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## **X and Y v Romania: A Partial Solution to an Impossible Dilemma?\***

### **Abstract:**

The issue of recognising the effects of gender affirmation is a controversial subject that the European Court of Human Rights often faces as a result of States' reluctance in addressing such matter. This paper analyses the recent judgment of the European Court in the case of *X and Y v. Romania*, in which, by unanimously declaring the requirement of mandatory surgery for gender affirmation as contrary to Article 8 ECHR, the Court significantly increases the protection and autonomy of transgender people and takes an extremely important and positive step forward in respect to transgender rights in Europe.

**Keywords:** X and Y v. Romania, transgender rights, Article 8 ECHR, gender reassignment surgery, human rights

### **I. Introduction**

The case *X and Y v. Romania*,<sup>1</sup> on which the European Court of Human Rights (hereinafter “Court” or “ECtHR”) ruled on 19 January 2021, puts an end to the existing controversy in Romanian case law regarding the requirement to perform gender affirmation surgery (also referred to as “gender reassignment surgery”) in order for persons, who do not identify with the gender assigned by birth, to amend their legal gender markers (forename and personal identity number). Romanian law not only did not provide for such a requirement (in general, such procedure being completely unregulated in Romania),<sup>2</sup> but this condition, imposed by some Romanian courts, seriously undermined the physical and mental integrity of the concerned individuals, calling into question degrading treatments and some serious human dignity issues.

Although the judgment in *X and Y v. Romania* can be criticised under various aspects, in particular in relation to the Court's refusal to examine cases of gender recognition under Article 14 of the European Convention of Human Rights (ECHR), it marks an important moment in the Court's case law, guaranteeing transgender people an additional and necessary level of protection, recognition and autonomy.

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1 Application nos 2145/16 and 20607/16. Note that only the French language version of the judgment is available. The judgment is summarised in an English language press release from 19.1.2021 (ECHR 024) and has been translated into Romanian by the European Institute of Romania (available at: <http://ier.gov.ro>). This contribution refers to the English language press release and the Romanian translation.

2 I am referring here to the lack of a special procedure on this matter.

## II. Summary of the Facts

X and Y are two transgender men, who were registered at birth as female, but began to identify as men from an early age, behaving as such in social and professional relationships. Both were diagnosed with gender identity disorder or transsexualism syndrome and underwent psychotherapeutic and hormonal sexual conversion treatments.

The proceedings initiated by the first applicant, X, began with his action registered at the District Court, in which he requested the court to authorise gender affirmation from female to male and an administrative change of forename and personal identity number, and to order the district council to make the necessary changes in the civil status register and issue a birth certificate indicating the applicant's new forename and male gender. He provided three medical certificates in support of his request, noting and confirming that he suffered from a gender identity disorder.

The court denied the first claim as inadmissible and the other as premature, withholding that the applicant should have applied for gender affirmation surgery before submitting such a request. The District Court noted that in the ECtHR case law, with particular reference to *Christine Goodwin v. United Kingdom*,<sup>3</sup> the refusal of the national authorities to change a person's civil status was indeed criticised, but in that particular case the authorities refused to recognise the new gender identity of the applicant after she underwent a gender affirmation surgery and not before, such change not being possible solely on the basis of a diagnosis of transsexualism. The judgment of the Romanian court regarding X's claim became final by dismissing the appeal on the same grounds as those of the first instance.

Applicant X subsequently settled in the United Kingdom where, on the basis of changing his forename by deed poll, he was able to obtain a driving license, open a bank account and obtain a diploma in administration, all under his new gender identity. However, X was unable to register and take the final examination for the equivalence of a legal profession due to the lack of identity between the documents he used in the preliminary examinations, attesting his male name. Although he also obtained a Gender Recognition Certificate in the United Kingdom, that certified that the conditions for gender recognition have been met, the document could not be used as an identity document.

The second applicant, Y, applied to the District Court for both the recognition of gender identity and the authorisation of a gender affirming surgery. The court granted the latter and rejected the other claims as premature on the ground that, once the gender affirmation surgery had been authorised and carried out, the applicant would be entitled to request a change of his forename and the amendment of his civil status records.

A second application was made by this applicant to the national courts for gender recognition, without having yet undergone the gender affirmation surgery, which was, however, rejected on the grounds that the applicant had not followed the procedure involving the surgery for gender affirmation, so that the civil status documents and the person's physical state are still consistent. The judgment of the first instance court became final by dismissing the appeal.

3 Application no. 28957/95.

Y subsequently underwent surgery and, as a result, the court granted his request and authorised the amendments on civil status documents of the markers relating to gender, forename and personal identity number, obliging the local council to make the necessary amendments in the civil status register and to issue a new birth certificate accordingly.

