



Congreso Internacional de Identidad de Género y Derechos Humanos

Congrès Internacional d'Identitat de Gènere i Drets Humans

International Congress on Gender Identity and Human Rights

Requirements for change of identification papers or legal sex change

(Conference Draft)

The characteristics and extent of the rights enshrined in the Universal Declaration of Human Rights have evolved over time. They have gradually incorporated judicial and administrative interpretations that have been made at national and supranational levels.

The right to identity is not an exception. This right appears today as the pure consequence of the inherent dignity of all human beings. This is reflected in the right of all human beings to self-determination as distinct and unique individuals through free decisions, conscious and without external coercion, and without social or cultural constraint to determine personal characteristics.

These features are essentially dynamic. That is, identity varies throughout life in the free development of personality.

The dynamic right to identity is limited only in the general principle of not causing harm to others and in the general principle of individual limits established where laws come into conflict with the protection of human rights.

The right to identity, so conceived, expresses individual and collective aspects.

At the individual level, this right implies that the person can choose freely in all general aspects of his life. This includes aspects as simple as choosing how to dress and act, or choosing with whom one wants to establish relationships and how they relate to other people. But it also includes such essential



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aspects as the right to identify one's self as a unique and distinct person with regard to identity or gender expression, understood as the right to internalize or separate social constructions ascribed stereotypically to either sex without mention of cultural or biological determinism.

Collectively, this right is included currently in the field of so-called social and cultural rights, and involves recognizing the right of people to freely and consciously assume the expressions and values of a particular ethnic or cultural group.

In both cases there is currently no collective agreement that States are under an obligation and duty to recognize, without interference of any kind, the consequences of the dynamics of identity development of people, both at the individual or at the collective level. The only limits to this recognition are associated with respect for other human rights.

Note that the right to identity has been confused initially with the right to legal identification, understood as the right of every individual to receive a legal means of identification from the State to allow the exercise of individual and social political rights.

However, the right to identity is detached from the right to identification. Since the latter is simply one of the means by which States comply with their duty to recognize unique personality of individuals and unique peoples. That is, the right to identification is only a means for recognizing the right to identity.

Accordingly, the clear separation of the right to identity from the right to identification observes clearly the obligation of States to recognize the means of identification and the dynamic identity of individuals. To the extent that the identity in these changes implies the free development of personality, States must agree on the means necessary to identify appropriate measures to reflect that personality.



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The fact is, however, that most public authorities do not recognize this right and the population of its citizens is registered following an exclusively two class system of genres which becomes a matter of public policy. The best example is the case of the intersexual persons: States do not provide the possibility of an identity recognition of intersex persons per se. They are instead inscribed into one of the two recognized gender categories which is recognized without regard for the expression of will and without option. Indeed, nearly every State has laws that allow parents or medical authorities to select a legal sex for those born intersex and even to insist on reparative surgery so as to establish a *fait complet* to ratify the choice and force the child into a defined gender. This must be regarded as a crime because both doctors and parents ignore the future development of the person which is manifested in gender identity and which may include the option of remaining intersexual.

Only a few States recognize the option of the legal sex change avoiding the genetic determinism and giving primacy to social and psychological identity, but even in these cases, most States recognize only changes undertaken when this identity is reinforced through psychological examination, hormonal treatment and surgery. These States, although they have provided a way for the recognition of change of sex as part of the right to gender identity do not offer real respect because external constraints are imposed on the exercise of rights and the manifestation of gender identity.

There is another issue that disturbs this process of the recognition of the right to manifest one's gender identity, which is the exclusive role given to medical diagnostic in the process of legal sex change. In reality, the methods used in the diagnosis of gender issues were originally designed to determine whether an irreversible medical treatment was applied to persons expressing their free and conscious intent. This was done to exclude responsibility for physicians who could otherwise be charged with medical negligence or the crime of



grave bodily harm. It so happens that the established protocols for medical indication have to been adopted as legal requirements in a clear confusion of purposes. This functional mixing is shown particularly clearly in the administrative structure of civil registries. In general, civil registries operate under different standards for the maintenance of legal certainty, among them the principle of previous standardization. According to this, the register accepts only previously established documents. When allowing a legal change of sex, the registration system makes demands and charges fees according to a system based on attests in which the medical certification has become the backbone of the process in place of the manifest will of the person .

In accord with these reasons this community, desires to explain the principles we consider in accordance with the international instruments of human rights we consider must rule the process of the legal change of sex.

Principles relating to the legal change of sex

- 1. States should renounce the classification of persons by gender.**
- 2. States should recognize the right to gender identity of all human beings**
as the free and public expresson as a development of the right of equality, of
the free development of personality and of health. All of these have been recognized as fundamental rights and first order constitutional rights in international human rights law and in all democratic constitutions.
 - 2.1 Every person has the right to dtermine their gender identity and gender expression.**



2.2 The right to gender identity and gender expression must be recognized by the courts and other public authorities, as a directly exercisable right without regard for the legislative development.

2.3 People are entitled to not having their gender identity defined by third parties, whether parents, medical personnel, or other expert committees, especially in the case of intersexuality.

2.4 Newly born intersex should not be defined by others as there is no development or ability to express gender self-definition.

