2002.



Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
ITALY	<p>Since 04.05.1982 in force: Norme in materia di rettificazione di attribuzione di sesso<sup>26</sup>, trans:</p> <p>Law concerning the rectification of gender assignment. The law is commonly called Transsexual Law, in the following (TSL)</p>	<p>Art.2 TSL allows for a procedure in non-contentious jurisdiction; In general cases are approved rather generously, yet a few applications have been turned down despite positive (medical) expertise.</p> <p>Art.2 Para 1 TSL requires an application to the court of the applicant's place of residence.</p> <p>Art.2 Para 3 TSL i.c.w. Art.70 Civil Procedure Code: a <i>Pubblico ministero</i>, trans.: representant of public interest<sup>27</sup> has to participate in the procedure.</p> <p>Art.2 Para 4 TSL:</p> <p>if required, the judge can demand an expertise about the applicant's psycho-sexual constitution.</p> <p>Art.2 Para 5 TSL:</p>	<p>Art.2 Para 5 TSL: If the court decides in favour of the application, it instructs the registrar of the municipality where the birth certificate was issued to rectify the register.</p>	<p>The survey does not state any restrictions concerning the right to apply.</p>	<p>The TSL does not have provisions concerning its application towards foreign nationals, it is not limited to Italian nationals.</p> <p>Therefore general principles apply: the personal status is determined by the law of the respective home country. if the home country does not allow for a gender Recognition the ordre Public applies Italian Law.<sup>28</sup></p>

<sup>26</sup> Legge 14 aprile 1982, n.164, Gazzetta Ufficiale n.106, del 19 aprile 1982, p.2879.

<sup>27</sup> according to the author of the survey, "pubblico ministero" is to be translated not as public prosecutor but as representant of public interest

<sup>28</sup> Patti/Will, Rivista di diritto civile 1982, II, 747 f., the same author: *Nouve leggi civili commentate* (1983), 39, the same author: *Commentario* (1986), p.26 f. with reference to the meanwhile differently regulated personal status in Art.17 Para 1 Disposizioni preliminari al Codice civile (now: Art.24, Legge 31 maggio 1995, n.218) and with reference to the principal of the ordre public due to then Art.31 Disposizioni preliminari al Codice civile, (now: Art.16, Legge 31 maggio 1995, n.218).

This legal opinion has been confirmed by case law: Tribunale di Milano, Sez.IX, 17 luglio 2000 – Pres. Fraccon – Est. Cosentini, in: *Famiglia e Diritto* (2000), 608 ff. , with annotations by Sara Tonolo Sacco. The court decided positively concerning an application by a Peruvian national with residence in Milan applying for gender recognition under Italian Law. The Peruvian law has no explicit provisions concerning gender recognition, but has likewise no respective prohibition.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
ITALY		<p>If the court decides in favour of the application, it instructs registrar of the municipality where the birth certificate was issued to rectify the register.</p> <p>Art.3 TSL: Its wording appears to require the permission of an operation through court decision. Yet, according to majority opinion an operation without respective permission does not exclude an application.</p> <p>Art.4 TSL: The rectification of the gender assignment has legal effect only from the court decision onwards.</p>			

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
THE NETHERLANDS	<p>Wet houdende nadere Regelen ten behoeve van Transseksuelen omtrent Het wijzigen van de Vermelding van de kunne In de akte van geboren, from 14.04.1985</p> <p>Trans.: law about the praxis transsexuals should follow to change the gender of their birth certificate”</p> <p>The provisions of this law were integrated in Art.28 – Art.28 c of the Nieuwe Burgerlijk Wetboek (NBW), trans.: the New Civil Law Code.</p>	<p>The law of the Netherlands has no specific procedure for gender recognition.</p> <p>Art.28 Para 1 NBW: a petition has to be filed at the rechtsbank (Court of First Instance = High Court [UK]) for changing the birth certificate.</p> <p>Art.28 b Para 2 NBW: The petition can be combined with a petition to have the first name Changed.</p> <p><u>Requirements for order of the court:</u></p> <p>&gt;The petitioner is convinced that he/she does not belong to the sex in his/her birth certificate, Art.28 Para 1 NBW</p> <p>&gt;The petitioner has to be adjusted physically to the chosen sex as close as medically and psychologically possible.</p> <p>&gt; The petitioner must not be married Art.28 Para 1 a) NBW</p> <p>&gt;the petitioner must not be potent or fertile, Art.28 Para 1 b.</p> <p>&gt;The petition has to be filed together with an expertise not older than six months, Art.28b Para 1 NBW.</p>	<p>&gt; The legal effects (see Previous column) will enter into force when the registrar enters the order of the court into the register (rectifies the register), Art.28c Para 1 NBW</p>	<p>Nationality is irrelevant</p> <p>Foreign nationals filing a petition have to fulfil the following requirements:</p> <p>&gt;the petitioner has to have had his residence in the Netherlands for at least one year, including just prior to the petition.</p> <p>&gt;the petitioner has to have a valid residence permit.</p>	