Following the dismissal of their requests by the national courts, X and Y addressed the ECtHR, invoking the violation of Article 3 (prohibition of torture), Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), Article 12 (right to marriage), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination) ECHR.

The applicants criticise the Romanian State, first, for the lack of a clear legal framework for the legal recognition of gender affirmation. At the same time, they consider that the obligation imposed on them in order to obtain a change in civil status, that of undergoing gender affirmation surgery, which could lead to sterilisation, is a violation of their right to privacy and an interference without legal basis which does not pursue a legitimate aim and is not necessary in a democratic society, thus constituting a violation of Article 8 ECHR.

The first applicant also alleges a violation under Article 3 ECHR, relating to inhuman treatment, as well as a violation under Article 6 resulting in the fact that the reclassification of his action by the national courts amounted to a denial of justice and, relying on Article 13, he maintained that he had not had an effective remedy by which to complain of the alleged violations of Articles 3 and 8 ECHR. He also alleges a violation under Article 14 ECHR, finding that imposing the condition on transgender persons to undergo gender affirmation surgery to change their gender is discriminatory in relation to cisgender persons whose sex is legally recognised at birth without any other conditions to be fulfilled. Last but not least, the same applicant alleges an infringement of Article 12 ECHR, in view of the consequences for infertility which the gender affirmation surgery, required by the national authorities as a condition for the judicial recognition of the new gender, may have.

### III. Applicable Romanian Legislation and Case Law

Before starting any discussion regarding the judgment itself, it is necessary to first examine the legal regulation in Romania pertaining to the subject matter of the case *X and Y v. Romania*.

As a preliminary point, it should be noted that at the time of this analysis of Romanian law, national legislation neither featured any act regulating the situation of transgender people nor disparate regulations on the essential issues that the affirmation of gender could evoke.

The only national provisions relevant<sup>4</sup> in this case are as follows:

4 Note that all the national legal provisions in this section are translated by the author.

- (i) the Romanian Civil Code<sup>5</sup> (“Civil Code”) provides under Article 68 that: “The civil status is the right of a person to identify himself, in the family and in society, through strictly personal qualities resulting from civil status acts and deeds”. Article 60 states that “An individual shall have the right to self-determination, provided that he does not violate the rights and freedoms of others, the legal order or morality” and Article 100 provides that “(1) The annulment, completion or amendment of civil status documents and the mentions on them may be made only on the basis of a final court decision.” [...] (3) The civil status may be modified on the basis of a decision annulling, supplementing or amending a civil status document only if a judicial procedure has been initiated in order to modify the civil status, granted by a final court decision.”
- (ii) Article 43 of Law no. 119/1996 on civil status documents<sup>6</sup> (“Law no. 119/1996”), includes a provision regarding the amendments on the civil status of a person, in the sense that: “Birth certificates and, where applicable, marriage certificates or death certificates shall contain details of changes in a person's civil status in the following cases: [...] (i) change of gender, after a final and irrevocable court decision”. Article 20 of the same law stipulates that: “A new PIN is assigned to the same person in one of the following situations: [...] (d) the applicant has changed his gender”. Article 57 provides that “(1) The annulment, completion or modification of the civil status documents and of the mentions inscribed therein may be made only on the basis of a final and irrevocable court decision; (2) In case of annulment, completion and modification of civil status documents, the referral to the court is made by the interested person, by the civil status structures within the local or county public community services for registration of persons or by the prosecutor's office. The application shall be decided by the court in whose district their residence or place of business is situated, on the basis of the verifications carried out by the local public community services and the conclusions of the public prosecutor.”
- (iii) Article 4 of the Government Ordinance no. 41/2003 regarding the attainment and administrative change of the names of natural persons<sup>7</sup> (“G.O. no. 41/2003”) contains provisions on the possibility of an administrative change of surname and forename and states that: “(1) Romanian citizens may obtain, for good reasons, an administrative change of surname and forename, or only of one of them, under the conditions of this Ordinance. (2) Requests for a change of name shall be considered as justified in the following cases: [...] (k) when the forename used is specific to the opposite sex; (l) when the person has been granted a change of sex

5 Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, no. 511 of 24.7.2009, amended by Law no. 71/2011 and rectified in the Official Gazette of Romania, Part I, no. 427 of 17.6.2011 and in the Official Gazette of Romania, Part I, no. 489 of 8.7.2011.