2.5 Persons should be entitled to remain in an intersex condition if it is their desire, or not to define their identity until a free choice is made possible by the development of their personality.

3. Identification by the State of its citizens should not limit the right of individuals to change their legal name and sex in the free expression of gender identity. Changes must be allowable and ensure the continuity of legal personality.

3.1 The exercise of rights and the development of personality in society, manifested by gender, cannot be tied to conditions of mandatory medical treatments such as sterilization or unsolicited gender reassignment.

3.2 The exercise of rights and the development of personality in society, manifested by gender, cannot be conditioned by gender practices, manifestations or stereotypes as defined by third parties.

3.3 The right to legal sex change should not be conditioned on the granting of such rights by medical professionals or commissions establishing models of masculinity or femininity.

3.4 People should have access to name change without needing to undergo sex change surgery.



3.5 People should have access to an effective system that facilitates the change

of legal sex as an expression of their identity, without medical, economic or legal constraints.

4. Sex change law must ensure legal personality and continuity of rights and obligations, as well as the full recognition of accomplishments, certifications and credentials earned or established prior to a change of sex.

5. Legal sex change process should be transparent, objective, simple and affordable.

- 5.1.- Procedures for legal sex change must be based on an applicant's expressed will.
- 5.2.- Administrative procedures for legal sex change should not involve fees nor special conditions.
- 5.3.- Court proceedings should not employ evidences adjusted to standard gender expressions, or be too expensive or too difficult to perform.
- 5.4.- Probation and evaluation procedures of legal sex change should not include humiliating physical exams or insults against personal dignity of the applicant.
- 5.5.- Procedures for legal sex change should not be subjected to excessive delay or conditioned upon a negative administrative silence.
- 5.6.- The right to gender identity includes the individual's right to be treated by the government under the gender claimed from the beginning of the transition process.



6.- Effects of legal sex change should not cause a lesser or restricted rights.

- 6.1.- Legal sex change must not cause loss of positions, occupations, acquired rights, or access to services on discriminatory terms.
- 6.2.- Legal sex change must not cause loss of social rights such as access to health, retirement, or similar.
- 6.3.- Legal sex change can not involve the production of adverse retroactive legal effects.
- 6.4.- Legal sex change recognized by the law should not be voided by interpretative or development subsidiary rules.

7.-The right to legal sex change should be made effective respecting the privacy of individuals who undergo it.

- 7.1.- Citizens who undergo legal sex change should be entitled to obtain further documentation under circumstances which respect their privacy and without need of publication of its circumstances.
- 7.2.- The records of legal sex change processes must be withheld from third parties and authorities not strictly needing to be aware to them.
- 7.3.- Certifications and documents resulting of the process of legal sex change should not express the previous data and the process realization itself.
- 7.4.- In order to safeguard privacy and better social integration, citizens engaged in legal sex change should be able to get adequate documentation to their gender expression during the processes of physical adaptation to the desired gender and legal change

8.-Minors have the right to being heard, cared for and protected in relation to their gender identity manifestations.



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- 8.1.-States shall take measures to safeguard the rights of minors in actions or omissions due to a lack of willingness or disregarding that may cause the child psychological or physical harm as a consequence of the nonobservance of his/her express will about his/her gender identity.
- 8.2.- All children should have access to assistance, advice and, if necessary, legal protection if the conduct of their legal guardians in relation to their expression of gender identity is verified or at least suspected of threatening their personality development.

9. Persons should have recognized their right to legal sex change without conditioned or diminished by their rights to family.

- 9.1.- States may not impose a divorce as a prerequisite or a consequence of legal sex change, this should not impede the right of the spouse to apply for divorce if this is his/her will.
- 9.2.- States should ensure that legal sex change does not involve loss of children, guardianship or custody rights.
- 9.3.- States should ensure that legal sex change does not involve lessening or loss of inheritance rights.
- 9.4.- Change of legal sex identity or gender expression can not cause impairment of the right of adoption.

10.- States should recognize the effects of legal sex change made under other jurisdictions.

- 10.1.- Recognition of legal sex change made in a State should not be hindered by another State through abuse of a public policy exception.
- 10.2.-The effects of legal sex change recognized in a State's family should be recognized by other members of the international community.



- 10.3.- In case of conflict of laws over legal sex change effects, the most beneficial law should be applied in the right to gender identity.
- 10.4.- Recognition of legal sex change should not result in the loss of original or dual nationality.
- 10.5.- States should give foreign citizens identification documents congruent with their gender identity, without prejudice or impairment of the sovereignty of the State of origin on the determination of civil status.
- 10.6 Foreign citizens with right to asylum recognized by gender identity causes should be able to access the procedures of legal sex change in the State of their asylum under the same conditions as nationals.

11. States should safeguard the right to complete the process of legal sex change and the integrity of persons in a situation of legal deprivation of liberty.

- 11.1.- States should articulate prison policies that provide for a diversity of conditions in relation to gender identity.
- 11.2.- Prison policies should particularly ensure during custody, respect for privacy, integrity and dignity of transgender people in their various expressions.
- 11.3.- States should ensure effective protection of persons detained or under public trust who are immersed in the process of legal sex change.

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