



**MAPPING AND ANALYSIS  
OF REGULATIONS AND  
PRACTICES ON SEX  
MARKER CHANGE  
IN PERSONAL  
DOCUMENTS**

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MAPPING AND ANALYSIS OF  
REGULATIONS AND PRACTICES ON SEX MARKER  
CHANGE IN PERSONAL DOCUMENT

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Nedim Seferović

MAPPING AND ANALYSIS OF  
REGULATIONS AND PRACTICES  
ON SEX MARKER CHANGE IN  
PERSONAL DOCUMENT  
  
HANDBOOK

Sarajevo, 2022.



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# 1. INTRODUCTION

When we think about a certain phenomenon and attempt to value ourselves in relation to it, we often fall into the trap of self-evidence. Certain terms and phenomena appear self-evident to us, to the point where we accept them without question. This trap of self-evidence is especially pronounced when it comes to gender and sex. The awareness of these issues is reflected in the fact that socially, historically and culturally conditioned stratification of the individuals' gender roles equates them with their sex. By knowing the sex determination of an individual we meet, come across or see, observed on a binary scale where there are only two (anti)podes - male or female, we believe that we know the gender, and thus the socially imposed gender role. As a collective, we define how a man, a woman, a boy, or a girl should behave based on these gender roles. We define their emotional characteristics, men's and women's appearance, manners and behaviour on various occasions based on these roles, often noticing only comparative differences between them.

The deep-rooted recognition of these differences in the male-female dichotomy is frequently an impediment to accepting the possibility that these differences are sometimes interconnected, varied, and subject to change beyond sex conditioning. Overstepping these roles is perceived as excess, as a foreign, unknown, and thus unacceptable phenomenon.

The reality, however, tells us otherwise. Observing gender and gender roles in such a simplified manner is unfounded and does not relate to the fact on which reality is constructed. In reality, gender roles are subject to change, interpretation, and different understandings rather than being immutable and assigned by external sources. There is a wide spectrum of gender identities between "man" and "woman", all of which are as real and essential as they are, and which are a trait of a specific individual that deserves nothing less than acceptance and respect.

Transgender persons express and experience their gender identity in a way that differs from traditionally conditioned ways. These individuals (self) identify as men, women, neither, both, or otherwise, and this identification is not based on their biologically assigned sex. Because of the disparity between biological sexual characteristics and their own gender perception, they feel the need to define their identity outside of the ascribed characteristics that gender brings. In some cases, such a definition of one's own identity implies certain adjustments in terms of personal data. To define their identity in accordance with their feelings, a transgender person may be forced (or may desire) to alter (or change) their sex or name data through administrative procedures. Transgender persons in this segment, as in many others, often face prejudice, discrimination and non-acceptance.

This negative attitude against transgender persons and their efforts to express their own gender and sex outside of conventionally and socially accepted patterns results in the denial of the possibility of their own conception of private and personal personality elements. It is, therefore, necessary to keep in mind that the question of gender and sex is ultimately a question of personality and, as such, is exclusively personal. When it comes to characteristics that are truly one's own and not social, and to which these persons as individuals have a full right, which cannot be limited or denied by any arbitrariness that would stem from a sphere of fear of the unconventional, social constructs should not take precedence over any person's right to self-determination. On the other hand, society has a positive commitment to transgender persons and any other person, to enable them (whether transgender or not) to enjoy the full spectrum of rights guaranteed by positive regulations and basic norms of civilization.

This publication was prepared with the primary objective of providing basic information to public administration officers regarding the implementation of currently valid laws and bylaws in support of transgender persons' rights and equality. Its goal is to serve as a resource for public administration officers to get more familiar with relevant legal solutions and best practices, which will be used in their work in cases of sex marker change in personal documents. Furthermore, the Handbook aims to improve the knowledge and capacity of BiH public administration representatives by providing clear guidelines and an effective model of legal recognition of gender identity, allowing them to perform best practices in terms of respecting the rights of transgender persons in sex reassignment procedures, with reference to good practices from the region and Europe.

## 2. TERMS AND CONCEPTUAL NOTES

To adequately grasp the very complex trans issue, it is necessary to start from the basic terms in order to get familiar with the phenomenology, characteristics and most essential postulates that enable understanding of transgender persons, their position in society, problems they face and ways to overcome them.

Understanding the trans phenomenon inevitably requires a step away from conventional approaches to defining the terms sex and gender. This may seem like a daunting task considering that we often accept these terms as entirely self-evident and so apparent that we do not see the need to reconsider our understanding of the meaning behind these words. It is not uncommon to insert an equal sign between the terms sex and gender, mistaking them for synonyms.

### 2.1 Sex

Sex (*lat. Sexus*) is commonly defined as a set of biochemical, genetic, anatomical and physiological characteristics that divide organisms of some species into male and female. In other words, sex is defined as the biological characteristics that distinguish human beings as women and men.

In the social sciences, sex is defined as the social and legal classification of biological characteristics that divide people into only two categories, male and female. The sex based on genitals and reproductive functions thus represents *knowledge* about the body and is also subject to interpretations and cultural conditioning.<sup>1</sup> Thus, sex is an expression of the classification of persons as “male” or “female”. This classification is primarily for medical and legal purposes. Medically, because sex is formally assigned to a newborn based on the appearance of its external anatomy, and legally because such a classified sex will ultimately be the foundation for sex registration during administrative procedures of entry into the registry of births or birth certificate. Furthermore, the expenses for sex analysis (but also sex and gender identity) that may arise throughout an individual’s life are performed and determined under the auspices of the medical profession. Any future changes to the sex category, that is, the personal identification number containing the sex marker, can only be made based on changes found in medical records. Sex determination, viewed from a biological-medical aspect, takes into account a combination of biological characteristics of a person,

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<sup>1</sup> Borić, R., ed. (2007) *Pojmovnik rodne terminologije prema standardima Europske unije*. Zagreb: Office for Gender Equality of the Government of the Republic of Croatia.

including chromosomes, hormones, internal and external reproductive organs (gonads, that is, testicles and ovaries).<sup>2</sup>

We can conclude from the foregoing that the term sex derives its formal definition from medical and legal classifications of biological characteristics, based on which persons are classified into two categories in a binary system, “female” – “male”. Transgender studies, on the other hand, highlight that, despite incorporating certain biological aspects (primarily hormones, chromosomes, gonads and reproductive organs), sex is not unchangeable and is also a social category. This viewpoint is backed by modern understandings of biology as a science that acknowledges that sex is not binary and that there are intersex persons. It is not reducible to binary frames of “male” and “female”.<sup>3</sup>

## 2.2 Gender

In addition to the term sex, a proper understanding of the term gender is crucial for understanding the trans phenomenon. In doing so, a distinction should be made between sex, which was previously discussed as a characteristic assigned to the individual at birth, and gender, as a broader and more complex term. Gender is a term that refers to social distinctions between women and men. Gender is defined as a socio-cultural concept that gives meaning to sex differences, as a creative aspect of social relations based on perceived sex differences, and as the primary means of assigning power. The culturally conditioned gender division into male and female, namely, is not binary symmetrical or value-neutral but is built on a hierarchical principle and, as such, has a reciprocal effect on the social relations of the sexes in a particular community.<sup>4</sup> In that sense, gender is primarily a social and cultural category.

In the prevailing narrative, gender is constructed based on biological sex, i.e., biologically conditioned distinctions that contribute to the development of gender identity, which is expressed through the individual’s personal experience as a woman or a man. However, it is also a term that exceeds and transcends individual identity and extends to social and cultural stereotypes about femininity

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<sup>2</sup> Female sex chromosomes are labelled XX (homogametic sex), because all ova carry one X chromosome, whereas males are labelled XY (heterogametic sex), because spermatogenesis produces two types of sperm cells: X (50%) and Y (50%). The sex of the offspring depends on which sperm cell (X or Y) will fertilize the ovum (X). Hormonally, females have higher estrogen levels, while males have higher (de)testosterone levels. In terms of reproductive organs or gonads, the female sex is distinguished by the clitoris and visible vaginal canal, whereas the male sex is distinguished by the testicles and penis.

<sup>3</sup> Banović, D. et. al. (2015). *Život van zadatih normi: Transrodnost u Bosni i Hercegovini*. Sarajevo: Sarajevo Open Centre.

<sup>4</sup> Borić, R., ed. (2007), op. cit.

and masculinity. In this sense, in addition to the basis for an individual psychological self-view, gender is also a set of elements, characteristics and behaviours that are socially expected from women, on the one hand, and men on the other.

In other words, gender is an identity that we define ourselves, and how we gender-identify does not have to correspond with the sex assigned to us at birth; hence, gender is a social construct of sex that determines the social roles of “men” and “women”. Gender can also be an individual construct of one’s own identity/expression that affirms, denies and/or transcends socially assigned and constructed sex and gender roles of “men” and “women”, as well as the entire binary basis of “male” and “female”.<sup>5</sup>

Therefore, gender can be understood as a construct that serves as a foundation for the social context and social meaning of sex terminology and categories. Gender refers to norms, roles, values, emotions, behaviours, language, names, colours, clothes, shoes, jewellery, makeup, hairstyles, hobbies, sports, occupations, perfumes, toys...<sup>6</sup> All of the elements, as well as many more, convey certain expectations. Society conventionally imposes such expectations on individuals based on the sex classification into “male” and “female” and gender roles.

These roles entail a set of both implicit and explicit rules that control gender relations and assign various jobs, values, responsibilities and duties to men and women.<sup>7</sup> Society has expectations of individuals based on their sex, therefore gender stereotypes from the earliest age. Stereotypical roles refer to both “boys” who are generally expected to demonstrate individuality, physical strength, an affinity for sports and a generally competitive spirit, as well as to develop the ability to hide their emotions at a certain age (often at an early age), and “girls” who are expected to develop decent manners, to show tenderness and willingness to cooperate. From an early age, stratification is reflected in different “male” and “female” toys, colours, hobbies and the like.

Through this differentiation, gender and gender roles are taught and embraced from early childhood, to be reproduced in later stages of life through various norms and accepted on a personal level as completely natural. In a situation when a certain phenomenon is perceived as natural, everything that deviates from that construct is instantly perceived as unnatural.

However, contrary to the generally accepted and common view, these roles are neither set, unchangeable, or assigned per se. This is because each individual’s gender identity is, by its nature, an inner, deeply personal feeling.

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<sup>5</sup> Banović, D. et. al. (2015), op. cit.

<sup>6</sup> Lesbian Organisation Rijeka “LORI”, ed. (2012). Put u prostranstvo, Transrodnost, transeksualnost, rodna normativnost. Rijeka: LORI.

<sup>7</sup> Borić, R., ed. (2007), op. cit.

