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Rule 9 (1) and Rule 9 (2) submission to the Committee of Ministers of the Council of Europe concerning the implementation A. D and others v. Georgia (App. nos. 57864/17, 79087/17 and 55353/19)

By

The European Human Rights Advocacy Centre (EHRAC), the Women's Initiatives Support Group (WISG) and the Georgian Young Lawyers' Association (GYLA)

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1. Introduction

1. This Submission is communicated by the European Human Rights Advocacy Centre (EHRAC), the Women's Initiatives Support Group (WISG) and the Georgian Young Lawyers' Association (GYLA) as the non-governmental organisations under Rule 9 (2) of the Rules of the Committee of Ministers (CM) for the supervision of the execution of judgments of *A. D and others v. Georgia* (Application nos. 57864/17, 79087/17 and 55353/19).
2. The Women's Initiatives Supporting Group (WISG)¹ advocates for women's equal societal roles, emphasizing the challenges in patriarchal contexts and pioneers the empowerment of lesbian, bisexual, and trans* individuals in Georgia. As a trailblazer in research and policy analyses on sexual orientation and gender identity, they've established themselves as a leading authority on LGBTI issues, both locally and internationally. Their mission revolves around promoting feminist ideals, fostering women's activism, and curating environments where bias is recognized and tackled, fostering transformative cultural, social, and legal shifts.
3. The European Human Rights Advocacy Centre (EHRAC) is an independent human rights centre that uses international legal mechanisms to challenge serious human rights abuses in Russia, Georgia, Azerbaijan, Armenia, and Ukraine, in partnership with committed local lawyers and NGOs. EHRAC aims to secure justice for victims of human rights violations and their families, and to bring about lasting systemic change in the region².
4. The Georgian Young Lawyers' Association (GYLA) is a prominent legal advocacy group in Georgia. Committed to upholding human rights, they provide free legal consultations, represent individuals in courts/administrative bodies, and actively engage with the Constitutional Court of Georgia and the European Court of Human Rights. GYLA aids in establishing legislative safeguards for human rights and raises public legal awareness through community outreach. Operating multiple offices nationwide, they offer educational opportunities for aspiring lawyers and oversee various monitoring projects, including those related to criminal justice, property rights, and media initiatives. Their diligent work has garnered notable acclaim both locally and internationally³.
5. The case of *A. D and others v. Georgia* (Application nos. 57864/17, 79087/17 and 55353/19, Judgment of 01 December 2022, final on 01 March 2023) concerned a violation of the applicants' right to respect for private life on account of the State's failure to provide quick, transparent and accessible procedures for legal gender recognition.
6. The case concerns three transgender men who applied to the Civil Status Agency ("the agency") to change their sex/gender marker in their civil-status records from female to male. Their requests were denied based on their failure to demonstrate that they had undergone medical sex reassignment procedures, as mandated by section 78(g)

¹ Details available here: <https://wisg.org/en/about>

² Details available here: ehrac.org.uk

³ Details available here: <http://217.147.239.51/en/page/history>

of the Civil Status Act 2011 for altering public records. The applicants' appeals against this decision were unsuccessful.

7. The European Court of Human Rights reaffirmed that issues regarding the legal recognition of transgender individuals' gender identity, particularly the conditions under which sex/gender markers could be changed, are encompassed within the right to respect for private life under Article 8. The Court identified a lack of clarity in Georgian law concerning the precise procedures for legal gender recognition, with the legislation in particular not delineating the exact medical requirements. Given the inconsistencies in interpreting the domestic law by Georgian courts and the imprecision of the current legislation, the Court ruled that the existing situation undermined the accessibility of legal gender recognition and granted excessive discretionary powers to authorities, potentially leading to arbitrary decisions. Such circumstances were in contradiction with the State's obligation to ensure efficient, transparent, and accessible processes for legal gender recognition, resulting in a unanimous finding of a violation. In its judgment, the Court found that the inability of three transgender men to acquire legal recognition of the gender they identify with by the Georgian authorities, unless they undergo medical procedures that physically alter their gender identity such as gender-affirming surgery, breached the applicants' rights under Article 8 of the Convention.
8. This Submission complements previous Rule 9.1 submission of 10 April 2023 (the 2023 CSO submission)⁴.

