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Psychiatry in legal gender recognition procedures in Europe

A comparative human rights analysis

Anne Degner / Miriam Nomanni

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Betreuung: Katharina Bager, Humboldt Law Clinic Grund- und Menschenrechte

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Humboldt Law Clinic Grund- und Menschenrechte

Juristische Fakultät

Lehrstuhl für Öffentliches Recht und Geschlechterstudien

Unter den Linden 9

10099 Berlin

www.hlcmr.de

Content

Abstract

For the vast majority of trans people in Europe, a psychiatric assessment and mental health diagnosis are legal preconditions for obtaining legal gender recognition. 'Legal gender recognition' refers to the possibility of changing one's gender marker and/or first name in public registries and key documents. The prerequisite of a medical diagnosis potentially implies that being trans constitutes a medical condition, as a consequence of which people who are in good health are classified as (mentally) ill, resulting in stigmatisation, social exclusion and discrimination. Furthermore, the diagnostic process can be a lengthy and humiliating experience for trans people. This paper demonstrates the role that psychiatry plays in legal gender recognition procedures in 49 European states and argues that these procedures violate several articles of the European Convention on Human Rights (ECHR).

The paper first investigates the role of psychiatry in legal gender recognition procedures in 49 European states, including the 47 that are member states of the Council of Europe. The involvement of psychiatry can include expert assessments, 'real-life tests' and supervision for at least 18 months. Of the states examined, 8 do not provide any legal gender recognition procedure at all. In most of the other states, the World Health Organization's International Classification of Diseases (ICD) diagnosis of 'transsexualism', which it considers a mental and behavioural disorder, is mandatory for legal gender recognition.

In some states, the psychiatric diagnosis and treatment requirements are explicitly indicated in statutory law. In others, they are based on legal interpretation or case law. In some countries, legal recognition is only granted after gender reassignment surgery or sterilisation, which themselves require a previous diagnosis and psychotherapy.
Second, the paper provides a human rights law analysis of these requirements on the basis of the ECHR. The psychiatric requirements for legal gender recognition violate the ECHR-protected human rights of many trans people and thus have a marked impact on their personal lives. These requirements violate the rights to respect for one's private life (Article 8 ECHR) and non-discrimination (Art. 14 ECHR). In especially serious cases, they also violate the prohibition of torture and inhuman and degrading treatment or punishment (Article 3 ECHR).

Consequently, we argue that, to be in accordance with the ECHR, states are required to provide legal gender recognition procedures that do not require any psychiatric diagnosis or intervention, but are based solely on self-determination.

1. Introduction

1.1. Objectives of the paper

The vast majority of trans people in Europe need to undergo psychiatric assessment and present a certificate of a mental health diagnosis in order to obtain legal gender recognition.

This first part of this paper analyses the role of psychiatry in legal gender recognition procedures in 49 European states. These states include all 47 members of the Council of Europe as well as Belarus and Kosovo. In order to illustrate the current situation and facilitate a comparison, a clustering of states according to their legal gender recognition procedures is presented and analysed comparatively in the second part of this paper. The results will be used for the subsequent legal analysis: the third part of the paper contains a human rights law analysis. On the basis of a hypothetical scenario of a trans person seeking legal gender recognition, it will be argued that the psychiatric requirements in legal gender recognition procedures violate human rights guaranteed by the European Convention on Human Rights (ECHR). All 47 member states of the Council of Europe, which are examined in the first part, are parties to this Convention. The final section offers guidance on how to use human rights mechanisms to ensure that these rights are respected.

1.2. Limitations of the paper

Currently, psychiatric requirements have an enormous impact on and are interwoven with trans-related legal questions and health issues. Psychiatric diagnosis and psychotherapy are preconditions for access to legal gender recognition and healthcare in almost all European states. The complete abolition of these preconditions would accordingly have an effect on both the legal and health issues involved. The legal point at issue is controversial. Even trans organisations and experts have diverging opinions: many fear that access to and funding for healthcare will be restricted if being trans is no longer considered an illness in the legal sense.[1] Therefore, it seems necessary to outline the approach of this paper.

[1] A survey in which 43 trans organisations participated was conducted by Vance et al. (2010). According to the survey, 56 per cent of respondents argued for a complete abolition of any kind of diagnosis. Twenty-one per cent argued in favour preserving the diagnostic requirement. These respondents explained their choice by referring to access to trans-related healthcare and its funding in national health insurance schemes. The results of the survey can be found in Jannik Franzen, Arn Sauer, *Benachteiligung von Trans*Personen, insbesondere im Arbeitsleben* (Expertise im Auftrag der Antidiskriminierungsstelle des Bundes 2013) 23.

The following comparative legal and human rights analysis applies only to the requirements for and the role of diagnosis on the basis of the World Health Organization's (WHO) International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10) and the American Psychiatric Association's (ASA) Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) and psychotherapeutic treatment in legal gender recognition procedures in Council of Europe member states. It will be argued that psychiatry in legal gender recognition has to be seen as a distinct issue from psychiatry in healthcare. Thus, the legal reasoning is limited to the need to abolish a psychiatric assessment and psychotherapy as mandatory preconditions for the legal recognition of gender.

In addition, it needs to be noted that the analysis is limited to psychiatry in legal gender recognition procedures for adults. The highly important issue of forced hospitalization and forced psychological assessment of children in order to be diagnosed with gender identity disorders could not be discussed due to limited resources.[2]

1.3. Terminology

The term *trans* is a broad generic term that is intended to include a variety of different identities.[3] Trans people's innate sense of their own gender differs from the sex they were assigned at birth.[4] The term *gender identity* describes 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'.[5] The term *trans* therefore includes all experiences and expressions of gender identity inconsistent with the sex assigned at birth, including the desire to undergo gender reassignment treatment, cross-dressing and not identifying as either 'male' or 'female'.[6]

To include as many people concerned as possible, this paper employs the broad term *trans*. Terms such as *transgender* or *transsexual* are only used when citing laws, court decisions or medical concepts. The term *transsexual* in particular is prevalent in legal

[2] Exemplary on the issue of legal gender recognition for children and psychiatry see: Kati Wiedner, 'Respekt statt Bevormundung: ein Plädoyer für die Abschaffung der Begutachtung bei Personenstands- und Vornamensänderungen' [2016] 29 Z Sexualforsch 67-72.
[3] Franzen, Sauer (n 1) 8.
[4] Amnesty International, *The States Decides Who I Am – Lack of Legal Gender Recognition for Transgender People in Europe* (United Kingdom 2014) 9.
[5] *Yogyakarta Principles* (2007), Introduction.
[6] European Union Agency for Fundamental Rights, *Being Trans in the European Union, Comparative analysis of EU LGBT survey data* (Luxembourg 2014) 5.

terminology. Laws, for example the German *Transsexuellengesetz* (Transsexuals Act),[7] and judicial decisions (the rulings of the European Court of Human Rights (ECtHR) refer to 'transsexuals'.[8] The authors of this paper decided not to use this term except when quoting others because it can be perceived as stigmatising. The term *transsexual* also points towards 'sexuality' rather than 'gender', and it therefore runs the risk of being associated with sexual preferences rather than the question of a person's own gender identity. Also, the term is used in psychiatric manuals to denote a mental disorder (see Section 1.4).

1.4. Medical frameworks

Today's medical understandings of gender identity and gender reassignment are rooted in Western medicine from the 1920s,[9] which understood gender as exclusively binary. In the 1950s, the terms *transsexualism* and *gender identity/gender role* were shaped by the American endocrinologist Harry Benjamin (1885-1986) and the American psychologist John Money (1921-2006).[10] In 1980, the DSM-3 defined 'gender identity disorder' (GID) as a mental disorder. This definition prevailed until the most recent edition of the DSM (DSM-5), released in 2014, when the supposed disorder was renamed 'gender dysphoria'.[11] As well, Chapter V of the ICD-10, which lists mental and behavioural disorders, includes 'gender identity disorders', which are divided into five subcategories:

> (1) F64.0 'transsexualism' is defined as the 'desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex';
>
> (2) F64.1 'dual-role transvestism' refers to the enjoyment of the temporary experience of membership of the opposite sex by wearing clothing of the opposite sex;
>
> (3) F64.2 'gender identity disorder of childhood' is characterised by an early manifestation of 'persistent and intense distress about assigned sex, together with a desire to be (or insistence that one is) of the other sex';

[7] The so-called *Transsexuellengesetz* ('*Gesetz über die Änderung der Vornamen und der Geschlechtszugehörigkeit in besonderen Fällen'*), from 10 September 1980, last amended 17 July 2009.
[8] E.g. *Christine Goodwin v. the United Kingdom* App no. 28957/95 (ECHR, 11 July 2002): 'The applicant, Christine Goodwin, a United Kingdom national born in 1937, is a post-operative male to female transsexual' (1. Principal facts).
[9] Daphna Stroumsa, The State of Transgender Health Care: Policy, Law, and Medical Frameworks [2014] 104 (3) American Journal of Public Health 31, 31.
[10] Franzen, Sauer (n 1) 14.
[11] Stroumsa (n 9).

(4) F64.8 'other gender identity disorders'; and

(5) F64.9 'gender identity disorders, unspecified'.[12]

For the diagnosis of F64.0, the diagnostic guidelines require that 'the transsexual identity' must persist for at least two years and must not be a symptom of another mental disorder, such as schizophrenia, or associated with any intersex, genetic or sex chromosome abnormality.[13] Obviously, these guidelines pathologise trans people and assume that there is only one homogeneous type of trans person.[14] A diagnosis on the basis of these classifications plays a decisive role in people's ability to obtain access to healthcare and gender reassignment treatment, and to be eligible to have the costs associated with them covered by health insurance.

Apart from the increasing criticism of the pathologisation of trans people by sociological researchers[15] and the trans community itself,[16] the number of voices in the medical community arguing for the depathologisation of trans people is growing:[17] the criticism is based on the lack of evidence that trans identities constitute a mental disorder, the impossibility of extraneous observation of gender identity even by experts and the paradoxical double role of psychiatry in this process, which involves the patient's dependence on the psychiatrist to receive a diagnosis to obtain treatment or legal gender recognition, on the one hand, and the necessary bond of trust for effective psychotherapy, on the other.[18]

The World Professional Association for Transgender Health (WPATH), formerly the Harry Benjamin International Gender Dysphoria Association, Inc. (HBIGDA), provides information and guidelines on trans health issues, e.g. 'The Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People'. WPATH calls for

[12] WHO, 'International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10) 2015-Version' (WHO, 2015) <http://apps.who.int/classifications/icd10/browse/2015/en#/F64.0>.accessed 24 November 2015.
[13] WHO, 'The ICD-10 Classification of Mental and Behavioural Disorders, Clinical descriptions and diagnostic guidelines' (WHO) 168 <http://www.who.int/classifications/icd/en/bluebook.pdf> accessed 24 November 2015.
[14] See also Udo Rauchfleisch,*Transsexualität – Transidentität: Begutachtung, Begleitung, Therapie* (4th edition, Vandenhoeck & Ruprecht 2014) 19.
[15] Jonas A. Hamm, Arn Thorben Sauer, 'Perspektivenwechsel: Vorschläge für eine menschenrechts- und bedürfnisorientierte Trans*-Gesundheitsversorgung' [2014] 27 Z Sexualforsch 4, 15 with further references; e.g. Franzen, Sauer (n 1).
E.g. Transgender Europe, *TGEU's Position on the revision of the ICD 10* (June 2013).
[17] Franzen, Sauer (n 1) 18ff.
[18] Hamm, Sauer (n 15) 15f.

the de-psychopathologisation of gender variance worldwide[19] and 'urges governments to eliminate unnecessary barriers' for trans persons (pointing to barriers that involve health professionals directly) 'and to institute simple and accessible administrative procedures for transgender people to obtain legal recognition of gender, consonant with each individual's identity'.[20]

The shift towards a depathologised trans identity is also partly reflected in the new DSM-5, which replaced 'gender identity disorder' with 'gender dysphoria', and which no longer classifies the identity as a mental disease.[21] However, the term 'dysphoria' retains the negative connotation.