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
THE NETHERLANDS		<p>The expertise has to be signed by the petitioner and the expert. The expertise states the legal requirements mentioned above (the conviction of the petitioner is permanent, how far the physical approximation has taken effect, the petitioner is not potent or fertile anymore). There is no need to make reference to the conviction of the petitioner if the physical approximation has already taken place, Art.28a Para 2 NBW.</p>			

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
PORTUGAL	<p>There is no specific legislation and the relevant jurisdiction is ambiguous in relation to gender recognition.</p> <p><u>In favour of the rectification of the register</u>  Court of Appeal, Lisbon<sup>29</sup>  (due to Art. 70 of Portuguese CC – protection of the individual’s personality, Art.25 Nr.1 of Portuguese Constitution [CPR] – the Physical and moral inviolability of citizens, Art.26 Nr.1 CPR– the right to Personal identity, Art.64 Nr.1 the right to protection of health and ECHR (which is to be applied for the interpretation of fundamental rights based on legislation or the Constitution - Art.16 Nr.1 CRP).  Furthermore the 12 th</p>	<p>Due to jurisdiction which decided in favour of gender recognition: (please see previous column):</p> <ul style="list-style-type: none"> <li>&gt;The petitioner has to be impotent</li> <li>&gt;The petitioner has to be unmarried<sup>30</sup>.</li> </ul>	Rectification of register		

<sup>29</sup> Judgement of 05.04.1984, Colectânea de Jurisprudência (CJ), 1984 II p.124 ff.

<sup>30</sup> The literature objects these requirements; it furthermore calls upon the Portuguese legislator to prepare respective legislation and to stop legal uncertainty, Coelho de Lima, *Transexualidade, identidade e casamento – alguns problemas*, *Scientia Iuridica*, Braga, V.50, Nr.289 (Januar-Abril 2001), P.125 ff.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
PORTUGAL	<p>Civil court of Lisbon in 1991<sup>31</sup> and the 7<sup>th</sup> Civil Court of Lisbon in 1994<sup>32</sup> (due Art.10 Nr.3 Portugese CC- closing a legal gap until the legislation responds). And again the Lisbon Court of appeal ruled in 1993<sup>33</sup> that due to fundamental rights, a sex change has to be legalised and legally recognised.</p> <p><u>Court decisions against gender recognition:</u></p> <p>Highest Civil Court in Portugal in 1988<sup>34</sup> (the petitioner was not considered to be transsexual despite several operational treatments. Therefore the court did not decide about possible claims linked to the status of a transsexual person. The court of appeal explicitly decided against a recognition in principle: the the civil status of a person is not at disposal.<sup>35</sup></p>				

<sup>31</sup> Judgement of 10.12.1991, CJ 1991 I p.301 ff.

<sup>32</sup> Judgement of 05.04.1994, CJ 1997 II p.27 ff.

<sup>33</sup> Judgement of 09.01.1993, CJ 1993 V p.118.