## 2.3 *Transness*

Transgender persons' personal internal identities do not match the sex assigned to them at birth, in contrast to most people who accept and internalize socially assigned roles on a personal level. Based on today's widely recognised definitions of transness, we can conclude that transgender is a general term used to describe persons whose gender identity differs from the sex assigned to them at birth. Gender identity is an inner, personal sense of being a "man", a "woman", or not identifying with anything in the binary system of sexes and gender roles.

Following birth, each person is assigned a sex marker based on the aforementioned characteristics determined by the medical staff immediately after birth. In most cases, the sex assigned this way does not deviate from one's own identification throughout life, so a person who is assigned the male sex at birth will identify with the male sex throughout life, i.e., internalize this identification and feel like a man on a personal level, just as a person who is assigned the female sex at birth will accept and identify as a woman throughout her life. However, in the case of transgender persons, at some point in their lives, they will realize on a personal level that they do not identify with the sex assigned to them at birth. Transgender persons, unlike people who have a match between their assigned sex and their identification, will eventually reconsider their own gender identity. Being trans is thus based on self-determination and personal feeling. When a person realizes that the sex assigned to them at birth does not correspond with the gender that, in their personal experience, feels like their own, they realize they are transgender.

The moment when a person realizes they are transgender is always individual. Some transgender persons claim that they have always known in some way that they cannot identify with the sex assigned to them at birth. Others go through a lengthy process of avoiding thinking about it, often for increased risk of stigmatization, social condemnation, or shame.

For persons whose gender identity is matched to the sex assigned to them at birth, and who have thus not gone through the process of questioning their own gender identity, it can be difficult to understand the feelings of a transgender person. Therefore, when attempting to understand how transgender persons feel, it is helpful to conduct an illustrative thought experiment: Gender identity is inherent in every person, transgender or not. With that in mind, consider how you would feel if practically everyone in your environment, including family, friends, acquaintances, and even doctors, stated unambiguously that the sex you were born with is not yours. How would you feel if you woke up one day and the entire world tried to persuade you that your body corresponds to the characteristics of a sex you know is not yours, or that the environment views you as

a man, expecting you to act and feel like a man, even though you are a woman or vice versa.<sup>8</sup>

It should also be mentioned that there is an essential difference between transgender persons' gender identity and their sexual orientation. There is often a stereotypical public perception of transgender persons as persons whose transness is equated with sexual orientation, so transgender persons with assigned male sex are assumed to have a sexual affinity for same-sex persons, and transgender persons with assigned female sex are assumed to be sexually attracted to females. However, as previously said, gender identity refers to an individual's internal understanding and awareness of their own gender, such as knowing if they are a man or a woman (or any other gender). Sexual attraction, as opposed to this issue, refers to physical, emotional, and/or romantic attraction to another person, with all of their traits and quirks.

Just like cisgender persons<sup>9</sup>, transgender persons can be of any sexual orientation. Thus, a transgender man (a person who lives and perceives himself as a man) may be primarily interested in men, and therefore declare himself a homosexual man, or he may be sexually attracted to women and declare himself a heterosexual man, or he may eventually have any other sexual orientation. The same can be said about transgender women (a person who lives and perceives herself as a woman). Transgender persons, regardless of their particular identity, can be heterosexual, homosexual, bisexual, queer<sup>10</sup>, or completely asexual, or fall under any other classification of sexual orientation. In short, sexual orientation refers to who we are attracted to, whereas gender identity refers to who we are.

A distinction must also be made between transgender and intersex persons. Intersex persons are persons whose anatomy of reproductive organs or genes does not conform to the common definitions of the male or female sex. Unlike this term, which is determined by anatomical or biological characteristics, these characteristics play a secondary role in transgender persons. Trans primarily denotes an internal, self-determining and self-defining relationship with one's own gender identity. Intersex persons are defined as such primarily by the fact that their physiognomy (primarily the physiognomy of the reproductive organs) or their genetic

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<sup>8</sup> Here we use a simplified sex and gender stratification based on the binary scale "male" - "female". In reality, trans implies a wide range of gender identities, hence transgender persons can identify as trans men, trans women, gender fluid, non-binary or gender queer, genderless or gender neutral, and so on. However, for the purposes of illustration and conceptualization in this example, it is sufficient to focus on the preceding example.

<sup>9</sup> Cisgender (cis) is a term for persons whose sense of personal identity corresponds to the sex and gender assigned to them at birth. Cisgender persons have a gender identity or perform a gender role that society deems appropriate for a given sex.

<sup>10</sup> In this context, the term refers to personal self-identification and identity, the main feature of which is non-compliance with "self-evident" adherence to social rules, i.e., primarily as one's own identifying feature that requires questioning and/or rejecting conventional norms, including those concerning sexual orientation.

and hormonal structure is neither typically male nor typically female.

A variety of conditions can lead to a medical conclusion about intersexuality. Some persons are born with XY chromosomes, but they have female genitalia and secondary sexual characteristics. Other intersex persons are distinguished by the fact that they are born with XX chromosomes but lack the anatomical characteristics of the uterus. These two conditions are just examples listed for illustration, however, there are more medical-biological variants that are considered intersexual. Therefore, although the terms trans and intersex do not have an exclusive relationship, no sign of equality can be placed between them. In that respect, the possibility of an intersex person identifying as transgender is not ruled out.

## 2.4 *Transition*

Transition is most simply defined as the process by which a person conforms their gender expression and/or physique to their gender identity. Gender expression as external manifestation refers to how a person (transgender or not) expresses themselves “outside” through their behaviour, clothing, body language, and other external characteristics such as hairstyle, makeup, manner of expression, physical features, jewellery, tattoos, and so on. In this sense, the transition can also be viewed as a person’s transition from the sex assigned to them at birth to the sex that they internally perceive as their own.

Psychological/psychiatric evaluation, hormone therapy, enhancing or developing secondary sexual characteristics, living in new gender identity, and sex reassignment surgery are all part of the transition process. In countries where this is possible, this process also includes officially changing the name in documents.<sup>11</sup> Some transgender persons may not want to change their bodies with hormones or surgery, but instead express different aspects of their gender identity that differ from the sex assigned to them at birth.<sup>12</sup> Transition is a very personal process, with unique features inherent in each individual in their own way. There are no elements of transition that are expected, common or required. On the contrary, each person decides what they will do in this process, when they will do it, and how they will do it based on their personal judgment and needs.

Transition as a term can be observed from three aspects:

- social,
- legal and
- medical.

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<sup>11</sup> Banović, D. et. al. (2015), op. cit.

<sup>12</sup> Todorović, J., Lazić, S.D. (2020). Vodič kroz tranziciju za trans osobe u Srbiji. Belgrade: Social In

When we talk about the social context of transition, we mean, first and foremost, coming out<sup>13</sup> to oneself and others, as well as harmonizing gender expression. When a transgender person recognizes and embraces their gender identity as their own, they are said to have come out to themselves; when they reveal that identity to others, they are said to have come out to others. Coming out may appear to be a routine procedure when described in this manner, but in reality, such actions are often extremely difficult for transgender persons for a variety of reasons, requiring significant psychological and emotional effort due to fear of reaction, rejection or violence from the environment. In addition to coming out, transgender persons might choose to harmonize their gender expression in all or some of its elements with their gender identity, for as by changing the way they dress.

The legal aspect of transition implies transgender persons taking specific actions to legally legitimize their gender identity in everyday life. This is a formal process based on the principle of self-determination which involves changing the information in personal documents – change of name, sex marker, obtaining new personal documents – so that the information after the change corresponds to the transgender person’s gender identity.

Medical transition<sup>14</sup> involves adapting biological sexual characteristics to gender identity. In this respect, the transition can include psychological, psychotherapeutic and medication support for transgender persons. Adequate psychiatric and psychological support for a transgender person can mean assisting them in researching their gender identity and expression, facilitating the process of coming out, possibly determining the necessary medical interventions in the process of sex reassignment, but also providing assistance and support to transgender family members. In addition to psychiatric evaluation, the medical transition includes evaluation by an endocrinologist, who checks the organism’s health status and readiness to include hormone therapy, which they prescribe and monitor if they believe the prerequisites are met. If a transgender person decides to have their sex surgically changed to match their gender identity, the medical transition includes a surgical phase that involves preoperative surgery consultations with appropriate specialists, as well as access to suitable surgery.

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<sup>13</sup> Coming out [of the closet] is a term that describes the voluntary public expression of one’s own gender identity that occurs after accepting one’s personal identity after it has been kept secret or suppressed for a certain period of time.

<sup>14</sup> In the most recent edition of the International Classification of Diseases (ICD-11), which was adopted in 2019, the World Health Organisation moved transgender conditions from the chapter on mental disorders to a new chapter on reproductive health. This change represents the de-pathologisation of transness, i.e., the formalization of the prevailing medical science trend according to which transness is not considered a personality and behavioural disorder, but is diagnosed as “gender incongruence”, which describes the condition of a person whose gender identity does not match the sex assigned to them at birth. ICD-11 has been officially in use since 2022.

It is important to emphasize that some transgender persons, for various reasons, decide to undergo a transition to a certain extent. It should be remembered that regardless of whether a complete or partial medical transition has been made, i.e., sex reassignment to match the gender identity, every type of transition *per se* is equally valuable and legitimate.

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A complete understanding of the terms stated above will require much more space, deeper analysis and a broader cognitive framework than the one provided here. However, to obtain a sense of how complex the phenomenon is and to move away from conventional understandings that are often unfavourable and/or discriminating against transgender persons, it is necessary to try to perceive at least these basic terms regarding transgender persons.

When it comes to transgender persons, it is necessary to emphasize the word persons, because what ultimately determines transgender persons, especially when dealing with often complicated administrative procedures, is not primarily their transness, but the requirement that such persons be treated with equal dignity and respect as any other person, regardless of their sex, gender identity, appearance or any other characteristics. This requirement is especially important because transgender persons frequently face inconvenience, unfair treatment, social condemnation, severe discrimination and even violence in various situations, in everyday life, on the street, at work or in connection with work, in the education system, health care and many other aspects of life.

### 3. *LEGAL FRAMEWORK AND PROCEDURAL ASPECTS*

Although the normative framework in Bosnia and Herzegovina has somewhat paved the way for more effective resolution of sex marker change requirements in public registries and personal documents, there are still shortcomings that make this procedure inefficient, ambiguous and potentially degrading for transgender persons.

As a general rule, the country should provide transgender persons with a minimum standard that allows respect for their rights and freedoms through the core principles of the normative framework in this field. This bare minimum is expressed in the demand that:

- a) the country provides a comprehensive possibility of legal recognition of sex reassignment, through efficient, transparent, accessible and fair procedures,
- b) such procedures maximally protect the right to privacy and other rights of transgender persons guaranteed by the Constitution of BiH and international documents,
- c) the country enables full utilization of the rights referred to in point a) without compromising other guaranteed rights and freedoms

When considering both the normative framework and procedural aspects of sex marker change in personal documents, it is important to remember the catalogue of rights and freedoms guaranteed by the Constitution of Bosnia and Herzegovina, as well as the direct effect and application of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the domestic legal order enabled by the Constitution.