2. Execution of Individual Measures

9. The applicants have duly noted receipt of the compensation as set out in the government's action plan⁵.
10. On 6 July 2023, the first Applicant A. D. approached the LEPL Public Service Development Agency to change his gender marker. On 26 September 2023, this was refused. №001223106346 Tbilisi Bureau of the Agency indicated the applicant's failure to produce a certificate which would affirmatively state that "with anatomical structure, he is male" as the basis for declining his request. The applicant appealed the decision to the LEPL Public Service Development Agency, however, he has not yet received a decision.
11. The second applicant A.K., currently residing in Belgium, has successfully obtained the legal recognition of his gender identity within Belgium.

⁴ DH-DD(2023)475

⁵ DH-DD(2023)1042

12. The third applicant, Nikolo Ghviniashvili, refrained from making further applications to the LEPL Public Service Development Agency for legal gender recognition. His reasons were LEPL's previous failures and its refusal to take the necessary measures to comply with international standards, despite several requests for it to do so, and that he had lost confidence in the possibility of achieving a positive outcome.

3. Execution of General Measures

3.1 Implementation of a mechanism for legal gender recognition

Responding to Government's action plan

13. In the Government's Action Plan, they have noted their ongoing efforts to examine the legislation and best practices of other State Parties in relation to legal gender recognition and are actively analyzing the Court's case law where comparable violations have been identified (para. 3). We acknowledge and appreciate the Government's willingness to engage and seek collaborative avenues with the Department for the Execution of Judgments of the European Court of Human Rights. However, while these preliminary steps are encouraging, we believe there's an urgent need for expedited action. To date, we have yet to receive information detailing any concrete measures or steps the Government has undertaken to implement the judgment.
14. It is noteworthy that, aside from these engagements, no substantive actions have been proposed by the Government to implement the decision. Therefore, we strongly recommend that the CM offer precise and detailed guidance to the authorities on the necessary steps for implementation.
15. Despite the judgment of the ECtHR in *AD and Others*, there has been no legislative amendments, and the situation for trans persons attempting to amend their gender markers remains unchanged. Due to the lack of clarity in the legislation, trans persons continue to face arbitrary decisions rejecting their applications to amend their gender markers. They are also subject to an ad-hoc requirement to undergo genital plastic surgery, in violation of Article 8 of the Convention.
16. In one of the landmark cases of *A.P., Garçon and Nicot v. France* (nos. 79885/12, 52471/13, and 52596/13, 6 April 2017) the European Court of Human Rights held that requiring sterilisation or medical treatment as a prerequisite for legal gender recognition is in direct violation of Article 8 of the European Convention on Human Rights. In the case of *X v. the Former Yugoslav Republic of Macedonia* (Application no. 29683/16, 17.01.2019), the Court found that "the circumstances of the case reveal legislative gaps and serious deficiencies that leave the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his identity"⁶.

⁶ Case of *X v. the Former Yugoslav Republic of Macedonia* (Application no. 29683/16, 17.01.2019), para. 70.

17. In accordance with the prevailing case law of the European Court of Human Rights and mirroring the practices adopted by a significant number of member States, we draw attention to the Council of Europe's 2022 recommendation on legal gender recognition (LGR). It is explicitly recommended that any provisions demanding sterilisation or any obligatory medical interventions as prerequisites for LGR be promptly repealed. The process of legal gender recognition ought to be distinctly separated from any medical procedures related to sex or gender that an individual might opt for, rooted in a foundation of informed consent. Accessibility to such medical care should be unfettered by considerations of one's medical condition, age, or migratory status⁷.

Current examples of attempts to achieve gender recognition

18. WISG is representing four trans individuals who are seeking to amend their gender marker before the LEPL Public Service Development. All of them have successfully managed to alter their name in official records. Alongside this change, they have provided the agency with comprehensive medical documentation. These documents attest to their diagnosis of "transsexualism" and detail the series of medical treatments they have undertaken. Such treatments encompass hormone therapy and a variety of surgical procedures. However, none of these individuals have had genital plastic surgery, which is commonly referred to as gender-affirming surgery. This demonstrates that the situation for persons in the same position as the applicants in *A.D. and Others* remains unchanged. Below is the status of the requests in each of the cases:

- On 15 September 2023, Mr. G. T., a transgender man, sought to amend his gender marker with the LEPL Public Service Development Agency Tbilisi Bureau. Regrettably, his request was denied based on the Bureau's stipulation that Mr. G. T. did not provide medical documentation verifying his gender transition and anatomical alterations;
- Ms. A.K., a transgender woman, approached the LEPL Public Service Development Agency Tbilisi Bureau to amend her gender marker. Her application was refused on the basis that she did not present "a certificate of biological (anatomical) gender change, issued by a medical institution," deemed essential for such adjustments. After she made her appeal to the LEPL Public Service Development Agency, the final decision to deny her claim was made on 29 September 2023;
- Mr. D.D., a transgender man, endeavored to modify his gender marker with the LEPL Public Service Development Agency Tbilisi Bureau. The Bureau, upon review, ascertained that the current gender recorded on his birth certificate was accurate and found no indications of administrative mistakes. Notably, the evidence Mr. D.D. provided did not affirm his gender transition, particularly as he lacked a "certificate of biological (anatomical) gender change" from a recognized medical

