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***INTERSEX RIGHTS IN THE WESTERN BALKANS AND GREECE\*\*\****

*In 2022 Greece became the fifth country in the world to ban harmful interventions and treatments on intersex infants and children. Previously, Malta, Portugal, Germany and Iceland also legally banned harmful interventions on intersex persons. A crucial difference between Greece and the rest of the aforementioned countries is that it is a Christian Orthodox country located in Southeastern Europe, on the Balkan Peninsula. Drawing from a contextual approach to law, in this comparative analysis the authors will use „contextuality“ to explore the meaning behind legal developments that took place in Greece regarding intersex rights and how they could potentially impact the overall situation of intersex rights in the Balkans. In addition, with this paper the authors seek to relocate the dominant focus of intersex rights from Western and Northern Europe with the aim to boost awareness of intersex issues in the Western Balkan region, especially Serbia.*

**Key words:** *Greece. – Intersex rights. – Human rights. – Sex characteristics. – Western Balkans.*

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\*\*\* This paper was presented at the International Interdisciplinary and Transdisciplinary Conference „The Universal Declaration of Human Rights at 75: Rethinking and Constructing its Future Together“, which took place from 6 to 8 December 2023 in Ghent.

## 1. INTRODUCTION

When we talk about „our body“, it is quite natural for us to think and conclude that we can make independent decisions about „our body“ and parts of „our body“. It represents an utterly intuitive feeling about owning one's own body. However, is that really so? Do we always have the opportunity to independently decide what happens to our body? Unfortunately – no, and that is exactly where the story of intersex begins (see Dreger, 2000; Carpenter, 2018a; Monro *et al.* 2021).

Intersex is an umbrella term used to describe a wide range of natural bodily variations (see UN Free & Equal). The United Nations (UN) defines intersex persons as „people who are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.“ It means that a child may be born „with a large clitoris and a shallow or absent vagina, with a micropenis and an opening in the scrotum that may resemble a vagina, with typical male or female external genitalia and atypical internal sex organs (such as retained testes in a person with typical female genitalia), with XY chromosomes and a typical female body, or with other characteristics that differ from the anatomical and hormonal features that doctors, nurses, and parents have been trained to expect.“ (Tamar-Mattis 2013, 64). In addition to the typical XX and XY chromosome pairs, it is possible for a child to be born with several chromosomal patterns, and this can also result in a number of internal, external, and secondary sex characteristics. Also, it can happen that certain atypical sex characteristics are discovered only at puberty, for example, when a girl enters puberty and menstruation does not occur. There is therefore an entire spectrum of biological, genetic, chromosomal, anatomical and hormonal features with which a child can be born (see also Council of Europe 2015; Carpenter 2018b; Liao 2022).

The hiding, shame and fear of having a child who is „different“ from the majority has created the circumstances where doctors perform harmful interventions and/or treatments with irreversible effects for the person, just so that they would conform to the female/male binary. Such interventions are most often performed immediately after birth or during early childhood, and are based on societal and medical notions according to which a person's external genitals do not look „normal“ enough to pass as „male“ or „female“ (Ghattas 2019, 10; see also Creighton 2001; Behrens 2020). It should be noted that harmful interventions and treatments cause both psychological and physical trauma to an intersex person. Many of those who underwent surgery have claimed that these operations led to a reduction or complete loss of sexual drive, numerous infections, and scars. Finally, the dominant

medical approach, based on secrecy and concealment of information, causes great psychological trauma, both for the intersex person personally and for their family members because it leads to a sense of shame, reinforcing the presence of a culture of sexual „abnormalities“, and represents a violation of the autonomy of personality (see Crouch *et al.* 2004; Monro *et al.* 2017; Ghattas 2019).

With regards to human rights violations that intersex persons face in other spheres of life, in 2024, the European Union Agency for Fundamental Rights (FRA) published the third edition of its survey on LGBTIQ people, providing up-to-date information on intersex people in the 27 EU Member States and EU candidate countries Albania, North Macedonia, and Serbia. The survey showed that intersex people face alarmingly increasing levels of violence in their everyday life. Data on the performance of medical interventions and treatments showed that more than half of the intersex respondents who were subjected to surgery (57%) did not provide their own or their parents' informed consent prior to their first surgical treatment to modify their sex characteristics, 61% of intersex respondents reported having experienced discrimination because of being LGBTIQ in at least one area of life in the year prior to the survey, and 74% of intersex respondents said that they experienced hate-motivated harassment in daily life in the 12 months prior to the survey (FRA 2024).