1.5. Legal gender recognition

In general, *legal gender recognition* refers to the official recognition of a person's gender identity in public registries and key documents, including birth certificates and passports, and extends to the person's gender marker and name(s).[22] The ECtHR has established a positive obligation on the part of European states to provide for legal gender recognition.[23] However, only 41 of the 49 states in Europe provide legal gender recognition procedures, some of them relying on burdensome mandatory requirements like gender reassignment surgery, forced sterilisation, divorce, age restrictions, proof of a diagnosis of mental illness and psychiatric therapy.[24] In a recommendation of the Council of Europe, the Committee of Ministers urged member states to take 'appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way' and to remove abusive prior requirements.[25] Also in 2015 the Parliamentary Assembly of the Council called on

[19] WPATH, 'De-Psychopathologisation Statement' (26 May 2010) <http://www.wpath.org/uploaded_files/140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf> accessed 17 March 15.
[20] WPATH, 'Statement on Identity Recognition' (19 January 2015) <http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf> accessed 23 October 15.
[21] Rauchfleisch (n 14) 18.
[22] TGEU, *Legal Gender Recognition in Europe, Toolkit* (2013) 9.
[23] ibid 10; see for an overview the European Court of Human Rights, 'Gender Identity Issues' (ECtHR, April 2016) < http://www.echr.coe.int/documents/fs_gender_identity_eng.pdf> accessed 9 December 2016.
[24] For an overview of the legal gender recognition procedures, see TGEU, 'Legal and Social Mapping – Europe #1' (TGEU, 2015) <http://www.transrespect-transphobia.org/uploads/downloads/Legal-Social-Mapping2014/web_tvt_mapping-europe_small.pdf> accessed 24 November 2015.
[25] Council of Europe, *Recommendation of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* (*CM/Rec(2010)5*) paras 20f.

member States explicitly to 'abolish (…) a mental health diagnosis, as a necessary legal requirement to recognise a person's gender identity in laws regulating the procedure for changing a name and registered gender'.[26] The former Council of Europe Commissioner for Human Rights, Thomas Hammarberg, stated that the classification of trans identity as a mental illness 'may become an obstacle to the full enjoyment of human rights by transgender people, especially when they are applied in a way to restrict the legal capacity'.[27] In February 2015, the European Parliament presented its Report on Human Rights and Democracy for 2013, in which it called on the Commission to reinforce its efforts to end the pathologisation of trans identities and 'encourages states to ensure quick, accessible and transparent gender recognition procedures that respect the right to self-determination'.[28]

2. The role of psychiatry in legal gender recognition procedures in Europe: A comparative analysis

The current European situation concerning legal gender recognition procedures is often ambiguous. In many of the 49 states examined here, it is not possible to obtain official governmental information, and the existing knowledge is transferred by word of mouth. To fill this vacuum, Transgender Europe (TGEU), a network of trans organisations that works for the human rights of trans people, sent questionnaires to experts and organisations dealing with trans issues in the 49 states. The survey started in August 2014,[29] and the information has been updated regularly ever since.

This information was analysed and clustered to create an overview of the involvement of psychiatry in legal gender recognition procedures in Europe.

2.1. The cluster

The focus of the questionnaires was to find out whether or not psychiatric diagnosis (ICD-10, DSM-5) or psychotherapy is required or is in any other way involved in the legal gender recognition procedure in the states concerned. Additionally they aim to find out

[26] Parliamentary Assembly of the Council of Europe, *Discrimination against transgender people in Europe* (Resolution 2048, 2015) para 6.2.2.
[27] Thomas Hammarberg, *Human Rights and Gender Identity* (CommDH/IssuePaper, 2009) para III.3.3.
[28] European Parliament, *Report on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter* (2014/2216(INI)) 162.
[29] The 'TvT Expert Questionnaire on the Social and Legal Situation of Trans People' and the experts' answers are confidential material belonging to TGEU that is not fully disclosed in this paper. Incomplete questionnaires were complemented by country reports from ILGA Europe's 'Recommendation of the Committee of Ministers on LGBT rights' project, Amnesty International's 'The State decides who I am – Lack of legal gender recognition of transgender people in Europe' from 2014, recommendations of national institutions, national statutes and case law.

how the procedure itself is regulated or organised. While interpreting the gathered information, it became clear that the examined states should be divided into three groups: states with legal regulations, states without any regulation at all and states with a non-legal but practical framework. As regards psychiatric requirements, states can be grouped into two groups. These requirements can be explicit – required by law – or implicit, resulting from recommendations, common practice or other requirements, such as the requirement that an applicant has to obtain a diagnosis and/or receive therapy in order to be eligible for gender reassignment treatment. Usually, these circumstances are not conclusively documented, but deduced from the experts' answers and real-life examples.

The states at the opposite ends of the scale in terms of the psychiatry requirement are Denmark, Malta, Ireland and Norway at one end and Ukraine and Iceland at the other.

Article 3 (6) of the Danish Amendment of the Act on the Civil Registration System[30] abolished psychiatric requirements and enables a change of one's legal gender after a reflection period of six months; diagnosis and therapy are not mandatory.

Malta adopted its Gender Identity, Gender Expression and Sex Characteristics (GIGESC) Act[31] in April 2015, which introduced a legal gender recognition procedure that requires only a declaration before a notary and prohibits the notary from requesting any psychiatric, psychological or medical documents. The procedure is therefore based on self-determination.[32] In June 2015, the Irish Oireachtas (parliament) passed its Gender Recognition Act, which allows people over the age of 18 to self-declare their gender identity.[33]

The Norwegian Storting (parliament) followed in June 2016 and approved a bill that also grants the right to legal gender recognition based on self-declaration and a simple administrative request.[34]

In contrast, the legislation requiring the highest and heaviest involvement of psychiatry has been Order No. 60 (2011) of the Ukrainian Ministry of Health Protection which required trans people to undergo 30 to 45 days of confinement in a psychiatric institution to be diagnosed with 'transsexualism'. The diagnosis was mandatory, as were coerced sterilisation, several medical tests and observation by a sexologist for a period of one

[30] 'Lov om ændring af lov om Det Centrale Personregister' from 25 June 2014.
[31] Maltese Gender Identity, Gender Expression and Sex Characteristics Act (ACT No. XI of 2015) from 14 April 2015.
[32] See Section 5 GIGESC Act; TGEU, 'Malta Adopts Ground-breaking Trans and Intersex Law' (Press Release from 1st of April 2015) <http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/> accessed 16 October 2015.
[33] Gender Recognition Act 2015, Number 25 of 2015 from 22 July 2015.
[34] 1 Lov om endring av juridisk kjønn from 16 June 2016.

year to determine the degree of 'social adaptation,' in order for the State Evaluation Commission to confirm the diagnosis of 'transsexualism' and authorise legal gender recognition.[35] In 2015 a multidisciplinary working group was established by the Ministry of Health to develop new medical standards. In September 2016 the documents 'Adapted evidence-based clinical guidelines "Gender dysphoria"' and 'Unified clinical protocol of primary, secondary (specialized) and tertiary (highly specialized) medical care "Gender dysphoria"' were approved by the MOH Order No. 972. According to the new regulations hospitalization in a psychiatric institution is not compulsory anymore, but possible if necessary. However, sterilization continues to be mandatory for legal gender recognition. Also the mandatory psychiatric assessment on an outpatient basis is ordered to take at least two years (while in the Order No. 60 it was one year).[36] Therefore, Ukraine is still one of the examples with the most extensive psychiatry requirements.

Another example of the highest involvement of psychiatry in legal gender recognition procedures is Iceland. A person in Iceland can only apply for legal gender recognition in front of an appointed 'expert committee' after having received the diagnosis of gender dysphoria and treatment by a special team at the National University Hospital of Iceland consisting of 'experts in psychiatry, endocrine medicine and psychology' and being supervised by this team for at least 18 months.[37]

The 44 other states range between these easiest and most severe regimes. Psychiatric assessment is the crucial element for obtaining legal gender recognition.

The following chart presents the relatively complex network of requirements across the 49 states. The chart is divided into three main groups: a) *states with legal regulations concerning legal gender recognition*, b) *states without legal measures, but with existing proceedings* and c) *states in which legal gender recognition is neither regulated nor possible*.

The following columns differentiate between the requirement of a *diagnosis* (ICD-10 or DSM-5) and *psychotherapy*. Furthermore, the cluster contrasts explicit and implicit requirements. *Explicit* is used in the sense of explicitly stated by law or interpreted as stated by law, while *implicit* is to be understood as arising from the circumstances of the legal gender recognition procedures. The latter mainly concerns cases in which either

[35] Human Rights Watch, 'Allegation letter regarding the legal gender recognition procedure in Ukraine, as specified in Order No. 60 of the Ministry of Health of Ukraine' (27 April 2015) <https://www.hrw.org/news/2015/04/27/allegation-letter-regarding-legal-gender-recognition-procedure-ukraine-specified#_ftn2> accessed 26 October 2015.
[36] See Insight Ukraine, 'Затверджено новий медичний протокол трансгендерного переходу' (2016) <http://insight-ukraine.org/zatverdzheno-novij-medichnij-protokol-transgendernogo-perexodu/>accessed 13 December 2016.
[37] Article 6 of the Act on the Legal Status of Individuals with Gender Identity Disorder (Law No. 57/2012).

sterilisation or other gender reassignment surgery or therapy is required in order to obtain legal gender recognition and a diagnosis or psychotherapy is mandatory in order to have access to gender reassignment surpery. This means that even though the requirement of a diagnosis or therapy is not explicitly stated in legislation, regulations or judicial decisions, it is still an implicit precondition for legal gender recognition.

To emphasise the various approaches in the different groups and states, differing colours are used.

- *Black* indicates cases in which diagnosis or therapy is clearly required by existing law or common practice.
- *Blue* indicates a requirement that is not directly stated by law, but has been construed in judicial decisions.
- *Red* indicates that sterilisation and other gender reassignment procedures are mandatory, and that diagnosis or therapy are required in order to undergo these mandatory procedures.
- In contrast, *pink* is used for states in which the common practice is ambiguous and non-documented, but it is more than likely that gender reassignment procedures are required, and a diagnosis is therefore also mandatory.
- *Yellow* indicates states in which gender reassignment surgery and sterilisation are not mandatory, but psychiatric therapy is likely to be a requirement for a diagnosis, which is mandatory. These states are the ones in which the obligation to undergo gender reassignment surgery was found to be inconsistent with national or international law, but the psychiatric requirements are still in force.

Denmark, Ireland, Malta, Norway and *Ukraine and Iceland* are highlighted to mark their outstanding positions.

2.2. Chart: Psychiatry in legal gender recognition procedures in Europe[38]

Procedure	Country	Explicit requirement		Implicit requirement	
		Diagnosis	Therapy	Diagnosis	Therapy
Legal regulation	Armenia				
	Austria		*		
	Belgium				
	Bosnia				
	Bulgaria		n/a		n/a
	Croatia		n/a		n/a
	Czech Rep.				
	Denmark				
	Estonia				

[38] Please note that the analysis focuses on the procedures for adults only. Special requirements and particularities for children are not discussed (see 1.2 Limitations of the paper).

	Finland	■			■
	France				
	Germany	■			■
	Greece			■	■
	Iceland	■	■		
	Ireland[39]				
	Italy			■	■
	Latvia			■	■
	Lithuania			■	■
	Luxembourg			■	■
	Malta				
	Moldova			■	■
	Montenegro			■	■
	Netherlands	■			■
	Norway				
	Poland			■	■
	Portugal	■			■
	Romania			■	■
	Russia[40]	■			■
	Slovakia	■			■
	Spain	■			■
	Slovenia			■	■
	Sweden[41]				
	Switzerland			■	■
	Turkey	■			■
	UK	■			■
	Ukraine	■	■		
No legal measures, but procedures in practice	Azerbaijan			■	■
	Georgia			■	■
	Hungary			■	■
	Serbia			■	■
No legal gender recognition	Albania, Andorra, Cyprus, Kosovo, Liechtenstein, Macedonia, Monaco, San Marino				

Key

■ = required

■ = required due to interpretation of law

[39] The absence of psychiatric requirements only applies to legal gender recognition procedures for adults. Ireland provides a special procedure for 16-18 year-olds which explicitly requires medical certificates concerning the capacity of a voluntary decision and discernment of the adolescent.

[40] Russia's legislation refers to a non-existent official form that leads to non-transparent and inconsistent procedures.

[41] The current practice was changed by an administrative court (Stockholm) judgement (16 May 2014) stating that a psychiatric diagnosis cannot be mandatory for obtaining legal gender recognition.

■ = required in order to undergo sterilization/ hormone therapy/ other gender reassignment measures

■ = presumably required in order to undergo sterilization/ hormone therapy/ other gender reassignment measures

■ = presumably required in order to get a diagnosis

***** = recommended by institution

n/a = data not available

2.3. Main outcome

Although the chart itself does not obviously show any strict pattern, it is still possible to point out three main results.

The first result is that the explicit requirement of a diagnosis is in many cases created by a judicial decision, by means of case law, or by administrative practice rather than by statute.[42] A concrete example is Section 1 (1) No. 1 to 3 of the German Transsexuals Act,[43] which requires that the person seeking legal gender recognition 'not identify with the birth-assigned sex/gender, but with the other one, and feels a compulsion to live according to her/his self-understanding for at least three years' (No. 1), and that there is a high probability 'that the feeling of belonging to the other sex/gender is not going to change' (No. 2).[44] Section 4 (3) of the Transsexuals Act substantiates these requirements with the prerequisite of two medical certificates, according to which the '*findings of medical science* suggest that there is a high probability that the feeling of belonging to the other sex/gender is not going to change.'[45] In the current administrative procedure, experts who, according to the law, are supposed to be familiar with trans issues and in fact happen to be medical practitioners make a diagnosis[46] – although such a diagnosis is not directly required by the wording of the law.[47] In fact, the need for a diagnosis has been read into the statute and has been accepted by common practice. This situation is not specific to Germany: it can also be found in other states, including Croatia, Slovakia and Turkey.

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[42] Chart, *Psychiatry in the legal gender recognition proceedings in Europe*, e.g. Croatia, Germany, Netherlands etc.

[43] 'Transsexuellengesetz' from 17 July 2009; changed due the German Constitutional Court,
Judgment of 11 January 2011, 1 BvR 3295/07, which declared Section 8 (1) No. 3 and 4 to be inapplicable.