6 Republished pursuant to Article V of Emergency Ordinance no. 80/2011 amending and supplementing Law no. 119/1996 on civil status acts, published in the Official Gazette of Romania, Part I, no. 694 of 30.9.2011, approved with amendments and additions by Law no. 61/2012, published in the Official Gazette of Romania, Part I, no. 257 of 18.4.2012.

7 Published in the Official Gazette of Romania no. 68 of 2.2.2003.

by a final and irrevocable court decision and requests to bear a corresponding forename, presenting a forensic document showing his/her gender”.

- (iv) The Emergency Ordinance no. 97/2005 regarding the records, domicile, residence and identity documents of Romanian citizens<sup>8</sup> (“E.O. no. 97/2005”), provides under Article 19 (1) that: “The public community services for registration of persons shall issue a new identity card in the following cases: [...] i) in case of a gender change”.

These are the only internal regulations to which the applicants, X and Y, but also the national courts called upon to resolve their claims, could relate. It should be noted that these provisions recognise (implicitly or explicitly) the possibility for individuals to reconcile their civil status documents due to a change in gender, but none of these provisions include the condition under which changes to the markers in the civil status documents may be made, still less do they make such procedures conditional on surgery.

Before reviewing the considerations of the judgment in *X and Y v. Romania*, it is necessary to exemplify the argumentation taken into account by the national courts in judgments denying/admitting requests in similar cases to the one under consideration by the ECtHR.

In this regard, in a judgment rendered by the Constanța District Court,<sup>9</sup> after analysing the provisions of Article 57 (2) of Law no. 119/1996 and of the Articles 60 and 98 of the Civil Code, the District Court held that Romanian law does not comprise express regulations regarding the legal recognition of gender identity, but that, according to Article 43 (i) of Law no. 119/1996 and Article 4 (2) (l) of G.O. no. 41/2003, Romanian citizens may obtain an administrative change of name for justified reasons, including the situation where the person has been granted a change of gender by a final court decision and requests to bear an appropriate name, presenting a forensic document indicating his or her gender.

In light of this legislative context, the District Court considered that the modification of the civil status documents cannot be carried out automatically as a natural consequence of a previous judgment that only allowed the applicant to undergo endocrinological and surgical procedures aimed at changing her gender from female to male, following which, upon completion of these treatments, she could obtain the modification of the civil status documents, in order for there to be a natural concordance between the external and internal nature of the applicant and the identity documents. However, at the time of the referral to the Constanța Court, the applicant had not completed any of the surgeries or treatments for which authorisation had been previously granted.

The District Court examined whether the requirement that a gender affirmation surgery be carried out prior to any application for the amendment of the civil status

8 Republished in the Official Gazette of Romania no. 719 of 12.10.2011 pursuant to Article 218 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, no. 409 of 10.6.2011, with renumbering of the texts.

9 Constanța District Court Judgment no. 9492/6.9.2019, <http://www.rolii.ro/hotarari/5d842f26e49009541f000035>, 21.1.2021 (in Romanian).

documents, would infringe the applicant's rights protected and guaranteed by the ECHR, contrary to Article 20 (2) of the Romanian Constitution, according to which international regulations concerning fundamental human rights are applied with priority in cases where there are inconsistencies between them and the national laws. In this regard, the District Court referred to Article 8 ECHR and considered, taking into account the ECtHR judgment in *A.P., Garçon and Nicot v. France*,<sup>10</sup> that, as a general rule, the rejection of applications for changes of the civil status documents (gender, forename, personal identity number) on the sole ground of failure to carry out the actual gender affirmation surgery could constitute an unjustified interference with the right to privacy: the applicant could not be free to lead the life she wanted as a man, to continue her studies, to integrate into society and her circle of friends without the fear she constantly felt of being subjected to humiliating situations if her true sexual identity were to be revealed. However, making the changes requested by the applicant is also of interest in terms of her relations with the State and the State's institutions, since it is necessary to bring into line the way in which she identifies herself internally and externally and the way in which she is depicted in her identity documents.

However, none of the above arguments apply to the applicant's situation. Following the amendment of the claim, the applicant requested only for the change of gender to be made in the civil status register and for the administrative amendment of the personal identity number and forename contained in the civil status documents to be amended after the surgery, in accordance with the provisions of Article 4 (2) (1) G.O. no. 41/2003, after the submission of a forensic document showing her new gender. As the applicant's true sexual identity could still easily be identified from an analysis of the civil status documents, the above arguments relating to the need to protect the applicant's real identity and her privacy do not carry weight.

In its conclusion, the District Court held that such interpretation of the provisions of Article 43 (i) of Law no. 119/1996 is necessary because, in so far as it were to uphold the present application and the plaintiff did not carry out endocrinological and surgical procedures to change her gender from female to male, the inconsistency between the markers in the civil status documents would persist, without any real possibility of subsequent administrative clarification.