The Council of Europe (CoE), which all the analyzed countries belong to, has repeatedly called member states to prohibit harmful medical practices, to facilitate the recognition of intersex individuals before the law through several measures, including legal gender recognition and introducing „sex characteristics“ as a specific ground in equal treatment and hate crime legislation, „or, at least, the ground of sex/gender should be authoritatively interpreted to include sex characteristics as prohibited grounds of discrimination“ (Agius 2017; Parliamentary Assembly of the Council of Europe 2017). Similarly, in its latest resolution, the UN Human Rights Council called on member States to enhance efforts to combat discrimination, violence and harmful practices against intersex people and to work toward fulfilling the enjoyment of the highest attainable standard of physical and mental health for intersex people (A/HRC/55/L.9). These interventions had previously been labelled as „torture“ by the United Nations Special Rapporteur on Torture (Méndez 2013, 19). At the EU level, the latest Resolution adopted by the EU Parliament has condemned „sex-normalizing treatments and surgery“ and welcomed laws that prohibit such interventions while encouraging other member states to introduce similar frameworks. A EP resolution also calls for the full depathologization of intersex: „the category of 'gender incongruence' in childhood pathologises non-gender-

normative behaviours in childhood; calls, therefore, on the Member States to pursue the removal of this category from the ICD-11, and to bring future ICD revision into line with their national health systems“ (EP, 2018/2878(RSP)).

In this paper, the authors will use legal developments regarding intersex issues in Greece as a key starting point for a broader and human rights-based discussion regarding the current situation of intersex people in Western Balkan countries and examine whether such developments could directly impact intersex legislation of the countries of the Western Balkans. Following a contextual approach, legal texts and actions will be explored with particular attention given to the broader context (Forest 2000), which can be social, historical, geographic, or religious (Selznick 2003; Barnes 2018). Therefore, the authors use the case of Greece, which, although a member of the European Union (EU), shares numerous historical, social and cultural circumstances with Western Balkan countries, in addition to the geographical connection and religion with some of them. The close relationship that Greece has with Western Balkan countries is clearly depicted in its external relations as the Ministry of Foreign Affairs states: „Greece, as a member of the European Union (1981), NATO (1952) and other European and regional institutions and fora, seeks to consolidate stability and security and the development of the Western Balkans region, in accordance with the principle of good neighborly relations and respect for international law. To this end, it firmly and actively supports the European perspective of the Western Balkans as a strategic objective“ (Ministry of Foreign Affairs of Greece 2024, translated by author).

With this in mind, starting from Greece and the legal developments that took place in this country regarding intersex, this paper provides readers an insight into the anti-discrimination legislation of the Western Balkans countries, showing that the grounds of „sex characteristics“ have only recently become the basis for the prohibition of discrimination, allowing intersex people to become legally recognized in these legislations. At the same time, the authors point out that the problems faced by intersex people and their families in Western Balkans (such as absence of the prohibition of harmful interventions and treatments of intersex infants and children, absence of standardized and transparent procedures for dealing with intersex children, as well as potential problems related to registration of sex/gender of intersex children in the birth certificate) are not only legally unregulated in the Western Balkans countries, but they are not even recognized by the competent institutions as issues that need to be addressed.

Lastly, since the majority of sources on intersex issues and the law in Europe until now reflects the situation of intersex people only in Western and Northern European countries (see e.g., Monro *et al.* 2021), authors see

this shift of perspective – from the countries of Western and Northern Europe to the countries of the Western Balkans – as essential for creating awareness regarding the situation of intersex people in the region and contributing to the protection of human rights and the promotion of just societies.

## **2. SETTING THE SCENE: CRISES AND THEIR IMPACT IN HEALTHCARE**

### **2.1. Greece**

Greece, just like the countries of the Western Balkans, has had turbulent historical periods. Since its liberation from the Ottoman Empire, the Greek state has declared bankruptcy multiple times and all bankruptcies have been directly or indirectly linked to important political developments that have marked political and social life (Totsikas 2015).<sup>1</sup> In 2014, the Center of Research for Equality Issues (Κέντρο Ερευνών για Θέματα Ισότητας) published a study on gender and how high levels of poverty caused by the financial crises, as well as high unemployment rates, have negatively impacted gender issues, since only matters linked with the state's economy were heavily prioritized.

With regards to healthcare in particular, based on the findings of a study conducted by Dianeosis, the budget allocated to healthcare for the period 2010–2014 was decreased by around 60% (Georgakopoulos 2016). This has severely impacted the quality of medical care services, especially for the unemployed and pensioners, and access to medicine has become problematic, which has led to an increase in private health care expenditure, financially burdening all income groups (Georgakopoulos 2016). According to Souliotis *et al.* (2018, 689–94), the problematic financial, organizational and operational framework of the healthcare system in the country existed already before the 2009 financial crisis, with citizens ensuring access to services by paying the relevant costs themselves, but the crisis led to the adoption of necessary measures that should have been taken when the economic environment could have supported such measures. In such

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<sup>1</sup> The first official Greek bankruptcy was in 1827, and three more followed in 1843, 1893, and 1932. Greece is an Orthodox Christian state as mentioned in the Constitution, which is „in the name of the Holy and Consubstantial and Indivisible Trinity.“ The most recent financial crisis was in 2009 where the country did not go bankrupt, but it had to commit itself to a policy that, by definition, resulted in the lowering of the standard of living of a large portion of the population (see Karalis 2016, 9).

circumstances, the protection of patients' rights and especially the rights of intersex people in healthcare institutions are not only neglected, but also seriously violated.