The current legislative framework in BiH is not entirely satisfactory, and certain shortcomings may, under certain conditions, be a cause of violation of transgender persons' human rights. However, application procedures, as well as applicants' rights to change their sex marker in personal documents, cannot necessarily wait for the enactment and adoption of a complete and satisfactory legal framework but must be implemented in a way that respects transgender persons' right to self-determination. Therefore, we present below the current legal framework for changing personal documents of transgender persons in BiH, with an overview of laws and bylaws in the order corresponding to the whole regulated by each regulation, and regarding the situation in both BiH entities, as well as the situation in the Brčko District of Bosnia and Herzegovina.

The regulations governing registry books, which are under the jurisdiction

of the entities and the Brčko District of BiH, and the Law on Personal Identification Number, which was passed at the state level, are significant for the issue of sex in the administrative sense. This is because the sex marker, i.e., the legal substratum of sex, is entered in the registry books, as well as because the personal identification number of every BiH citizen in its structure contains figures that differentiate male and female sex, as discussed further below.

### *3.1 Federation of BiH*

#### **Law on Registry Books of the Federation of BiH**

The Law on Registry Books of the Federation of Bosnia and Herzegovina was published in the Official Gazette of the Federation of Bosnia and Herzegovina 37/12, with amendments to that Law published in the Official Gazette of the Federation of BiH 80/14.

This law regulates the following: jurisdiction for keeping registry books, types and content of registry books, civil registry, entry of data in registry books, entry of facts in registry books based on documents from foreign authorities, keeping and maintaining registry books, issuing excerpts and certificates from registry books, insight into the registry books and use of data from the registry books, renewal of the registry books, administrative supervision, resolving complaints and misdemeanour liability and other issues related to the registry books in the Federation of Bosnia and Herzegovina.

The importance of this Law for the topic discussed in this text is evident in the fact that it governs sex marker entry in various types of registry books, with a provision directly related to sex marker change or registration of such a fact in the registry books. In this sense, and in accordance with the provision of Article 2, paragraph 2 of the Law on Registry Books of the Federation of BiH, sex is normatively recognised as a fact determined by the law and entered in the appropriate registry books, but also as a fact the change of which is possible and legally recognised. Pursuant to the provisions of paragraph 3 of the aforementioned provision, this fact (as well as all other facts) may be changed, corrected or entered only based on corresponding decisions or other acts of authorities referred to in Article 7 of the F BiH Law on Registry Books and other competent authorities envisaged by the Law thereof.

It is important to remember that the F BiH Law on Registry Books recognises the birth registry as the basic registry for personal data of each person registered in that book and that it serves to organise other registries and data for identification documents so that data in other registries and identification documents must be identical to the data from the birth registry. As a result, the birth registry, i.e., the entry or change of sex, is of vital importance in the procedure for

the sex marker change. Article 12 of the Law on Registry Books of the Federation of BiH prescribes which data are entered in the birth registry, and according to paragraph 1 of the Article, it includes data on the birth and sex of a child. According to the above, this fact of the assigned sex at birth will later be the subject of change in the procedure in which transgender persons request the entry of change of such a fact from the competent authority. The provision of Article 12, paragraph 3 of this Law explicitly recognises the possibility of entering a change of sex in the registry books. Among other entries relating to circumstances that may arise during a person's life, such as acknowledging and disputing paternity and maternity, marriage, termination of marriage, change and termination of citizenship, and so on, this provision prescribes sex reassignment as a fact that is entered in the birth registry.

According to the Law on Registry Books of the Federation of BiH, sex is entered in the registry book of citizens, which arises from the provision of Article 22, paragraph 1, items 1) and 2), as well as in the registry book of deaths in accordance with Article 26, item 1).

The provision of Article 44 of the Law on Registry Books of the Federation of BiH, which prescribes that sex marker changes are only made based on a final decision of the cantonal Ministry of the Interior responsible for the place of residence of a person who has undergone sex reassignment, is relevant for the topic of this text. This provision is important because it specifies the authority's actual and territorial jurisdiction over the request for sex marker change in the registry book.

True, a linguistic interpretation of the cited norm could lead to the conclusion that the final decision of the competent cantonal Ministry of the Interior<sup>15</sup> is the basis for the entry of sex marker change only in the birth registry, and not in other registry books where sex is entered. However, as previously said, the birth registry is the basic registry for each person's personal data, whose content must be harmonised with all other registries and identification documents. In this regard, the entry of sex marker change at the request granted during the procedure should not be limited to the entry of change in the birth registry, but in such cases, the authority should *ex officio* collect data on whether the person has updated data in other registry books (for example the registry book of citizens, which will generally be the case for citizens of the Federation of BiH and BiH), and decide on the entry of change in these books, within its actual and local jurisdiction.

It is important to note that Article 4 of the Law on Registry Books of the Federation of BiH prohibits all forms of discrimination "based on sex, religion, race and ethnicity, skin colour, language, national or social background, education and social status in the registration and issuance of excerpts and certificates on facts and data from the registry books, as well as conducting administrative

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<sup>15</sup> The legal text of Article 44 of this Law specifies "cantonal ministry", although it is evident from Article 14 of the Law that the term cantonal ministry refers to the cantonal Ministry of the Interior.

proceedings in connection with the facts that are entered in the registry books and other issues regulated by this Law”.

Although the list of protected characteristics in this case does not explicitly include the prohibition of discrimination based on sexual orientation, gender identity and sexual characteristics, it is undeniable that the *ratio legis* of this provision extends to protection against discrimination on these grounds, which is critical in proceedings initiated at the request of transgender persons. Nonetheless, amendments to the Law that would reflect in the expansion of the catalogue of protected characteristics against which discrimination is prohibited, including “sexual orientation, gender identity, sexual characteristics” provided by the Law on Prohibition of Discrimination in BiH, would be expedient, justified, and based on the legal obligation from Article 24, paragraphs 1 and 2 of the Law on Prohibition of Discrimination of BiH.

### **Instruction on the Manner of Keeping the Registry Books of the Federation of BiH**

The Instruction on the Manner of Keeping the Registry Books of the Federation of BiH (Official Gazette of FBiH, 51/13, 55/13, 82/13, 6/15) is the implementing regulation that controls in further detail, among other things, the entry of sex marker changes in the registry books.

The provision of Chapter II, paragraph 2), item 8 stipulates the cantonal ministry’s explicit competence for sex marker change and determining identity (name of that person), as determined in Article 44 of the Law on Registry Books of the Federation of BiH. Item 63 of Chapter VII (Subsequent entries in the registry books) stipulates that data in the registries constitute a change and are resolved within the subsequent entry if they refer to personal name, sex and citizenship in the birth registry.

This chapter’s paragraph 2, item 66, titled Procedure for Entry of Sex Marker Change in the Birth Registry, is especially important. According to that provision:

“66. According to Article 44 of the Law, the entry of sex marker change in the birth registry is done based on a final decision issued by the competent cantonal ministry. The procedure is initiated at the request of the party.

To respond to that request, the ministry must establish two facts: first, the sex reassignment, and second, the personal name of the individual who made the request. To establish these facts, other evidence provided by the Law on Administrative Procedure is used, if necessary, in addition to the mandatory medical records related to sex reassignment, as determined by the ministry. The decision must indicate the person’s sex, as well as their personal name, which will be determined in accordance with the Law on Personal Name.”

Article 9, paragraph 2 of the Law on Personal Name of the Federation of BiH (Official Gazette of FBiH, 7/12) prescribes that

“A person may change their personal name, just name or just surname after a change in family or personal status (adoption, recognition and determination of paternity or maternity, marriage, termination of marriage - divorce or annulment, death of a spouse or declaring spouse dead, sex reassignment), or at personal request.” Therefore, it is a possibility that a transgender person can use when requesting the entry of sex marker change, but it is not a condition for such a change. This means that a person can request only a change of sex marker without changing their name, or they can request both a change of sex marker and a change of name in the same request, which is left to the discretion of each individual.

### *3.1.1 Procedure for personal name change in the Federation of BiH*

Change of personal name is regulated by the provisions of the Law on Personal Name of the Federation of BiH (Official Gazette of the Federation of BiH, 7/12), which states in Article 9 that every person has the right to change their personal name, just name or just surname except in cases where the Law provides otherwise.

The procedure for changing the personal name is initiated by a request, which must include the personal name requested, and the Article 14 of the Law specifies which documents the applicant must enclose with the request:

- 1) Applicant's Birth Certificate and Certificate of Citizenship;
- 2) Excerpts from the registry books containing the fact whose change is the subject of the procedure;
- 3) Photocopy of ID card;
- 4) Certificate of Residence;
- 5) Certificate from the competent court stating that no criminal proceedings have been initiated against the applicant;
- 6) Certificate from the competent tax authority stating that there are no outstanding tax and customs liabilities.

The request for a change of personal name is submitted to the cantonal Ministry of the Interior based on the applicant's place of residence. Negative presumptions for fulfilling the request are explicitly prescribed by law, therefore a change of personal name, just name or just surname will not be granted to a person who is the subject of criminal proceedings, or a person convicted of a crime until the sentence is carried out or the legal consequences of the conviction expire, a person who is on the international wanted persons notice or a person who is determined to have submitted the request to avoid the obligations determined by the competent authorities' act.

If it decides favourably on the request, the cantonal Ministry of the Interior delivers a decision on changing the personal name following the entry into force to the registrar who keeps the registry books for the person who has changed their personal name, the registrar who keeps the birth registry for the child of the person who has changed their personal name, to the authority that keeps records of citizens based on the entry in the birth registry and to other authorities responsible for keeping records of citizens kept in accordance with special regulations, and include data that has been changed during the procedure in accordance with this law.

A person who has been approved to change their personal name cannot submit a new request for a change of personal name within five years from the date of entry of the changed personal name in the registry books unless otherwise prescribed by a particular law.

A person who has changed their personal name, just name or just surname must submit a request for replacement of personal documents (ID card, passport, driver's license and other documents) to the competent authority within 15 days from the day of entry of the change in the registry books.

### *3.1.2 Procedure for sex marker change in the Federation of BiH*

The administrative procedure for sex marker change in the Federation of Bosnia and Herzegovina is resolved according to administrative procedure rules and begins with submitting a request to the competent authority of interior, based on the place of residence of the person wishing to change sex marker. The Sarajevo Canton website provides information on the content and supporting documents that must be attached to such a request.<sup>16</sup> According to the information provided above, the applicant must provide the following basic information in the request: name and surname, residence and address, phone and e-mail, place and date of application, ID number (ID card or passport) and handwritten signature.