[44] Loosely translated.

[45] Loosely translated and emphasis added.

[46] Annette Güldenring, 'Eine andere Sicht über Trans*' in Udo Rauchfleisch (eds), *Transsexualität – Transidentität: Begutachtung, Begleitung, Therapie* (4th edition, Vandenhoeck & Ruprecht 2014) 161.

[47] Jens T. Theilen, 'Depathologisation of Transgenderism and International Human Rights Law' [2014] 14 HRLR 327, 338.

Second, in some states diagnosis and therapy are not obviously required by the wording of the law, but result from other mandatory requirements, which can only be fulfilled if the diagnosis or therapy has already been obtained. For example, for legal gender recognition a law could require proof of gender reassignment surgery. In order to be allowed to undergo the surgery, the person needs to be diagnosed and undergo therapy.

Due to the absence of data and adequate information from some of the governments concerned, it cannot always be known with certainty whether diagnosis and/or therapy are strictly required for access to the prescribed medical procedures. However, the responses of the experts questioned as well as the documented real-life cases make it possible to conclude with almost absolute certainty that they are indeed required.[48] A typical example could be found in Norway until June 2016. According to Section 2-2 (5) of the Regulations Relating to Population Registration[49] 'the date of birth and personal identity number may be changed when the date of birth or gender status is changed'. In practice, according to a report by Amnesty International, this vague legal wording was interpreted as only allowing a change to one's national identification number once the Oslo University Hospital (*Rikshospitalet*) had confirmed the procedure.[50] The confirmation, however, depended on the certification of 'real sex conversion', which required, among other things, sterilisation.[51] This decision was made by a multidisciplinary unit specialising in 'transsexualism' that was also in charge of diagnosing trans individuals. As a consequence, a person without a certified 'gender identity disorder' was automatically excluded from the ability to obtain legal gender recognition, as access to state-funded healthcare, including reassignment surgery, would be denied. In this case, the applicant did not fulfil the requirements resulting from common practice and the Oslo University Hospital, which was the only institution in Norway that provided these services.[52] The same applied to mandatory psychotherapy. No legal document required psychotherapy in order to change one's legal gender, but if the multidisciplinary team in Oslo was adamant that the applicant had to undergo therapy, it was equal to a legal obligation in practice.

In 1 July 2016, however, a new law entered into force in Norway that now makes it possible to change one's gender marker without diagnosis or therapy. The procedure is based on self-declaration only.[53]

[48] Chart (n 42), e.g. Latvia, Montenegro and Cyprus.
[49] 'Forskrift om folkeregistrering' from 8 September 2009.
[50] Amnesty International (n 4) 70.
[51] ibid 71.
[52] ibid.
[53] Lov om endring av juridisk kjønn from 16 June 2016.

Third, even though psychotherapy is mandatory in many states, it is rarely regulated, as a result of which the nature of the therapy is left to the discretion of the treating medical practitioner. This is the case in all states in which therapy is required, except Iceland and Ukraine, where the law itself lays out the minimum conditions and kind of therapy required.[54] Section 5 of the Finnish Trans Decree[55] refers to 'treatment' and a 'real-life test,' which, according to Section 3, have to be supervised by a 'qualified multidisciplinary team for examination and treatment of transsexualism'. The medical team seems to have sole discretion in regards to the frequency, length and type of therapy the applicant receives. In states where legal gender recognition is regulated, the wording does not necessarily extend that regulation to the therapeutic process.

This survey has revealed that in some countries without a legal framework, such as Serbia and Hungary, it can be hard to find general information about legal gender recognition procedures or the authorities responsible for them. This situation can subject people seeking legal gender recognition to legal uncertainty, varying practices and non-compliance with minimal standards. In these cases, individuals who wish to change their legal gender are considerably dependent on the decision-making body as well as on their treating medical practitioner's opinion, without any legally enforceable rights.

2.4. Individual aspects

Apart from the main outcome, other noteworthy points have resulted from the analysis.

2.4.1. Medical practitioners

Criteria for the diagnosis differ significantly across European countries. First, it is possible to distinguish between the procedural nature of the decision-making process: the diagnosis can be made by either a single medical practitioner or a team of medical experts. Another relevant factor is whether a person can choose between several qualified practitioners or not.

In some European states,[56] so called 'gender teams', consisting of different specialists, including psychologists, endocrinologists, gynaecologists and urologists, carry out compulsory or requested treatment. Article 4 of the Icelandic Act on the Legal Status of Individuals with Gender Identity Disorder[57] states that the 'Gender Identity Disorder

[54] In Iceland, Article 6 of the Act on the Legal Status of Individuals with Gender Identity Disorder (Law No. 57/2012) requires treatment for at least 18 months, while in Ukraine confinement was required (now an assessment of 2 years is required).
[55] 'Sosiaali- ja terveysministeriön asetus sukupuolen muuttamiseen tähtäävän tutkimuksen ja hoidon järjestämisestä sekä lääketieteellisestä selvityksestä transseksuaalin sukupuolen vahvistamista varten' from 3 December 2002.
[56] E.g. Finland, Georgia, Iceland, Norway, Netherlands and Portugal.
[57] Law No. 57/2012 (n 54).

Team' shall 'supervise the diagnosis and recognised treatment of individuals with gender identity disorder'. The team itself should include specialists in psychiatry, endocrinology and psychology, but it can also include other specialists. As there is significant demand for these teams, which are few in number, access to their services is restricted. In states such as Norway until June 2016, where the Oslo University Hospital was the only institution of its kind, applicants were confronted with further barriers in practice. In most states, the diagnosis is based on the opinion of one (or two) treating psychologist(s) or psychotherapist(s). In Estonia, for example, only a single psychiatrist is required to make the diagnosis.[58] In other cases, the law or common practice refers vaguely to 'experts' or 'medical practitioners'.[59] As a result, even when it is not explicitly required, in many cases psychologists or psychiatrists get to decide whether an individual is eligible for legal gender recognition.

2.4.2. Type and duration of therapy/treatment

Legal gender recognition procedures – including the therapy or treatment required – depend on very different factors and are often time-consuming. A distinction must be made between the different roles therapy or treatment can play within legal gender recognition procedures: in some cases, therapy or treatment have to be completed before a diagnosis can be made, while in others they are required for diagnosis or for a follow-up on the diagnosis.

The so called 'real-life test' often plays a crucial role in diagnosis. The 'real-life test' or 'real-life experience' involves a period of time in which a trans person is required to live according to stereotypical characteristics of their gender identity before other measures, such as gender reassignment surgery, hormone therapy or legal gender recognition, can be pursued, because the test itself required by the psychiatrists before they prescribe any kind of treatment.[60] Although the real-life test is not obligatory, the Standards of Care 7 of the World Professional Association for Transgender Health (WPATH) indicate that it is still common[61] and prolongs the waiting period. In Estonia, the General Requirements on Medical Procedures for the Change of Gender[62] issued by the Minister for Social Affairs require the applicant to have been living in a transsexual identity for more than two years (Section 2 (1)). The required surgery must occur a minimum of one year after permission by the Minister of Social Affairs has been granted (Section 3 (2)). And finally, the final decision about legal gender recognition is made a minimum of two

[58] 'General Requirements on Medical Procedures for the Change of Gender' issued by the Minister for Social Affairs (Estonia).
[59] E.g. Croatia, France (before October 2016), Germany and Slovenia.
[60] Rauchfleisch (n 14) 32.
[61] E.g. Germany and the United Kingdom.
[62] 'Soovahetuse arstlike toimingute ühtsed nõuded' from 1June 2002.

years after the applicant begins medical treatment (Section 4). In total, the applicant has to wait at least five years until they know whether their documents will be changed. In Norwegian practice before June 2016, it could take up to ten years to fulfil all the requirements imposed by the Oslo University Hospital.[63] In Germany, Section 1 (1) No. 1 of the Transsexuals Act requires an on-going compulsion to live in a different gender identity for at last three years. In situations such as these, the question remains: how can the real-life test be passed if the applicant is not under any kind of medical supervision? This ambiguity seems to be a gateway for the involvement of the psychiatric profession. In Spain, for example, the procedure is linked to weekly check-ups of the individual's gender identity through group and family therapy.[64] In Germany, the law requires only that the applicant feel compelled to live in a different gender for three years, and a real-life test is not required, but in practice such a test might be requested by medical experts or judges.

2.4.3. Decision-making bodies

Additionally, there are many differences across states in regard to the decision-making institutions involved in granting legal gender recognition. In some states, expert panels or special committees[65] consisting of appointed individuals, often with experience in the field of gender identity, are responsible for the decision. In others, the decision is made by a court[66] or an administrative institution[67]. Especially in states with a legal framework, expert panels are common, while in states in which applications are more or less decided on a case-by-case basis, judges or legal clerks asses the material and make the decision. Again, it is currently not possible to find a uniform approach in Europe, and the compliance of the different approaches with any kind of minimum standards is questionable.

The abovementioned arbitrariness and lack of transparency as regards the psychiatric assessment is therefore amplified if the decision-making institution operates in an arbitrary and non-transparent way.

2.5. Conclusion

Arbitrariness and the dependence on a psychiatric diagnosis are characteristic of psychiatric requirements in legal gender recognition procedures in Europe.

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[63] Amnesty International (n 4) 76.
[64] Diana Demiel, 'Das eigene Geschlecht ist ein Menschenrecht' in Anne Allex (ed), *Stop Trans* Pathologisierung* (3rd ed, AG Spak Bücher 2014) 26.
[65] E.g. Croatia, Estonia, Iceland, Moldova, United Kingdom and Ukraine.
[66] E.g. France, Italy and Poland.
[67] E.g. Hungary and Serbia.

As varied and inconsistent as the results are, they also perfectly reflect the legal situation of trans persons seeking legal gender recognition. There is no uniform system in Europe, and many states do not have a clear approach. Differences across states and even in particular areas within a given state are considerable. Trans people are often confronted with arbitrariness. They have to rely on the decision-making panel, judge or clerk, and especially on the opinion of the medical practitioners whose assessment of the applicant's mental status is decisive. In some states, the applicant's application is denied, while in others applicants are required to live in the "opposite gender" for a determined period of time. Sometimes the outcome of an individual's case depends on chance. In the majority of the states examined here, there is no transparent or clear way to obtain legal gender recognition. For applicants, legal gender recognition procedures are often fraught with uncertain requirements and the unpredictable decisions of third parties, which can lead to the rejection of the request, irrespective of the time, money and effort that have been invested.

Although the laws of a given state often do not explicitly require a diagnosis or the state lacks a legal framework in this area, this requirement and the dependence on psychiatric procedures seem to be deeply rooted. Only four of the 49 states examined have abolished the requirement of a diagnosis, while in Sweden this abolition is only a result of a decision by Stockholm's administrative court. The requirement for psychotherapy is rarely regulated, and it is mostly neither discussed by courts nor explicitly abolished by proposed legislation. Psychotherapy is usually required before a diagnosis can be made, during the diagnostic process or afterwards as a follow-up on the diagnosis.

Consequently, the prevalent tendency is for diagnosis and psychotherapy to be required. As a result, a trans person who seeks to have their legal gender recognised has to undergo a procedure that results in pathologisation. Whether this connection of psychiatry and legal gender recognition is consistent with human rights law is discussed in Section 3 below.

2.6. Prospects

At the moment, psychiatric assessment and treatment are required for legal gender recognition procedures in almost all European states. But there are signs of change.

Some states have recently changed their laws on gender identity, for example Portugal, the Netherlands, Denmark, Iceland, Malta, Ireland, Norway and France.[68] While the laws

[68] Portugal: Gender Identity Law (16 January 2011); Netherlands: New Law (1 July 2014); Denmark: 'Lov om ændring af lov om Det Centrale Personregister (25 June 2014); Iceland: Act on the Legal Status of Individuals with Gender Identity Disorder (27 June 2012); Malta: Gender Identity, Gender Expression and Sex Characteristics Act (14 April 2015); Ireland: Gender Recognition Act (22 July 2015); Norway: Lov om endring av

mostly abandon requirements such as forced sterilisation, psychiatric requirements often remain.

As already pointed out, however, in June 2016 Norway became the fourth state in Europe, after Denmark, Malta and Ireland, to adopt a legal gender recognition procedure based solely on self-determination.

The Danish Amendment of the Act on the Civil Registration System grants legal gender recognition for people over the age of 18 after a reflection period of six months. According to Malta's 2015 GIGESC Act, only a declaration before a notary is required, and the notary is prohibited from requesting any psychiatric, psychological or medical documents.[69] Ireland's 2015 Gender Recognition Act allows people over the age of 18 to self-declare their gender identity. The Norwegian Bill grants legal gender recognition on the basis of self-declaration and a simple administrative request.