Available research on LGBTQ+ persons' experiences of the healthcare system was published in 2017 (Giannou 2017) and collected data from LGBT people and health workers showed that homophobia and transphobia are key factors contributing to systematic exclusion and limiting access to health services (see also FAROS 2014–2020). This information, coupled with findings published by the Council of Europe (CoE), the European Commission of Racism and Intolerance (ECRI), and the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), shows that the situation for intersex people does not differ from the experiences of LGBT people. Specifically, in 2022, the ECRI stated in its report on Greece that „as regards in particular intersex persons, notably children, they may face serious forms of discrimination and intolerance, including from medical professionals who reportedly often recommend abortion of intersex children to expecting parents, while medically unnecessary surgery on intersex children is also common“ (ECRI 2022, 5). In its submission to the GREVIO, the Intersex Greece organization reported incidents of hate speech and violence against intersex people that took place in both public and private medical settings and highlighted the need for the introduction of reporting mechanisms at hospitals for intersex women and girls who are victims of violence (Intersex Greece 2022, 6). After the submission of the report, the GREVIO published its Baseline Evaluation Report for Greece and stated that „specialist support services are not able to meet the needs of LBTI women, in particular intersex women victims of violence, who are often referred to specialist NGOs by the network of services,“ including intersex women for the first time (Grevio 2023, 37 para. 137).

## 2.2. Western Balkans

The situation in the Western Balkan countries (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia, and Kosovo\*<sup>2</sup>) has developed in a slightly different way. To grasp the context in these countries, one must take into consideration the political circumstances that have significantly shaped the social and economic development of the Western

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<sup>2</sup> In this article we will use the official designation Kosovo\*. This designation is without prejudice to positions on status, and is in line with UNSCR 1244 (1999) and the ICJ Opinion on the Kosovo declaration of independence.

Balkan countries, including the attitude towards respect for fundamental human rights of minorities. It is worth noting that most of the Western Balkan countries had to struggle simultaneously with various processes of radical transformations after the fall of the Berlin Wall (from the late 1980s), including: political transformation (transition from communism to democracy), economic transformation (transition from a planned to a market economy), and in some cases, transformation of the state (establishment of new national states in cases of disintegration, secession of states or disappearance of a state, as was the case with Yugoslavia after 1991) (Simić 2019, 2). Unfortunately, Serbia, Montenegro, Bosnia and Herzegovina, and North Macedonia had to go through all three transformation processes simultaneously. Even today, in the third decade of the 21<sup>st</sup> century, all these countries continue to struggle due to unfinished transformation processes in all areas, only one of them being respect for the fundamental human rights of intersex people. Therefore, all these changes that took place at the state level in all Western Balkan countries reflected generally on the patient-doctor relationship and led to the collapse of the quality of the provided healthcare services and the absence of any transparency in the work of health professionals. The patient was completely subordinated to the will of the doctor who treated them, and it was not even possible to speak of legal protection of the autonomy of the patient's personality and respect, especially regarding issues surrounding the protection of bodily integrity of intersex people. Special legal norms on patient rights or protection of the patient did not even exist until 2005, when the Western Balkan countries gradually began to adopt special laws on the rights of patients (Simić 2013, 146). The same is the case with anti-discrimination laws that have only been gradually adopted in the Western Balkan countries since 2004.<sup>3</sup>

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<sup>3</sup> Kosovo\* adopted the Anti-Discrimination Law in 2004, followed by Serbia and Bosnia and Herzegovina in 2009, Montenegro, Albania and the former Yugoslav Republic of Macedonia (now Republic of North Macedonia) in 2010. See: Kosovo's Anti-discrimination Law No. 2004/3. Adopted by the Assembly 19 February 2004; Serbia's Law on Prohibition of Discrimination, *Official Journal of the Republic of Serbia* 22/09 dated March 26, 2009; BiH's Law on Prohibition of Discrimination, *BiH Official Gazette* 59/09, published on 28 July 2009; Montenegro's Law on the Prohibition of Discrimination, *Official Gazette of Montenegro* 46/2010, 40/2011 – as amended, 18/2014, and 42/2017; Albania's Law No. 10 221 dated 4 February 2010, on Protection from Discrimination; Macedonia's Law on Prevention of and Protection Against Discrimination *Official Gazette of the Republic of Macedonia* 50/2010, 44/2014, 150/2015, 31/2016, and 21/2018; Decision of the Constitutional Court of the Republic of Macedonia U. No. 82/2010, dated 15 September 2010, published in the *Official Gazette of the Republic of Macedonia* 127/2010.

