

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

*C.V. c. France*

(Application no. 13948/21)

**WRITTEN COMMENTS**

Submitted jointly by  
Transgender-Europe,  
ILGA-Europe,  
and NELFA

10 February 2022

1. These written comments<sup>1</sup> are submitted on behalf of Transgender Europe (TGEU), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), and NELFA (the Network of European LGBTIQ\* Families' Associations) pursuant to leave granted on 30 November 2021 and an extension granted on 21 December 2021.<sup>2</sup>
2. We respectfully refer the Court to our previous interventions in three cases concerning trans parenthood, which address a number of issues applicable *mutatis mutandis* to the present case, presenting scientific and statistical evidence, as well as analytical insight into the mechanism of overlapping anti-trans reproductive oppressions exemplified by this application as well. Please see our interventions in *A.H. and others v. Germany* (Application no. 7246/20) (2020), *A.M. and Others v. Russia* (Application no. 47220/19) (2020), and *O.H. and G.H. v. Germany* (Applications nos. 53568/18 and 54741/18) (2019). Due to space constraints, we choose not to reproduce content already featured in our said recent submissions. We kindly hereby suggest further relevant content for the Court to consider. We kindly stress that the material submitted in our recent preceding interventions is equally critical to the fair examination of the present application. We expect the Court will see the benefit of reviewing our previously submitted information and considerations.
3. First, we will conceptualise the harm of parental misgendering on the parent and the child. Second, we will contextualise trans parents' misgendering. Third, we will discuss responsive solutions. Fourth, and final, we will present relevant national developments.

#### *I. Conceptualizing the harm of parental misgendering*

4. Misgendering a trans person, i.e. addressing or referring to them using the wrong gender/ wrongly-gendered name, whether in speech or in documents, is a form of transphobic abuse, regardless of the intent. An officially misgendered trans parent litigant has articulated: "The identities of trans people get invalidated as soon as they become parents."<sup>3</sup> Scholarship has documented that "[f]or trans parents, having their gender appropriately marked – not having to deal with being misgendered – on their child's birth certificate is a matter of basic dignity, respect, privacy, and human rights, as well as safety for their child".<sup>4</sup>
5. Research has identified the forced disclosure of trans parents and their children as a central issue produced by parental misgendering on legal documents.<sup>5</sup> Such forced outing of both parent and child by the State is tantamount to actively exposing them to prevalent stigma, harassment, less favourable treatment, and ill-treatment, including hate crime. TGEU's report, *Stuck on the swing: Experiences of trans parents with freedom of movement in the EU*, 2021, is based on direct evidence. It details the experiences of trans families being adversely affected where the parental gender identity is not extended to kinship documents. Mismatched documents mean trans families are unable to travel without facing forced outing, a significant risk of intrusions and harassment, a fear of forced separation, and triggering of the mental suffering caused by the misgendering. The study also documents for some trans parents the need to be able to use gender-neutral parent designations on documents. It clearly demonstrates that forced outing of their parents in predominantly transphobic environments could never be in the children's best interests. Documents misgendering a parent impair a child's privacy, depriving them of free choice when and to whom to disclose information about their parents.

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<sup>1</sup> The third-party intervenors are grateful for the support of Margarita S. Ilieva, TGEU Strategic Litigation Advisor, in drafting this submission.

<sup>2</sup> Taking into account the extension granted us by the Court, the submission deadline is 10 February 2022.

<sup>3</sup> Patrick Strudwick, *A High Court Judge Has Ruled That "Mother" No Longer Means "Woman"*, BUZZFEED NEWS, 25 September 2019.

<sup>4</sup> For example, Frieder, A. B., *Trans Parenthood in an Era of Assisted Reproductive Technology: Approaches to Defining Motherhood*, Harvard Human Rights Journal / Vol. 34, Spring 2021.

<sup>5</sup> See also Nixon, L., *The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 WM. & MARY J. WOMEN & L. 73, 77 (2013).