In another case pending the before Cluj-Napoca District Court,<sup>11</sup> the court notes the existence of a legislative framework which is incomplete as regards the possibilities offered to transgender or transsexual persons to obtain recognition of their real gender identity in civil status documents. It refers to the fact that in the case at hand it has been proven beyond any doubt, both by the medical documents on file, including an expert's report, as well as by the statements of the witnesses and the applicant's statement that the applicant identifies himself and has always identified himself as a male, having undergone medical treatments with testosterone hormones in order to acquire characteristics specific to the male gender.

Due to the lack of a complete national framework, the District Court analyses the ECtHR case law on this matter and the documents issued by the institutions of the

10 Application nos 79885/12, 52471/13 and 52596/13, para. 123.

11 Cluj-Napoca District Court Judgment no. 2254/5.6.2020, <http://www.rolii.ro/hotarari/5ee580a6e49009bc0b00003a>, 21.10.2021 (in Romanian).

European Union. It considers the judgments in *A.P., Garçon and Nicot v. France*,<sup>12</sup> *S. V. v. Italy*,<sup>13</sup> *X v. The former Yugoslav Republic of Macedonia*,<sup>14</sup> as well as the Parliamentary Assembly Resolution no. 2048 (2015) on discrimination against transgender people in Europe,<sup>15</sup> as documents adopted at the level of the European Union.

Furthermore, the court notes that the issue of protecting the rights of transgender people is a priority in the European Union, as mentioned by the new European Commissioner for Equality H. Dalli who, in his statement on the cabinet's future agenda from March 2020, stated that "The situation of transgender and intersex people is par-

12 See fn. 10.

13 Concerning the refusal of the Italian authorities to authorise the change of the male forename of a transsexual person to a female forename on the grounds that she had not undergone a sex reassignment operation and that no final court decision establishing gender conversion had been obtained. Thus, in its judgment of 11.10.2018, the ECtHR found a violation of Article 8 ECHR by holding that the applicant's inability to obtain a change of name for a period of two and a half years on the ground that her transition from one gender to the other had not been completed with a gender reassignment operation constituted a violation by the respondent State of its positive obligation to guarantee the right to peaceful enjoyment of her private life. According to the Court, the rigidity of the judicial process for recognising the gender identity of transgender persons in force at the time placed the applicant – whose physical appearance, as well as his social identity, had already long been female – for an unreasonable period of time in an abnormal situation, inspiring feelings of vulnerability, humiliation and anxiety – application no. 55216/08.

14 In which the ECtHR held that there is no provision in the domestic law explicitly allowing for a change in the mention on a person's gender in the civil status register, although the right to change the forename is regulated. At the same time, the Court found that the national law does not impose time-limits, conditions and procedures to be met and complied with in order to change the gender mention and there is no provision clearly specifying the competent authority to decide on such a request. Thus, the ECtHR held that the circumstances of the case reveal legislative loopholes and serious deficiencies in the recognition of his identity which, on the one hand, leave the applicant in a situation of uncertainty in relation to his private life and, on the other, have long-term negative consequences for his mental health. The above considerations were sufficient to allow the Court to conclude that the current legal framework in the respondent State does not provide for "prompt, transparent and accessible procedures" for changing the sex recorded on the birth certificates of transsexual women, in violation of Article 8 ECHR – application no. 29683/16.

15 Parliamentary Assembly Resolution no. 2048 (2015) states that "[t]he fact that the situation of transgender people is considered as a disease by international diagnosis manuals is disrespectful of their human dignity and an additional obstacle to social inclusion". The Parliamentary Assembly called on Member States to "develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents; make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record; abolish sterilization and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognize a person's gender identity in laws regulating the procedure for changing a name and registered gender; remove any restrictions on the right of transgender people to remain in an existing marriage upon recognition of their gender; ensure that spouses or children do not lose certain rights; consider including a third gender option in identity documents for those who seek it; ensure that the best interests of the child are a primary consideration in all decisions concerning children." <http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=21736>, 21.10.2021.



ticularly concerning. Overall, we see that they often face even higher levels of discrimination. While respecting national prerogatives, we shall address the specific challenges that trans and intersex people face”.<sup>16</sup>

In light of the above, the District Court held that the submission of a medical certificate showing the applicant’s gender is not required for the application to be admissible and granted the application in its entirety and accordingly ordered: to allow the change of the gender marker in the applicant’s civil status documents (i.e. from female to male), to allow the change of his forename, to allow the change of the applicant’s personal identity number so as to show that he is male; order the defendants (the competent national authorities) to make the necessary amendments in the civil status register in respect of the forename, personal identity code and gender, and order the defendants to issue a new birth certificate for the applicant certifying the aforementioned amendments, without leaving any indication that betrays the change of the aforementioned following the gender affirmation.