### 3. TOWARDS THE PROTECTION OF INTERSEX RIGHTS: FIRST STEPS

#### 3.1. Greece

LGBTI rights and intersex rights in particular are considered to be well-protected in Greece, especially when compared to other countries in Europe, based on the findings of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) Europe 2023 Rainbow Map, which serves as a tool for examining how safe, free, and equal LGBTI people are in Europe. Interestingly, Greece climbed to 13<sup>th</sup> place after it introduced a law on the ban of harmful practices and treatments on intersex children, up from 17<sup>th</sup> in 2022 (ILGA-Europe 2023). Rapid legal and policy developments in Greece occurred after the publication of the National Strategy for the Equality of LGBTIQ+ people in 2021.

The Greek National Strategy followed right after the European Union's LGBTIQ Equality Strategy 2020–2025 and for the first time, it incorporated an analysis of intersex issues marking the first instance where intersex issues were distinctly separated from transgender ones (see Pikramenou 2024, 11). Nonetheless, efforts to protect intersex rights in Greece started far before the Strategy, in 2016, as analyzed in the following section, but it remains unclear whether these laws have been properly implemented. In its last report on Greece, the ECRI mentioned that racism and intolerance against intersex still exists, and mentioned specific cases. „during its visit, the ECRI delegation heard shocking testimonies about some teachers' statements to intersex pupils (e.g. 'you should not exist')“ (ECRI 2022, 12). This could be due to the fact that prior to 2021, trans issues used to be confused with intersex and this occurred especially around 2017, when the law on the legal gender recognition for trans people was passed (see Section 5 below). For instance, in 2015 the Greek National Commission for Human Rights published the report „Trans persons and legal recognition of gender identity“ which in an effort to include intersex issues, resulted in the use of the words intersex (Greek διαφυλικός, diafylikos) and trans (Greek διεμφυλικός, diemfylikos) interchangeably and in an unclear manner (see National Commission for Human Rights of Greece 2015). It also used the word „middlesex“ (Greek μεσόφυλος, mesofylos) instead of „intersex“.

The Strategy was published by a committee that was formed in 2021, by decision of the prime minister, and was composed of academics, members of civil society and government officials. This initiative coincided with the establishment of the organization Intersex Greece intersex, meaning that the intersex movement was stronger compared to the previous years and

therefore the Strategy was based on a submission that the Committee received from the organization (see Intersex Greece 2021). The Strategy remains the only policy document to date to explicitly mention intersex issues, dedicating almost three pages to the situation of intersex people in the country. The text focuses on several issues, including the revision of textbooks in education, discriminations that intersex people face in employment, challenges faced by intersex refugees, the need for intersectional and intersectoral cooperation when working on intersex issues, provision of health care by specialized multidisciplinary teams, provision of adequate psychosocial support mechanisms (National Strategy for LGBTIQ+ people 2021). The most important added value of this Strategy is that the terminology used regarding intersex is proper, it does not mislead the readers, and it does not perpetuate the stigma and pathologisation surrounding intersex issues as prior documents did in the past. As a result, this could potentially combat past confusion surrounding intersex issues and contribute to the proper implementation of the Strategy, as well as the existing frameworks on intersex, and protect intersex people against human rights violations.

### **3.2. Western Balkans**

On the other hand, in the Western Balkan countries intersex people were completely legally invisible prior to 2016, and the term intersex appeared exclusively as the letter „I“ in the acronym LGBTI, but not as a separate term that would be the subject of any legal or other analyses. The intersex community almost did not exist, and the main problem was the impossibility of obtaining any information about intersex from the competent state authorities.

The little data that can be found at all shows that, for example, the ECRI in its reports focused on the practice of intersex children in health institutions, among other things. In the sixth monitoring cycle, in 2020 the ECRI covers the situation of intersex people in Albania. The ECRI was informed by the authorities that it is not mandatory in Albania to carry out so-called „sex-normalizing“ surgery on newly-born intersex babies and that such operations are, in fact, not carried out currently in Albania (ECRI 2020, 13). In North Macedonia, according to ECRI’s information from 2023, one hospital in Skopje (the only one in North Macedonia to do so) carries out „sex-normalizing“ operations on intersex children, with the parents’ consent, if it is certified that they are medically necessary (ECRI 2023, 12). In Bosnia and Herzegovina, ECRI notes a dearth of information on the situation of intersex people, including children, and reports that no official guidance or

rules exist to regulate „sex-normalizing“ operations on intersex children, leaving it up to each individual medical doctor to decide on what advice to give (ECRI 2024a, 12). According to ECRI’s information from 2024, in Serbia no official data on intersex people exists. There is also no official data on the carrying out of so-called „sex-normalizing“ surgeries performed on intersex children in the country (ECRI 2024b, 15).