6. The UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has found that improper gendering on trans people's identity documentation results in "mockery and humiliation inflicted on them in daily life as well as when they seek to cross borders or access services and facilities." (U.N.G.A., *Protection against violence and discrimination based on sexual orientation and gender identity: report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, U.N. Doc. A/72/172 (July 19, 2017). The causality between misgendering through identity documents resulting in involuntary disclosure and the ensuing high risk of transphobic harassment and disadvantage is well-established.<sup>6</sup> Misgendering on papers is proxy for rendering both parent and child a target for transphobic abuse.
7. In this way, officials directly place affected children and adults at heightened risk of mental and bodily harm. We submit that this causality merits consideration by the Court in light of the State's negative duties under Articles 2, 3 and 8 of the Convention not to actively jeopardize humans, and/or of the relevant positive duties to protect them from foreseeable risk. Again, the risk that forcibly outed trans parents and their children are at is well-established in light of available statistics on anti-trans discrimination and bias/hate incidents.<sup>7</sup>
8. Forced outing of trans families through misgendering parents on their children's birth certificates also impairs their human rights to privacy, to family planning, and to travel, as well as their equality rights with regard to all those aforementioned rights.<sup>8</sup> Trans people are entitled to keeping their trans status private as a matter of individual autonomy, as well as to stay safe from abuse.<sup>9</sup> Through upholding misgendering, domestic courts are officially coercing trans parents into outing themselves whenever their children need to use legal documents to access essential social services, such as healthcare and education, as well as with regard to cross-border travel.<sup>10</sup> Such parents face a hostile legal system, neglectful of their specific dignity requirements and their and their children's heightened vulnerability. Children with LGBTQ parents are affected by well-documented bullying and other disadvantage. We submit that, in such cases, the courts often fail to adequately consider the individual interests and rights of the child and the parent, causing them to be outweighed by exaggerated/ purported/ alleged conflicting public interests.
9. Because of the harm it does, the mismatch between a parent's legally recognised gender and their identification on their children's documents has been documented as one of the *barriers to trans parenthood*.<sup>11</sup>

## II. Contextualizing trans parents' misgendering

10. In a landmark judgement, published on 14 December 2021, CJEU ruled that "if one EU Member State recognises a parental relationship between a child and its parents, then all Member States should, in order to give the child its right to freedom of movement."<sup>12</sup> TGEU recently published a report dedicated

<sup>6</sup> Id. See also Frieder, *op.cit.*

<sup>7</sup> Please see our earlier interventions before the Court noted in para 2.

<sup>8</sup> Among many other sources, Frieder, *op.cit.*

<sup>9</sup> See Frieder, *op.cit.*

<sup>10</sup> See Frieder, *op.cit.* For an example from a Council of Europe jurisdiction, see this UK High Court ruling in the case of trans father, Freddy McConnell: <https://www.judiciary.uk/wp-content/uploads/2019/09/TT-and-YY-APPROVED-Substantive-Judgment-McF-23.9.19.pdf>, which received extensive media coverage: <https://www.nytimes.com/2020/04/29/world/europe/transgender-man-uk-mother.html>, <https://www.bbc.com/news/uk-england-kent-52471697>, <https://www.theguardian.com/society/2020/nov/16/trans-man-loses-uk-legal-battle-to-register-as-his-childs-father>. To avoid further misgendering as regards his second birth child, this man is going to the trouble of giving birth in another country: <https://www.pinknews.co.uk/2021/10/21/trans-dad-freddy-mcconnell-sweden/>.

<sup>11</sup> For example, Frieder, *op.cit.*

<sup>12</sup> ILGA-Europe. Top EU Court Recognises Relationship of Same-sex Parents and their Children Under EU Law [Internet]. Available from: <https://ilga-europe.org/resources/news/latest-news/top-eu-court-recognises-relationship-same-sex-parents-and-their-children>

specifically to the experiences of trans parents from across Europe in the area of free movement.<sup>13</sup> The report found that “the experiences of trans parents in the area of free movement are very much influenced by the national laws of Member States, including on legal gender recognition, access to reproductive health and rights, and partnership and parenthood recognition.”<sup>14</sup> While trans parents will greatly benefit from CJEU’s ruling, many of the obstacles mentioned in TGEU’s report have yet to be overcome.