In France, the National Assembly recently adopted the country's first law granting legal gender recognition. While the regulation still requires that a request to change one's gender marker has to be made before a judge, it at least does not require any medical proof: 'The fact of not having undergone medical treatment, surgery or sterilisation cannot motivate the refusal to grant the request.'[70]

Remarkably, the first state to introduce a self-determination-based legal gender recognition procedure was Argentina. Article 4 of Argentina's Gender Identity Law, passed in 2012, explicitly states that gender reassignment surgery, therapy and psychiatric assessment or therapy are not required. The change in one's legal gender is therefore an independent act of self-determination, which is kept separate from any medical questions. Also, Argentina is the first state to explicitly refer to the right to medical treatment for trans people in its legal gender recognition legislation that is based on informed consent only.[71]

It is not only legal reforms, but also court decisions that can change the law or legal practice relating to gender recognition. For example, the Administrative Court in Stockholm dismissed the decision of the National Board of Health and Welfare to reject an applicant's legal gender recognition application solely on the basis of a lack of a psychiatric examination. The Court held that a diagnosis was not required by the law, as

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juridisk (16 June 2016); France: Projet de Loi de modernisation de la justice du XXIe siècle, Art. 56 (12 October 2016).

[69] Section 5 GIGESC Act.

[70] TGEU, 'Celebrated & contested – breakthrough towards first French gender recognition law (Press Release from 15 July 2016) <http://tgeu.org/celebrated-contested-breakthrough-towards-first-french-gender-recognition-law/> accessed 9 December 2016; Projet de Loi de modernisation de la justice du XXIe siècle, Art. 56.

[71] Article 11 of Argentina's Gender Identity Law.

a result of which the absence of a diagnosis could not be used as a ground for rejecting the application.[72]

Moreover, further proposals for legal changes are on the agenda in several states, including Croatia, Finland, Lithuania, Sweden and the UK.

In conclusion, the changes and proposals indicate a trend towards eliminating the role of psychiatry in legal gender recognition procedures. The beginnings of a paradigm shift towards self-determination can be observed.

3. Human rights law analysis

3.1. Introduction

This part of the paper analyses psychiatric assessments as a condition for legal gender recognition with respect to their compliance with the provisions laid down in the ECHR, in particular with the right to respect for private life (Article 8) and the prohibition of discrimination (Article 14).

The ECHR is an international treaty whose purpose is to protect human rights and secure the fundamental freedoms and equality rights in the member states of the Council of Europe. It was signed on 4 November 1950 by twelve European states.[73] Today, all 47 Council of Europe member states are parties to the Convention. This analysis therefore applies to all European states except Belarus and Kosovo. All member states are obliged to implement the Convention. Individuals claiming a violation of the Convention by a member state can apply directly to the ECtHR, whose rulings determine the nature of the Convention's rights and freedoms.

The ECtHR has not yet issued a decision in regard to the psychiatric requirement in legal gender recognition proceedings.[74] Nevertheless, the Court considers the Convention a 'living instrument' that has to be interpreted in light of new developments and cases.[75] Therefore, it is useful and necessary to analyse the current psychiatric requirements in legal gender recognition procedures and potential violations of the ECHR in order to be prepared for future individual complaints.

[72] Case 24931-13 *Burman vs National Board of Health and Welfare* [16 May 2014] Administrative Court in Stockholm General Division.
[73] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th edition, Oxford University Press 2014) 4.
[74] A decision on the requirement of a diagnosis could be made in the ongoing cases of *A.P. v. France* App. no.79885/12, *Garçon v. France* App. no. 52471/13 and *Nicot v. France* App. no. 52596/13.
[75] *Tyrer v. United Kingdom* App. No. 5856/72 (ECHR, 25 April 1978) para 31.

To facilitate such an analysis, a hypothetical scenario is presented in which a trans person is seeking legal gender recognition.

The scenario has been chosen as example that is easily applicable to situations in the 41 European states with psychiatric requirements, especially in those states in which psychiatry is intensely involved in legal gender recognition procedures.[76]

Person P is an adult who identifies as female. P was assigned with the male gender at birth. P lives in the fictitious European state S, which is a member of the European Council and a party to the ECHR. S has a legal gender recognition procedure that requires psychiatric assessment and treatment. The relevant paragraph in the relevant statute states as follows:

A. *The person does not identify with the birth-assigned sex/gender, but with the other one, and feels a compulsion to live according to her/his self-understanding for at least three years.*

B. *It is to be assumed with high probability that the feeling of belonging to the other sex/gender is not going to change.*

C. *Two medical experts are required to deliver an opinion on whether the findings of medical science suggest that there is a high probability that the feeling of belonging to the other sex/gender is not going to change.*

In the current administrative procedure, the experts need to make a diagnosis, although such a diagnosis is not directly required by the wording of law. This approach has been established in practice and has been accepted.

P seeks to be legally recognised as female and therefore undergoes the psychiatric assessment.

In this hypothetical example, the legal gender recognition procedure entails the minimum involvement of psychiatry required by European states (apart from Denmark, Sweden, Malta, Ireland and Norway).

The legal analysis begins with an assessment of Article 8 in order to examine the Court's extensive jurisprudence on this matter. Subsequently, the violation of other ECHR rights will be assessed. Finally, enforcement mechanisms and the situation in relation to other conventions will be described.

[76] This scenario has been chosen because it is applicable to most legal gender recognition procedures in European states. An explanation of the enforcement mechanisms can be found in Section 3.6.

3.2. Violation of Article 8 ECHR: Right to private life

The first question to be addressed is whether P's right to private life according to Article 8 ECHR might be violated by S's requirement to undergo a psychological assessment and receive a diagnosis.

Article 8 of the Convention guarantees the right to respect for private life. It is therefore primarily a defensive mechanism against the state and constitutes a negative obligation on the part of the latter. An interference with Article 8 can be justified if the requirements stated by Article 8 (2) are met. Namely, if the interference is 'in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Consequently, a careful consideration of both the individual's interests the general interests of society is necessary in order to determine whether an interference with P's right to private life can be justified. For this purpose, the core question is whether state S must be granted a certain margin of appreciation to determine the preconditions for legal gender recognition.[77] Generally, Article 8 can, - under certain circumstances - constitute so-called 'positive obligations'. This means Article 8 does not only constitute rights of defence against a member state, but imposes in some cases an obligation on them to take active measures to ensure the effective enjoyment of the right.[78] Therefore, it must be determined whether S is under a legal obligation to provide legal gender recognition procedures without psychiatric requirements.

3.2.1. Scope of protection

In the hypothetical scenario presented here, P's situation would have to fall within the scope protected by the right to private life.

The right encompasses a sphere in which individuals can freely pursue the fulfilment and development of their personality.[79] The wide scope of the term 'private life' has been outlined by the ECtHR's case law.

As a part of private life, Article 8 (1) protects a person's psychological and physical integrity, including the right to exercise control and make decisions over their own

[77] See Section 3.2.3.3.2.
[78] See Section 3.2.1.
[79] Christoph Grabenwarter, *European Convention on Human Rights – Commentary* (C.H. Beck 2014) para 6 to Article 8.

body.[80] As well, the Court has stated that 'the very essence of the Convention is respect for human dignity and human freedom'.[81] Respect for human dignity is the basis for all rights protected by the ECHR[82] and therefore needs to be considered within the scope of Article 8.

In *Pretty v UK*, the Court established that personal autonomy is an aspect of the right to private life.[83] Hence, Article 8 protects the mentioned aspects of an individual's physical and social identity, including their gender identification. In summary, whether and under what conditions P can obtain legal gender recognition falls under the scope of Article 8.

Additionally, positive obligations can be derived from Article 8.[84] In order to determine whether Article 8 imposes a positive obligation on a state, a fair balance must be struck between the competing interests of the individual and the community as a whole.[85] Taking the protection of gender identification into account, legal gender recognition is a precondition for the respect for one's private life. The ECtHR has already adopted a positive obligation on states to provide procedures for legal gender recognition in *B v France* and *Goodwin v UK*[86] in cases of post-operative gender. It ruled that 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'[87] and that 'there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition'.[88]

Accordingly, the state generally has the obligation to provide a legal gender recognition procedure that is consistent with human rights law. However, the absence of abusive requirements for legal gender recognition will – according to the view represented here – be treated as a negative obligation in the paper at hand for various reasons.

First, to consider a positive obligation without acknowledging the intrusive character of the respective state's action in this context does not do justice to the severity of the interference.[89] The precondition of psychiatric assessment has to be regarded as an

[80] ibid para 7 to Article 8.
[81] *Christine Goodwin v UK* App no 28957/95 (ECHR, 11 July 2002) 90.
[82] Jens Meyer-Ladewig, *Europäische Menschenrechtskonvention* (2nd edition, Nomos 2006) para 10 to Article 8 ECHR.
[83] *Pretty v UK* App no 2346/02 (ECHR, 29 April 2002) 61.
[84] *Rees v UK* App no 9532/81 (ECHR, 21 February 1990).
[85] Grabenwarter (n 79) para 72 to Article 8.
[86] *B v France* App no 13343/87 (ECHR, 25 March 1992); *Christine Goodwin v UK* App No 28957/95 (ECHR, 11 July 2002).
[87] *Christine Goodwin v UK* App no 28957/95 (ECHR, 11 July 2002) 77.
[88] ibid 92.
[89] Compare Jochen Frowein and Wolfgang Peukert, *Europäische Menschenrechtskonvention – EMRK-Kommentar* (3rd edition, N.P. Engel Verlag 2009) 295.

active interference with the trans applicant's right to private life rather than a situation in which the state merely does not fulfil an obligation: the need for a legal gender recognition procedure based on the principle of self-determination only arises because the state's legal system depends on a fixed binary gender system in which only the 'biological sex' at birth is decisive, which can be seen as 'a continuing interference'[90] with Article 8.

In any case, the dividing line between negative and positive obligations under Article 8 is fine, and the analysis in regard to both is very similar.[91] For the ECtHR to find a violation of Article 8, it does not make much difference whether the state has breached a positive or a negative obligation. In *Hatton and others v UK*,[92] the ECtHR held that in both cases a fair balance has to be struck, and certain margin of appreciation is left to the state. '(E)ven in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance'[93]. There are even voices in favour of applying the criteria of Article 8 (2) in cases of breaches of all sorts of obligations under Article 8.[94] Anyway, the requirement of a weighing of interests under the proportionality test would apply for both negative and positive obligations.

Due to the fact that the subject of legal gender recognition has been recognised by the Court as Article 8 and concerns not only P's psychological and physical integrity, but also P's social and physical identity and all the mentioned aspects in relation to it, this hypothetical scenario falls under the scope of Article 8.

Furthermore, as argued above, the following analysis is based on the possible violation of Article 8 by way of active governmental interference to highlight the severity of the situation.

3.2.2. Interference

The next question is whether state S interfered with P's right to private life by requiring a psychiatric assessment as a precondition for legal gender recognition.

[90] Compare *Cossey v UK* App no 10843/84 (ECHR, 27 September 1990) – Dissenting opinion of Judge Martens, 3.4.
[91] Raney, Wicks and Ovey (n 73) 361f.
[92] *Hatton and others v UK* App No 9532/81 (ECCHR, 8 July 2013).
[93] ibid 98.
[94] *Stjerna v. Finland* App. no. 18131/9125 (ECHR, 25 November 1994) - Concurring opinion of Judge Wildhaber; partly: Cordula Dröge, *Positive Verpflichtungen in der Europäischen Menschenrechtskonvention* (Springer Verlag 2003) 355.

3.2.2.1. Interference through forced treatment

Because the legal gender recognition procedure relies on psychiatric intervention, there could be an interference with P's psychological and physical integrity if the intervention took place under compulsion. The ECtHR has established in its case law that a medical intervention constitutes an interference with Article 8 if it is carried out against the subject's will and free, informed and express consent.[95] This also applies to judicial orders of psychological or psychiatric assessment and treatment, for example in order to determine someone's criminal responsibility.[96]

In the context of legal gender recognition, the question is whether P voluntarily consents to the psychiatric assessment and treatment. At first glance, it appears that P decides on her own account to exercise her right to legal gender recognition. However, a decision is considered non-voluntary if the choice is between two evils, one of which is unbearable to the applicant. A scenario of such a 'difficult choice' was found in *Dvoracek v Czech Republic*,[97] in which the issue was whether the applicant, a sex offender, had freely consented to medical treatment as a protective measure, as his only choice was between taking anti-androgen drugs, which created the possibility that his period of detention would be shortened, and psychotherapy, with the prospect of a longer period of detention. The ECtHR acknowledged that the choice presented the applicant with a dilemma, and that the prospect of a longer period of detention constituted a form of pressure.[98]

In the same way, P has the choice to undergoing the proceedings to obtain legal gender recognition or live with identity documents that do not match her gender identity. The latter can be an unbearable option: the change of documents is vital in order for an individual to live according to their gender identity, as these documents are needed in everyday life situations, like using one's driver's licence or health insurance card.[99] P could be hindered from travelling with valid documents, finding employment, obtaining housing and participating meaningfully in society.[100] Thomas Hammarberg, the former Council of Europe Commissioner for Human Rights has referred to the 'discrimination and exclusion to a worrying extent' that result from this situation.[101] His view is reinforced by a comparative analysis of EU LGBT survey data carried out by the European Agency for

[95] *X v. Austria* App no. 8278/78 (Commission Decision, 13 December 1979) 156f.; *A.B. v. Switzerland* App no. 20872/92 (Commission Decision, 22 February 1995) 70; *Herczegfalvy v. Austria* App no. 10533/83 (ECHR, 24 September 1992) 26; *Storck v Germany* App no. 61603/00 (ECHR, 16 June 2005) para 143.
[96] Meyer-Ladewig (n 82) para 15 to Article 8.
[97] *Dvořáček v. Czech Republic* App No 12927/13 (ECHR, 6 November 2014).
[98] ibid paras 102, 104.
[99] Hammarberg (n 27) 17.
[100] Amnesty International (n 4) 20; Hammarberg (n 27) 21.
[101] Hammarberg (n 27) 21.