Among the necessary evidence that the party is required to submit with the request to change the sex marker are the birth certificate, BiH citizenship certificate, medical record confirming that the person has undergone sex reassignment procedure, BiH ID card and certificate of residence.

Concerning the content of the request, it is sufficient for the party to briefly describe the facts upon which such a request is based and to make a particular statement that the request is being submitted to change the sex marker from the present marker to a new one. According to Article 135, paragraph 1 of the

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<sup>16</sup> <https://ap.ks.gov.ba/administrativni-postupak/102> – accessed on March 1, 2022

FBiH Law on Administrative Procedure, the party is required to disclose the factual circumstances on which he/she based its request accurately, truthfully and specifically. The relevant factual circumstance in this case refers to the party's decision to make administrative changes regarding their sex marker and the applicant's personal name, which the party supports with the appropriate medical record. In that respect, it is entirely sufficient for the party requesting to state these critical facts, which they will verify with proper evidence, for such a request to be valid.

Regarding the evidence attached to the request by the party, the evidence indicated above would be sufficient to conduct the administrative procedure. However, insisting on solely original records would be wrong<sup>17</sup>. Given that the citizenship is subject to change, the necessity to indisputably determine whether the applicant is a citizen of BiH and thus eligible to have their request considered may justify this request for the Certificate of Citizenship of BiH. However, if the party only has certified copies of medical records, it is advisable to comply with Article 164, paragraph 1 of the Law on Administrative Procedure of the Federation of BiH, which states that the party must submit documents that serve as evidence in the original, microfilm copy or reproduction of those copies, either in a certified transcript or a certified photocopy. Under this provision, if a party submits a certified copy of a document, the official may require the party to show the original document. This is a possibility left to the discretion of the head of the procedure, not a requirement, thus such a necessity should be evaluated in each case.

It should be noted that transgender persons are still required to provide medical records to prove their sex reassignment. Medical interventions that transgender persons undergo as a result surely have an impact on their emotional and psychological well-being, thus particular precautions must be made to avoid exposing such persons to further difficulties throughout the administrative procedure. A medical record in a certified photocopy, for which the official does not establish a clear suspicion that it is not true to the original, may be sufficient evidence of the relevant fact, and in such cases, when there is no doubt about the authenticity of such record, the lack of original copies cannot be the reason for rejecting the request.

Furthermore, given that the cantonal ministries of the interior are in charge of carrying out these administrative procedures, and given that the facts regarding the issuance of ID cards and certificates of residence are kept by these ministries, the lack of such evidence attached to the request should not be a reason for rejection or denial of a request. This is because Article 134, paragraph 3 of the FBiH Law on Administrative Procedure requires the official conducting the

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<sup>17</sup> According to the information provided on the Sarajevo Canton's website, the party is required to include the original certificate of BiH citizenship as well as the original medical record.

procedure to collect *ex officio* data on facts concerning which official records are kept by the authority responsible for resolving.

Article 16, paragraph 1 of the FBiH Law on Personal Name stipulates that a change of personal name shall not be granted to a person who is the subject of criminal proceedings, or a person convicted of a crime until the sentence is carried out or the legal consequences of the conviction expire, a person who is on the international wanted persons notice or a person who is determined to have submitted the request to avoid the obligations determined by the competent authorities' act. Positive regulations do not recognise this prohibition when it comes to sex marker change, thus asking the party for evidence of not being the subject of criminal proceedings or other evidence to prove the aforementioned facts is not appropriate. A legal solution of this nature is logical because a change of name might have an impact on criminal proceedings, the consequences of a conviction, the possibility of executing a wanted persons notice, or avoiding certain obligations, whereas a sex marker change cannot have such consequences. However, as stated in paragraph 2 of the aforementioned Law, to establish the aforementioned facts, the competent authority conducting the procedure (name change) shall perform appropriate checks on its records and the records kept by the prosecutor's offices, as well as verification through Interpol, then the head of the procedure may, if they decide favourably on the sex marker change and after issuing a decision, perform the same checks, and if necessary, notify the competent authorities about the sex marker change, without impacting the procedure's efficiency or duration.

The authority is required to decide on the party's request after receiving a properly filled request. In general, no special examination procedure will be required in accordance with Article 140 of the FBiH Law on Administrative Procedure; thus, when there are no reasons for the delay of the decision, the authority is required to make a decision upon request and deliver it to the party as soon as possible, but no later than 30 days from the date of submission of a properly filled request, under the provisions of Article 216, paragraph 1 of the FBiH Law on Administrative Procedure.

As previously noted, the Federation of BiH Instruction on the Manner of Keeping the Registry Books specifically states that the cantonal Ministry of the Interior must use medical records of sex reassignment to establish facts pertinent to the entry of sex marker change. Because existing legislation does not clarify which mandatory medical data is required to establish this fact, officials who act on such requests face the greatest challenge. In the absence of any normative observation as to which medical record is sufficient and acceptable to make a favourable decision on the request, the head of the procedure must undertake responsibility and take a stand on the sufficiency of a medical record. Given that this is an issue that necessitates expert knowledge for determination or assessment, it is expected that officials will need the presentation of evidence

by an expert witness. Competent authorities frequently refer people who desire to change their sex marker to the Institute for Medical Expertise of Health Conditions of the Federation of BiH for medical expertise. According to the Rulebook on Criteria and Procedure for Medical Expertise of Health Conditions (Official Gazette of the Federation of BiH, 6/10), the procedure for medical expertise is initiated in the competent department for the first instance procedure of medical expertise of health conditions of the Institute, according to a place of residence or domicile of a natural person.<sup>18</sup>

However, such expertise can be an additional burden for transgender persons who have already gone through the medical transition process, visited adequate doctors, and in some cases undergone certain medical interventions (hormone therapy, surgery, etc.), so it is critical to assess whether it is necessary to use the expertise as an act of evidence, exposing the applicant not only to the additional burden of going to the expertise but also prolonging the decision.

It may be useful to consider comparative solutions and practices from neighbouring countries for such an assessment. The National Health Council of the Republic of Croatia is in charge of issuing opinions regarding sex reassignment or change in gender identity status. Pursuant to the provisions of Article 3, paragraph 1 of the Regulations on the Methods of Collecting Medical Records and Determining the Terms and Conditions of Sex Reassignment or Change in Gender Identity Status (Official Gazette 132/14), the applicant for the issuance of a decision on the entry of sex marker change in the birth registry is required to enclose this opinion with the request. Article 4 of the aforementioned Regulations requires that an adult person enclose the following with the request:

- Opinion/report of a doctor of medicine, a specialist in psychiatry
- Opinion/report of a doctor of medicine, a specialist in endocrinology and diabetes, and
- Opinion of a clinical psychologist and a report of the competent social care centre on personal and family conditions

If the applicant is a child, parent or guardian, the following medical records must be included with the request:

- Opinion/report of a doctor of medicine, a specialist in child and adolescent psychiatry,
- Opinion/report of a doctor of medicine, a specialist in paediatric endocrinology,
- Opinion/report of a doctor of medicine, a specialist in paediatrics, and
- Opinion of a clinical psychologist with experience in the field of child psychology and a report of the competent social care centre on personal and family conditions.

With reasoned objections to such a normative solution, and without the intention of considering the relevant regulation of the Republic of Croatia in any

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<sup>18</sup> Miftari, E. (2017). Vodič kroz administrativnu procedure

way applicable in procedures conducted in Bosnia and Herzegovina, its provisions can still be used as a guide for heads of procedures in determining which medical record is required to make the right and legal decision in the procedure. If the head of the procedure assesses that the attached medical record corresponds to the facts presented by the applicant, and thus justifies their request, it is not necessary to resort to a medical expert opinion, given that Article 157, paragraph 2 of the FBiH Law on Administrative Procedure stipulates that everything that is suitable for determining the state of affairs and corresponds to a particular case may be used as evidence.

In Bosnia and Herzegovina, there is no medical centre or a medical team that would perform pre-surgical, surgical and post-surgical procedures, or provide a systematic interdisciplinary approach to sex reassignment. People seeking medical sex reassignment usually go to centres in Slovenia or Serbia.<sup>19</sup>

In this regard, it is important to note that Bosnia and Herzegovina is a signatory to the Hague Convention, that is, the 1961 Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, which applies to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State. For the present Convention, the following are deemed to be foreign public documents: a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor; b) administrative documents; c) notarial acts; d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures. Because a medical report is an administrative act, a foreign medical record proving sex reassignment and requiring the entry of sex marker change in the registry books may be regarded as a foreign public document under the terms of this Convention. Bosnia and Herzegovina has signed a treaty with several countries, including Croatia, Serbia, and Montenegro, on mutual recognition of public documents, known as the Bilateral Treaty on Mutual Legal Assistance in Criminal and Civil Matters, and these countries do not need an apostille stamp to use the document in BiH, and vice versa.<sup>20</sup>

As a result, officials as heads of the procedure for the entry of sex marker changes can use these documents as valid evidence and make decisions in the administrative procedure based on this evidence.

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<sup>19</sup> Banović, D. et. al. (2015), op. cit.

<sup>20</sup> Miftari, E. (2017), op. cit.

### *3.1.3 Procedure for changing the Personal Identification Number*

The Law on Personal Identification Number of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 32/2001, 63/2008, 63/2011 - Decision of the Constitutional Court of BiH, 103/2011, 87/2013, 84/2015) was adopted at the state level. This Law regulates the marker, allocation, registration, use, records, structure, annulment and replacement of personal identification numbers (hereinafter: JMB) of citizens of Bosnia and Herzegovina and foreign citizens in Bosnia and Herzegovina.

In terms of procedural elements, the provision of Article 29 of this Law is essential, as it states:

“The body responsible for issuing decisions on the change of an individual’s name or the correction of an individual’s registered day, place and year of birth, as well as the body responsible for issuing decisions on entry of an individual’s change of sex, shall be obliged to submit one copy of the issued decision to the relevant competent authority, within 30 days after the effective date of the decision.

Within 15 days after receiving a decision referred to in the preceding paragraph, the competent authority shall annul the JMB and issue a new JMB. The competent authority shall contact the individual concerned and the body responsible for issuing the decision, to inform them of the new JMB.”

In the Federation of BiH, the procedure for the entry of sex marker change, in addition to the procedure conducted by the competent cantonal Ministry of the Interior, includes carrying out an additional special administrative procedure to annul the old and issue a new personal identification number. This is required because, in addition to the sex marker in the registry books, there is a part of the sex marker code in the personal identification number structure<sup>21</sup>. In that regard, the competent registry office will, after receiving the final decision of the cantonal Ministry of the Interior, decide on the entry of sex marker change in registry books and submit a copy of it to the competent cantonal Ministry of the Interior to issue a new personal identification number in accordance with Article 44 of the Law on Registry Books of the Federation of BiH. Within 15 days, the cantonal

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<sup>21</sup> Pursuant to Article 4 of the Law on Personal Identification Number, the JMB shall be an individual and unique code of a person’s identification data, consisting of 13 figures, categorised under 6 groups, as follows: Group I day of birth (two figures)  
Group II month of birth (two figures)  
Group III year of birth (three figures)  
Group IV number of JMB registry – registration areas (two figures)  
Group V combination of sex and ordinal number for persons born on the same day (three figures)  
- men 000-499 - women 500-999  
Group VI control number (one figure).