### III. Relevant Considerations in the ECtHR Judgment

#### 1. Romanian Legislation and Case Law

With reference to the Romanian legislation and case law existing at the time of the referral, the ECtHR held that the provisions of Article 98 and Article 100 (1) and (3) Civil Code, provide for the possibility of a change in the civil status on the basis of a final court judgment. Also, Article 43 (i), Article 57 (1) Law no. 119/1996, as well as Article 4 (2) (l) G.O. no. 41/2003 reiterate the need for a final court judgment for amending the civil status documents.

Last but not least, according to the provisions of Article 19 (i) E.O. no. 97/2005 on the registration, domicile, residence and identity documents of Romanian citizens, a new identity document is issued in case of gender change.

From the perspective of the Romanian judicial practice, the Court held that the Romanian courts took into account in their judgments the fact that Romanian legislation does not provide for a special procedure for the legal recognition of gender affirmation. Accordingly, it is their task to ascertain in each specific case whether the State has a positive obligation to recognise such affirmation and, if so, what its scope would be.

The Court also observed different solutions adopted by the Romanian courts, ranging from the recognition of only an administrative procedure for amending civil status documents, such as that provided for by G.O. no. 41/2003, requiring a forensic medical expert to determine the gender of the applicant, to direct application of the ECHR and admission of applications for change of civil status.

It also takes into account the Constitutional Court Judgment no. 530/2008,<sup>17</sup> which concluded on the constitutionality of the provisions of Article 44 (i) Law

16 [https://ec.europa.eu/commission/commissioners/2019-2024/dalli/announcements/statement-commissioner-dalli-union-equality\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/dalli/announcements/statement-commissioner-dalli-union-equality_en), 21.10.2021.

17 The judgment of the Constitutional Court of Romania no. 530 from 13.7.2008, published in the Official Gazette of Romania no. 526 from 11.7.2008. By this judgment the Constitution



no. 119/1996 and on the possibility of recognition of gender affirmation by a court judgment.

## 2. Violation of the Provisions of the Convention

The ECtHR analyses Article 8 ECHR from a dual perspective. The first refers to the legal framework on aspects for gender recognition as a result of gender change in Romania, the second analyses the validity of gender affirmation surgery as a requirement for legal gender recognition from the perspective of the Convention. However, despite the arguments of the applicants and third parties concerning the State's negative obligations, the Court decided to examine both aspects in relation to the State's positive obligations under Article 8.

The Court notes that Romanian legislation makes it possible for a person to have their gender (assigned by birth) reassigned, based on a corresponding court judgment. The Court subsequently analyses twenty court judgments on gender affirmation and finds there is no consistency in the Romanian judicial practice regarding the conditions which the Romanian courts require to be fulfilled before admitting such a request.<sup>18</sup>

The Court does not contradict the legislator's choice to make gender recognition dependent on a judicial procedure, but cites international recommendations (from the Council of Europe and UN bodies), insisting on the need for a "quick, transparent and accessible"<sup>19</sup> gender recognition procedure as a result of gender affirmation. Given that national courts have reached such different conclusions on the conditions and procedure for gender recognition, the Court concludes that this procedure is not sufficiently transparent and, consequently, finds a violation of Article 8 regarding the lack of clarity of the internal legal framework.<sup>20</sup>

Despite the complaint made by the second applicant, according to which his physical integrity was affected by reference to Article 3 ECHR, the Court limits its analysis of gender affirmation surgery as a requirement for gender recognition in the field

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nal Court dismisses the unconstitutionality objection of the provisions of Article 44 (i) Law no. 119/1996 and of Article 4 (2) (1) G.O. no. 41/2003. The author of the objection considered that the provisions of the law under challenge are contrary to Article 22 (1), Article 26 and Article 34 (1) of the Constitution, as the right of the person to change his or her gender is a personal decision concerning his or her private life, for which a court decision is not required. Having analysed those criticisms, the Constitutional Court found that they were unfounded. The entries to be made in civil status records pursuant to a court judgment relate exclusively to the legal nature of those records and to the legal status of the person, the purpose of which is to ensure that the population is properly registered. Having regard to that regime of civil status documents, the Constitutional Court held that the consent to a change of gender by a final court judgment is necessary for the registration of the change in the person's civil status, so that there can be no question of the courts intervening in the private life of a person, as the author of the exception claims, and it remains for the court to decide on the decision taken. Thus, a change of sex is a choice made by the person concerned, but it affects his or her social status, which is a matter of public policy.