<sup>34</sup> 16.111988, BMJ, 1988 Nr.381 p.579 ff.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
SWEDEN	Lag (1972:119) om fästställande av könstillhörighet i vissa fall <sup>36</sup> (trans.: Law concerning the declaration (by court) of the affiliation of a person's gender in certain cases), In the following : TSL	<ul style="list-style-type: none"> <li>&gt; The petitioner has to have had a feeling of affiliation to the other sex since his/her youth and must have lived in accordance with this gender for considerable time, § 1 Para 1 of TSL</li> <li>&gt; He/she has to be at least 18 years old and has to be sterilised or impotent for other reasons , § 1 Para 2 TSL</li> <li>&gt;He/she has to be unmarried and Swedish national (§ 3 TSL)</li> <li>&gt; A physical sex change is possible but not a legal requirement, § 4 TSL.</li> </ul>		Only Swedish nationals are entitled to file a petition; being the first law on transsexuality in Europe, Sweden feared a “tourism of transsexual persons” who would file a petition for a gender recognition. Despite the fact that many countries now have law on transsexuality and the Swedish TSL is to be revised, there is currently no possibility (like e.g. in Finland) for foreign nationals to have a gender recognition.	

<sup>35</sup> Judgement of the Lisbon court of appeal of 06.02.1986, CJ 1986 IV P.123 ff.

<sup>36</sup> Law from 21.04.1972, modified in 1975, 1980, 1991, 1993, 1995. The basic structure of the law and the respective provisions on transsexuality has remained unchanged since 1972.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
SWITZER- LAND	No specific legislation, but case law dating back (in favour of gender recognition) to 1931. First major decision concerning gender recognition dates from 27.06.1961 <sup>37</sup>	As the Swiss legislator has not foreseen the possibility of a sex change, there are no explicit provisions on gender recognition. This gap in legislation has to be filled by the courts in the way a legislator would do, Art.1 Para 2 Civil Law Code. Due to the enhanced value of evidence registries have, the question of rectification after a sex change has to be clarified by legal procedure. The procedure thus involves an action for declaratory judgement on the status of a person (yet it belongs to the non-contentious jurisdiction). Substantial requirements are: > Physical sex characteristics have to be removed or changed in order to obtain infertility (or impotence) in reference to the original sex of the petitioner <sup>40</sup> . This has to be proved with a post-operative medical expertise <sup>41</sup> .	Gender recognition will have effect after the conclusiveness of the judgement. The Court will order that the civil registry is to be changed according to the recognised gender.  Legal action for name change is often combined with legal action for gender recognition <sup>38</sup> . Thus the change of the first name is effected in the very same court decision. Until the end of 2001 a only in the rectification of the family register, not in the other registers, namely the birth register. From 01.01.2002 gender recognition is also entered into the birth, register Art.52 Nr.1 ZStV. <sup>42</sup>		Cases with international Implications are dealt with In Art. 33 ff. of the Federal Law on International Private Law (IPRG); it refers to the principle of residence and only alternatively refers to nationality. Thus, foreign nationals with residence in Switzerland can file a petition for gender recognition. <sup>39</sup>  The same is valid for the change of the first name, Art.38 Para 1 effects are determined by Swiss law, Art.38 Para 3 IRPG. Under Swiss law Art.30 Para 1 of the Civil Code requiring an important reason for the name change (see column "Requirements /

<sup>37</sup> Judgement of the Basel-City Civil Court of 27.06.1961, BGE 119 II 264;269., Schweizerisches Zentralblatt für Staats-und Gemeindeverwaltung (ZBl.) 62/1961, p.418 ff.

<sup>38</sup> e.g. Judgement of the Basel-City Civil Court from 08.Mai 1979, ZZW 1979, p.281, 285.

<sup>39</sup> Santoro in Müller/Wirth (edi.): Gerichtsstandsgesetz: Kommentar zum Bundesgesetz über den Gerichtsstand in Zivilsachen (2001), Art.14 Rn.37; Siehr, Das Internationale Privatrecht der Schweiz (2002), § 8 I 1 (P.137 ff.)

<sup>40</sup> Aubert/Reich, Der Eintrag der Geschlechtsänderung in die Zivilstandsregister, in ZZW 1987, p.5; Judgement of the Basel-City Civil Court of 17.Juli 1981, ZZW 1985, p.374, 376; Judgement of District Court St.Gallen of 26.11.1996, ZZW 1997, p.161, 162.