When talking about Serbia, we can add that prior to 2021, no laws or bylaws mentioned intersex people. From the annual reports by independent bodies (the Ombudsman and the Commissioner for the Protection of Equality), reports by civil society organizations, or following the media on cases of discrimination, it could be concluded that discrimination exists in the Serbia, in various areas, but none of those reports presented the needs of the group of intersex people or analyzed them separately (Gayten–LGBT 2019, 59). The Strategy for the Prevention and Protection against Discrimination, just like the Action Plan of the Republic of Serbia for the implementation of the Strategy for Prevention and Protection against Discrimination for the 2014–2018 period failed to specifically mention intersex people or intersex issues.<sup>4</sup>

Speaking of an exclusively medical approach of intersex people in the Western Balkans, interestingly, data regarding systematic, i.e., institutionalized clinical interest in intersex people and intersex issues, can only be found in Serbia. According to data presented by Gayten–LGBT, in the period between 1986 and 1993, 84 intersex children and adolescents received medical care at the University Children’s Hospital in Belgrade (Gayten–LGBT 2019, 83). The first scientific monograph on the subject of intersex, which to this date is the only Serbian-language scientific study of its kind, was published by Dr. Zoran Krstić, pediatric surgeon and urologist, based on the results of independently conducted research in 1994 (Gayten–LGBT 2019, 84). In his work, he advocated the position that the treatment of children with „gender differentiation disorders“<sup>5</sup> is very difficult and often

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<sup>4</sup> See Strategy of Prevention and Protection Against Discrimination of Republic of Serbia for the 2014–2018 period, *Official Gazette of the Republic of Serbia* 60/2013.

Also, see the second report on monitoring the implementation of the Action Plan for the implementation of the Strategy of Prevention and Protection Against Discrimination for the 2014–2018 period, *Official Gazette of the Republic of Serbia* 107/2014.

<sup>5</sup> Note that this language is outdated and pathologizing.

controversial and subject to evolutionary attitudes and techniques, but he did not advocate the position that surgical interventions related to „gender differentiation“<sup>6</sup> are mutilating and damaging to the patient.

## **4. ANTI-DISCRIMINATION LEGISLATION: A KEY POINT FOR THE PROTECTION OF INTERSEX RIGHTS?**

### **4.1. Greece**

As previously mentioned, several legal developments regarding intersex issues in Greece occurred primarily from 2016 to 2019, when several amendments were introduced to add „sex characteristics“ to various laws. First, Law No. 4443/2016 enshrined „sex characteristics“ as one of the grounds for protection against discrimination in the field of employment, incorporating Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, and Directive 2014/54/EU on measures to facilitate the exercise of workers' rights in the context of freedom of movement for workers. In 2017, Article 1 of Law 927/1979 was amended by para. 2 of Article 7 of Law 4491/2017 and added „sex characteristics“ to the legal framework on hate speech. In 2019, Law No. 4619/2019 amended the Penal Code and Article 82A on crimes with racist characteristics and added „sex characteristics“ to the list of aggravating circumstances. It seems that the fact that Greece is a member of the European Union played a pivotal role for the implementation of most of the abovementioned reforms, as they followed after the publication of EU Directives and the LGBTIQ+ Equality Strategy.

In 2022, Greece became the 5<sup>th</sup> country in the world and the 4<sup>th</sup> in the European Union to ban „sex-normalizing“ procedures and treatments on intersex infants and children. More specifically, Articles 17–20 of Law 4958/2022 „Reforms in medically assisted reproduction and other urgent regulations“ prohibit medical procedures and treatments performed on intersex children under the age of 15. Such interventions can only be performed on intersex minors who have reached the age of 15 and only with their free and informed consent. In addition, prior authorization will have to be granted by the relevant County Court, following the opinion of

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<sup>6</sup> Note that this language is outdated and pathologizing.

an Interdisciplinary Committee composed of experts on intersex. If medical „procedures and treatments“ resulting in the sex of the intersex person being inconsistent with the already registered sex are carried out, it is possible to correct the registered sex by court order. The law provides for a minimum of 6 months of imprisonment, loss of license and a fine for doctors who perform interventions on intersex minors without authorization.