⁷ THEMATIC REPORT ON LEGAL GENDER RECOGNITION IN EUROPE - First thematic implementation review report on Recommendation CM/Rec(2010)5 Council of Europe, 2022, 40.

establishment, a requisite for such changes. Consequently, his application was definitively declined on 11 October 2023;

- Ms. N.G., a transgender woman, submitted the application for legal gender recognition to the LEPL Public Service Development Agency Tbilisi Bureau on 11.07.2023, but she is still awaiting a response.

Only successful example of gender recognition requires surgery, violating Article 8

19. WISG's experiences suggest that in Georgia, legal gender recognition is available to trans individuals who have completed gender-affirming surgery. A significant development occurred on 25 March 2021, when the Tbilisi Civil Registry Service of the LEPL Public Service Development Agency, part of the Ministry of Justice, approved a trans woman's request to alter her gender marker from "male" to "female." This decision was supported by a medical certificate issued on 25 December 2020, confirming her gender reassignment surgery⁸. Subsequently, a revised birth certificate displaying the accurate information was produced. This incident is a landmark as the first instance of the state sanctioning a legal gender alteration for a trans individual, indicating a budding practice in Georgia, notwithstanding the lack of a formal legislative or administrative framework. It is crucial to note, echoing previous remarks, that this emergent prerequisite of genital surgery both lacks legal merit and is incongruent with Article 8 of the Convention. We argue that while it is laudable to witness a successful instance of legal gender recognition, the stipulation of surgery constitutes a retrogressive measure in this evolution.

Assessment of Progress in Georgia

20. According to the Constitutional Court of Georgia, "free development of personality, first of all, implies the right of a person to self-determination and autonomy. It is the personality that determines the essence of a person and indicates his/her individual and distinguishing characteristics"⁹. Gender identity is a crucial component of the free development of a personality, for it is a fundamental guarantee that ensures exercising an individual's other rights, and it protects the freedom to lead one's own life at one's discretion. The Constitutional Court of Georgia explains that "for the autonomy of the person, her/his free and full development, it is specifically important the freedom to define one's own relationships with the outside world, as well as to define physical and social identity"¹⁰. A trans person has the right to free development, which implies his/her right "to freedom to self-determination, the right to define one's own identity, lifestyle and ways of life, individual development and ways and forms of relationships with others, means to satisfy moral, social, intellectual or other needs; farther, it comprises a person's intimate life, the right to

⁸ Available here: <https://wisg.org/en/news/detail/324>

⁹ Judgment N2/1/536, II-54, of The Constitutional Court of Georgia on the case of "Citizens of Georgia – Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka BuchaSvili and Gocha Gabodze v. Ministry of Health, Labour and Social Affairs of Georgia", February 4, 2014.

¹⁰ Judgment N2/4/532,533, II-3, of the Constitutional Court of Georgia on the case of "Citizens of Georgia – Irakli Qemoklidze and Davit Kharadze v. the Parliament of Georgia", October 8, 2014.

determine one's own gender and sexual orientation, and the freedom to choose one's sexual behavior"¹¹.