Ministry of the Interior is required by law to annul the old personal identification number, issue a new one, and notify the competent registry office.

## *3.2 Republika Srpska*

### Law on Registry Books of the Republika Srpska

The subject of regulation of the Law on Registry Books of the Republika Srpska (Official Gazette of the Republika Srpska, 111/2009, 43/2013, 66/2018) is fundamentally comparable to the subject of regulation of the Law on Registry Books of the Federation of Bosnia and Herzegovina.

Article 12, paragraph 1, item c) of this Law requires, among other things, that sex marker changes be entered in the birth registry. However, unlike the Law on Registry Books of the Federation of BiH, the Law on Registry Books of the Republika Srpska lacks an explicit provision governing the entry of sex marker changes in the birth registry. In other words, there is no implicit provision in this Law that would relate the entry of sex marker change in the birth registry to a final decision of the Ministry of the Interior.

Such competence in the legislation of the Republika Srpska is prescribed by the provision of Chapter II (Manner of Keeping Registry Books), item 130 (Instructions on Keeping Registry Books) (Official Gazette of the Republika Srpska, 55/10), which stipulates that sex marker change is entered in the birth registry by entering the following note in the section “Subsequent entries and notes”: “Reassigned sex from ..... (specify sex assigned at birth) to ..... (specify sex after reassignment)”, based on the competent authority’s decision from Article 5, paragraph 2 of the Law on Registry Books (name of authority, number and date of the decision). The decision referred to in this item is based on the medical records of the health institution that performed the sex reassignment surgery.

The provision of Article 5, paragraph 2 of the Law on Registry Books of the Republika Srpska states that the activities of keeping the registry book and resolving administrative procedures in the first instance are undertaken by the competent body of the local self-government unit. As a result, in the Republika Srpska, a sex marker change is entered in the registry book based on the decision of the competent body of the local self-government unit, with the fact of sex reassignment entered in a separate section (Subsequent entries and notes).

This legal solution is questionable for several reasons. To begin with, the fact of entry of sex marker change is undeniably determined later; however, from this provision, it may be concluded that any future birth certificate, which for whatever reason is obtained by a person who has undergone sex reassignment, will contain a rather striking note that may be a source of discrimination and condemnation under certain circumstances. We believe that changing the entry

in the registry book related to the section “sex” (from “M” to “F” or vice versa) is sufficient, while any notes regarding subsequent entries and notes should be kept in the registry office’s internal records.

In that regard, it would be useful to amend this Instruction to reflect the provision of item 156a of the Instruction on the Manner of Keeping the Registry Books of the Federation of BiH, which stipulates that when issuing a birth certificate for a person who has undergone sex reassignment and changed their personal name pursuant to Article 44 of the Law, only the latest valid data should be entered within the data relating to the basic entry (sections for personal name and sex), and a note referring to the change of personal name and sex marker for that person in the section “Subsequent entries and notes” should not be entered.

Such a provision is a more adequate solution to the issue of sex marker change entry since it regulates the question of what data will be contained in the birth certificate in a less intrusive manner, *in favorem* of the right to protection of personality and privacy of the person who has undergone sex reassignment procedure.

Furthermore, the part of the aforementioned provision stating that the Decision (on the entry of sex marker change) is made based on the medical records of the health institution that performed the sex reassignment surgery is also questionable. Specifically, as stated previously in the transition section of the article, sex reassignment does not necessarily indicate a reassignment performed by a health institution. It is indisputable that some medical records should serve to establish relevant facts in the administrative procedure, however, according to this provision, the entry of sex marker change is only feasible when the “sex reassignment” is performed by a health institution. The concern is whether this provision has put persons who want to change their sex marker in a position where they can only do it if they undergo a medical procedure in a health institution. Furthermore, the Regulation does not define or explain what is meant by “sex reassignment performed by a health institution”, and this issue is not regulated by other implementing regulations.

### *3.2.1 Procedure for personal name change in the Republika Srpska*

The Law on Personal Name of the Republika Srpska (Official Gazette of the Republika Srpska, 82/19) explicitly stipulates in Article 7 that a person may change their name and surname, just name or just surname after a change in family or personal status (recognition of paternity, establishing or disputing paternity or maternity, adoption, conclusion or termination of marriage, sex reassignment), or at personal request.

Specifically, in the case of sex reassignment, Article 11 of this Law stipulates that after sex reassignment, a person may change their name and surname, just

name or just surname. The competent body of the local self-government unit decides on this change as part of the same procedure initiated to enter the person's sex marker change in the birth registry. Such a legal solution that directly regulates the conduct of a single administrative procedure in an adequate procedural sense sets the preconditions for achieving administrative resolution efficiency.

The negative presumptions for fulfilling the request are nearly identical to those in the FBiH Law on Personal Name. There is a distinction in terms of competence for deciding on the request, since Article 15, paragraph 1 of the RS Law on Personal Name stipulates that the competent body of the local self-government unit in whose territory the applicant resides decides on the request for a change of personal name.

The decision on changing the personal name is delivered immediately following the entry into force to the registrar who keeps the registry books for the person who has changed their personal name, the registrar who keeps the birth registry for the child and spouse of the person who has changed their personal name, to the competent body of interior and other bodies responsible for keeping records of citizens kept in accordance with special regulations, and include data that has been changed during the procedure in accordance with this law.

### *3.2.2 Procedure for sex marker change in the Republika Srpska*

Taking into account the previously described competencies prescribed by the provision of item 130 of the Instruction on the Manner of Keeping the Registry Books in connection with the provision of Article 5, paragraph 2 of the Law on Registry Books, the administrative procedure for changing the sex marker in the registry books begins with a request to the competent body of the local self-government unit in whose territory applicant resides (i.e., the body in whose territory the applicant's birth registry is kept if the applicant is registered in the Republika Srpska but does not have a residence in the same territory). Given that the procedure is essentially the same as in the Federation of BiH, and that there are no significant differences in this regard between the Law on Administrative Procedure of the Federation of BiH and the Law on General Administrative Procedure of the Republika Srpska, everything stated in point 3.1.1. is applicable.

As in the Federation of BiH, there is no legal act in the Republika Srpska that regulates or defines which medical record is in question, so the competent authority has the responsibility and right to assess any evidence without established standards and criteria for assessment, but also without much prior experience because such requests are not so common.<sup>22</sup> Because the issue of

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<sup>22</sup> Miftari, E. (2017), op. cit.

medical records is practically the same as in the Federation of BiH, everything that has previously been written in this regard applies here as well. There is a difference concerning the fact that the Decision (on the entry of sex marker change) is based on medical records from the health institution that performed the sex reassignment surgery. Until a more adequate regulation is adopted, the medical records submitted with the request to change the sex marker must include aspects that would provide a head of the procedure with sufficient information for determining what kind of medical reassignment has been made. According to the previous experience of the competent organisational local self-government units, medical records from Serbia did not need to be translated and verified, but certified photocopies attached to the request for correction of the fact in the registry book were sufficient.<sup>23</sup>

The administrative procedure for issuing a decision on sex marker change is the same in both the Federation of BiH and Republika Srpska, and it is then submitted to the competent registry office for the entry of sex marker change in the birth registry. Such entry serves as the foundation for the annulment of the old and the issuing of the new personal identification number. The provision of Article 29 of the Law on Personal Identification Number of BiH applies in this case as well, so the body that issues the decision on the entry of sex marker change shall, within thirty days of the decision, submit one copy to the Ministry of the Interior of the Republika Srpska, who is competent for determining, annulling and replacing the personal identification number in the Republika Srpska in accordance with the provision of Article 3 of the Law on Personal Identification Number of BiH.

After receiving the decision, the Ministry of the Interior of the Republika Srpska is required to annul the personal identification number and issue a new one within 15 days, as well as notify the applicant and the body that issued the decision about the new personal identification number.

### *3.3 Brčko District of Bosnia and Herzegovina*

Unlike legal solutions in the Federation of BiH and the Republika Srpska, the Law on Registry Books of the Brčko District of BiH (Official Gazette of the Brčko District of BiH, 58/11) does not contain any provisions related to sex marker change or change of personal identification number. This is certainly a lack of a legal framework that needs to be addressed as soon as possible through amendments to the law.

However, despite the lack of an explicit provision in this Law relating to sex marker or JMB change, it is necessary to refer to Article 8 of the Law on Registry

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<sup>23</sup> Ibid.

Books of the Brčko District of BiH in the context of the possibility of changing sex marker.

This provision prescribes, among other things, in paragraph 1), that “data on the child’s birth: surname, name and sex...” shall be entered as the basic entry in the birth registry, while paragraph 2) of the same article prescribes that “data relating to (...) a) personal identification number (...) n) fees for correction of errors and other data changes in the birth registry shall be entered as subsequent entries and notes”. This provision should be linked to the provision of Article 2, paragraph 2) of the same Law, which stipulates that birth, citizenship, marriage, death and other facts provided by law, as well as changes to them, shall be entered into the registry books.

We can conclude from these provisions that the sex category is provided by law as a fact that is entered in the registry books in the Brčko District of BiH, and therefore the sex marker change can be treated as a subsequent change of previous entry due to change. Such a solution is unsatisfactory, especially given that it is completely inconsistent with the legal solutions in the entities, and, if it does not deny, it certainly limits and diminishes the Brčko District citizens’ right to simple, transparent and efficient administrative service, which should be implied.

There is a Department for Public Registry within the Government of the Brčko District of BiH that performs professional, administrative and other tasks within the Government’s competence that relate, *inter alia*, to the implementation of laws and regulations of competent bodies and institutions of BiH and the District in the field of public registries, under the supervision and instructions of the mayor. A Subdepartment for Personal Documents established within the Department for Public Registry performs administrative procedures related to JMB and receives and processes requests for issuance and annulment of JMB both at the request of parties and *ex officio*. There is also a Subdepartment for Registry Records within this Department, whose scope of activity includes keeping registry books, making regular and subsequent entries, corrections and changes in registry books.

As a result, anyone desiring to change their gender marker in the Brčko District of BiH would be instructed to file a request to the Subdepartment for Registry Records, along with the necessary attachments. Based on this request and attachments, the Subdepartment should conduct an administrative procedure and decide on the request following the Law on Administrative Procedure of the Brčko District of BiH, and then *ex officio* submit a decision on the change to the Subdepartment for Personal Documents to annul the old and issue a new personal identification number. After completing this procedure, the Subdepartment for Personal Documents should notify the applicant and the Subdepartment for Registry Records of the newly assigned personal identification number.