Fundamental Rights (FRA), according to which 30 per cent of trans people living in the EU felt discriminated against in the previous twelve months in a situation in which it was necessary to show an official document indicating their sex.[102] The ECtHR confirmed that the lack of legal gender recognition could lead to vulnerability, humiliation and anxiety.[103]

Therefore, it can be argued that for P the pressure, that she sees herself confronted with, is too intense to consider the decision she needs to make as voluntary. Any psychiatric treatment or assessment she agrees to has to be understood as an unavoidable necessity in order to obtain legal gender recognition. Consequently, P does not have a genuine alternative. She does not consent freely to the psychiatric treatment and assessment, but agrees under the pressure of obtaining acceptable living conditions. The latter constitute the core of Article 8's right to private life.

Hence, the requirement that P obtains a psychiatric assessment and therapy is an interference with her right to private life: legal gender recognition is based on forced treatment.

3.2.2.2. Interference through pathologisation and stigmatisation

The effects of the psychiatric requirements for legal gender recognition may also interfere with P's physical integrity as protected by Article 8. First, the requirement of a diagnosis means that P has to be assessed as mentally ill. This pathologising practise can have different disease-promoting effects.

3.2.2.2.1. Stigmatisation

A diagnosis of mental illness leads to stigmatisation in many cases. Denouncing trans people as 'abnormal' impedes their ability to integrate into society.[104] In particular, the psychiatric perspective of psycho-pathologisation of individual and social phenomena of crisis, which are interpreted as subjective failure, can contribute to stigmatisation.[105] By establishing psychiatric requirements for legal procedures, the state actively encourages existing stereotypes of trans people and aggravates existing discrimination against them.[106] The FRA survey data showed that within the EU, 54 per cent of trans people felt discriminated against or harassed in the previous twelve months for being perceived as trans by other people, which led to lower life satisfaction among trans people.[107] This situation can amount to interference with the mental and/or physical integrity of trans

[102] European Union Agency for Fundamental Rights (n 6) 82.
[103] *Christine Goodwin v UK* App no 28957/95 (ECHR, 11 July 2002) 77.
[104] Güldenring (n 46) 161.
[105] Demiel (n 64) 92.
[106] Transgender Equality Network Ireland, *The Medical Criteria in the Gender Recognition Bill 2014* (Policy Paper 2015) 9.
[107] European Union Agency for Fundamental Rights (n 6) 24.

people. The disease-promoting effect can be described through Meyer's minority stress model, which has been adapted to the situation of trans people by several American scholars.[108] The model suggests that minority stress factors, such as discrimination and stigmatisation, have potentially dire mental health effects,[109] which definitely interfere with the trans person's integrity. The link between stigmatisation and discrimination on the one hand and health problems on the other has been the subject of a great deal of research.[110] The influence of discrimination and victimisation on the high rate of attempted suicide among trans people has been demonstrated.[111] In these cases, the mental disorders individuals suffer from are independent of their gender identity, and they occur as a result of the social stress inflicted on them.[112] This shows that the pathologisation implicit in the legal procedure itself can drive a healthy trans person to illness.[113]

3.2.2.2.2. Dependence

The dependence of the legal procedure on a psychiatric assessment has further negative consequences. First of all, the assessment typically leads to a test situation. Applicants will often feel that they have to fit into the standard understanding of 'typical trans persons' to receive the diagnosis they need to have their gender identity legally recognised. This test situation can be a stressful experience. In many cases, applicants feel that they have to lie about their personal life stories during medical consultations in order to adapt them to trans stereotypes.[114] The manifold forms of gender variance described in Section 1.3 are hardly ever recognised for legal gender recognition; many countries do not have any (transparent) standards of diagnosis; and if they exist at all, they are based on the ICD-10. Thus, legal gender recognition procedures are usually tied to a diagnosis that relies on the standard stereotypical picture. Amongst other things, applicants may need to prove that they are mentally ill in order to match the assessment criteria.[115] Once again, P may be forced into pathologisation due to the dependence on psychiatric assessment, which pressures trans persons to behave in a certain way,

[108] E.g. Kristi Gamarel, Sari Reisner, Jean-Phillippe Larenceau, Tooru Nemoto and Don Operario, 'Gender minority stress, mental health, and relationship quality: A dyadic investigation of transgender women and their cisgender male partners' [2014] 28 (4) J Fam Psychol 437.
[109] ibid 465.
[110] Franzen, Sauer (n 1) 63.
[111] Kristen Clements-Nolle, Rani Marx and Mitchell Katz, 'Attempted Suicide among Transgender Persons – The Influence of Gender-Based Discrimination and Victimization' [2006] 51 (3) Journal of Homosexuality 53.
[112] Rauchfleisch (n 14) 49f.
[113] Güldenring (n 46) 161.
[114] Hamm, Sauer (n 15) 16.
[115] Güldenring (n 46) 163.

comparable to stressing test situation. This constitutes an interference with Article 8 in relation the P's mental and possibly also her physical integrity.

Moreover, the described dependence reveals the highly problematic dual role of psychiatry in these cases. Psychiatry is intended to provide patients with psychological support and treatment, but it serves as a 'gatekeeper' in legal gender recognition procedures. This can make it very difficult or nearly impossible for an individual to build a bond of trust with the psychiatrist.[116] Therefore, the dependence can impede the individual from receiving psychiatric help if such help is needed and wanted. Only a psychiatric process that is based on voluntariness can help trans people overcome difficulties caused by stigmatisation, discrimination or mental illness whose causes are completely independent of their gender identity.[117] Hence, the dependency factor in many cases also restricts peoples' ability to make decisions concerning their own health[118] and can therefore interfere with their right to private life, which includes psychological and physical integrity.

3.2.2.2.3. Heteronomy

An interference can also be seen in the heteronomy of legal gender recognition procedures. The ECtHR has repeatedly stated that 'the very essence of the Convention is respect for human dignity and human freedom', and that '[u]nder Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings'.[119] Trans people are denied the right to make unsupervised decisions about their legal gender,[120] which constitutes an important aspect of personal identity.[121] Consequently, it can be argued that the factor of heteronomy constitutes an interference with Article 8 as well.

3.2.2.3. Result

In this hypothetical scenario, P, who, according to the legal requirements in state S, needs to undergo a psychiatric assessment, would likely be confronted with the consequences of pathologisation. The factors of dependence and heteronomy would restrict her ability to make her own decisions concerning the most intimate aspects of her private life. As a result, the pathologisation and the deriving stigmatisation of P, as well

[116] Hamm, Sauer (n 15) 16.
[117] ibid.
[118] Franzen, Sauer (n 1) 52.
[119] *Christine Goodwin v UK* App no 28957/95 (ECHR, 11 July 2002) 90.
[120] Transgender Equality Network Ireland (n 106) 9.
[121] *Christine Goodwin v UK* App No 28957/95 (ECHR, 11 July 2002) 77.

as her dependence on the deciding psychiatrist's opinion and the heteronomy, constitute interferences with her right to private life as protected by Article 8.

3.2.3. Justification

However, an interference with the rights protected by the Convention does not automatically lead to a violation of the Convention. It can be justified if it is, as per Article 8 (2) ECHR, 'in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Hence, it is necessary to look closely at the interferences involved in P's case, and to analyse whether they are in accordance with the law, pursue a legitimate aim and fulfil the principle of proportionality.

3.2.3.1. Interference 'in accordance with the law'

Article 8 (2) of the Convention states that an interference must be in accordance with the law in order not to violate the guaranteed right. This means that (i) there must be a specific rule or regime that authorises the interference, (ii) the citizen must have adequate access to the law[122] and (iii) the interference must be formulated with sufficient precision to enable the individual to foresee the circumstances in which the law would or might be applied.[123]

The term 'law' in Article 8 is to be understood in a material rather than formal sense.[124] Thus, it does not only refer to primary legislation, but also includes subsidiary rules and case law.[125] Therefore, it covers all domestic legal rules that allow interference with fundamental rights.[126]

In the fictitious state S, the legislation specifying the conditions for gender recognition exists and meets the mentioned criteria.

[122] *The Sunday Times v UK* (1979) 2 EHRR 245.
[123] *Malone v UK* (1984) 7 EHRR 14.
[124] Meyer-Ladewig (n 82) para 100 to Article 8 ECHR.
[125] Douwe Korff, 'The standard approach under Articles 8-11 and Article 2 ECHR' (2008) 2 <http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pd> accessed 9 April 2015.
[126] ibid.

Excursus

The same can be said for countries with legislation and regulations on the issue, as with Iceland, and for countries with corresponding case law, as with France[127]. In these two cases the applicable law – statute and case law, respectively – has been published and therefore does enable the applicant to foresee the course of action. The same applies to most Northern European countries.[128] Accordingly, the requirements of Article 8 (2) are met.

However, the legal situation for trans people is very challenging in many European states. In some countries, legal regulations for gender recognition exist, but they do not explicitly refer to the specific requirements and the precise role of psychiatry. This poses a serious problem for many trans people, as it can lead to uncertainty and arbitrariness. It is especially problematic in regard to the foreseeability of legal consequences.

In countries such as Russia, where there is a significant disparity between the statutory requirements for legal gender recognition and actual practices,[129] the question arises as to whether the obligation to enable legal gender recognition should be regarded as prohibiting practices that differ from the statutory requirements. As a consequence, countries in which the legal framework does not allow the applicant to foresee the necessary steps – initially independent of the question of whether these steps themselves violate Article 8 of the Convention – or when the applicant does not have access to the relevant case law (or, for that matter, if the case law has not been published), a violation of the first requirement of Article 8 (2) is highly likely. Although absolute certainty concerning the consequences of a rule is not necessary and authorities do have discretion in regard to the interpretation of the law, major disparities between existing legislation and jurisprudence or the fact that authorities do not act according to the legislation or judicial decisions can serve as evidence for the lack of foreseeability.[130]

In countries such as Serbia and Georgia, Article 8 is violated as a result of the general lack of an adequate legal procedure. In the absence of any kind of legal framework, the other requirements of Article 8 (2) of the Convention cannot be met.

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[127] Before the law 'Projet de Loi de modernisation de la justice du XXIe siècle' was introduced on 12 October 2016.
[128] Including Sweden, Norway, Finland, Denmark and others.
[129] Chart (n 42).
[130] *Mkrtchyan v Armenia* App no 6562/03 (ECHR, 11 January 2007) para 39.

In a case such as this, it is likely that the Court would determine that Article 8 of the Convention had been violated and would not analyse further issues, e.g. the question of whether the requirement pursued a legitimate aim.[131]

3.2.3.2. Legitimate aim

Article 8 (2) ECHR also requires the interference to be necessary for the pursuit of at least one of the legitimate aims listed in the conventional text.

The question of the legitimacy of an aim is rarely discussed in ECtHR jurisprudence.[132] The criterion 'necessity of an interference' is often much more important.[133] The Court has not yet found a violation of Articles 8, 9, 10 or 11 purely on the basis of the failure of a state to satisfy the requirement for a legitimate aim underlying the interference.[134] Nonetheless, the aims in question have to be discussed to make it possible to weigh them in the proportionality test.

Often, it is not easy to identify the specific aim. For example, the Court has recognised that the state and the public have an interest in restricting parents' choice in naming their children 'for example in order to ensure accurate population registration or to safeguard the means of personal identification and of linking the bearers of a given name to a family.'[135] In general, the aim here could be understood to be the protection of public safety.

In the present scenario, the question is not whether legal gender recognition has to be provided at all – that has already been established by the ECtHR[136] – but whether it is permissible for the procedure to involve psychiatric diagnosis or treatment. Therefore, the question is whether there is a legitimate aim for requiring psychiatric diagnosis or treatment.

3.2.3.2.1. The 'abuse' argument and its underlying aim

One possible response as to why legal gender recognition has various preconditions is the so-called 'abuse' argument: strict preconditions are required in order to avoid having people change their legal gender back and forth, complicating their identity verification

[131] Korff (n 125) 2.
[132] Meyer-Ladewig (n 82) para 108 to Article 8 ECHR.
[133] ibid.
[134] P. Kempees, '"Legitimate aims" in the case-law of the European Court of Human Rights' in P. Mahoney and others, *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal* (Carl Heymanns, Köln 2000), 659.
[135] *Stjerna v. Finland* App. no. 18131/9125 (ECHR, 25 November 1994) 39.
[136] *Christine Goodwin v UK* App no 28957/95 (ECHR, 11 July 2002).

and creating the possibility of fraud.[137] This argument is based on the societal interests of public safety and the prevention of disorder or crime.