18 Para. 152.

19 Para. 153.

20 Para. 155.

of Article 8 ECHR. The Court emphasises the importance of the accuracy of the public records of civil status, stating that their significance justifies the application of rigorous procedures around any changes therein.<sup>21</sup> However, this public interest still needs to be balanced against the private interests of the applicants.

As regards the positive obligation of the State to respect private life, it should be recalled that, although the main purpose of Article 8 ECHR is to protect individuals against arbitrary interference by public authorities, it is not sufficient for the State to refrain from such interference. On the contrary, this negative obligation is joined by the positive obligation of the State to guarantee its citizens the right to effective private life.<sup>22</sup>

In its case law, the Court has held that this obligation may involve the creation of a legal framework to protect the rights of individuals to private life, the adoption of specific measures or effective and accessible procedures to that end, and the implementation of those measures where required (*Hämäläinen v. Finland*).<sup>23</sup> It is true that in *X and Y v. Romania*, the applicants allege both a failure by the Romanian State to fulfil its positive obligation in the absence of an adequate legislative framework which allowed the authorities to make the granting of their applications conditional on the performance of a gender affirmation surgery, and the existence of an arbitrary interference by the same authorities. However, in similar cases to which it refers in its judgement,<sup>24</sup> the Court has held that it is necessary to consider applications relating to refusal of gender affirmation in the light of the positive obligations to ensure respect for the applicants' right to privacy.<sup>25</sup> Moreover, it is recalled that the general principles applicable to the assessment of the fulfilment of positive obligations are similar to those applicable to the assessment of negative obligations, in that the general interests and the personal interests of the applicant concerned shall be weighed against each other. The Court also emphasises the particular importance of certain aspects of private life, such as gender identity, where States have a limited margin of appreciation.<sup>26</sup>

With regard to the existence of a legal framework for the legal recognition of the gender affirmation, the Court therefore found that there is no special procedure provided by the Romanian legislation in this respect, a fact also taken into account by the Romanian courts in their judgments. However, it was noted that the cited provisions – Article 43 (i) Law no. 119/1996 and Article 4 (l) G.O. no. 41/2003 – allowed transgender people, in certain cases, to obtain judicial recognition of gender affirmation, as did the Constitutional Court Judgment no. 530/2008, which concluded on the possibility of recognising gender affirmation by a court, giving effect to these legal provisions.<sup>27</sup> However, the ECtHR found that the absence of a special procedure establishing the specific conditions under which gender affirmation may be recognised by an in-

21 Para. 158.

22 Para. 146.

23 Application no. 37359/09.

24 *Ibid.*, para. 62-64, *IP.*, *Garçon și Nicot v. France*, fn. 10, para. 99, *S.V. v Italy*, fn. 13, para. 60-75 and *X v. The former Yugoslav Republic of Macedonia*, f. 14, para. 63-65.

25 Para. 147.

26 See *A.P., Garçon and Nicot*, fn. 10, para. 123.

27 Para. 151.

stance has made it very difficult for national courts to decide on such sensitive issues.<sup>28</sup> Emphasis has thus been placed on the divergent case law on the requirement of gender affirmation surgery, which some courts have held to be required by the provisions of Law no. 119/1996 and those of G.O. no. 41/2003, while others have not.

From the latter perspective of the requirement of gender affirmation surgery prior to the amendment of civil status documents, the Court pointed out that preserving the principle of the unavailability of personal status, the guarantee of reliability and consistency of civil status and, more generally, the requirement of legal certainty is in the general interest and justifies the establishment of rigorous procedures, in particular in verifying the grounds on which an application for a change of identity is based.<sup>29</sup>

Although the applicants were found to be transgender persons on the basis of the information about their psychological state, lifestyle and the gender conversion treatments they had undergone, it was held that the Romanian courts had rejected the applications to change gender, forename and personal identity number on the grounds that the applicants had not undergone gender affirmation surgery. In other words, the domestic courts considered the principle of self-determination insufficient.<sup>30</sup>

The Court goes on to compare the present case to its previous case law on gender. It finds that the applicants' approach is essentially different from that in *S.V. v. Italy*<sup>31</sup> and *Y.T. v. Bulgaria*,<sup>32</sup> in that X and Y expressly state that they do not wish to undergo the gender affirming surgery procedure.<sup>33</sup>