In addition to the difficulties experienced by heads of procedures in the Federation of BiH and the Republika Srpska, the situation in the Brčko District of BiH is further complicated by the lack of specific laws and bylaws that would precisely define procedural aspects, deadlines and actions for such requests. Therefore, the change in the legislative framework of the Brčko District of BiH in this regard is crucial.

The change of name in the Brčko District of BiH is regulated by the Law on Personal Name of the Brčko District of BiH (Official Gazette of the Brčko District of BiH, 08/02, 29/05), and the provisions of this law do not differ significantly from the basic provisions of entity laws on a personal name. According to Article 8, paragraph 1 of this Law, a District resident has the right to change their personal name, just name or just surname. The Department for the Public Registry of the Government of the Brčko District of BiH decides on the request for a change of personal name in accordance with the provisions of the Law on Administrative Procedure.



## 4. PRACTICE REVIEW

### 4.1 *Judgments of the European Court of Human Rights in favour of transgender persons*

Cases before the European Court of Human Rights (hereinafter: ECHR) frequently involve the exercise of the right to legal recognition of gender identity. Many judgments addressed the obligation of states to participate in covering the costs of transgender persons' medical treatments, pension rights, heterosexual marriage after transition, and in some parts of the judgments, the ECHR addressed the legislative framework governing sex reassignment, including issues related to obligatory medical treatment and the right to legal recognition through sex marker change in personal documents. The following are some examples of ECHR judgments that found violations of appellants' rights granted by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

Gender identity was described in the ECHR's judgments as "one of the most intimate aspects of private life"<sup>24</sup>, as an independent "right"<sup>25</sup>, as "a fundamental aspect of the right to respect for private life"<sup>26</sup> and as "one of the most basic essentials of self-determination"<sup>27</sup>, connecting it to "the right to sexual self-determination", which is *per se* aspect of the right to respect for private life.<sup>28</sup>

When considering ECHR judgments as the supreme interpreter of the Convention, it should always be remembered that the Convention is extremely important in Bosnia and Herzegovina because it is integrated into the Constitution of Bosnia and Herzegovina as a constitutional principle<sup>29</sup>, and an international agreement ratified by Bosnia and Herzegovina. The European Convention, both as a constitutional principle and as a ratified international agreement, as well as one of the pillars of Bosnia and Herzegovina's state structure, together with the principle of democracy, rule of law and free elections, is directly applicable, i.e., "self-executing" and hierarchically above other constitutional provisions, that is, "has priority over all other law", as stated in the same Constitution.<sup>30</sup>

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<sup>24</sup> Van Kück v. Germany, Application no. 35968/97

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> Y.Y. v. Turkey, Application no. 14793/08

<sup>28</sup> Ibid

<sup>29</sup> The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law (Article II/2 of the Constitution of Bosnia and Herzegovina)

<sup>30</sup> Vehabović, F. (2006). Odnos Ustava Bosne i Hercegovine i Europske konvencije za zaštitu ljudskih prava i osnovnih sloboda, Sarajevo: Alumni Association of the Centre for Interdisciplinary Postgraduate Studies (ACIPS)

Although these are specific cases, the reasoning in the following judgments of the ECHR can serve as a universally applicable guide to good practice in dealing with similar situations, as well as a reference framework for understanding the scope of protection of transgender persons provided by the Convention.

#### *4.1.1 X v. the Former Yugoslav Republic of Macedonia, Application no. 29683/16*

The applicant, in this case, was a transgender person from North Macedonia (the former Yugoslav Republic of Macedonia at the time of the application) who had not undergone a sex reassignment procedure and had participated in the procedure for sex marker change in the birth registry for over 6 years.

Applicant X was born in 1987 and was assigned female sex at birth. In 2010, at a specialist clinic in Belgrade, Republic of Serbia, X was diagnosed with “transsexuality” and began hormone therapy in preparation for sex reassignment surgery from female to male.

In June 2011, he submitted a request to the domestic authorities for a change of personal name and surname, which was granted. However, his sex marker and personal identification number remained unchanged in his personal documents. In July 2011, he requested to have the sex marker changed. The Registry Office of the Ministry of Justice dismissed this request because the applicant failed to provide evidence that he had undergone sex reassignment. The applicant filed an appeal against such a decision, claiming that such conditions were not specified in current legislation. His appeal was dismissed. In June 2013, the Administrative Court annulled the second-instance decision and remanded the matter for retrial, stating that the second-instance decision did not specify the relevant evidence on which the administrative body might rule on the applicant’s request. In the same month, X underwent a mastectomy (breast removal) and continued his hormone therapy. During the retrial, the Registry Office requested the opinion of the Institute of Forensic Medicine, which concluded that, while the genital surgery had not yet been performed, the applicant showed clear masculine characteristics and that his request should be accepted. In the procedure, the Ministry of Health indicated that there are no regulations governing this issue, but that prior medical interventions should be considered.

The applicant’s request was dismissed for the second time, citing a lack of evidence of an actual change of sex provided to the Registry. The Ministry of Justice received his appeal against this decision. The Administrative Court annulled the second-instance decision and again remanded the case for retrial because the defendant did not submit the case file to the court. Finally, the Registry rejected the applicant’s request, this time declaring itself incompetent. This decision was confirmed by the ministry. During the procedure, the applicant

presented multiple reports to the authorities dating from 2012 to 2016, in which psychologists concluded that the length of the procedure for demanding legal recognition of the applicant's gender identity had a significant impact on his psychosocial and mental health, as well as his everyday life.

In its decision, the ECHR concluded that the applicant's appeals were related to the lack of a regulatory framework for legal recognition of gender identity, as well as the necessity that such recognition is conditional on full sex reassignment surgery. According to the ECHR, the primary question to be answered was whether the state had failed to meet its positive obligation to develop an efficient and accessible procedure with clearly specified conditions to ensure the right to respect for the applicant's private life. The answer to that question is critical for the second aspect of the request, which alleges that the applicant was forced to undergo a complete sex reassignment surgery to change his sex marker in the registry books.

The ECHR determined that no provision in domestic legislation allows for the change of sex data in the registry book, as opposed to the change of personal name data, if changed. Furthermore, the Administrative Court confirmed that the legislation did not specify any requirements or procedures that would have to be followed. Furthermore, there is no legal provision that explicitly prescribes a certain body's competence to decide on a request to change the sex marker. The ECHR investigated the Government's allegations, according to which the Government believes that the provision of Article 22, paragraph 2 of the Law on the Registry stipulates that correction and modification of data in the registry book is allowed, with the Registry having established competence to act in two ways: errors can be corrected directly by the Registry, and entries may be changed based on a special decision of the competent body as a precondition for the requested change. Given that the applicant requested a change in the sex marker assigned to him at birth and as such entered into the registry book, the procedure indicated above should have been followed. This was the approach of the Registry, which rejected the applicant's request to change the sex marker in the registry book from female to male on two occasions due to a lack of evidence to confirm the sex reassignment. However, the ECHR found that the Registry did not specify the nature of this evidence, even though it had asked the Ministry of Health to specify the nature of the evidence and the relevant authorities that would be competent to confirm sex reassignment. The Administrative Court referred to this failure during the first remand of the case. The ECHR emphasized that the Government had not provided any evidence that these issues, including the procedure for acquiring relevant evidence, were regulated by law or that such practice existed. Concerning the Government's claim that the Registry could accept the Administrative Court's decision recognising the applicant's new gender identity, the ECHR pointed out that the court did not rule out the possibility that the request was well-founded, although it was considered twice and

remanded to the administrative body. The ECHR further stated that the fact that the authority determined that it lacked the competence to decide on the request in February 2018 – six and a half years after the applicant submitted it – was not irrelevant.

Based on the foregoing, the ECHR concluded that Macedonia's current legal framework for legal recognition of gender identity does not provide answers to many important questions. Among them is the existence and nature of the conditions that the applicant must meet to change the sex marker in the official records. Domestic law does not address this problem, and no evidence has been presented to the court indicating the existence of any (let alone elaborate) practice determining such conditions. The applicant stated that he was compelled to undergo a full sex reassignment surgery to change his sex marker in the registry book. Even assuming that the administrative authorities' initial conclusions led to such a conclusion, the ECHR emphasized that no definitive position was taken on the matter throughout the procedure. The administrative procedure was still ongoing at the time of the ECHR's judgement in this case. Accordingly, the ECtHR noted that any conclusion as to whether the applicant, as a pre-operative transsexual who has undergone partial surgery, will be allowed to have his preferred gender legally recognised would veer precariously close to speculation.

The ECHR concluded that the circumstances of this case indicated legal flaws and serious shortcomings that had left the applicant in a state of distressing uncertainty about his private life and identity recognition. The length of the procedure, which is completely the responsibility of national authorities, has long-term detrimental consequences on the applicant's mental health. The ECHR determined that Macedonia's current legal framework does not provide for "quick, transparent and accessible procedures" for transgender persons to change their sex markers in registry books.

Given the foregoing, the ECHR found a violation of Article 8 of the Convention (right to respect for private life), on account of the lack of a regulatory framework ensuring the right to respect for the applicant's private life.<sup>31</sup>

### *4.1.2 X and Y v. Romania, Application no. 2145/16 I 20607/16*

In this case, the applicants are X and Y, two transgender men seeking legal gender recognition in Romania through modifications to their legal gender marker, names, and personal identification numbers. Both applicants identified as men from an early age and underwent medical procedures such as mastectomy and hor-

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<sup>31</sup> X v. the Former Yugoslav Republic of Macedonia, Application no. 29683/16, available at <https://hudoc.echr.coe.int> (accessed on March 17, 2022)

hormone therapy. Both applicants then filed cases in national courts, with the first seeking only legal gender recognition and the second asking permission to undergo surgery in addition to legal gender recognition. The courts rejected the first applicant because the ECHR's case law allowed the Member States to require surgical treatment for sex reassignment before applying for legal gender recognition. For the same reason, only the first request of the second applicant was approved, who was granted permission to undergo genital surgery but would then have to go through additional court proceedings to achieve legal gender recognition.

The first applicant then proceeded to Great Britain, where he acquired a Certificate of Sex Recognition after several years of residence. However, this certificate cannot be used as an identification document, resulting in a discrepancy between his (female) Romanian ID card and his (male) administrative identity in Great Britain. This discrepancy exposed him to vulnerability and discrimination and hindered his professional ambitions as a lawyer.

The second applicant knew the experimental nature, financial cost, and invasiveness of such surgery in Romania. As a result, he decided to file a second case to seek sex recognition without surgery. This request was denied. Following this judgment, the second applicant eventually underwent genital surgery. As a result, his third request for sex recognition was granted by the national courts.