11. The UN Special Rapporteur on the right to privacy has called upon States to ensure that “Birth certificates are issued for children upon birth, including for indigenous and tribal children, and that they reflect the self-defined gender identity of the parents.”<sup>15</sup>
12. According to TGEU’s Trans Rights Map, only 4 countries in the Council of Europe region recognise the gender identity of trans parents within binary options while Malta also recognises non-binary parents.<sup>16</sup>
13. Overall, every fifth (19 %) trans respondent to the FRA LGBTI Survey 2019 is a parent. Trans women (29 %) are more likely to be parents than trans men (14 %) and gender non-conforming people (16 %). Although this difference could in part be due to difference in age between on the one hand trans women and on the other hand trans men and gender non-conforming respondents,<sup>17</sup> previous research has consistently found higher percentages of transgender women than transgender men reporting to have children.<sup>18</sup>
14. Most (75 %) of trans parents in FRA’s survey are their children’s biological parents and legal guardians. The fact that every fifth (22 %) trans parent in FRA’s survey is not their children’s legal guardian indicates that trans parents may face barriers in accessing or keeping their parental rights. Trans women are somewhat disproportionately affected in this regard. Compared with 13 % of trans men and 9 % of gender non-conforming respondents who are biological parents but not legal guardians of their children, the same is true for as many as 20 % of trans women. This finding may support previous evidence that there are formal and informal attempts to limit the contact of trans parents, particularly trans women, with their children.<sup>19</sup>
15. Research has recognized that the barriers to trans parenthood – of which the withholding of a parent’s legal gender recognition (LGR) on their child’s document is one – which are embedded in apparently neutral legal institutions and procedures, as well as in directly discriminatory provisions, manifest the anti-trans bias prevalent in legal systems.<sup>20</sup> Scholarship has found that reproductive policies and legislation reflect a social context shaped by inequalities, “expressing which groups are valued and deemed worthy to bear children”.<sup>21</sup> Reproductive justice thinkers have defined this ingrained bias as anti-trans ‘eugenics’, including “passive eugenics inherent in the lack of policy supports for [trans] fertility preservation”.<sup>22</sup> It has placed former and existing surgery and sterilization requirements for access to LGR on the continuum of such heteronormative reproductive oppressions, characterizing them as ‘active eugenics’ marked by the design to disincentivize trans birth parenthood.<sup>23</sup> In other words, denying trans persons official recognition

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<sup>13</sup> Karsay D. Stuck on the swing: experiences of trans parents with freedom of movement in the EU [Internet]. 2021. Available from: <https://tgeu.org/trans-parenthood-and-freedom-of-movement-in-the-eu>

<sup>14</sup> Id, p. 9

<sup>15</sup> UN Special Rapporteur on the right to privacy, Report of the Special Rapporteur on the right to privacy, A/HRC/43/52, 24 March 2020, para 36 (a), available from: <https://undocs.org/A/HRC/43/52>

<sup>16</sup> TGEU, Trans Rights Map, as of April 2021, available from: <https://transrightsmap.tgeu.org/home/family>

<sup>17</sup> 51 % of trans women in FRA’s survey are 40 years of age or older, compared with respectively 33 % and 30 % of trans men and gender non-conforming respondents.

<sup>18</sup> Stotzer RL, Herman JL, Hasenbush A. Transgender Parenting: A Review of Existing Research [Internet]. 2014. Available from: <https://williamsinstitute.law.ucla.edu/publications/transgender-parenting/>

<sup>19</sup> Id. The submitters acknowledge Sandra Sevic for contributing to this information.

<sup>20</sup> For example, Frieder, op.cit.

<sup>21</sup> See also Nixon, op.cit.

<sup>22</sup> See also Nixon, op.cit.