The legal ban of harmful „sex-normalizing“ procedures and treatments could have been achieved earlier in 2017, as it was included in the Bill for Law 4491/2017 for the legal gender recognition of trans people, but the provisions on intersex in this Bill were removed when by the Drafting Committee the draft text was sent to the Ministry of Justice and hence they never reached the parliament (Pikramenou 2024, 6). Minister of Justice Stavros Kontonis had mentioned during the voting process of the Bill for Law 4491/2017 that another bill on intersex issues would follow after the adoption of Resolution 2191 by the Parliamentary Assembly of the Council of Europe (Pikramenou 2024, 6–7) but this did not happen. Interestingly, the articles of the bill concerning intersex infants and children were adopted almost unanimously and there was no opposition from the Church, as had been in the case of the legalization of same-sex marriage. The Orthodox Church in Greece seems to oppose mainly and publicly „homosexuality“, for instance, prior to the voting of the Bill on same-sex marriage in 2024, the Church had published a text stating that the Bill was „subverting Christian marriage and the institution of the traditional Greek family, changing its model“ and that „homosexuality has been condemned by the entire ecclesiastical tradition, beginning with the Apostle Paul“ (LifO 2024, translated by author).

The Greek law is considered as a good practice, since it contains characteristics that other legal frameworks do not.<sup>7</sup> For instance, it is the only law, along with the Maltese law,<sup>8</sup> that criminalizes those performing medical interventions and treatments on intersex children. The Interdisciplinary Committee is not composed only of scientific experts but it includes a member of the civil society, in contrast to German law for which civil society

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<sup>7</sup> This analysis includes laws that were introduced before the Greek law and excludes the Spanish law as it was a subsequent development. For more information on the Spanish law, see the most recent in depth-analysis published by OII Europe: Spain becomes fifth EU country to ban IGM <https://www.oii europe.org/spain-becomes-fifth-eu-country-to-ban-igm/>, last visited July 19, 2024.

<sup>8</sup> Malta amended the GIGESC Act with Act No. XIII 2018, to introduce punishment by imprisonment not exceeding five years or a fine ranging from EUR 5,000 to EUR 20,000 in case of the performance of medical interventions rooted in social factors, without the consent of the intersex minor.

has lately expressed concerns that the law includes gaps<sup>9</sup> that could lead to the violation of bodily integrity of intersex persons. The law prohibits all interventions and treatments, contrary to Icelandic law,<sup>10</sup> which does not include a universal prohibition, and it uses correct language, in contrast to Portuguese law,<sup>11</sup> which is problematic in this regard. Nonetheless, the proper implementation of the Greek law on the ban of medical interventions and treatments is still not guaranteed (Pikramenou 2024) and the same has occurred with previous laws on anti-discrimination and hate against intersex. As stressed by ECRI „both interviews with relevant experts and members of the intersex community, as well as FRA’s (2020) data, indicate that intersex persons all too often fall victims of discrimination in Greece. The stance and perception of Greek society towards intersex people moves between ignorance, (medical) pathologisation and hostility. Hiding being intersex and/or harassment and discrimination on the grounds of sex characteristics in everyday life, particularly in health, education, and the employment sector, appear to be constantly present aspects of an intersex person’s life in Greece“<sup>12</sup> (ECRI 2022, para. 32).

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<sup>9</sup> Recently, OII Germany and OII Europe published a joint statement on deeply concerning German Family Court decision authorizing an intervention on an intersex minor (OII Germany and OII Europe 2024).

<sup>10</sup> For more information see Law No. 154. <https://www.althingi.is/alttext/pdf/151/s/0721.pdf>, last visited July 19, 2024.

<sup>11</sup> For more information see the Law on Right to Self-Determination of Gender Identity and Gender Expression and Protection of Everyone’s Sex Characteristics No. 38/2018. <https://diariodarepublica.pt/dr/legislacao-consolidada/lei/2018-115935378>, last visited July 19, 2024.

<sup>12</sup> At the same time, Intersex Greece noted in its report „Hate speech against intersex people in Greece“ that „the implementation of laws –especially the laws on hate speech and racist crimes– remains problematic, as there is no monitoring mechanism“ (Vouvaki *et al.* 2023, 14–18). The organization stated that the statistics that the Greek police shared with them regarding incidents of violence recorded during the 2015–2021 period were confusing as the incidents against intersex people were recorded under „gender identity/sex characteristics“ and appear to be too low (Vouvaki *et al.* 2023, 16) while the European Union Fundamental Rights Agency (FRA) published a survey in 2019, according to which in the previous 5 years 45% of intersex people from Greece who responded to their questionnaire had suffered physical or sexual violence (FRA 2020).

## 4.2. Western Balkans

In the Western Balkan countries, intersex people have started to gain legal visibility only recently, exclusively through anti-discrimination legislation. Similarly in this case, things have gradually changed in favor of intersex people, and the changes came almost solely thanks to strong external political influences, which this time came from the EU, and due to the aspirations of the Western Balkan countries to speed up their processes of association with the EU as much as possible. However, it turned out that after the adopted legal solutions, nothing was done in the Western Balkan countries to enact comprehensive measures to raise awareness on how to respect and protect the human rights of intersex people, while at the same time there is very harsh hate speech in the public arena. Yet, to grasp the full picture, we should first focus on how the changes to the anti-discrimination laws progressed.