Nonetheless, the Court finds that the situation is similar to that of the applicants in *A.P., Garçon and Nicot v. France*,<sup>34</sup> in which recognition of gender affirmation was conditional on undergoing surgery or sterilisation treatment, which the applicants did not wish to follow. In contrast to the latter case, however, the applicants in the analysed case did not insist and did not emphasise the sterility issue, although they pointed out that the surgery imposed by the national authorities could have led to such outcome. In any event, the Court reiterates that requirements for recognition of gender identity are problematic when they have consequences for the physical integrity of the person concerned.<sup>35</sup>

Returning to the case under discussion, the Court also held that, in their reasoning, the Romanian courts did not indicate the precise nature of the general interest protected, which did not permit the recognition of gender affirmation in the case of the two applicants, and did not weigh, within the margin of the granted appreciation, that general interest against the applicants' personal interest in recognising their gender identity.<sup>36</sup>

Finally, the Court speaks of the rigidity of the reasoning behind the recognition of the change in gender identity, which placed the applicants, for an unreasonable and

28 Para. 155.

29 Para. 158.

30 Para. 159.

31 See fn. 13.

32 Application no. 41701/16.

33 Para. 160.

34 See fn. 10.

35 Para. 160-161.

36 Para. 164.

continuous period, in a position that inspired feelings of vulnerability, humiliation and anxiety. At the same time, reference is made to the applicants being placed in an “*impossible dilemma*”:<sup>37</sup> either they agree to undergo surgery that they do not wish, thereby waive their right to respect for their physical integrity, which derives from the right to respect for private life guaranteed under Article 8, but which is also guaranteed by Article 3,<sup>38</sup> or they waive recognition of their gender identity, which also derives from the right to respect for private life, considering that such a situation represents a breach of the fair balance which States are obliged to maintain between the general interest and the personal interest of the concerned applicants.<sup>39</sup>

Furthermore, detailed comparative research was carried out on the need to undertake gender affirming surgery as a requirement for the recognition of gender identity. The result of this analysis of national laws showed a steady decline in the number of States imposing such a condition.<sup>40</sup>

### 3. The Court’s Findings

The Court therefore found a violation of Article 8 ECHR in the absence of a clear and predictable procedure for the legal recognition of gender identity, allowing for the change of gender and, consequently, of forename and personal identity code, in a transparent and accessible manner. It also found that the authorities’ refusal to recognise the applicants’ male identity did not strike a fair balance to be maintained between the general and personal interests of the applicants in the present case.

As regards the application in respect to a violation under Articles 6, 12, 13 and 14 ECHR, the Court held that, having regard to the circumstances of the case, separate analyses and remedies were not necessary in view of the conclusion it had reached as to the violation of Article 8 ECHR.

### 4. Consequences

#### a) No gender affirmation surgery

By qualifying gender affirmation surgery as an abusive requirement, the ECtHR judgment in *X and Y v. Romania* leads to increased protection of the physical integrity of transgender persons. However, the positive consequences of this judgment go further by making the gender recognition procedure accessible to more people who are unwilling or unable to undergo genital surgery.

The Court explicitly legitimises the refusal to undergo gender affirmation surgery through the “*impossible dilemma*” argument and extends this argument to economic and financial issues and to the inconvenience of medical interventions as valid rea-

37 Original: “*dilemme insoluble*” (para. 165).

38 The Court mentions this aspect, yet does not provide a detailed analysis.

39 Para. 165.

40 Para. 166.

sons why a transgender person is unable or unwilling to (safely) undergo such a procedure.

Moreover, the Court's ruling leads to a significant simplification of gender recognition procedures, thus considerably shortening the period of vulnerability, humiliation and anxiety to which transgender people are subjected, as gender affirmation interventions are often long and difficult.

The Court bases this development in its case law on developments in soft law, civil society and national legislation.<sup>41</sup> The Court cites recommendations and reports of several UN, Council of Europe and European Union bodies and takes into account the interventions of the UNHCHR as well as LGBTQ+, Transgender Europe, ILGA-Europe and Accept. It also indicates that twenty-six European countries have waived the requirement of gender affirmation surgery. This trend can be seen as far back as *Christine Goodwin v. United Kingdom*,<sup>42</sup> where the Court attached great importance to international legal and social trends in the acceptance of trans people, and this judgment is another expression of how the interaction and mutual reinforcement of several areas of society and law is leading to the evolution towards greater protection and autonomy for trans people.

#### b) Unresolved issues

The judgement in *X and Y v. Romania* leaves a number of questions unanswered. First, we are still far from the scenario of recognising self-determination as the only condition for gender recognition. Gender affirmation surgery is only one of the abusive requirements that this ruling eliminates, but there are many other such requirements (such as hormone treatments or the requirement of a gender identity disorder diagnosis) that the ruling leaves unaffected.