<sup>41</sup> see e.g. Judgement of District Court St.Gallen of 26.11.1996, ZZW 1997, p.161, 162 f.

<sup>42</sup> ZStV = Zivilstandsverordnung (trans.: Regulation concerning Civil Status) of 24.10.2001.



Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
SWITZER- LAND		<p>&gt; At times hormone treatment and a psychiatric expertise are required.<sup>43</sup></p> <p>&gt; Whether further approximation of the physical appearance is required (e.g. construction of a penis, breast implants) remains contested<sup>44</sup>.</p> <p>&gt; The requirement of celibacy is likewise contested.<sup>45</sup></p> <p>In practice gender recognition and change of name are often combined in one legal procedure. There is no case law concerning the question whether a name change can be effected separately from gender recognition and thus avoiding sex change surgery (see Law in Germany). Art.30 Para 1 of the Civil Code requires an important reason for the change of name. Competent in this case is the court which decides about the gender recognition Whereas the sex change is</p>			Procedure").

<sup>43</sup> Judgement of the Basel-City Civil Court of 08.Mai 1979, ZZW 1979, p.281, 283 f.

<sup>44</sup> Against the requirement of further approximation of appearance: Aubert/Reich (Footnote 35), p.3.

<sup>45</sup> Concerning problems of a married petitioner: Geiser/Lüchinger, in Honsell/Vogt/Geiser (edi.): Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I<sup>2</sup> (2002), Art.104, Rn 5 f.; pro nullification of an existing marriage: Hegnauer/Breitschmid, Grundriß des Eherechts (2000) Rn.705, Heussler: Geschlechtsänderung einer geschiedenen Frau; Verarbeitung im Familienregister, ZZW 1993, p.3 ff.; Heussler, o.T., ZZW 1997, p.168. The District Court of St.Gallen has decided on 26.November 1996 (ZZW 1997, p.161 ff.) in favour of a gender recognition where a married man applied for the recognition of a sex change which has taken place while he was still married. The gender recognition implied the rectification of the register, a nullification of the marriage beforehand was not required. The Federal Office for the civil status administration (Eidgenössische Amt für das Zivilstandswesen EAZW) after the judgement required in an order of 2.7.1997(ZZW 1998, p. 18f.) that future rectifications of the register in such cases depend on a judgement concerning the nullification of the marriage or a certificate concerning the death of the spouse. However, this order has no legal force and it thus legally no binding.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
SWITZER- LAND		considered as an important reason, a name change through administrative offices seems possible, if a first name has been chosen which refers to both genders. <sup>46</sup>			

<sup>46</sup> See Götz, o.T., ZZW 1978, p.261 (Sascha Sandro).

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
SPAIN	There is no specific legislation on gender recognition <sup>47</sup> , but case law. The first court decision granting gender recognition dates from 02.07.1987. <sup>48</sup>	Art.10.1 of the Spanish Constitution (Constitución Española, CE) – right to free personality development) is the legal basis for gender recognition. There is no specific procedure for the rectification of the personal status register concerning the sex <sup>49</sup> and the first name. The rules about register rectification (modificación) - due to a contradiction between registration and reality (after the registration)- apply. The later change of circumstances (the change of the gender affiliation) has to be created by a contentious legal procedure (juicio ordinario) which leads to a definite judgement, Art.93.2 Ley del Registro Civil – LRC (trans: law on civil register). <sup>50</sup>	Change of register (modificación)	> Prosecution (Ministerio Fiscal) > Persons who can apply for the registration of data which is relevant for personal status > Persons who relate to this data	The personal status register of Spain does include mostly Spanish nationals, therefore there has been no legal action for rectification filed by foreign nationals. Yet, as the right to have a gender recognition is considered as a fundamental right, Art.10.1 CE (human dignity and free development of personality) Spanish courts would probably not differ between Spanish nationals and foreign nationals.

<sup>47</sup> The latest draft gender recognition bill dates from 20.03.2001, [http://www.congreso.es/public\\_oficiales/L7/CONG/BOCG/B/B\\_124-01.PDF](http://www.congreso.es/public_oficiales/L7/CONG/BOCG/B/B_124-01.PDF).