It can be argued that in order to ensure public safety, it is necessary to determine a person's identity.[138]

Following this argument, if a person's identity is not clearly identifiable, the public is put at risk of terrorism or other threats.[139] In the current societal perception, the gender of a person is part of their identity[140] and therefore part of the information about them that has to be disclosed. A person's gender is normally understood as an unalterable part of their identity and is therefore referred to in passports, driver's licences and sometimes identification numbers, as in Sweden, for example.[141] The requirement of a psychiatric assessment allows a member state a further level of control in regard to people's reasons for changing their legal gender. A state might fear that without strict requirements and authorised validation, the risk of misusing legal gender procedures for criminal purposes could increase.

'Prevention of disorder or crime' has frequently been accepted as a legitimate aim in ECtHR case law.[142] Hence, it cannot be ruled out that the ECtHR might accept it in a case involving psychiatric requirements for legal gender recognition.

A further concern in regard to public safety is that administrative bodies run smoothly. If legal gender recognition procedures were simplified by abolishing the psychiatric requirements, the number of applications for legal gender recognition could increase, as could the number of times specific individuals change their legal gender, and thus put a strain on the administrative bodies involved. Accordingly, there is a possibility that the aim of public safety vis-à-vis the functioning of the administration could be presented as a defence in a case involving legal gender recognition.

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[137] Transgender Equality Network Ireland (n 106) 5.
[138] This defence was invoked by the French government in the context of prohibiting the wearing of a burqa or niqab in public in *S.A.S v France* App no. 43835/11 (ECHR, 1 July 2014) para 115. The Court describes the defence as 'the need to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud'.
[139] Frowein, Peukert (n 89) para 16 to Article 8.
[140] *Goodwin v UK* App. no. 28957/95 (ECHR, 11 July 2002) para 77.
[141] Folkbokföringslag (1991:481) § 18.
[142] Steven Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Human rights files No. 15, 1997) 29.

3.2.3.2.2. The economic wellbeing of a country

Furthermore, it has to be taken into account that a change to the existing system for legal gender recognition, e.g. via the establishment of institutions responsible for the procedure, could lead to an increase in administrative costs.

The ECtHR has accepted the economic wellbeing of a country as a legitimate aim for interference with Article 8 in several cases. Examples include *Miailhe v France*, which concerned the exercise of search and seizure powers in people's home by customs authorities investigating suspected irregularities in financial dealings with foreign countries,[143] *Yordanova and others v Bulgaria,* in which the Court accepted the economic wellbeing as a legitimate aim for the forcible removal of Roma settlements in Sofia,[144] and *Orlic v Croatia*, in which the aim was invoked to justify an eviction of a retired military serviceman from a flat he had obtained from the former Yugoslav People's Army.[145]

Hence the aim of the economic wellbeing of the country tends to be interpreted widely and could be accepted in the case of legal gender recognition.

3.2.3.2.3. The protection of health or morals

The protection of morals in the context of sexuality or sexual content has been raised before the Court in some cases. As the Court stated in *Dudgeon v UK*,[146] the protection of moral standards is not a legitimate aim in regard to prohibiting private homosexual relations between adults capable of valid consent.[147] The Court also held, however, that some degree of control over homosexual conduct is necessary in a democratic society in order to provide safeguards against the exploitation and corruption of those who are especially vulnerable,[148] particularly juveniles.[149] However, it would be difficult for a member state to use this aim in the context of legal gender recognition, which is not related to sexual activity. Nonetheless, the underlying idea of gender binarity, which is apparent in the requirement that everyone be designated either male or female, often determines the discussion.[150] When being transgender is considered abnormal or to constitute a mental disorder, the protection of society and the protection of the current

[143] *Miailhe v France* App no 12661/87 (ECtHR, 25 February 1993) para 33.
[144] *Yordanova and Others v Bulgaria* App no 25446/06 (ECtHR, 24 April 2012) para 113.
[145] *Orlic v Croatia* App no 48833/07 (ECtHR, 21 June 2011) para 62.
[146] *Dudgeon v UK* App no 7525/76 (ECHR, 22 October 1981).
[147] ibid para 61.
[148] ibid para 49.
[149] Frowein, Peukert (n 89) para 15 to Article 8.
[150] See Laura Adamietz, *Geschlecht als Erwartung* (Nomos 2011) 62ff. as critical voice on this issue.

binary system[151] could be important. Consequently, it cannot be ruled out that a member state would invoke the protection of morals as a legitimate aim for imposing psychiatric requirements.

Moreover, it could be argued that the diagnosis and/or therapy are intended to protect individuals' health. The decisions in which the Court has considered the protection of health a legitimate aim have involved the requirement that prisoners participate in cleaning their cells,[152] the obligation that soldiers have their hair cut above the collar[153] and the criminalisation of consensual adult sado-masochistic sexual practices where the harm inflicted was considered severe.[154] In these cases, the Court accepted that these requirements serve to prevent the misuse of the law in order to access surgeries paid for by the healthcare system – which would otherwise be unnecessary – and thus place a burden on the entire healthcare system, which also puts public health at risk. Hence, the protection of public health could be invoked by a member state.

3.2.3.2.4. Interim result

As a result, public safety (in relation to being able to control the legal gender procedure and the functioning of administrative bodies), the prevention of crime (by monitoring the reasons for changing one's legal gender), the economic wellbeing of a country and the protection of public health could be invoked by state S as legitimate aims for an interference with Article 8. Because changing one's legal gender is not related to sexual activity and the *Dudgeon* decision is more than 30 years old, it seems unlikely that the ECtHR would consider the protection of morals a sufficiently legitimate aim. Nevertheless, arguments in regard to this aim will also be assessed.

3.2.3.3. The principle of proportionality

As well, state S needs to meet the principle of proportionality: the remedy has to be suitable and the interference must be necessary in a democratic society and proportionate.

3.2.3.3.1. The suitability of the remedy

In general, the suitability of a remedy – or, more precisely, the suitability of the interference – is implied in the principle of proportionality but rarely pointed out by the

[151] Sophinette Becker, 'Transsexualität Geschlechtsidentitätsstörung Geschlechtsdysphorie' in Götz Kockott and Eva-Maria Fahrner (eds), *Sexualstörungen* (Thieme Verlag 2004).
[152] *X v United Kingdom* App no 8231/78 (ECHR, 6 March 1982) 18.
[153] *Peter Sutter v Switzerland* App no 8209/78 (ECHR, 1 March 179) 166.
[154] *Laskey and others v United Kingdom* App no 21627/93, 21628/93, 21974/93 (ECHR 19 February 1997) para 50.

Court,[155] which has done so only in exceptional cases.[156] Due to the complex intertwining of psychiatry and legal gender recognition procedures, it seems to be necessary to look more closely at the remedy itself. In P's case – and therefore in regard to trans persons in general – it has to be asked whether the requirement of a psychiatric assessment in order to access legal gender recognition actually helps S pursue one of the mentioned aims. If the restriction does not have a positive effect on these aims, a justification would not be sufficient and the violation of Article 8 would already be evident.

In P's case, it cannot be assumed that the psychiatric requirements for the legal gender recognition procedure are suitable to the pursuit of the intended aims. This is especially true in regard to the protection of public safety and the prevention of disorder and crime.

Psychiatric and psychological diagnoses are often influenced by the subjective assessment of the treating practitioner and cultural, local and traditional perceptions of normality that are contextual and variable.[157] Therefore, a reliable psychiatric diagnosis in the terms of ICD-10 or DSM-5 is in many cases not possible.[158] Psychiatrists have started to question the view that individuals' subjective feelings, moods, worldviews and inner identity can be judged from the outside or assessed objectively.[159] Because gender identity is a question of self-consciousness that has to be experienced individually, it can only be understood, described or felt individually. An external assessment runs the risk of being deficient and misleading.[160]

This problem is intensified when trans people are forced into therapy that is unlikely to have positive effects on them because it is not undergone voluntarily. A crucial element of psychotherapy is its emancipatory potential.[161] The purpose of therapy is to help patients face their – possible – difficulties and find ways of coping with them. But this aim seems unobtainable if the patient does not want to engage in this process but is forced to do so.

First, transgenderism should not be considered a 'gender identity disorder' or a 'curable illness.'[162] Instead the existence of a variety of gender identities[163] within and beyond the binary system should be acknowledged. Second, therapy aiming to change an individual's

[155] Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (5th edition, C.H. Beck 2012) para 15 to section 18.
[156] E.g. *Lustig-Prean and Becket v UK* App no 31417/96 (ECHR, 29 September 1999) 67.
[157] Annette-Kathrin Güldenring, 'Zur 'Psychodiagnostik von Geschlechtsidentität' im Rahmen des Transsexuellengesetzes ' [2013] 26 Z Sexualforsch 160, 169.
[158] ibid.
[159] ibid.
[160] ibid.
[161] Christian Huchzermeier, 'Psychotherapie hinter Gittern?' in Hans-Jürgen Kaatsch, Hartmut Rosenau, Werner Theobald (eds), *Medizinethik* (Lit Verlag 2008) 130.
[162] Adamietz (n 150) 107.
[163] Güldenring (n 157) 171.

gender identity in order to make it congruent with the gender the individual was assigned at birth is likely to force that person to pretend to act according to particular gender roles or to pretend to suffer psychologically.[164]

It can therefore be argued that, although the aims pursued in requiring psychiatric assessment or therapy can be legitimate, Article 8 might nonetheless be violated because psychiatric assessment and therapy are not suitable means through which to achieve these aims.

Therefore, the violation of Article 8 can in many cases already be determined at this point. In order to examine the issue fully, however, it remains necessary to consider necessity and the proportionality between the aims mentioned above and P's Article 8 rights.

3.2.3.3.2. The democratic necessity test and proportionality

The ECtHR has held that an 'interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention.'[165]

Therefore, the question of necessity – whether the legitimate aim that is pursued by the interference cannot be achieved by less restrictive measures – can only be answered in a concrete case in which the national circumstances are completely disclosed. Due to the complexity and diversity of different national conditions, as demonstrated in the first part of this paper, it is not possible to examine this issue definitively here. However, several lines of argument can be illustrated in order to facilitate the evaluation of a specific legal situation.

As interpreted by the ECtHR, Article 8 leaves a margin of appreciation to the member states whose extent depends on various factors.[166] A narrow margin is generally applied where the individual's effective enjoyment of key rights, particularly their existence or identity, is affected.[167] In the scenario here, it has been shown that a person's gender identity touches the core of Article 8, because it affects their human dignity.

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[164] ibid 165.
[165] *Coster v. UK* App. No. 24876/94 (ECHR, 18 January 2001) para 104.
[166] ibid para 105.
[167] *Evans v. UK* App. No. 6339/05 (ECHR, 10 April 2007) para 77.

Another factor is whether there are relevant disagreements and differences between European states leaving a wide margin or whether there is a large measure of agreement and strong tendency on the issue bringing forth a narrow margin and in-depth examination of the necessity of the interference.[168]

In a recommendation of the Council of Europe, the Committee of Ministers urged member states to take 'appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way' and to remove abusive prior requirements.[169] Their latest resolution explicitly calls requirements including a diagnosis of mental disorder a violation of 'a person's dignity, physical integrity, right to form a family and to be free from degrading and inhuman treatment'.[170] The former Council of Europe Commissioner for Human Rights, Thomas Hammarberg, stated that the classification of trans identities as a mental illness 'may become an obstacle to the full enjoyment of human rights by transgender people, especially when they are applied in a way to restrict the legal capacity'.[171] In 2015, the European Parliament adopted the Report on Human Rights and Democracy for the year 2013, which 'calls on the Commission to reinforce its efforts to end the pathologisation of trans identities' and 'encourages states to ensure quick, accessible and transparent gender recognition procedures that respect the right to self-determination'.[172]

Also, recent law reforms (as in Denmark, Ireland, Malta and Norway) indicate a transition towards a more informed and tolerant societal perception of trans identities by member states. These developments in domestic law, together with several ground-breaking judgments in the past,[173] give rise to the hope that, in an application by an applicant from a state requiring psychiatric assessment, the Court may in the future grant member states only a narrow margin of appreciation.

Consequently, in this case the interferences of Article 8 have to be proportionate to the legitimate aim pursued. Hence, it is necessary to weigh up the possible arguments, impacts and consequences for the fictional state S as well as for the fictional trans person P.

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[168] Korff (n 125) 3.
[169] Council of Europe (n 25) paras 20f.
[170] Deborah Schembri, *Discrimination against transgender people in Europe* (Committee on Equality, CoE 2015) para 62.
[171] Hammarberg (n 27) III.3.3.
[172] European Parliament (n 28) 162.
[173] *Rees v UK* App no 9532/81 (ECHR, 21 February 1990); *B v France* App no 13343/87 (ECHR, 25 March 1992); *Christine Goodwin v UK* App No 28957/95 (ECHR, 11 July 2002).

3.2.3.3.2.1. The 'abuse' argument

As stated above, the abolition of psychiatric requirements in legal gender recognition procedures could enable an individual to change their legal gender in official documents multiple times and therefore constitute a threat to public safety and facilitate the commission of crimes such as fraud.[174] Hence, the purpose is the prevention of 'abuse'[175] of the legal gender recognition procedure.