The first country of the Western Balkans to provide protection for intersex people in its anti-discrimination legislation was Bosnia and Herzegovina, which in 2016 adopted the Amendments to the Law on the Prohibition of Discrimination and introduced sex characteristics as a basis for the prohibition of discrimination (Pandurević 2017, 15). In practice, however, this important legal innovation has not brought much to this day, but seems to have remained only declarative in nature. Reports by nongovernmental organizations dealing with the protection of human rights state that competent institutions within Bosnia and Herzegovina, such as the Ombudsman, the Ministry of Human Rights and Refugees of Bosnia and Herzegovina, entity and cantonal ministries of health, do not have relevant information about the needs of intersex people, nor have they been addressing this issue. Also, there are no clear medically established procedures for dealing with intersex children, and no information can be found to inform parents or guardians of intersex children about the risks of certain medical interventions and treatments of intersex children (Burić 2020, 35; Brković *et al.* 2023, 46).

In Montenegro, one of the key laws establishing a system of protection against discrimination was adopted in 2010. As in other Western Balkan countries, „sex characteristics“ were not recognized as a basis for prohibiting discrimination. However, shortly after its adoption, the Law was amended twice, first in 2014 and then in 2017, the reason being the negative opinion of the European Commission, which stated that the law was not fully compatible with the EU Acquis Communautaire (Đuković 2022, 83). With the latest changes, in 2017 (a year after Bosnia and Herzegovina),

Montenegro introduced „intersexual characteristics“<sup>13</sup> as one of the grounds for the prohibition of discrimination.<sup>14</sup> (Art. 2, para. 2, of the Montenegrin Law on Prohibition of Discrimination). The law defines that „[i]ntersexual characteristics are understood as different physical characteristics of a person (which can be chromosomal, hormonal and/or anatomical) that do not correspond to strict medical definitions of a man or a woman and can be present in varying degrees“ (Art. 19, para. 6, of the Montenegrin Law on Prohibition of Discrimination, translated by author).

In Albania intersex people are still not legally visible, however, in 2020, the Ministry of Health approved a specially prepared Medical Protocol for the Assessment of Children with Atypical Genital Development (OII Europe 2020; Jakaj 2022, 173). This protocol stipulates that medical interventions on children immediately after birth can only be performed in cases where it is necessary for health reasons and not, as had previously been the case, by decision of the parents (OII Europe 2020). Despite being criticized by representatives of organizations for the protection of the rights of intersex individuals, this protocol, which recognizes the human rights of intersex individuals, has been the most progressive step in the country’s post-communist history, especially having in mind that medical protocols are rare in Albania. Unfortunately, in Albania even today, as is the case in the Republic of Northern Macedonia, where the situation is the worst compared among the Western Balkan countries, anti-discrimination laws do not recognize „sex characteristics“ as grounds for discrimination, so there is no direct legal protection for intersex persons. According to data from December 2023, published by ILGA Europe, North Macedonia adopted the new Equality and Anti-discrimination Strategy in May 2022, but this Strategy mentions LGBTI people only once, in the section on preventing hate speech, violence and other forms of discrimination (ILGA Europe 2024). It is interesting to note, contrary to Greece, which has not opposed LGBTI as a whole nor intersex but mainly same-sex couples, in North Macedonia, legislative initiatives during 2022 and 2023, were demonized by the Orthodox Church which launched a misinformation campaign against the Gender Equality Law and the amendment of the Birth Registry Law regarding legal gender recognition. In addition to gender equality, the Church also attacked the concept of gender identity and the Istanbul Convention (ILGA Europe 2024). As a reminder in Serbia, which is also a Christian Orthodox country, the negative attitude of

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<sup>13</sup> Note that in order to align with international human rights standards the word „sex characteristics“ should be used in anti-discrimination frameworks.

<sup>14</sup> Law on Prohibition of Discrimination, *Official Gazette of Montenegro* 46/2010, 40/2011 – state law, 18/2014, and 42/2017.

the Church was particularly visible during the public debate on the adoption of the Law on Prohibition of Discrimination in 2009 when the Church nearly prevented its adoption (Jovanović 2022, 440).