<sup>48</sup> Judgement of the Tribunal Supremo (TS), no source cited; subsequent court decisions e.g.: judgement of TS from 15.7.1988, or from 3.3.1989, or from 19.4.1991 (no source cited)

<sup>49</sup> The entry on the gender is part of the birth registration (inscripción de nacimiento, Art.41 Ley del Registro Civil LRC i.c.w. Art.170 Reglamento de la Ley del Registro Civil RRC)

<sup>50</sup> This is different in the case of Intersexuality, here only a simple application (expediente gubernativo) is required which will lead to the rectification of the register (rectificación), Art.93.2 Ley del Registro Civil RRC i.c.w. Art.194 Reglamento del Registro Civil –RRC. The register had been wrong from beginning onwards, as with an intersexual person an unambiguous entry about a sex is wrong in itself, further legal assessment is not necessary.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
TURKEY	Art.40 new Civil Code (nZGB); it involves an action for declaratory judgement	<p>The legal procedure has two phases:</p> <p><u>1. Phase:</u> Sex change permit – requirements: Petitioner &gt; is at least 18 years old &gt; is unmarried &gt; has a transsexual disposition &gt; is continuously impotent<sup>51</sup> Requirement (disposition and impotence) has to be confirmed by an expertise of a special panel of a research hospital.</p> <p><u>2. Phase:</u>  After the sex change surgery which requires the above mentioned permit, legal action for rectification of the personal status register is possible. The sex change surgery is confirmed by an expertise of the Public Health panel.</p>	<p>Sex change surgery is legal.</p> <p>Rectification of personal Status register</p>	<p>&gt; Nationality and residence is irrelevant – the goal of the procedure can only be the declaration of the court concerning the gender recognition</p> <p>The fact that an expertise of the research and teaching unit of the University hospital is required Could prevent any kind of “transsexual tourism” to Turkey to achieve gender recognition more easily.</p>	

<sup>51</sup> This requirement exists despite the sex change surgery taking place only afterwards, therefore it will be rather problematic for the affected person to fulfil this requirement; see Atamer, The Legal Status of Transsexuals in Turkey, International Journal of Transgenderism (in print); Will, das Gespenst im Zivilgesetzbuch – zum neusten türkischen Zivilgesetzbuch, in: Festschrift für Erik Jayme, 2004.

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
<b>UNITED KINGDOM</b> <sup>52</sup>	<p>Gender Recognition Act 2004</p> <p>It allows for the full recognition of the chosen gender</p> <p>It has also effect on Matrimonial Law and the Law concerning birth registers, but also other areas such as Pension Rights and Social Security Rights.</p> <p>The gender recognition bill was motivated by two leading cases of the EctHR<sup>53</sup>, which ruled that the UK has violated Art.8 and Art.12 of the ECHR. In the view of these two decisions the House of Lords gave a Declaration of incompatibility in the case of <i>Bellinger v. Bellinger</i>.<sup>54</sup></p>	<p>The person (please see column: right to apply) has to apply to a gender recognition panel for having his/her sex change acknowledged. The panel will issue a gender recognition certificate (please see column effects for Details) if all the requirements of Sec.2 are fulfilled.</p> <p>If the application is founded on Sec. 1 (1) (1): the person lives as a member of the opposite sex, the sex change will be acknowledged under the condition that the applicant:</p> <ul style="list-style-type: none"> <li>&gt;Suffers or suffered from a gender dysphoria;</li> <li>&gt;Has lived in her/his acquired gender for at least two years,</li> <li>&gt;Intends to live in his/her chosen gender until death</li> </ul> <p><u>Evidence of sex change:</u> Survey report of a doctor and a psychologist who are both</p>	<p>1. There exist two forms of gender recognition certificates</p> <ul style="list-style-type: none"> <li>&gt; Full gender recognition certificate: allows for full legal effect of recognition</li> <li>&gt;Interim gender recognition certificate: if the applicant is still married at the termination of the procedure he/she will receive the interim gender recognition certificate. Within 6 months the applicant has to apply for the nullification of his/her marriage. The Gender recognition bill introduced a respective reason for the nullification in the Matrimonial Causes Act 1973.</li> </ul> <p>After the nullification of his/her marriage the applicant will receive a full gender recognition certificate.</p> <p>2. Effects of the gender recognition certificate: Due to Sec.9 the issue</p>	<ul style="list-style-type: none"> <li>&gt; The person needs to be at least 18 years old <b>and</b></li> <li>&gt;either live as a member of the opposite sex (Sec.1 (1) (a)) <b>or</b></li> <li>&gt; have his/her sex changed due to the law of another country (Sec. 1 (1) (b)).</li> <li>&gt;British nationality is not required</li> <li>&gt; Residence is not required</li> </ul> <p>Unless changes will be made by respective directives, even foreigners appear to be able to apply for gender recognition in the UK.</p>	<p>The gender recognition bill deals with some aspects concerning foreign legal orders in the context of gender recognition.</p> <ul style="list-style-type: none"> <li>&gt;Sex changes which are undertaken outside the UK and under another legal order have no legal effect in the UK whatsoever.</li> <li>&gt;To obtain a gender recognition the affected person has to apply for a gender recognition certificate due to Sec.1 (1) (b). The panel grants the recognition if the physical sex change took place in an <i>approved country</i> and the applicant submits the relevant proof according to Sec.3</li> <li>&gt;There are specific</li> </ul>

