

## 1. WHAT IS THE NATURE OF THE QUESTION?

When addressing private international law issues of intersex, one first has to clarify whether the attribution of a legal gender to a certain person is a legal question and, if so, whether it is a question of substance or procedure.

It is, of course, rather obvious that the legal gender of a person is a question of law and not of mere facts,<sup>1</sup> and therefore the issue of the applicable law arises.<sup>2</sup> The gender of a natural person is different from merely factual personal criteria, for example, the colour of the person's eyes, the birth weight, or the religion of a person – all criteria, which might be registered in some jurisdictions in the civil status registers or identity documents. The fact that many jurisdictions contain provisions on the recognition of the preferred gender identity for transsexual and transgender persons makes clear that the gender of a natural person has to be a legal question. If the gender of a natural person was only a question of facts, there would be no need for a legal gender recognition. Gender is therefore not just a personal matter, at least as long as the law distinguishes between different genders and attaches legal consequences to that distinction, as it still does in many jurisdictions (unlike, for example, regarding the colour of one's eyes).

## 2. A PLEA FOR A SPECIFIC GENDER CONFLICT RULE

The question of the applicable law first arises when in a cross-border case the birth of an intersex person is registered.

What would be the optimal or at least a better solution? The problem of defining jurisdiction and applicable law in cross-border gender cases is not new. A rather similar problem arises regarding the gender identity of foreign transgender or transsexual persons. Here some jurisdictions have introduced specific legislation establishing rules on jurisdiction and applicable law. Belgium, for example, did not restrict the 2007 reform to substantive law but introduced conflict of law rules. The Belgian civil status registrars are competent to receive a declaration of gender reassignment not only from Belgian nationals residing in Belgium or abroad but also from foreigners being registered in the Belgian population register or the alien register as having their principal residence in Belgium (Article 35bis(1) *Code de droit international privé*, Belgian Private International Law Code). Article 35ter of the Code refers to the general conflict rule concerning status and capacity. The law of the state, whose nationality the applicant has, is applicable. If the national law of the applicant does not exclude

the registration of a new gender identity, but has no specific provisions, Belgian law applies to the substantial and procedural requirements. If specific provisions exist, substantial requirements, such as age and consent, are governed by the national law of the applicant, but procedural requirements, such as the medical doctor's attestation, are governed by Belgian law.<sup>21</sup> Provisions of the applicant's national law excluding gender reassignment are not applicable because they are contrary to public policy and Belgian law applies (Article 35ter(2) of the Belgian Private International Law Code).<sup>22</sup> Another example for specific legislation on the international scope of specific gender regimes based on nationality is the German *Transsexuellengesetz* (TSG), Transsexuals Act. This Act requires, in principle, the German nationality of the applicant (§1(1) No. 3 lit. a TSG).<sup>23</sup> However, foreign nationals can also make applications under the Transsexuals Act if the law of their state of origin does not contain provisions comparable to the German Transsexuals Act and if the foreign national has legal status under German immigration law.<sup>24</sup> This means that while German private international law still follows the nationality principle, it allows foreigners a kind of *forum necessitatis* in Germany. German law applies only where the applicant's state of origin does not permit him or her to obtain gender recognition and in cases where the applicant is strongly connected with Germany. This *forum necessitatis*, like many other important developments in the area of gender recognition in Germany, was not introduced by the German legislator, but rather by the Constitutional Court. In a 2006 decision the Court held that the equality principle, enshrined in Article 3(1) *Grundgesetz* (GG), German Constitution, would be violated if Germany refused to recognise the preferred gender of foreigners whose national law does not provide for the recognition of the preferred gender.<sup>25</sup>

The legislation on transgender persons should not necessarily be a starting point for a specific gender status for intersex persons. But with specific legislation for transgender persons the legislator has expressed its view that gender and sex should not automatically fall under the category 'status and capacity' but merits a specific conflict rule. This specific rule should apply to all matters of gender without any distinction between transgender and intersex persons. Another source of inspiration can be found in a proposal of the German Institute for Human Rights.<sup>27</sup> The proposal sees gender as a specific category distinct from status and capacity and applies nationality as the connecting factor. Private autonomy is underlined by allowing a *professio iuris*. A foreign national with habitual residence in Germany or a minor having a parent with habitual residence in Germany according to the proposal could opt for German law.

#### 4. THE RECOGNITION OF A SPECIAL GENDER STATUS FOR INTERSEX PERSONS ACQUIRED ABROAD

Private international law is not only relevant when the legal gender of a person is registered for the first time and a specific gender status is acquired. Also later in life the legal gender of a person can be relevant and the question of private international law then will have to be answered. Problems will arise, in particular, if an intersex person was registered in the birth registry with a specific intersex gender status and the gender of that person becomes relevant in another jurisdiction which does not provide for a comparable status.

A general conflict rule – for example, using nationality as a connecting factor – would not be a convincing solution. As already seen, there can be cases where,

upon birth of that person, an intersex gender status is acquired although the intersex person is not a national of that country. The only practicable solution is the introduction of a duty to recognise the foreign gender status once registered in a foreign birth register. This approach was recently adopted by Maltese law, the only jurisdiction which, so far, specifically deals with the recognition of a special gender status acquired abroad. Article 9(2) of the Maltese Gender Identity, Gender Expression and Sex Characteristics Act 2015 provides that a special gender status 'other than male or female' will be recognised in Malta if 'recognised by a competent foreign court or responsible authority acting in accordance with the law of that country'.

Such a recognition approach would, of course, be another step in the direction of a general recognition principle, which is controversial in some jurisdictions. However, at least within the European Union such a duty to recognise could be established on the basis of the fundamental freedoms. An example can be found in the law of names. In the *Grunkin and Paul* decision, the Court of Justice of the European Union (ECJ) has held that a name registered in a Member State where the bearer has habitual residence has to be recognised in all other Member States.<sup>33</sup> Otherwise the freedom of movement and residence, enshrined in Article 21 of the Treaty on the Functioning of the European Union would be violated. The legal gender of a person must have the same relevance as the name of that person. It therefore is not inconceivable (and indeed to be expected) that the ECJ would establish a duty to recognise a specific gender status for an intersex person granted by another Member State.<sup>34</sup>

The recognition principle could even be clothed in a conflict rule, which provides that the legal gender of a person registered by a competent authority is governed by the law of the state of registration. Similar conflict rules can also be found in other areas of family law, for example, as to registered partnerships. Here, the new European Property Regulation for registered partners<sup>35</sup> follows the register principle: Article 26(1) of that Regulation subjects the property consequences to 'the law of the State under whose law the registered partnership was created'.

The recognition principles are universally limited by a public policy exception. This exception has, of course, to be applied restrictively. A specific gender status for intersex persons will probably not be regarded as a violation of

public policy, at least in most European jurisdictions,<sup>36</sup> especially if one keeps in mind the human rights dimension.<sup>37</sup>

## 5. CONCLUSION

This short contribution proposes a twofold approach. First, the acquisition of an intersex legal gender status should be subject to the same conflict rules which govern the recognition of the preferred gender for transsexual or transgender persons. Transferring the basic idea of those conflict rules to intersex leads to the applicability of the law of nationality. However, domestic law should be applicable if a specific gender status for intersex persons is not available in the state of origin. Second, the recognition of an intersex gender status acquired abroad should be governed by the law of the state in which this status was first registered.

While it may seem rather premature to discuss intricate questions of private international law before introducing special substantive provisions for intersex persons, experience shows that quickly after a new regime is introduced, cross-border cases will arise within the area of personal status. The legislator should therefore always keep the private international law dimension in mind.