<sup>23</sup> Id.

of their gender identity in situations where they make use of their reproductive capacities continues the tradition of forced sterilisation. Passive eugenics laws and policies having the effect of discouraging trans reproduction are on the spectrum of the systemic denial of trans bodily autonomy.

16. Denying a trans parent recognition of their gender identity on their child's birth certificate is a form of reproductive injustice that follows the logic of eugenics by effectively punishing trans parents for, and accordingly deterring them from, using their natal reproductive capacity. By being misgendered in relation to something as important as their legal relationship to their birth child, trans parents are sent a powerful signal by the State that their parenthood is subject to official denial via obfuscation as being incapable of integration by the law. This amounts to a denial of trans (prospective) biological parents' personhood before the law, diminishing their reproductive potential. Moreover, as detailed above, it effectively subjects, via forced outing, trans parents and, more importantly, their children to being 'fair game' for the pervasive transphobia of public spaces.
17. Trans-constrictive parental gendering curtails the reproductive agency of trans people. Trans people considering own biological offspring may forego fertility choices to avoid the triggering experiences of being outed on their child's birth certification. This causes trans parents to struggle under a dilemma as impossible as the one already outlawed by the Court – the choice between LGR and one's bodily integrity – the dilemma of having biological children or retaining their legally recognized gender identity. Legal rules that impair trans people's right to parent by (in)directly discouraging their reproduction strike at the core of reproductive justice.<sup>24</sup>
18. The request for official documentation featuring the parent's recognising gender identity should not be mistaken for keeping the children uninformed about who their biological parents are. It protects these families against outside interference and forced outing, enabling them to establish their identity as a family on their own terms. Just like any other family would.
19. We submit that the Court's theory of change should center the reproductive potential of trans people by countering the reproductive stigma that attaches to this vulnerable community. The Court should support legal reform that facilitates the reproductive fulfilment of trans people, by (unmasking and) outlawing covert, as well as overt eugenics disincentives, including the denial of parental LGR.
20. Scholars have found that people who resist the unmasking of anti-trans reproductive barriers tend to deny those barriers' eugenics intent.<sup>25</sup> Such resistance is an obstacle to the above-mentioned much-needed reform. To counter such resistance, research has pointed out that the documented impact of the impugned anti-trans legal policies is an indication of their inferable design, i.e. their design can be inferred from their impact.<sup>26</sup>
21. Researchers have included amongst the 'tremendous barriers to parenthood' that trans people equally face less favourable treatment by courts in custody disputes.<sup>27</sup> In construing the 'best interest of the child' standard in trans-negating ways, courts have effectively perpetuated trans stigma, affirming that a gender non-conforming parent is more harmful to their own child than a lacking parent.<sup>28</sup> This Court has exposed such discriminatory judicial decisions.<sup>29</sup> It has held that any purported harm to a child's best interest said to result from parental gender transition must be demonstrable and specific. Equally, we submit, any

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<sup>24</sup> See also Nixon, op.cit.

<sup>25</sup> For example, see Nixon, op.cit.

<sup>26</sup> Id.

<sup>27</sup> See Frieder op.cit referring to U.S. discriminatory rulings in trans child-custody cases, arguing that the continuum of trans parenthood oppressions amounts to a violation of the right to create a family under the Universal Declaration of Human Rights.

<sup>28</sup> See also Frieder, op.cit., referring to a unanimous 2019 decision of Japan's Supreme Court to uphold a legal forced sterilization requirement on grounds that it was intended to reduce 'confusion in families and society'.

<sup>29</sup> See *A.M. v. Russia*, Application no. 47220/19.

alleged benefit for a child to be obtained from misgendering their parent on the child's document must be very precisely identified and substantiated, as well as weighed fully against the likely harm to be done to both the parent and their child (discussed above), within an in-depth contextual analysis, factoring in the hostile and unfair public environments for exposed trans people.