The ECHR found a violation of Article 8 of the Convention (right to respect for private and family life) in this case.

The court found that the domestic courts had presented the applicants, who did not wish to undergo sex reassignment surgery, with an “impossible dilemma”: either they had to undergo the surgery contrary to their better judgment, and thus forego full exercise of their right to respect for their physical integrity - or they had to forego recognition of their gender identity, which likewise came within the scope of the right to respect for private life. In the Court's view, this upset the fair balance to be struck by the States Parties between the general interest and the individual interests of the persons concerned. Thus, the domestic authorities' refusal to legally recognise the applicants' gender in the absence of sex reassignment surgery amounted to unjustified interference with their right to respect for their private life.<sup>32</sup>

### 4.1.3 *Rana v. Hungary, Application no. 40888/17*

At the time of the application, the applicant, Jafarizad Barenji Rana, was an Iranian refugee in Hungary. The applicant unsuccessfully addressed Hungarian

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<sup>32</sup> X and Y v. Romania, Application no. 2145/16 | 20607/16, available at <https://hudoc.echr.coe.int> (accessed on March 10, 2022)

authorities, specifically the Immigration and Citizenship Office, with a request to change the legal status of his name and sex. The Office denied such a request because the matters in question fell under the jurisdiction of the Registrar of Births/Marriages/Deaths (the counterpart of the registry offices in Bosnia and Herzegovina). However, because the applicant was born in the IR Iran, he was not registered in the Hungarian birth registry, and this fact could not be changed. The applicant requested a judicial review of the decision. The Budapest Administrative and Labour Court dismissed his request, upholding the conclusion of the administrative body as to the Hungarian administrative authorities' lack of jurisdiction.

The Court found a violation of Article 8 of the Convention (right to respect for private life) for restricting access to the legal gender recognition procedure, concluding that a fair balance between the public interest and the applicant's right to respect for his private life had not been struck. The Court also emphasized that the domestic sex recognition system had dismissed the applicant only because he was not registered in the Hungarian birth registry, in a circumstance where a change in the birth registry was a manner of legally changing the name and sex marker. For the ECHR, the domestic authorities rejected the applicant's request purely on formal considerations, without examining his situation and therefore without conducting any balancing exercise of the competing interests. In particular, the domestic authorities did not take into account the fact that the applicant had been recognised as a refugee precisely because he had been persecuted on the grounds of his trans identity in his country of origin. The ECHR established that in the circumstances of this case the applicant could not have been reasonably expected to pursue the recognition of sex reassignment and the name-change procedure in his country of birth. In that connection, the ECHR in its judgment reaffirms the principle that the Convention protects rights that are not theoretical or illusory, but practical and effective.<sup>33</sup>

#### 4.1.4 *Y.T. v. Bulgaria, Application no. 41701/16*

The case of *Y.T. v. Bulgaria* concerned a transgender person who had taken steps to change his physical appearance but whose application for recognition of gender reassignment (female to male) had been denied by Bulgarian courts. The applicant claimed that he had become aware of his male gender identity during adolescence, and had lived in society as a man. In his application, he complained about the refusal of the Bulgarian courts to make changes regarding his personal

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<sup>33</sup> *Rana v. Hungary*, Application no. 40888/17, available at <https://hudoc.echr.coe.int> (accessed on March 10, 2022)

data in the registry books, including his sex, name, patronym and surname.

The ECHR found a violation of Article 8 of the Convention (right to respect for private life), finding that the Bulgarian authorities' refusal to grant legal recognition to the applicant's gender reassignment, without providing relevant and sufficient reasons for such a decision and without explaining why it was possible to accept the same requests in other cases, constituted an unjustified interference with the applicant's right to respect for his private life. The Court noted in particular that the judicial authorities established that the applicant had begun a process of gender transition, changing his physical appearance and that his social and family identity had already been that of a male for some time. Nonetheless, they had considered that the general interest required that the legal change of sex should not be permitted, without giving a detailed explanation of their reasoning as to the exact nature of this general interest and had not balanced this interest against the applicant's right to recognition of his gender identity. The ECHR characterised this fact as rigid reasoning of the domestic courts that had placed the applicant, for an unreasonable and continuous period, in a troubling position, in which he was liable to experience feelings of vulnerability, humiliation and anxiety.<sup>34</sup>

#### 4.1.5 *S.V. v. Italy, Application no. 55216/08*

This case referred to the refusal of the Italian authorities to allow a transgender woman to change her male name because she had not yet undergone sex reassignment surgery at the time of her application for a change of name and because she had not yet received a final court judgment confirming sex reassignment. In May 2001, the Rome District Court granted the applicant permission to undergo sex reassignment surgery. However, under current regulations, she could not change her name until the court confirmed that the surgery had been performed and a final judgment on her gender identity was rendered, which occurred in October 2003.

The ECHR found a violation of Article 8 of the Convention (right to respect for private life). In particular, it found that the applicant's inability to change her name for two and a half years, because the sex transition process had not been completed through sex reassignment surgery, constituted a failure of the state to ensure the applicant's right to respect for her private life. According to ECHR, the rigid nature of the judicial procedure for recognising the gender identity of transgender persons as applicable at the relevant time placed the applicant – whose physical appearance and social identity had long been female – for an un-

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<sup>34</sup> Y.T. v. Bulgaria, Application no. 41701/16, available at <https://hudoc.echr.coe.int> (accessed on March 10, 2022)

reasonable length of time in an anomalous position in which she was apt to experience feelings of vulnerability, humiliation and anxiety. The ECHR also concluded that the legislation was amended in 2011, which resulted in no longer requiring a second court decision in the proceedings to confirm the sex reassignment of the persons who underwent surgery, as the change in the registries can now be ordered by a judge when giving the decision authorising the surgery.<sup>35</sup>

#### *4.1.6 Van Kück v. Germany, Application no. 35968/97*

The applicant complained to the ECHR about the injustice of the court proceedings on her claim for reimbursement of costs as a result of her sex reassignment procedure, in which she sued private health insurance. Furthermore, she believed that the impugned court decisions had infringed her right to respect for her private life.

Deciding on her application, the ECHR found a violation of the right to a fair trial under Article 6, paragraph 1 of the Convention. According to the ECHR, the German courts should have sought further clarification from the medical expert. Concerning the Court of Appeal's allegations about the applicant's condition, the ECHR determined that it could not be argued that there was anything arbitrary or capricious in its decision to undergo sex reassignment surgery, given that the applicant had already undergone such surgery at the time the Court of Appeal made its decision. Overall, the proceedings did not meet the requirements of a fair hearing.

The ECHR also found a violation of the right to respect for private life under Article 8 of the Convention. In its judgment, the ECHR stated that, since gender identity was one of the most intimate aspects of each person's private life, it seemed disproportionate to require the applicant to prove the medical necessity of treatment. The Court held that in the present case no fair balance was struck between the interests of the insurance company on the one hand and the interests of the individual on the other.<sup>36</sup>

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<sup>35</sup> S.V. v. Italy, Application no. 55216/08, available at <https://hudoc.echr.coe.int> (accessed on March 10, 2022)

<sup>36</sup> Van Kück v. Germany, Application no. 35968/97, available at <https://hudoc.echr.coe.int> (accessed on March 10, 2022)

## *4.2 Models of legal gender identity recognition - best practices*

### *4.2.1 Malta*

The legislation of the Republic of Malta is frequently cited as an example of good solutions in the literature and discussions on the rights of transgender persons and the legal solutions that follow the exercise of these rights.

The initial regulation related to the procedures of legal gender recognition was adopted in the Republic of Malta by amendments to the Civil Code in 2004. According to these amendments, the precondition for recognising a gender identity reassignment was an irreversible sex reassignment, and recognising a gender identity reassignment did not extend to marriage.

The relevant provisions were repealed in 2015, with the adoption of the Gender Identity, Gender Expression and Sex Characteristics Act.<sup>37</sup> This Act normatively recognises the right to gender identity for all citizens of Malta by recognising the right to:

- the recognition of their gender identity,
- the free development of their person according to their gender identity,
- be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein,
- bodily integrity and physical autonomy.

The Gender Identity, Gender Expression and Sex Characteristics Act provides for the legal recognition of gender identity based on self-determination and bodily integrity. Most people over the age of 16 can change their sex marker with a simple notarized written declaration of will, which is subsequently entered in the relevant public registries as a public document. The Director of the Public Registry Office<sup>38</sup> then grants the authority to change the entry in the registry books, allowing the relevant change in other identification documents such as passport, ID card and driver's license. In the event of younger minors (persons under the age of 16), the procedure requires parents to apply to the court on behalf of their child to change their sex marker. The court then makes a decision

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<sup>37</sup> Gender Identity, Gender Expression and Sex Characteristics Act, Act XI from 2015, as amended by Act XX from 2015, LVI from 2016 and XIII from 2018. Integral text of regulations available at: <https://legislation.mt/eli/cap/540/eng/pdf>, accessed on March 14, 2022

<sup>38</sup> The Public Registry Office is the public authority in the Republic of Malta in charge of keeping records of births, marriages, deaths and adoptions, among other things.

and submits it to the Director of the Public Registry for birth registry changes.

In addition to the foregoing, the Gender Identity, Gender Expression and Sex Characteristics Act contains provisions according to which no one is required to provide proof of a surgical procedure for total or partial sex reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity. This also applies to children, although the court may, in appropriate proceedings, request an expert opinion to assess if the minor is fit to voluntarily consent to the reassignment.

According to this Act, a person can obtain legal recognition of gender identity even if they are married, and in that capacity, they will be entitled to change the data in the marriage registry to correspond to the person's name and gender identity. Gender identity is considered an individual's right; therefore, such a change does not require permission or approval from the spouse. The Act also allows for the recognition of gender identity of persons who have been given international protection under the Refugees Act. Detainees may also get legal recognition of gender while detained based on a statement provided to a notary if they do not have access to regular legal procedures for recognising gender identity.

Malta has depathologised transness by amending the 2016 Act (Act no. LVI). In this regard, Maltese legislation ensures that depathologisation does not interfere with transgender persons' right to specific health services.

In July 2015, the Government of the Republic of Malta adopted the LGBTIQ Action Plan 2015-2017, which included the obligation to add an alternative sex marker in personal documents - passport and ID card, in addition to the existing markers "M" and "F" (male-female). The option of determining an alternative "X" marker was introduced in September 2017, and it is now available to all persons with a Maltese ID card or passport. The "X" marker indicates that the person has opted not to disclose their sex on personal documents. In that case, the legally recognised sex will remain the one listed in the birth registry. Persons who choose this option instead of the markers "M" or "F" are required to take the oath before the notary, who is also the Commissioner for Oaths.<sup>39</sup> The statement or certificate of the oath is then presented to the appropriate state authorities - the Identity Card Office and the Passport Office within the state agency Identity Malta, after which the applicant is issued a new ID card or passport with the "X" marker.