21. A notable advancement was the judgment of the Supreme Court of Georgia on 30 January 2023, under case No. A-4985-SH-135-2022. The Court deliberated on the acknowledgment and enforcement of a foreign court's decision regarding the legal gender recognition of a Georgian citizen. The court highlighted that "the absence of explicit criteria in the Law of Georgia 'On Civil Acts' and other legislative enactments about the specific conditions a person must fulfill to change their gender does not justify the rejection of a foreign country's decision. This legislative ambiguity was addressed by the European Court of Human Rights in the case *A.D. and others v. Georgia*. Based on the case's outcome, the Georgian Court indeed acknowledged the foreign gender recognition, marking a significant judgement in the advancement of legal frameworks for gender recognition¹².
22. The European Court of Human Rights (ECtHR) and the Council of Europe (COE) have consistently emphasized the necessity for member states to provide a clear, transparent, and accessible legal framework for gender recognition. The Court's jurisprudence, as evidenced in several judgments, asserts that the legal recognition of gender identity is intrinsic to the right to respect for private life under Article 8 of the Convention. Furthermore, the COE's Recommendation CM/Rec(2010)5 explicitly mandates member states to ensure the full legal recognition of a person's gender identity in all areas of life, particularly emphasizing the need for changing first names and gender markers in official documents in a prompt and transparent manner.
23. Despite the clear directives and principles outlined in the European Court of Human Rights (ECHR) judgment, there has been a conspicuous absence of progress in implementing the necessary changes within our legal framework. Specifically, the ECHR has pointed out the critical gaps in "the terms and conditions to be fulfilled and, if so required, the medical procedures to be followed for legal gender recognition in civil records to take place" (para 74) under Article 78(g) of the Civil Status Act of 20 December 2011. The continued denial of the right to amend the gender marker perpetuates the systemic marginalization of trans individuals, leaving them in a distressing. This inaction results in authorities having excessive discretion, leading to arbitrary decisions (para 76).
24. The Public Defender of Georgia highlighted in their report that "without legal gender recognition, transgender people face discrimination in all spheres of life, including

¹¹ Judgment N2/1/536, II-56, of The Constitutional Court of Georgia on the case of "Citizens of Georgia – Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka BuchaSvili and Gocha Gabodze v. Ministry of Health, Labour and Social Affairs of Georgia", February 4, 2014.

¹² Judgment of the Supreme Court of Georgia of January 30, 2023 of case No. A-4985-SH-135-2022, para. 14.

employment, housing policy, and social protection, resulting in social exclusion and violence, as well as restrictions on their freedom of movement”¹³.

25. The misalignment between an individual's legal sex records and their affirmed gender identity gives rise to numerous challenges in the daily life of trans individuals. It forces an involuntary revelation of their trans identity—a phenomenon akin to an imposed "compulsory coming out." In an environment where both homophobia and transphobia are deeply entrenched, the anxiety surrounding such involuntary disclosures can further ostracise trans persons, obstructing their ability to fully integrate and participate in public life. It is not merely an issue of personal identity but extends to the fundamental exercise of civil, political, social, and economic rights. Based on a study undertaken by the Social Justice Center, half of the participants expressed that for legal gender recognition to be genuinely effective, respectful of individual dignity, and aligned with human necessities, it should hinge upon a person's self-determination.¹⁴

Context of anti-gender and anti-trans rhetoric

26. Legal gender recognition in Georgia remains deeply politicized, often leveraged by various political and religious groups, sidelining its essence as a fundamental human rights issue. The discourse rarely addresses the genuine rights and concerns of transgender individuals, frequently delving into divisive rhetoric. There has been a notable absence of a shift towards meaningful discussions concerning the legal rights of the transgender community in the country. NGOs advocate for comprehensive reforms in the gender recognition legal framework, centering on the actual needs and rights of the community to redirect the current contentious debates. Such reforms should encompass a move towards more inclusive language by the Government, underscoring the importance of respect and dignity for transgender individuals.

27. The Government has yet to demonstrate a genuine commitment to addressing the human rights challenges faced by trans individuals in Georgia. Throughout 2023, an intensification of anti-gender rhetoric was observed, driven by governmental figures and influential religious entities. While legal advancements may be on the horizon, they risk being undermined by the pervasive and aggressive anti-trans discourse prevalent in the nation.

28. In 2023, an official representative of the Georgian Government attended the annual Conservative Political Action Conference in Hungary. Statements made emphasized a perception of external threats to national values, cautioning against forces believed to undermine traditional norms through the promotion of "coercive false freedoms" and "LGBTQ+ narratives". A specific area of concern highlighted was the encouragement of "gender-affirming procedures for minors". The narrative

¹³ Jalaghania L. "The Rights of LGBT+ People in Georgia", the Public Defender of Georgia, 2021, 18. Available at: <https://www.ombudsman.ge/res/docs/2022051115380032325.pdf>

¹⁴ Jalaghania, L., Social Exclusion of LGBTQ Group in Georgia, p. 172, , available at: t.ly/Qkmo.

emphasized a staunch commitment to "traditional, Christian, conservative family values", and the importance of upholding a conventional definition of marriage, stressing the distinction of roles within such a union¹⁵. On June 29, 2023, members of the Georgian Parliament from the opposition proposed a legislative package with the intent of removing references to "gender" from pivotal legislations, notably the "Law on Gender Equality" and the "Law on Elimination of All Forms of Discrimination"¹⁶. On 17th May 2023, the leader of the Georgian Orthodox Church remarked, "Recently, there's been a surge in promoting measures like child gender procedures. Proponents, often advocating for human rights, overlook or dismiss the basic right of an individual to be born and exist in this nation"¹⁷.