22. Through conservative legal presumptions, courts have privileged traditional, heteronormative family structures, marginalizing trans-inclusive family diversity. The legal principles favoured by the establishment, which is vested in the unequal status quo, such as legal certainty/ clarity/ coherence, have consistently been used by trans rights opponents to curb the emergence of trans equality and to void trans experience. Indeed, such purportedly incontrovertible legal principles have never been used to further trans rights, or, for that matter, any other minority's rights. The suitability of such principles for illiberal legal argument is marked, particularly as contrasted to their general ineptitude to serve dignity-based evolution-oriented human-centering legal construction.
23. To conclude, the withholding of parental LGR on a child's birth certificate is an aspect of the very State system of trans-negating eugenics that produced sterilization requirements, which the Court outlawed 5 years ago.<sup>30</sup> The interveners submit, that if the Court is unable, at this time, to acknowledge that this form of trans reproductive disempowerment constitutes institutionalised direct discrimination, it should at the least scrutinize it as a pattern of indirect discrimination as per its own case law addressing system bias as a matter of disparate impact, regardless of intent.<sup>31</sup>

### III. *Responsive solutions*

24. This Court held that trans people may not be deprived of their reproductive capacity in order to access LGR. Post-LGR trans parenthood is a natural, inherent consequence of the right to LGR, as acknowledged by the Court. This right encompasses the right to bring one's preserved natal reproductive capacity to fruition as a post-LGR trans parent, without being deprived of LGR as a parent in this process. It also implies that the child is to be protected against negative consequences following out of their parent's forced outing as described above.
25. The Court should acknowledge that conservative interpretations of parenthood are incapable of serving trans rights and, through those, the general interest. No legitimate public interest is furthered through trans rights oppression. Construction of the general interest as *per se* conflicting with trans rights is heteronormative and therefore essentially transphobic, and not dignity-based or human-oriented. No valid public interest benefits from trans oppression. Trans invalidation is human invalidation. The general interest lies in affirming equal trans rights in all areas of life as a core – not peripheral – justice concern. This is because human dignity is indivisible and could not be upheld for any member of the general public if a trans member of the public is denied their own.
26. The Court has held, in the context of gestational surrogacy, that Article 8 rights to establish one's identity as a human being, including one's filiation as an essential part of that identity, require the authorities to register the tie between an intended biological parent and their child. Indeed, this is a matter of the child's right and of their superior interest, which must guide all decisions.<sup>32</sup> We submit that the requisite official acknowledgment of the filiation must be based on the reality of the parent's legally recognized gender in order to constitute recognition of that parent as a person rather than their objectification. Substituting the person for the function of their gametes, in terms of recognition as genetic and intended parent, would constitute objectification incompatible with human dignity.<sup>33</sup>

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<sup>30</sup> See *A.P., Garçon and Nicot*, [79885/12](#), [52471/13](#) and 52596/13.

<sup>31</sup> See, among other authorities, *D.H. and Others v. the Czech Republic*, [57325/00](#).

<sup>32</sup> Inter alia, *Mennesson c. France*, 65192/11, §96 and 99.

<sup>33</sup> See also Pearce, R. and others, *Of trans fathers and male mothers – the importance of centering experience*, 2019, at Trans Pregnancy, a research project of the Univ. of Leeds. The study found: "For these people, having their gender appropriately recorded on their child's birth certificate is a matter of basic dignity. But mostly importantly, it is a matter of respect and safety for the child."

