

Deletion of sex and gender markers under public international law

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Introduction

1° What is “deletion of sex and gender markers” ?

- Markers :
 - Act of birth
 - Identity document
 - (Various forms)
- **Sex and gender markers**
 - Sex markers = biological markers, used in some countries for marriage or access to medically assisted procreation
 - Gender markers = social markers, used for segregated spaces or quota regulation
- Deletion = suppression or optional for all

Introduction

2° Is deletion of sex and gender markers an intersex claim ? **Yes !**



In the future, as with race or religion, sex or gender should not be a category on birth certificates or identification documents for anybody.

Malta Declaration,
1st December 2013

Introduction

3° What is the state of public international law on this question ?

- I. Soft law
- II. Hard Law

I. Deletion of sex and gender marker in soft law

○ Refusing it

ICAO, December 2012

The costs of the removing the requirement to display the holder's gender on travel documents outweigh the benefits at this stage. The costs of the change would be more significant given the adverse affects on the operations of border authorities and the potential inconvenience for passengers.

ICAO, Technical advisory group on machine readable travel documents,
*A Review of the Requirement to Display the holder's Gender
on Travel Documents*, 10-12 déc. 2012

I. Deletion of sex and gender marker in soft law

◉ Admitting it

- Council of Europe, Commissioner for Human Rights, 12 May 2015

*Flexible procedures should be observed in assigning and reassigning sex/gender in official documents while also providing for the **possibility of not choosing a specified male or female gender marker. Member states should consider the proportionality of requiring gender markers in official documents.***

*Human rights and intersex people.
Issue Paper, 12 May 2015*

I. Deletion of sex and gender marker in soft law

◉ Admitting it

- Council of Europe, Parliamentary Assembly, nov. 2017

State should:

7.3.4. consider making the registration of sex on birth certificates and other identity documents optional for everyone;

Resolution 2191 (2017), Promoting the human rights of and eliminating discrimination against intersex people

I. Deletion of sex and gender marker in soft law

◉ Admitting it

- Yogyakarta principles plus 10, 2017, principle 31

States shall:

A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;

II. Deletion of sex and gender marker in hard law

- ◉ No specific hard law on this topic
- ◉ Could hard law be derived from right to privacy, especially art. 8 EConvHR? Yes!
 - Explanation
 - Application

II. Deletion of sex and gender marker in hard law

● Explanation

- Sex and gender markers is an attempt to privacy
- Is this attempt valid?
 - Does it follows one of the legitimate aim of article 8? No for most forms
 - Is compulsory sex/gender marker proportionate to the aim of these markers?
 - Interest of the intersex: 2 problems currently
 - Identification problem
 - Risk of discrimination
 - Interest of non intersex: markers allow them to affirm their identity, but they can do so with *optional* markers added after birth
 - Interest of third parties using ID: markers facilitate proof, but such proof is only needed far after birth, and other proof can be used
 - Interest of register and title managers: low cost obstacles for ID and acts of birth ; high legal obstacle for passport
- Conclusion : no proportionality for sex/gender marker on act of birth and ID's except passport

II. Deletion of sex and gender marker in hard law

○ Application

- ECHR, *Sinan Işık c/ Turquie*, 2nd Feb. 2010, n° 21924/05, §44 et 49 (religious markers)
- Court of appeal of Orléans, 22 mars 2016 (sex markers only for intersex)
- ECHR, *P. vs. Ukraine* ; *D. vs. France* ?