The Court insists that both applicants were diagnosed with "gender identity disorder" by a psychiatrist and had lived "as men for several years before seeking legal gender recognition". This seems to be implicitly used as a justification for why gender affirmation surgery is no longer necessary in their cases. Thus, the Court gives legitimacy to psychiatric diagnosis and lived experience as requirements for gender recognition.

The scope of this ruling could also be seen as limited in terms of the categories of trans persons to which it applies. In presenting the circumstances of the case, the Court rather insists on the "classic" trans experience of the plaintiffs, emphasising that both realised they were trans at a young age, as well as their extensive medical and social transition, without considering the possibility of trans experiences outside this classical view. This raises questions about the Court's attitude towards a future, hypothetical applicant whose experience of being trans deviated from this path.

41 For an analysis of this case and other references see: S. Schoentjes & P. Cannoot, *X and Y v. Romania: the 'impossible dilemma' reasoning applied to gender affirming surgery as a requirement for gender recognition*, <https://strasbourgobservers.com/2021/02/25/x-and-y-v-romania-the-impossible-dilemma-reasoning-applied-to-gender-affirming-surgery-as-a-requirement-for-gender-recognition/>, 21.10.2021.

42 See reference under fn. 3.

The Court refuses to examine this case under Article 14 ECHR. This ignorance of the issue of discrimination is disappointing, especially in the context that both the first applicant and the intervening third parties have put forward arguments in support of their complaint by reference to this text. Such arguments take into account the fact that cisgender people do not have to comply with a multitude of conditions in order to have their gender identity recognised, whereas transgender people have to comply with a series of requirements in order to do so, even if their gender is as integrated into their personal identity as in the case of cisgender people.

From the perspective of national law, the effects of the judgment in question will be rendered useless when, after the trans person's civil status documents have been amended, he or she will find it impossible to reflect his or her new "official" gender identity in documents such as marriage certificates<sup>43</sup> or a child's birth certificate<sup>44</sup> (if such events took place before the gender change). Thus, this kind of situations lead to another "impossible dilemma", that of accepting to give up such a procedure in order to preserve their family relationships or to accept to go through this procedure with the obvious consequence of affecting the relationships that these people have built with their life partner and their children, as it is obvious that such a situation will generate long periods of vulnerability, humiliation and anxiety.

#### IV. Conclusion

Leaving aside its "flaws", *X and Y v. Romania* is an extremely important and positive step forward for transgender rights in Europe. By unanimously declaring that compulsory gender reassignment surgery as a requirement for legal gender recognition violates Article 8 ECHR, the European Court of Human Rights significantly increases the protection and autonomy of transgender people.

The Court thus makes this procedure accessible to transgender people who are unable or simply unwilling to undergo gender affirmation surgery, freeing them from the dilemma of choosing between their physical integrity and official recognition of their gender identity. It also allows transgender people to go through this procedure after their gender identity has been matched to their civil status markers, shortening the period in which the mismatch between their appearance and behaviour and their civil status documents can subject them to harassment and discrimination.

43 Article 277 Civil Code expressly prohibits same-sex marriage. The same law also expressly states that no form of marriage or partnership between persons of the same sex is recognised in Romania. Similar texts are to be found in other provisions governing civil status, such as Law no. 119/1996. Moreover, as anticipated, domestic legislation does not contain provisions on the fate of a marriage following a gender change in civil status documents, so that the situation of a marriage in which one of the spouses has undergone a sex change procedure remains uncertain, even in the presence of a prohibition such as that comprised in Article 277 Civil Code.

44 Article 14 et seq. of Law no. 119/1996 uses the notion of "parents" for the "father" and the "mother" of a child, so there is no provision for the possibility of a child having two mothers or two fathers as parents following a change of gender procedure.

As a final remark, the judgment in *X and Y v. Romania* has already found application in domestic case law. Thus, following the publication of this judgment, the Romanian courts began to refer to this case in their considerations, allowing applications for gender affirmation, without the requirement of gender affirmation surgery.<sup>45</sup>

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45 For example, such arguments are comprised in Brasov County Court Judgment no. 877/24.6.2021, <http://www.rolii.ro/hotarari/60f8d13be490092c1a000045>, in Bucharest District 6 Court Judgment no. 3388/21.4.2021, <http://www.rolii.ro/hotarari/6131826be49009680a0000a0> or in Bucharest District 6 Court Judgment no. 5664/8.7.2021, available at: <http://www.rolii.ro/hotarari/61303022e49009b018000311>, 21.10.2021 (each in Romanian).