27. Furthermore, defining a person's gametes as 'male' in order to then define the person who physiologically produced them as 'male' on this basis alone, defying other significant aspects of that person, including their gender identity, does not rest on sufficient scientific evidence but appears to be more of an ideological assumption. The underlying ideology is heteronormativity and binarism, which is keen on preserving a rigid dichotomy of genders, obliterating a range of empirical facts, including biological facts, in order to selectively zoom in on a particular fact, rendering it larger-than-life, at the expense of actual life. This could arguably be likened to the pseudoscientific concept of 'race' designed by whites to other non-whites in order to justify exploiting and victimizing them. Conversely, in contemporary democratic culture, we do not think of semen as 'white' or of a particular nationality merely because the sperm donor was from a local Swedish extraction. We do not define the foetus conceived using this semen in another country as a Swedish national. Equally, we do not redefine a woman as 'male' on grounds that she received an organ transplant originating from a man. Racialising or genderising bodies based on their cells/ body parts regardless of personal identity as defined by self-determination and context, is not about science but about perpetuating racist, patriarchal privilege. Gametes are merely cells. They have no gender identity *per se* and are not exclusive to any gender.<sup>34</sup>
28. Moreover, if the biological link (through the semen) is important for establishing the legal link of parenthood and thus serves the rights of the child (right to be cared for by both their parents, as well as to know their origins, among other rights) and of the parent to care for their own child, it is unnecessary to premise this exclusively on a parent being denominated as 'father'. Even if this might be the case for the majority of parents, the situation of a trans woman begetting a child needs to be evaluated differently. The aim of establishing kinship can be achieved through different means, for example by designating her as 'mother' or 'co-mother'.<sup>20</sup>
29. Comparative law has evolved several tests for determining legal motherhood in contexts, such as gestational surrogacy, that have *mutatis mutandis* relevance to the issue currently before the Court: one such test is based on intent, and another on genetic contribution.<sup>35</sup> Arguably, those two established tests may be jointly interpreted in a trans-specific teleological fashion: where a genetic parent intends to be the newborn's *mother* as opposed to their father, 'motherhood' should be capable of integrating this. Regardless of the purported 'maleness' of the said parent's genetic contribution, the legal definition of motherhood should accommodate that variance of parental status. In a social context of increasingly diverse familyhood, the law should be responsive and inclusive in this way.<sup>36</sup> This is *a fortiori* the case where the interest of the intended, genetic mother does not conflict with the interest of the gestational mother.
30. 'Intended' parent in a trans-specific context should denote the parent as a figure defined by their own autonomous gender self-determination, particularly when the latter is legally recognized. As *lex specialis* legal gender recognition procedures can and should define such exceptions from established ways of defining motherhood and fatherhood. If the law is incapable of achieving this, it creates its own disruption with the ensuing mismatch between filiation and ID documents. A trans parent intends to parent their child in line with their self-determined gender, and not at variance with it. This holds true for trans women, trans men and non-binary parents. Scholars have opined that courts will achieve more just outcomes in trans parenthood cases, if they incorporate in their reasoning the 'intent approach' – as a trans man intends to be a father figure for his child and male for life,<sup>37</sup> a trans woman intends to be her child's mother in line

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<sup>34</sup> The submitters acknowledge Ms. Clélia Richard for contributing the gist of these parallels.

<sup>35</sup> For example, see Coleman, M., *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 Cardozo Law Review 497 (1996).

<sup>36</sup> The submitters have previously demonstrated before the Court the increasing diversity of families in Europe that need the Court's acknowledgment and protection: see our written comments *supra* note 3.

<sup>37</sup> See, for example, Frieder, *op.cit.*

with her womanhood, and a non-binary intends to be their child's parent in line with their self-determined gender identity. A trans woman could not be the child's intended parent as a father, as she intends instead to be the child's *mother*, intending to be a woman and having been legally recognized as one. Documenting such a woman as a 'father' would be a frivolous fiction – no such person in fact exists, there being no male person in this place – obliterating the real person, the woman intending to mother the child. We argue that this would amount to withholding a woman her recognition as a person before the law on an equal footing with a non-trans person. A trans woman is no less woman than a cis woman. The former's natal reproductive capacity, including any male gametes, and the use thereof, is incapable of altering this gender reality, which is of equal worth as a ciswoman's gender identity.