<sup>52</sup> The UK has three different partial legal orders (England and Wales, Scotland, Northern Ireland). The Gender Recognition Bill 2002/2003 will be valid throughout the UK. It will change laws which are in connection with the subject, e.g. in Family Law or the registrar law. This involves also the partial legal orders. The gender recognition bill addresses these legal orders separately. The information given here will be restricted to the English partial legal order. Also here you will also only find the current legal situation, for details of the old law, please refer to the chapter of “Principal and underlying legal concepts”

<sup>53</sup> *Goodwin v. United Kingdom*, Application no.28957/95, Court decision of 11.07.2002. and *I.v.UK*, Application No. 25680/94, Decision of 27 May 1997 by the European Commission of Human Rights

Country	Law	Requirements / Procedure	Effects	Right to apply	Recognition / IPR
UNITED KINGDOM	which itself was another motivation for the draft of the gender recognition bill.	experienced in the treatment of gender dysphoria; if there has been medical treatment for the change of sexual characteristics the report should include details of it, too. Sec.3 describes in detail the demanded requirements for a gender recognition.	of the full gender recognition certificate results in a Complete change of gender for all legal purposes  The certificate as such is to be registered in the gender recognition register. Due to Sec.9 <sup>55</sup> , the entry of the birth register has to be changed concerning the gender and the name of the transsexual person.  The change of the birth register is limited to persons who have been borne in the UK- irrespective of their nationality – only they have an entry in the register which could be subject to change.		provisions for marriages if one of the parties has had a sex change abroad. Due to Sec.21 (1) a sex change abroad does not by act of law result in a gender recognition in the UK. In consequence the marriage of a person who has had a sex change abroad is not recognised (Sec.21 (3)). The marriage will not be Regarded as void, if the person has received a full gender recognition certificate (Sec.21 (3)).

<sup>54</sup> Bellinger v. Bellinger [2003] 2 All E.R. 593, 602 f. for further details

<sup>55</sup> Sec.9 (1): “Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is male gender, the person’s sex becomes that of a man and if it is the female gender, the person’s sex becomes that of a woman).”

In order to clarify the various terms used to describe phenomena in the field of transsexuality the following definitions might be useful. The author regards the differentiation between sex and gender as most important to the theoretical and practical dealing with the field of transsexuality.

**Gender**

French equivalent: genre

German equivalent: Gender, nm

Definition: psychological characteristics of one's sexual identity in contrast with one's biological sex. Gender is the most fundamental part of one's identity as a human being. The very first question everyone asks about birth is "Is it a boy or a girl?" As my article on Intersexuals explains, gender is about more than just male and female XX, or XY chromosomes.