## 4.2.2 Denmark

Although the Republic of Malta has probably regulated transgender persons' rights in the most liberal manner, it is not an isolated example. Denmark has made legislative efforts to affirm the principle of self-determination in deter-

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<sup>39</sup> In certain legal systems, the Commissioner for Oaths is a person authorised to witness the signing of relevant legal documents under oath, including affidavits.

mining gender identity prior to the adoption of the previously discussed Maltese Gender Identity, Gender Expression, and Sex Characteristics Act.

Since 1968, each person registered as residing in Denmark has been allocated a 10-digit social security number in the Central Person Registry system. The final digit of this number determines the person's legal sex. If the final digit is odd, the person's sex status is certified as male; if it is even, it is certified as female.

The adoption of amendments to the Act on the Civil Registration System in 2014 enabled the legal recognition of gender identity in Denmark based on self-determination. When it came into force, this law was the first of its kind in Europe.

The most important provision of the amendments to this Act prescribed that the Ministry of Finance and the Interior shall, upon written request, assign a new social security number to a person who believes they belong to the opposite sex. The assignment of a new social security number is conditional on a written statement that the desire for a new social security number is based on an experience of belonging to the opposite sex and that the person has gone through a six-month period of "reflection" (in terms of reflecting on such a decision) from the date of request. It is not possible to request a change of sex marker or the assignment of a new social security number if the applicant was under the age of 18 at the time of submitting the request.

Although these amendments are often regarded as a pioneering step in the legislative implementation of the principle of gender identity self-determination in Europe, their impact is limited. Objections to such a legal solution relate to the complete exclusion of minors from the law for a six-month "reflection period", the limitation of gender identity recognition in the binary male/female model, the lack of any provisions that would provide legal protection of labour issues, and the fact that access to health care in Denmark is not increased.<sup>40</sup>

### *4.2.3 Ireland*

In Ireland, legislative regulation of gender identity recognition is the outcome of a judicial decision in the case of the Supreme Court of Ireland in which the party was Lydia Foy, a transgender woman who applied for a change of sex marker in the birth registry. After her application was rejected by the Registrar of Births/Marriages/Deaths, Lydia appealed to the Supreme Court of Ireland which found a violation of the applicant's rights under Article 8 of the Convention. The Supreme Court has found that Irish legislation in this area is incompatible with the Convention. The Irish government initially filed an appeal against this decision, which was later withdrawn, and an advisory group was formed to make proposals for new legal solutions. Given the lack of progress on the new legal solutions

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<sup>40</sup> More in: Dietz, C. (2018). Self-declaration of legal gender status in Denmark. Leeds: University of Leeds School of Law.

for a long time, Lydia filed another appeal with the Supreme Court in February 2013, requesting that the state commits to allowing her to have a change in her birth registry, in which her sex will be marked as female, and that the state violated the Constitution and Convention of Ireland by failing to provide her with an effective remedy for a violation of her rights. The Gender Recognition Act was adopted in July 2015, after 21 years of a legal battle.

The enactment of this law abolished the requirement of mandatory accompanying medical records from psychiatrists and endocrinologists and introduced the principle of self-determination, whereby formal and legal recognition of gender identity is given through a Gender Recognition Certificate issued by a social security authority. In this way, the state ensures gender identity recognition in all circumstances. The certificate is used when applying for sex marker changes in the registry books.

## 5. MAPPING RESULTS

During the drafting of this text, requests for access to information were submitted to all cantonal ministries of the interior, the Ministry of the Interior of the Republika Srpska, and the Department for Public Registry of the Brčko District Government, keeping in mind the competence to decide in administrative procedures regarding requests for sex marker change. The request sought information on whether the addressed body received requests for entry of sex marker change in personal documents from January 1, 2017 to the date of receipt of the request, and if so, how many such requests were received and how they were resolved.

Part of the answers have been received by the conclusion of this text:

- The Ministry of the Interior of the Republika Srpska responded, stating that during the aforementioned period in the territory of the Republika Srpska, a request for change of data (name, JMB, etc.) due to sex reassignment was submitted by two persons with the necessary evidence, primarily a new birth certificate confirming that the sex reassignment is recorded in the registries. Both requests were positively resolved and all changes in the records under the jurisdiction of the Ministry of the Interior of the Republika Srpska were made, and new personal documents were issued.
- The Ministry of the Interior of the Central Bosnia Canton reported that there were no requests for the entry of sex marker change in personal documents in the period from January 1, 2017 to February 25, 2022.
- The Ministry of the Interior of the Zenica-Doboj Canton reported that no requests were received during the requested period pursuant to Article 44 of the Law on Registry Books (Official Gazette of the Federation of BiH, 37/12, 80/14), in accordance with item 8 of the Instruction on the Manner of Keeping Registry Books (Official Gazette of the Federation of BiH, 51/13, 55/13, 82/13, 6/15).
- The Ministry of the Interior of Canton 10 reported that from January 1, 2017 to the day of the request for access to information, it had not received any requests for the entry of sex marker change in personal documents.
- The Ministry of the Interior of the Posavina Canton reported that no requests were received during the requested period regarding the entry of sex marker change in personal documents.
- The Ministry of the Interior of the Bosnian-Podrinje Canton reported that from January 1, 2017 to the day of the request for access to information, it had not received any requests for the entry of sex marker

change in personal documents.

- The Ministry of the Interior of the West Herzegovina Canton reported that no requests were received during the requested period regarding the entry of sex marker change in personal documents.
- The Ministry of the Interior of the Una-Sana Canton reported that no requests were received regarding the entry of sex marker change in personal documents.
- The Ministry of the Interior of the Herzegovina-Neretva Canton reported that no requests were received regarding the entry of sex marker change in personal documents.
- The Department for the Public Registry of the Government of the Brčko District of BiH reported that from January 1, 2017 to the day of the request for access to information, it had not received any requests for the entry of sex marker change in personal documents.

The Ministry of the Interior of the Tuzla Canton and the Ministry of the Interior of the Sarajevo Canton did not submit the requested information until the mapping process was completed.

## 6. *RECOMMENDATIONS*

Ad.1 Consistently apply internationally established human rights standards contained in international documents (Yogyakarta Principles, Council of Europe Recommendations, ECHR case law) and domestic legislation (Law on Prohibition of Discrimination, Convention...) in the application of positive regulations when deciding on requests for sex marker change.

Ad.2 Apply the provisions of domestic procedural legislation (Law on Administrative Procedure of FBiH, Law on General Administrative Procedure of RS, Law on Administrative Procedure of Brčko District of BiH) in the part relating to the form of evidence, method of obtaining evidence and evaluation of evidence while seeing the bigger picture outside of rigid interpretations of the legal text.

Ad.3 Develop the practice of quick, transparent, and efficient action in the procedures including sex marker change, in accordance with administrative procedure principles. This includes steps that do not impose an excessive burden on the applicant in terms of obtaining the required documentation submitted with the request, as well as acting in the shortest reasonable period, no longer than the legal deadlines.

Ad.4 During the procedure, allow or personally initiate the inclusion of a transgender person as an applicant to the maximum extent, and consider the possibility and necessity of including organisations dealing with the protection and promotion of transgender rights.

Ad.5 Continually educate on transgender human rights and the prevention of gender-based discrimination, both formally and informally.

Ad.6 Legal sex reassignment should be regulated by adopting appropriate legal and implementing regulations at the level of entities, cantons and Brčko District of BiH, to systematically and comprehensively prescribe the procedure for sex marker change in personal documents, based on the transgender person's request and the right to self-determination, without requiring prior medical interventions, as well as to define guidelines for health professionals on the treatment of transgender persons.

Ad.7 The previous recommendation's normative solutions should include provisions regarding the recognition of the legal consequences of sex reassignment, the right to register sex reassignment, name, personal identification num-

ber in appropriate registries and personal documents, competence to act on requests, the role of medical experts (medical commissions for giving opinions on sex reassignment at the request of the interested person), the manner of collecting medical records and other relevant provisions that would comprehensively regulate procedures and conditions for acting upon requests, in accordance with standards set out in international documents and ECHR judgments and anti-discrimination legislation, to fully protect and enable the full exercise of transgender rights.

Ad.8 BiH needs to adopt and implement measures from the 2021-2023 Action Plan for the Promotion of Human Rights and Fundamental Freedoms of LGBTI Persons in BiH concerning medical and legal aspects of sex reassignment.

Ad.9 Adoption and implementation of laws and implementing regulations at the level of entities, cantons, and the Brčko District of BiH are required to define the duties of health institutions to establish teams, equip health facilities and train experts who will monitor the process and conduct medical sex reassignment procedures in BiH, as well as the obligation of the health insurance institute to cover the costs of these procedures from health insurance.

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# ABOUT SARAJEVO OPEN CENTRE

Sarajevo Open Centre (SOC) works on promoting human rights, particularly the position and human rights of LGBTI people and women in Bosnia and Herzegovina, by interpreting, presenting and representing the authentic experiences of persons suffering from human rights violations and inequalities, and by advocating for legal, political, economic, social and cultural changes in all areas of life. We will mention only some of the achievements related to the equality of LGBTI people and women. Apart from psychosocial and legal counselling, we continued running the only LGBTI medium in the country – [www.lgbti.ba](http://www.lgbti.ba) portal. We organized trainings for the police, prosecutor's offices and courts, with a focus on hate crime, hate speech and the application of anti-discrimination law; for medical professionals and health workers, with a focus on trans-specific and trans-inclusive gender reassignment; for the LGBTIQ community. We have worked intensively on creating a local institutional support network for LGBTI people in Sarajevo Canton, improving the regulation of biomedically assisted fertilisation in the Federation of BiH, rights of female workers related to discrimination based on sex and maternity leave, introducing gender sensitive language in parliaments and universities, adopting and implementing cantonal gender action plans, but also raising awareness about gender-based violence in BiH. Over the past years, several of our legislative and policy initiatives have entered government or parliamentary procedure. We focused our advocacy activities on policies for equality of women and LGBTI people in BiH, reproductive rights of women and men, parenting in the context of reconciling private and business life, freedom of assembly of LGBTI people, improvement of the institutional framework for the protection from violence and discrimination, and we intend to continue working on issues concerning transgender persons, intersex persons, same-sex partnerships, their social inclusion, but also the position of LGBTI people in education, health, work and employment. Over the past years, we have carried out media campaigns that have reached over one million citizens of BiH, and we also organized the LGBTI film festival Merlinka, which, in cooperation with Tuzla Open Centre, became the local festival Kvirhana in 2021.

For more information about our work, see: [www.soc.ba](http://www.soc.ba).

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