31. The Court has held that the need to acknowledge the tie between a child and their intended mother applies *a fortiori* where the child was conceived with the mother's gametes.<sup>38</sup> The legal tool to secure such acknowledgment must be effective.<sup>39</sup> We assert that misrecognizing the child's genetic parent by misgendering them could not be considered an effective mechanism for such acknowledgment. The child's best interest could not be aligned with the harm done by their genetic parent being misgendered on the child's identification document, for both dignity and safety reasons, as presented above. A legal mechanism misaligned with the child's best interest could not be considered 'effective' within the Court's meaning, whatever its intention or outcome.
32. The European Commission (EC) has acknowledged that recognition of a trans person's gender on their parental status is a significant aspect of LGR, highlighting the Member States (MS) that allow trans individuals to be recognised as '(co)mother', '(co)father', 'parent', or 'parent 1' and 'parent 2', or to be re-registered in the correct gendered role.<sup>40</sup> The EC has flagged the lack of possibility for trans people with children to change their parental status as an issue, as well as their misgendering on their children's birth certificates resulting in a mismatch between identity documents, preventing free movement of families, peaceful exchanges with school authorities, and other essential social interactions.<sup>41</sup> The EC's findings draw on evidence that includes direct testimonies of trans parents to the serious negative mental impact of being misgendered and misnamed in birth registers in relation to their own children. The EC has identified the [disregardful] *design* of existing legal procedures, as well as the *lack* of necessary procedures as the root causes of such adverse impacts on trans parents.<sup>42</sup> In response to these legal flaws, it has expressly recommended, as key actions, for the MS to adopt LGR procedures based on self-determination that respect the Yogyakarta principles, in particular, by guaranteeing that "no status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity".<sup>43</sup> In other words, gendered parental roles/ designations as per traditional legal provisions/ interpretations may not be used to misconstrue a trans person's parental status in order to misgender them.
33. Jurisdictions committed to equality must adjust their legal documentation standards, using gender-inclusive designations for parents. Gender-inclusive parent terminology would protect trans parents and their children from being outed and becoming targets for transphobia, as previously pointed out. Moreover, correct documentation is important for the development of the child's sense of self and of their family as being 'normal'. Their family is 'the family' for them, and the law should give equal recognition and protection to their *lived* family identity and family life. Finally, inclusive parent designation would cancel the need to evolve new legal definitions of motherhood and fatherhood, conceptually releasing parental

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<sup>38</sup> See *D c. France*, 11288/18, §53.

<sup>39</sup> See *D c. France*, 11288/18, §64.

<sup>40</sup> EC, *Legal gender recognition in the EU: the journeys of trans people towards full equality*, June 2020, p. 115.

<sup>41</sup> *Ibid*, p. 162.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, p. 16 and elsewhere.



figures and roles from the limitations of being gendered and therefore stereotyped. If applied to all parents, it would also ensure legal consistency.<sup>44</sup>

34. In certain cases, national authorities have legally termed parents ‘parent’ rather than ‘mother’ or ‘father’ in circumstances to do with assisted reproductive technology, surrogacy, and adoption.<sup>45</sup> Extending this to trans biological parents who use their rightfully preserved natal reproductive capacity would eliminate existing double standards and the heteronormativist and binarist reproductive disenfranchisement of trans people.<sup>46</sup> However, for equal recognition of the law, children conceived through the use of ART, may not have their parents designated differently than children conceived differently.
35. Trans parents’ right to adequate gendering as parents, including their implied right to reasonable accommodation of procedures and registers, must not be restricted based on improper arguments that the issues only affect a small proportion of the general population. Firstly, such arguments would be incompatible with the idea of human rights, which values the dignity of a single individual as the world entire. Secondly, a significant share of the trans community are parents and/or wish to have (more) children.<sup>47</sup>
36. Trans-centering research has found: “Many trans people undertake a social or medical transition that does not involve surgery to remove their reproductive organs. Therefore transition does not necessarily take away the ability or desire to reproduce. Family forms and structures have changed many times through history and are still changing. Families with trans parents exist and they are here to stay.”<sup>48</sup>