**Gender identity**

conception an individual has of his/her gender

Gender identity is the private experience of gender role; and gender role is the public manifestation of gender identity ... 'gender identity' can be read to mean 'gender identity/role'.

**Intersexual**

French equivalent: intersexuel

German equivalent: Intersex, nn

Definition: person with genetic, physical and/or hormonal attributes which cannot easily be classified as male or female. Intersexuals are people born physically between the male and female genders with anatomy that is either ambiguous or comprised of varying degrees of both male and female anatomy.

**Sex**

French equivalent :sexe

German equivalent:: Geschlecht, nn

Definition: biological characteristics used to describe someone as male or female

**Sexual identity**

totality of characteristics concerning sex and gender

German equivalent: : Geschlechtsidentität, nf

Technical remark: Sexual Identity and Gender Identity are different

**sexual orientation**

French equivalent: orientation sexuelle

German equivalent: sexuelle Ausrichtung, nf

Definition: fact of being attracted towards persons with certain characteristics

Technical remark: it can be people with blond hair, long hair, beard, etc.. Sexual orientation is not limited to the anatomical sex.

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<sup>1</sup> This glossary has been compiled with the help of the Glossary provided by C.A.R.I.T.I.G. (Center for Assistance, Research, Information on transsexuality and gender identity), please see [www.caritig.org](http://www.caritig.org)

### **Sex reassignment surgery**

French equivalent: réassignation sexuelle

German equivalent: Geschlechtsumwandlung, nf

Definition: genital reassignment surgery (GRS) or sex change surgery

Synonymes: gender reassignment surgery (GRS) or gender reassignment

Remark : The two synonymes are in fact a bad transcription of the acronym.

Sex change surgery: male to female, referring to a person with a male sex and a female gender (This follows the thesis, that sex and gender diverge) or from a male sex to a female sex (this definition is linked to medical treatments) The sex change surgery means undergoing a "transsexual transition", which in the case of a male to female (MtF) transsexual involves completely changing the body from that of a boy to that of a woman.

### **Transgender:**

French equivalent: transgenre

German equivalent: transgender

Definition : whose gender differs from his/her sex

Because of non-conventional gender identities, the MTF transgender population is among the most stigmatised groups in modern society. "The formation of a transgender community denotes a new found kinship which supplants the dichotomy of transsexual and transvestite with a concept of continuity." Some people consider ALL situations involving cross-dressing as being under the "overall transgender umbrella". Transgendered identity in no way determines a person's sexual orientation. An individual exhibiting transgender behaviour is one that sees gender as being either constructed or inborn but nevertheless open in manifestation.

Following political and theoretical debate there exist two forms of transgender definitions ( TG (1) and TG (2)):

#### TG (1)

Definition: person whose gender fluctuates between femininity and masculinity

#### TG (2)

Definition: whose gender differs from his/her sex

### **transsexual**

French equivalent: transsexuel

German equivalent: Transsexuelle, nm/nf

Definition: transgendered individual who generally conforms with the preferred sex

Technical remark: the argument that transsexuals should be called transgender because sex is sex and gender is gender, would then not be able to be applied to anyone who has not transsexed.

### **transexualism**

is a medical and psychological condition of being in the wrong body and needing to at any costs transition to that of your desired gender. transexualism can also be caused by being born intersexed, or gender ambiguous (described by the outdated term hermaphroditic).



## Annex III

## Table of cases

### 1. Cases in EU-Member States:

#### **Austria**

BverfG 11.10.1978, NJW 1979, 595 = StAZ 1979, S.9.

VwGH (Administration court of appeal), of 30.09.1997, file number 95/01/0061, ZfRV 1999, 185.

#### **Belgium**

Court of Mons, Belgisches Staatsblatt, 10.07.1997

Appelationshof Brussel, court decision of 7.5.1974, Journal des Tribunaux 1974, p. 713.

#### **France**

Cour de cassation, Assemblée plénière 11. December 1992, Bulletin civil n°13; Gazette du Palais. 1993, 180 concl. *Jéol*;

Juris-Classeur Périodique (JCP) 1993.II.21991 concl. *Jéol*, note *Mémeteau*;

Defrénois 1993, 431 note *Massip*;

Revue trimestrielle de droit civil (RTDciv) 1993, 598 obs. *Hauser*.