First, however, this argument is hypothetical and difficult to confirm. It does not seem common for people to undergo legal gender recognition for fraudulent reasons. Organisations in Argentina, which has a simplified legal gender recognition procedure, do not have data about cases in which either legal gender recognition has been refused or fraud was an issue.[176] Moreover, states can easily avoid this alleged risk by implementing a legal gender recognition procedure based on self-determination that relies on an administrative or notary declaration. In this way, states would still be able to effectively monitor their gender recognition procedures.

The same can be said in regard to the alleged risk that individuals might pretend to be trans in order to avoid a particular penal consequence, e.g. being imprisoned in a facility for female prisoners although the person in question is biologically male. Such cases seem to be extremely rare and are not well documented.[177] Also, it is rather unlikely that persons would subject themselves to social stigma only to obtain this relatively minor advantage. Against the minor risk, it has to be kept in mind that trans persons who do not obtain legal gender recognition due to the complicated process involved and whose gender identity is consequently not recognised are known to be at high risk of abuse or becoming a victim of violence.[178]

Also, changing one's gender maker multiple times entails more than changing one's legal documents. Living according to a gender identity different from the one assigned at birth impacts a person's social and work life severely. In most cases, transitioning is an emotionally challenging process fraught with great personal costs and conflicts.[179] If people abusively changed their gender marker more than once, they would most likely

[174] For example, car insurance premiums can be cheaper for women than men; House of Commons, The Gender Recognition Bill [HL] Bill 56 of 2003-04 (Research Paper 04/15, 2004) 11.
[175] Wiebke Fuchs, Dan Christian Ghattas, Deborah Reinert and Charlotte Widmann, *Studie zur Lebenssituation von Transsexuellen in Nordrhein-Westfalen* (2012) 22.
[176] Transgender Equality Network Ireland (n 106) 5.
[177] There is an ongoing discussion about this issue in the case of Chelsea Manning, who was convicted of leaking confidential U.S. government information and is serving a 35-year sentence at the maximum-security U.S. Disciplinary Barracks at Fort Leavenworth.
[178] Darren Rosenblum, '"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism' [2000] 6 Mich. J. Gender & L. 499, 522f.
[179] See: Amnesty International (n 4).

face strong social pressure from both their family and their professional environment. Again, so far there seems to be no evidence of the abuse of legal gender recognition procedures.

3.2.3.3.2.2. The economic wellbeing of the country

The argument that the removal of the psychiatric requirements in legal gender recognition procedures would increase public expenditure seems farfetched. As stated above, there is no proof of multiple changes of one's gender marker or abuse of legal gender procedures that could lead to higher costs for the state. It is also unlikely that the implementation of a purely administrative procedure (without psychiatric requirements) would increase state costs significantly. There is no evidence to support this view. On the contrary, it can be assumed that shortening and simplifying the procedure by eliminating experts' involvement would instead lower the costs for the state. This is particularly the case in countries where the psychiatric involvement is funded by their healthcare system or via legal aid.

3.2.3.3.2.3. The protection of health or morals

The ECtHR leaves the details of the protection of morals to the state's discretion, and the issue of public opinion has to be addressed in each state individually. However, the margin of appreciation is not unlimited. In its 1976 *Handyside* judgment, the Court held that, when assessing whether the protection of morals necessitates the measures taken, it is necessary to make an 'assessment of the reality of the pressing social need implied by the notion of "necessity" in this context' and stated that 'every "restriction" imposed in this sphere must be proportionate to the legitimate aim pursued'.[180]

As already described above, the need to protect the existing gender binary system seems to be a central concern in many societies. This need could be ascribed to the basic human fear of change, the fear of the unknown and the principle of not changing a system that generally seems to work. But often the rare cases that challenge a system also reveal the need for a change to the status quo. The increasing number of organisations that support trans persons' rights, the judgments of many national courts[181] and discussions in national newspapers[182] show that there is momentum in the

[180] *Handyside v United Kingdom* App no. 5493/72 (ECHR, 7 December 1976) 21-23, paras 46, 48 and 49.
[181] E.g. Sweden: 24931-13 *Burman vs National Board of Health and Welfare* [16 May 2014] Administrative Court in Stockholm General Division; Germany:1 BvR 3295/07 [11 January 2011] Constitutional Court in Karlsruhe; Austria: Zl. 2008/17/0054-8 [27 February 2009] Supreme Administrative Court in Vienna.
[182] E.g. Nike Laurenz, 'Transsexualität im Beruf: Und dann kam Andrea' (Spiegel Online, 10 April 2015) <http://www.spiegel.de/unispiegel/jobundberuf/transgender-im-beruf-und-dann-kam-andrea-a-1027522.html> accessed 23 April 2015; Siobhan Fenton, 'Are

field and that people realise that the difficulties faced by trans people reflect negatively on the whole community. In 1981, the ECtHR stated in *Dudgeon v UK*,[183] in regard to the criminalisation of homosexuality, that although there are 'members of the public who regard homosexuality as immoral' and 'may be shocked, offended or disturbed by the commission by others of private homosexual acts,' that does not justify an interference with the right to respect for one's private life.[184] This argument can be applied to the scenario here. In a democratic society, people have to respect that other people have the right to live according to their gender identity. This right includes their right to legal gender recognition options that do not require pathologising medical diagnoses.

Consequently, the protection of morals cannot be a valid argument to justify psychiatric requirements in legal gender recognition procedures.

In regard to the protection of health, the issue of potential misuse in order to access trans-related healthcare has to be considered entirely separately from the issue of legal gender recognition procedures. The question of whether trans-related healthcare has to be granted and paid for by public health insurance and how access has to be facilitated – and hence the question of whether transgenderism has to be diagnosed on the basis of psychiatric diagnostic manuals in order to facilitate such healthcare – are questions that cannot and should not be answered by this analysis. These issues and the issue of legal gender recognition are distinct from each other and involve different legal issues and problems. The intermingling of these issues is unnecessary and causes artificial problems that make a clear legal analysis impossible. Hence, the often used counterargument – that depathologisation would complicate access to trans-related healthcare[185] – will only be addressed very briefly. The argument arises because many trans people wish to undergo certain treatments and surgeries access to which is dependent on ICD diagnosis in many states.[186] However, it has to be considered that a right to access to trans-specific healthcare might arise from human right obligations. Also, the role of depathologisation in promoting the acceptance of transgenderism could even lead to an improvement of access to healthcare in the long run.[187] This issue cannot be considered further here, as this paper is limited to an examination of depathologisation within the legal context of gender recognition.

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universities doing enough to support transgender students?' (The Guardian, 2 February 2005) <http://www.theguardian.com/education/2015/feb/02/are-universities-doing-enough-to-support-transgender-students> accessed 23 April 2015.

[183] *Dudgeon v UK* App no 7525/76 (ECHR, 22 October 1981).

[184] ibid para 60.

[185] Theilen (n 47) 333.

[186] ibid.

[187] ibid 335f.

What can be concluded is that the argument that psychiatric requirements are necessary for the protection of health in the context of legal gender recognition cannot be examined fully here as it relates to a potential problem in the context of trans-related healthcare that would need to be addressed in debates about the latter.

3.2.3.3.3. Recap and final considerations

The final part of this analysis assesses the proportionality between the aims and the interference by weighing the legal interests of both parties.

This weighing includes the infringements of P's Article 8 rights through forced treatment, stigmatisation and pathologisation, on the one hand, and the aims that could be used to justify those infringements – public safety, the economic wellbeing of the country and the protection of health and morals – on the other.

It has been shown in the hypothetical case that the right to legal gender recognition falls under the scope of Article 8, and that interference with this right touches the core of P's right to private life, as the gender identity is a crucial part of personal identity and personal autonomy, which, in turn, derives from human dignity. The interference with human dignity for trans people in many cases weighs heavily in this consideration. It has been shown[188] that the requirement of a diagnosis or therapy is likely to cause severe distress to trans people seeking legal gender recognition. The impact on their wellbeing is often intense, and the aims are neither pursuable nor in need to be pursued.

Not only the lack of suitability of psychiatric requirements to pursue the aims has been shown above (see 3.2.3.3.1.) but also the weighing up of the infringements and the different aims cannot be considered satisfactory. Even if the protection of public safety, the economic wellbeing of the country or the protection of public health and morals were accepted as legitimate aims, the infringements of Article 8 through stigmatisation, dependency and heteronomy weigh much more heavily than any potential claim for protection – not only, because the human dignity of P is concerned. Regardless, the danger for the mentioned aims has been shown to be hypothetical and mostly non-existent, meaning that the interference with P's Article 8 rights cannot be justified.

Even if legal gender recognition procedures were subject to abuse, the number of cases involved would be insignificant, as a result of which the resultant burden would be relatively small. In contrast, the interference with P's Article 8 rights is severe, and the prohibition of abuse therefore does not outweigh the interference and cannot be used as a justification for that interference.

[188] See Section 3.2.2.3.

Even if there were costs associated with changing the procedure, these costs would not overweigh the extensive interference with P's right to private life. P's right outweighs potential insignificant costs. And even if morals were endangered, the slight danger would not outweigh P's rights.

As every argument intended to justify psychiatric requirements has been shown to be invalid, there can be no other conclusion than that the interference with P's Article 8 rights is unjustified.

Excursus[189]

Two examples are presented here to question why legal gender recognition procedures specifically call for such an intense infringement of trans persons' rights.

First, in Germany particular traffic offences and the repeated failure of a driver's licence exam require the individual in question to pass a test to assess their fitness to drive, the Medical-Psychological Assessment, colloquially known as the 'Idiot Test.'[190] *The test includes a psychological examination.*[191] *In contrast to legal gender recognition, the aim of the interference with the person's right to privacy here*[192] *is to ensure road safety, and therefore to protect public safety and the rights of others.*[193] *The interference is justified because of the legitimate and serious purpose it serves, and because the interference is proportionate to those aims. As well, the interference with the driver's right does not necessarily touch the core of their personal identity.*

Second, in most European countries it is relatively easy to change legal documents the moment they become 'false'[194] *– for example, when a person divorces and changes their name back to their original family name. In this case, when the name that implies the status of being married is invalid, there is an administrative procedure to correct the issue and change the documents. For this procedure, neither a psychiatric diagnosis nor psychotherapy is needed. Of*

[189] As the following arguments can neither be included in the Article 14 analysis nor can be seen as a direct part of the Article 8 analysis, it was decided to include them in an excursus in order to underline the fact that states can justify interference with Article 8 ECHR, but mainly in cases in which the interference is outweighed by the importance of the aim. Therefore, the following examples have to be considered *argumenta a contrario* for a trans person's case.
[190] German: *Idiotentest*.
[191] Section 2 (8) of the German Road Traffic Act.
[192] See Section 3.2.2.1, Interference with Article 8 – forced treatment.
[193] See e.g. 10 S 2716/86 [11 August 1987] Administrative Court in Mannheim.
[194] See e.g. Sections 1, 6 and 27 of the German *Personalausweisgesetz*.

course, it is not necessarily clear when exactly a trans person's documents became invalid – whether at birth or at some later point – but this question again only arises because of the legal system's reliance on a system based on a binary understanding of gender. Without this system, the choice between two genders would be redundant. Documents would not contain inaccurate information, from the point of view of a trans person or any other person. It remains unclear why the procedure for changing one's legal gender on a document cannot be treated in the same way as changing one's family name after a divorce. Opponents could raise the aforementioned aims concerning the case of legal gender recognition. Article 8 would also be violated,[195] *the only difference being that in the case of legal gender recognition the person's gender identity and human dignity are affected.*

3.2.4. Result

The two examples provided in the excursus underline the intensity of the negative impact as well as the extent of the interference with trans people's right to private life. They were chosen to demonstrate that the psychiatric requirements are not justifiable in the case of legal gender recognition. As well, the intended aims and arguments for them are not sufficient to outweigh the interference with trans people's rights.

Hence, it has been shown that the interference with trans peoples' right to private life entailed by the psychiatric requirements is not justifiable.

Therefore, the necessity to undergo a psychiatric assessment in order to obtain legal gender recognition is a violation of trans people's rights to private life according to Article 8. In the hypothetical scenario presented here P could consider to lodge an application with the ECtHR and claim a violation of her conventional rights.

3.3.Article 3 ECHR: Prohibition of torture

In some cases, trans people might be treated so badly during the psychiatric assessment that a possible violation of the convention's prohibition of torture (Article 3 ECHR) has to be considered.

3.3.1. Scope of the protection

Article 3 ECHR prohibits torture or inhuman and degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour.[196] The prohibition is

[195] *Burghartz v. Switzerland* App no 16213/90 (ECHR, 22 February 1994) para 24.
[196] *Labita v.Italy* App no. 26772/95 (ECHR, 6 April 2000) para 119.

absolute, meaning that it is not permitted to derogate from the prohibition under any circumstance, and that there can be no justification for an infringement of Article 3.[197]

To classify as a violation of Article 3, the interference with a person's integrity must attain a minimum level of severity and disrespect a person's humanity.[198] The ECtHR has set a high threshold for the severity and disrespect to a person's humanity permissible under Article 3. The assessment depends on the circumstances of the specific case, such as the duration of the treatment, the mental or physical effects it has and possibly the sex, age and state of health of the victim.[199] According to the Court, treatment can be considered as degrading if it "is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. [200] Although the purpose of the ill treatment must be taken into account, the lack of intent to humiliate or debase the victim does not necessarily rule out the finding of a violation of Article 3.[201]

The meaning of the protection against torture and inhuman or degrading treatment is emphasised through the 1987 European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment as adopted by the member states of the European Council.[202]

3.3.2. Interference

In the hypothetical scenario presented here, the question is whether state S's legal gender recognition procedure interferes with the prohibition of torture or inhuman and degrading treatment and punishment.