#### IV. National developments<sup>49</sup>

37. In France, recently, a child born to a trans man and his husband was able to have both parents on the birth certificate without their male gender being denied.<sup>50</sup> Whilst, under the law, parents may not both be designated as ‘mother’ or ‘father’ outside of the context of adoption, in this case, in which the ‘male’ gametes originated from the ‘mother’ (the man who gave birth), the authorities adapted the legal provisions to accommodate the requirements of trans parenthood, obtaining a result consistent with the male gender of both parents.<sup>51</sup>
38. The litigant commented that his case illustrated the ‘silence of the law’, which had enabled, in 2016, trans people to receive LGR without sterilization, yet had not regulated the ensuing novel filiation types with their new children.<sup>52</sup> Whilst parliamentarians are aware of the causality between trans people preserving their natal reproductive capacity and their procreating, using said capacity, no provisions have been crafted to acknowledge their filiation ties to offspring.<sup>53</sup>

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<sup>44</sup> See also Frieder, *op.cit.*

<sup>45</sup> For example, in the United Kingdom, parental orders and adoption certificates in cases surrogacy and adoption contexts use the term ‘parent’ rather than ‘mother’ or ‘father’.

<sup>46</sup> See also Frieder, *op.cit.*

<sup>47</sup> See statistical evidence from the FRA summarized above. See also, for statistics, our earlier interventions in comparable cases before the Court referred to in para 2. See additionally TGEU’s report, *Stuck on the swing: Experiences of trans parents with freedom of movement in the EU*, 2021.

<sup>48</sup> Pearce, R. and others, *Of trans fathers and male mothers – the importance of centering experience*, 2019, at Trans Pregnancy, a research project of the Univ. of Leeds.

<sup>49</sup> The submitters acknowledge Mr. Aaron Danino and OUTrans for contributing to this section.

<sup>50</sup> See Tanguy, Y., *Filiation et parents trans: le combat des familles pour être reconnues. En décembre 2019, un homme trans a été reconnu ab initio comme le père de l’enfant dont il a accouché. Une première qui devrait bousculer le droit de la filiation*, Huffpost, at huffingtonpost.fr, 1 July 2021.

<sup>51</sup> At first, officials had instead suggested to the couple that the birth parent be documented as ‘mother’. The couple had declared this unacceptable. Next, the suggestion was for the child to be recognized by the gestational parent in a ‘father’ capacity, and adopted by his husband. Facing the couple’s rejection, the official had resorted to the prosecutor’s office to resolve this apparent deadend.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

39. The prosecutors resolved the above case by avoiding the gendered designations ‘mother’ and ‘father’ on the birth certificate, substituting them for an alternative enunciation of the child’s filiation: she was documented as having been “born to [name] and [name], his husband”. The double fatherhood was thusly implied by the parents’ names and the pronoun ‘his. This solution, which did justice to the specific parenthood at hand, was unprecedented and not expressly foreseen by the legislation. Yet it was lawful, as it did not contradict any provision. Indeed, it was said to conform to an official guideline.<sup>54</sup>
40. Accordingly, despite the lack of express provisions on trans parents’ filiation ties, there is legal space for interpretations that accommodate trans experience. However, such case-by-case interpretations are likely to vary, producing disparities and uncertainty, unless appropriately codified, i.e. explicitly tailored to trans parents’ identity requirements, rather than adjusting legal presumptions designed for cis people. Trans-specific legislation would be based on parents’ intention (and LGR), rather than their natal body parts.
41. The prosecutor affirmed that their interpretation responded to the consequences of the judicial LGR decision in the birth parent’s case. Designating the man who received this LGR as a ‘mother’, would have contradicted his LGR decision. This prosecutorial interpretation was subsequently re-applied in another trans parent’s case. The couple in the latter had sought out the relevant locality for the birth in order to benefit from the trans-friendly ‘filiation law’ there.
42. In line with the eugenics argument presented above, a French MP has stated that these legal complications for trans couples indicate an intention to discourage them from becoming parents. “Certain people are forced to choose between living their gender identity and living their parenthood; a perverse system. There is a model to be deconstructed in order to exit the idea that reproduction necessarily implies a man and a woman.”<sup>55</sup>

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<sup>54</sup> Id.

<sup>55</sup> Id.