#### **Germany**

VwGH from 30.09.1997, file number 95/01/0061, ZfRV 1999, 185.

BverfG 11.10.1978, NJW 1979, 595 = StAZ 1979, S.9.

German Constitutional Court of 26.01.1993 – BvL 38/92 u.a. – (BGBL.I S.326).

#### **Ireland**

[2002] Irish High Court Decisions (IEHC) 116., Court decision of 11.07.2002.

#### **Italy**

Tribunale di Milano, Sez.IX, 17 luglio 2000 – Pres. Fraccon – Est. Cosentini, in: *Famiglia e Diritto* (2000), p.608 ff, with annotations by Sara Tonolo Sacco.

Judgement of the Tribunal Supremo (TS), judgement of TS of 15.7.1988, or of 3.3.1989, or of 19.4.1991 (no source cited)

## **Portugal**

Judgement of 05.04.1984, Colectânea de Jurisprudência (CJ), 1984 II S.124 ff.

Judgement of 10.12.1991, CJ 1991 I p.301 ff.

Judgement of 05.04.1994, CJ 1997 II p.27 ff.

Judgement of 09.01.1993, CJ 1993 V p.118.

16.11.1988, BMJ, 1988 Nr.381 p.579 ff.

Judgement of the Lisbon court of appeal of 06.02.1986, CJ 1986 IV P.123 ff.

## **Switzerland**

Judgement of the Basel-City Civil Court of 27.06.1961, BGE 119 II 264;269.,  
Schweizerisches Zentralblatt für Staats-und Gemeindeverwaltung (ZBl.) 62/1961, p.418 ff.

Judgement of the Basel-City Civil Court of 08.Mai 1979, ZZW 1979, p.281, 285.

Judgement of the Basel-City Civil Court of 17.Juli 1981, ZZW 1985, p.374, 376;

Judgement of District Court St.Gallen of 26.11.1996, ZZW 1997, p.161, 162.

Judgement of District Court St.Gallen of 26.11.1996, ZZW 1997, p.161, 162 f.

Judgement of the Basel-City Civil Court of 08.Mai 1979, ZZW 1979, p.281, 283 f.

District Court of St.Gallen on 26.November 1996 (ZZW 1997, p.161 ff.)

## **United Kingdom**

I.v.UK, Application No. 25680/94, Decision of 27 May 1997 by the European Commission of Human Rights

Bellinger v. Bellinger [2003] 2 All E.R. 593, 602 f.

## **2. Cases of the European Court of Human Rights (EctHR)**

*B v. France*, Case 57/1990/248/319, Application number 13343/87, published in A232- C

*Goodwin v. United Kingdom* Judgement of 11.07.2002, Application no.28957/95,

*Rees v; United Kingdom* Judgement of 17 October 1986, Series A, no.106;

*Cossey v. United Kingdom*, Judgement of 27 September 1990, Series A, no.184, p.15

*X, Y and Z v. United Kingdom*, Judgement of 22 April 1997, Reports of Judgements and Decisions, 1997-11, p.619;

*Sheffield and Horsham v. United Kingdom*, Judgement of 30 July 1998, Reports 1998-V, p.2011.

### **3. Cases of the European Court of Justice (ECJ)**

*P.v.S and Cornwall County Council*, ECJ, C-13/94, Slg.1996, S.1-243 ff:

*K.B. v. National Health Service Pensions Agency*, ECJ Judgement of 07 January 2004, Rs. C-117-01

### **4. Cases in Non-EU-Member States:**

#### **Australia**

Re Kevin, (Validity of marriage), [2001] FamCA 1074 ff, No.329.

Secretary of Department of Social Security *v. SRA* (1993) 118, Australian Law Reports, Reports (A.L.R) 467.

#### **Brazil**

Tribunal de Justiça de São Paulo, AC 165.157.4/5 of 22.3.2001;

#### **Canada**

(1984) 42 Reports of Family Law (R.F.L.) 55 (Prince Edward Island, P.E.I).