29. In stark contrast to the perspectives of political and religious factions, civil society organizations uniformly emphasize the need to address legal gender recognition. On 31 July 2023, various non-governmental organizations communicated their viewpoints to the Georgian Government about crucial matters proposed for inclusion in the Human Rights Action Plan. Foremost among these concerns was the establishment of a swift, transparent, and accessible system for legal gender recognition¹⁸.

30. We urge the Government to include both Georgian and international civil society experts, like WISG (and other relevant organizations such as GYLA), in its review process as they are well-placed to provide input based on their experience working with and understanding the needs of the Georgian trans community. This inclusion is crucial, considering the Government's expressed willingness to explore cooperation avenues (para 5) and its consultation with the DEJ (para 4).

3.2 Access to trans-specific healthcare and its relation to legal gender recognition

31. The Court in *A.D. and Others v Georgia* noted the lack of clarity and domestic consensus on the medical procedures required to allow gender recognition to take place. This observation underscores a broader issue in Georgia: there is an absence of a national standard catered to trans-specific medical services. This void extends to both the clinical practice recommendations (or guidelines) tailored for trans-specific medical care and the state standards for managing clinical conditions (protocols)¹⁹. The lack of a national standard has also been identified as a concern by the Public Defender of Georgia.

¹⁵ Available here: <https://www.gov.ge/en/news/357446?page=&year=>

¹⁶ Available in Georgian: <https://info.parliament.ge/#law-drafting/26770>

¹⁷ Available in Georgian: <https://mtavari.tv/news/123391-mtkitsdeba-normebi-romlebits-akhalisebs>

¹⁸ Available in Georgian: <https://wisg.org/ka/news/detail/392>

¹⁹ Bakhtadze K. "Trans-specific Healthcare Services - Policy Paper", WISG, 2022, 14. Available in Georgian: <https://wisg.org/Data/docs/publications/policy-paper/WISG-TAtH-in-Georgia-2022-GE.pdf>

32. In response, a broad recommendation by the Public Defender of Georgia was put forth, primarily targeting those displaced from Georgia's occupied territories and directed to the Ministry of Labour, Health and Social Protection. This recommendation emphasizes the need to develop guidelines and protocols that would encompass both medical and ethical dimensions of trans-specific healthcare, along with addressing the psychological and social factors to assist individuals during the periods before and after their transitions²⁰. These protocols should address the medical and ethical dimensions of trans-specific healthcare comprehensively, considering the psychological and social factors crucial for supporting individuals through their transition periods.

33. Implementing these initiatives is vital for the proper enactment of the decision of the ECtHR in *A.D. and Others v. Georgia*. Without a robust framework for the healthcare treatment of trans persons, establishing a non-arbitrary system for gender recognition becomes unfeasible, especially if the recognition process necessitates specific medical procedures (i.e., defining the medical steps, if any, a person must undertake to align with the domestic framework for gender recognition).

4. Recommendations

To adequately address both individual and general measures under the case of *A.D. and others v. Georgia*, WISG, EHRAC and GYLA, submit the following recommendations:

Recommendations concerning Individual Measures:

- I. Provide immediate clarity to the LEPL Public Service Development Agency, clarifying that gender surgery is not a prerequisite for gender recognition, as per Article 78(g) of the Civil Status Act of 20 December 2011, and amend the gender marker of the first Applicant A. D accordingly.***

Recommendations concerning General Measures:

- I. Express serious concern about the failure to execute the judgment promptly, fully and effectively;***
- II. Urge the government to initiate a gender recognition law aligned with Council of Europe standards, emphasizing speed, transparency, accessibility, and self-determination. This plan should also include a roadmap specifying how they intend to address and overcome the highlighted human rights challenges, along with a set deadline for its realization; This action plan should be developed and implemented within and alongside a broader framework that also enhances policies and***

²⁰ General Proposal of the Public Defender of Georgia of May 13, 2020, N08/4904.

practices related to the healthcare and psychosocial needs of trans persons;

- III.** *Ensure that the new legal gender recognition procedure is based on self-determination devoid of any medical pre-requisites such as medical checks, age limits, gender-affirming surgery, hormonal treatment or binary gender restrictions, and eliminate notary-related barriers;*
- IV.** *Encourage the government to ensure that LGBTI community organizations and CSOs are included in every phase related to the development or effective implementation of any law or administrative procedure.*

On behalf of the applicants and signatory organisations,

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