First of all, psychiatric requirements in legal gender recognition procedures can interfere with a person's integrity (see part 3.2.2.2.1). Depending on the circumstances of the specific case, the interference can be severe enough to violate Article 3.

The ECtHR has heard several cases involving alleged ill treatment during medical interventions against a person's will in the context of Article 3, in which it has reiterated that the essence of the Convention is the respect for human dignity and human freedom. On this basis, it has declared that 'the imposition of medical treatment without the

[197] Aisling Reidy, *The prohibition of torture – A guide to the implementation of Article 3 of the European Convention on Human Rights* (Human rights handbooks, No.6, 2002) 19f.
[198] Grabenwarter (n 79) para 2 to Article 3.
[199] ibid.
[200] *Smith v. Grady* App no. 33985/96 and 33986/96 (ECHR, 27. September 1999) para 120.
[201] *Peers v. Greece* App no. 28524/95 (ECHR, 19 April 2001) paras 68 and 74.
[202] Meyer-Ladewig (n 75) para 5 to Article 3 ECHR.

consent of a mentally competent adult patient would interfere with his or her right to physical integrity'.[203]

It has been demonstrated that trans people often undergo psychiatric assessment because it is a mandatory requirement rather than a personal choice (see part 3.2.2.1). Although people consent to the psychiatric assessment and therapy, the consent is not given freely or voluntary, but rather due to the lack of an alternative in when seeking legal gender recognition. Therefore, the psychiatric requirement can be regarded as an 'imposition of medical treatment without consent'. Even if there is no indication that medical practitioners have the intention to ill-treat the applicant, the gross disregard for the applicant's rights to autonomy and choice can still constitute a violation of Article 3.[204] Therefore, depending on the specific situation and assessment practices, a violation of Article 3 may occur.

Article 3 could be violated if the assessment involves severe violations of human dignity – for example, if the person is (repeatedly) asked to undress and show their sexual organs or is required to answer very intimate and invasive questions about their sexual preferences or fantasies. If the person feels forced to comply with the requests or answer the questions, this amounts to torture or inhuman and degrading treatment.

If P undergoes such inhuman and degrading treatment in the course of the psychiatric assessment, P can invoke both a violation of Article 8 and Article 3 when filing an application to the ECtHR.

3.4.Article 14 ECHR: Prohibition of discrimination

The psychiatric assessment or therapy requirements in legal gender recognition procedures might constitute discrimination on the basis of gender identity. Article 14 ECHR prohibits discrimination. However, the scope of the prohibition is limited. According to its wording it only prohibits discrimination regarding 'the enjoyment of the rights and freedom set forth in this Convention'.
The analysis of Article 8 has pointed out that the requirement of psychiatric assessment or therapy constitutes a violation of Article 8 ECHR. For that reason, the question remains whether the legal requirement also violates the Article 14 of the convention (in connection with Article 8).

[203] *V.C. v. Slovakia* App no. 18968/07 (ECHR, 8 November 2011) para 105.
[204] The authors examined Article 8 first for strategic reasons. However, if the Court establishes that an interference with a person's integrity reaches the degree of severity in the sense of Article 3, it usually does not consider the treatment separately in the light of Article 8 (e.g. *Jalloh v Germany*).

For Article 14 to be applicable it is only required that the facts of the case fall within the scope of the conventional rights. But due to the current jurisprudence of the ECtHR, the additional analysis of Article 14 is only carried out if the discrimination is a fundamental aspect of the case.[205] It has to be shown that the violation has an independent discriminatory nature that is not a natural result of the already established violation.[206] Additionally, Protocol 12 to the ECHR strengthened the prohibition of discrimination. In *Sejdić and Finci v. Bosnia and Herzegovina*, the Court held that 'Article 1 of Protocol No. 12 extends the scope of protection to "any right set forth by law" and "thus introduces a general prohibition of discrimination"'.[207] It has to be taken into account, however, that the Protocol has only been ratified by a few states[208] and has not been very important in the Court's jurisprudence so far.[209]
In the hypothetical scenario presented here, it needs to be established whether P's being obliged to undergo psychiatric assessment for legal gender recognition constitutes discrimination within the meaning of Article 14. In cases concerning Article 14, the Court examines whether persons in a similar situation are treated differently and whether this difference in treatment is justified – that is, that the aims are legitimate and that the means are proportionate.[210]

First of all, in the hypothetical scenario presented here the psychiatric requirements only apply to trans people, whereas other comparable procedures do not require a psychiatric assessment (e.g. changing one's name after a divorce; see Section 3.2.3.3.3). In other cases (e.g. a psychiatric assessment to regain one's driver's licence after serious traffic offences; see Section 3.2.3.3.3), the context is different: there is a need to protect the rights of others. In the scenario involving P, there is a clear difference in treatment.

Second, in regard to having free access to legal documents that state a person's correct gender identity, P is treated differently than people who do not have to undergo any psychiatric requirements in order to obtain to such documents.[211] At the time of birth, gender is assigned solely on the basis of external body features. People whose gender

[205] Frowein, Peukert (n 89) 403.
[206] ibid.
[207] *Sejdić and Finci v. Bosnia and Herzegovina* App no 27996/06 and 34836/06 (ECHR, 22 December 2009) para 53.
[208] Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Montenegro, Netherlands, Romania, San Marino, Serbia, Slovenia, Spain, Macedonia and Ukraine.
[209] Frowein, Peukert (n 89) 402.
[210] Meyer-Ladewig (n 75) para 9 to Article 14 ECHR.
[211] Compare Adamietz (n 150) 261.

has been recognised correctly at the time of birth have correct legal documents without needing to undergo a recognition procedure.[212]

The grounds for discrimination prohibited in Article 14 (amongst others, sex, race, language) do not specifically include gender identity. However, the term 'other status' allows the ECtHR to extend the scope of protection to grounds that are not explicitly mentioned. On this basis, the Court has repeatedly stated that the prohibition of discrimination under Article 14 extends to sexual orientation and gender identity.[213]

A difference in treatment only constitutes discrimination if it cannot be justified on the ground that it is intended to pursue a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought.[214]

The possible legitimate aims have already been assessed in Section 3.2.3.2 in regard to Article 8. It was argued there that psychiatric requirements in legal gender recognition procedures are neither suitable means through which to achieve the stated aims – for example, the need to protect against abuse of legal gender recognition procedures or the need to protect society's morals – nor proportionate. A procedure that only requires a psychiatric assessment for trans people cannot be justified for the same reasons that the interference with Article 8 cannot be justified (see Section 3.2.3.3.2). E.g. the fear of potential abuse of legal gender recognition proceedings or the argument in regard to the necessity of the protection of society's morals lack a convincing basis.
As a result, the psychiatric requirements constitute discrimination against trans people and violate Article 14 in conjunction with Article 8.

3.5. Result

The analysis has shown that the requirements for medical diagnosis or psychotherapy in legal gender recognition procedures, which exist in most of the 49 countries examined here, interfere with the human right to respect for one's private life (Article 8 ECHR) and constitute discrimination (Article 14 in combination with Article 8). These interferences cannot be justified, as the pursued aims are not suitable and the potential risks cannot be verified. As well, the infringement of Articles 8 and 14 and the negative implications for P are disproportionate to the intended aims.

In cases in which a person undergoes psychiatric assessment or therapy in order to seek legal gender recognition and is treated in an undignified or cruel manner within the course of treatment, the prohibition of torture (Article 3) is violated as well. The following

[212] ibid.
[213] *Identoba and others v. Georgia* app no. 73235/12 (ECtHR, 12 May, 2015), para 96.
[214] *Karlheinz Schmidt v. Germany* app no. 13580/88 (ECtHR, 18 July, 1994), para 24.

section analyses what P could do to have the violation of her rights acknowledged by the ECtHR.

3.6. Meaning and enforcement

As already mentioned, P's case is based on the minimum case of psychiatric requirements in legal gender recognition procedures in European states, with the exceptions of Denmark, Sweden, Malta, Ireland and Norway. The purpose of using the minimum case in the hypothetical example is to offer an *a fortiori* argument (argument from a yet stronger reason) for all the procedures and circumstances in the different European states, especially for countries with more intense involvement of psychiatry.

Because Articles 8, 14 and (where applicable) 3 were violated in the hypothetical scenario, it can be concluded, that these human rights are also violated in all states with similar or stricter legal gender recognition procedures.

The current European situation in regard to legal gender recognition is highly diverse, and each case is therefore unique. Nonetheless, the legal assessment offered here should be applicable to many situations and cases, although it would need to be adapted to the specific circumstances of each case. Nevertheless, the core arguments regarding psychiatric requirements for legal gender recognition remain the same: the interference of human rights through forced treatment, pathologisation and stigmatisation can be found in most European countries. States that do not provide any legislation for legal gender recognition at all are most obviously in violation of their legal obligations under the ECHR.

In general, individual complaints before the ECtHR are possible.

Articles 34 and 35 of the Convention lay out the admissibility criteria for individual applications to the ECtHR. Article 34 ECHR states that applications by any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of the ECHR and its protocols by one of the parties to the ECHR are subject to the jurisdiction of the ECtHR.

Article 35 ECHR requires that all domestic remedies (complaints and court decisions) be exhausted before the Court deals with the matter within a period of six months after the final decision was made (Paragraph 1). Potential exclusion criteria are anonymity (Paragraph 2 (a)), further pendency (Paragraph 2 (b)), abusive use (Paragraph 3 (a)) and the lack of a significant disadvantage (Paragraph 3 (b)). This means that all domestic courts (if necessary) have already decided on the matter; that there are no further domestic remedies available; that P should not act anonymously and should not abuse the individual complaint mechanisms; and that the disadvantage suffered by P

must be significant. The trial itself is without charges, although this does not include the costs for lawyers or other expenses. The applicant may also apply for legal aid, which can be granted during the trial.[215]

Once the individual application is admitted, the Court will deliver a judgment. A finding of a violation of the Convention and its protocols obliges the contracting parties to make the required changes in domestic law to avoid further violations, and to compensate for the causes of the violation. These requirements derive from Article 46 (1) ECHR. The judgment is only binding *inter partes*[216] and does not set a precedent in the strict sense of a Europe-wide *stare decisis*. But the ECHR and ECtHR rulings do influence domestic law and even domestic constitutional law. An example is the jurisprudence of the German Constitutional Court, according to which German courts are obliged to follow the rulings of the ECtHR.[217] Indeed, the German Constitutional Court went so far as to argue that non-consideration of the ECHR in the interpretation of the German Constitution can constitute a violation of individuals' constitutional rights and is thus a legitimate ground for an individual constitutional complaint.[218]

3.7.The ECtHR and other sources of human rights

Clearly, the ECHR and its Court are not the only source of human rights law. Violations of the UN treaties, the European Social Charter or the Yogyakarta Principles can be assumed as being within the same line of arguments as mentioned in the analysis beforehand. The enforcement mechanisms of those legal instruments differ significantly from those of the ECHR. While the Yogyakarta Principles are not a binding international treaty and their compliance cannot be enforced by a judicial or quasi-judicial body, UN treaties like the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Cultural and Social Rights (ICESCR) and the UN Convention against Torture (UNCAT) have been ratified by several states and the states' compliance is monitored by reports of the treaties' bodies and complaints are possible. The same can be said for the European Social Charter, although in that case complaints can only be made by organisations.

In the context of P's situation and her best course of action, Article 35 (2) (b) ECHR makes it nearly impossible to both apply to the ECtHR and file a complaint at one of the other international human rights bodies regarding the same factual connection. She must therefore decide which body she wishes to file her complaint with.

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[215] European Court of Human Rights, 'Your application to the ECHR' <http://www.echr.coe.int/Documents/Your_Application_ENG.pdf> accessed 12 May 2016.
[216] Grabenwarter, Pabel (n 155) para 2 to section 16.
[217] *Görgülü* - BVerfGE 111, 307 at 307 to 322.
[218] *Sicherungsverwahrung* - BVerfGE 131, 268 at 358ff.

In terms of the most effective legal remedy, it would be advisable to apply to the ECtHR. Cases can be brought directly by individuals, and the jurisprudence of the ECtHR in relation to Article 8 is the most developed and therefore also promises the highest likelihood of success. Also, the fact that ECtHR rulings are binding *inter partes* shows its effectiveness. But proceedings can be lengthy, and the support of and networking with NGOs, peer groups and specialised lawyers is highly recommended. Furthermore, pending cases such as *A.P. v. France*, *Garçon v. France* and *Nicot v. France*[219] could address the legal issues examined here and should therefore be monitored.

Finally, P should bring her case to the domestic courts of state S and exhaust domestic remedies before filing an individual application with the ECtHR. The analysis provided here has shown that there are strong arguments to support her case, so the ECtHR may decide in her favour.

[219] *A.P. v. France* App. no.79885/12, *Garçon v. France* App. no. 52471/13 and *Nicot v. France* App. no. 52596/13.

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