In the case of Kosovo\*, a new law on Gender Equality was adopted in 2015.<sup>15</sup> It includes an updated definition of gender identity protecting „the gender related identity, appearance or other gender related characteristics<sup>16</sup> of a person (whether by way of medical intervention or not), with our [sic] without regard to the person’s designated sex at birth“ (ERA 2016). The Law on Gender Equality differentiates between the two, defining sex as „biological and physiological characteristics that define men and women“ and gender as a role or identity „that is learned, changed over time, and varies widely within and across cultures“ (Law No. 05/L –020 on Gender Equality Article 3, paragraph 1, point 1.9., translated by author). At the beginning of 2016 it was made public that the Kosovo Clinical Centre had undertaken several surgical interventions on intersex minors (ERA 2016). The practice of harmful interventions and treatments performed on intersex infants was not specifically required by law but could be performed with parental consent. Also, in 2019, the Kosovo\* media reported about the case of a „double-gendered child“<sup>17</sup> (Kika 2019). On that occasion, the Kosovar doctors explained that there was no standard process by which parents are told that their baby is intersex and that no doctor explicitly provides them with this information or further explanation. Instead, a group of physicians including an endocrinologist, geneticist, radiologist and pediatric surgeon tell the parents distinctly about the different elements that are linked to their own field of specialization (Kika 2019).

On the other hand, in the Republic of Serbia, legal protection was granted to intersex people through two laws: the Gender Equality Law<sup>18</sup> and the Law on Prohibition of Discrimination.<sup>19</sup> With the adoption of amendments to the Law on Prohibition of Discrimination in 2021, „sex characteristics“ were introduced into the law as grounds for the prohibition of discrimination,

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<sup>15</sup> Law No. 05/L –020 on Gender Equality is approved by Assembly, dated 28 May 2015, and promulgated by the Decree of the President of the Republic of Kosovo No. DL-016–2015, dated 15 June 2015.

<sup>16</sup> Note that in order to align with international human rights standards the word „sex characteristics“ should be used in anti-discrimination frameworks.

<sup>17</sup> Note that this language is outdated and stigmatizing.

<sup>18</sup> Law on Gender Equality of the Republic of Serbia, *Official Gazette of the Republic of Serbia* 52, of 24 May 2021.

<sup>19</sup> Law of Prohibition of Discrimination of the Republic of Serbia, *Official Gazette of the Republic of Serbia* 22/2009, and 52/2021.

which made the Republic of Serbia, in addition to Bosnia and Herzegovina and Montenegro, the third country in the region to recognize „sex characteristics“ as grounds for discrimination. Article 22 of the Law specifically prohibits discrimination against children based on sex characteristics.<sup>20</sup> In 2022, Serbia also adopted the Strategy for Prevention and Protection against Discrimination for the 2022–2030 period, which represents an umbrella strategy in this area, as well as the Action Plan for the implementation of this Strategy.<sup>21</sup> The Strategy, although concisely, for the first time presents and analyzes the position of intersex people in Serbia (Serbian Strategy of Prevention and Protection against Discrimination, 78).

Despite the fact that we can now say that the normative framework is satisfactory in regard to the prohibition of discriminatory behavior towards intersex people, their full equality has not yet been ensured in practice. The combination of individual and/or family isolation, social and institutional stigma, discrimination and violence, and traumatic experiences associated with medicalization are reasons for most intersex people to remain „invisible“. In its latest annual report, for 2023, the European Commission states that due to a lack of trust in institutions, cases of violence and discrimination against LGBTIQ persons are often not reported, and that „[i]ntersex persons remain invisible both socially and legally“. Hate speech, threats and violence continue to be directed at lesbian, gay, bisexual, transgender, intersex and queer persons (European Commission 2023, 46–47).

So, if we compare Greece and the Western Balkan countries, we can see that between 2016 and 2021, in all these countries, with the exception of the Republic of North Macedonia and Albania, there were legislative changes that started with anti-discrimination legislation. In 2022 Greece went one step further and became the fifth country in the world to ban harmful interventions and treatments on intersex infants and children. However, such provisions are still absent in the Western Balkan countries. We have seen that Albania introduced this ban by defining the medical protocol for the conduct of doctors. In Serbia, on the other hand, there is a multidisciplinary team of nine medical experts who work with intersex babies and children at the Dr. Vukan Čupić Serbian Institute for Health Care of Mother and Child in Belgrade (Randjelović *et al.* 2017, 39). They also follow a medical protocol that is used, exclusively internally, to establish intersex diagnosis

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<sup>20</sup> Art. 22, par. 2 of the Law on Prohibition of Discrimination of the Republic of Serbia

<sup>21</sup> Action plan for the period 2022–2023 for the implementation of the Strategy of Prevention and Protection against Discrimination for the period from 2022 to 2030, *Official Gazette of the Republic of Serbia* 112, dated 12 October 2022.

with the help of tests and examinations, but the protocol uses the term „hermaphrodite“, which indicates an outdated and discriminatory approach by doctors in Serbia (Randjelović *et al.* 2017, 39). It is therefore necessary, both in Serbia and in other countries of the Western Balkans, to standardize the approach of health professionals in relevant hospitals where intersex people are treated, as well as introduce a legal ban on harmful interventions and treatments on intersex infants and children, and to make transparent all procedures and mechanisms related to them, especially those related to collecting statistics on the number of people who are born intersex.

## **5. LEGAL GENDER RECOGNITION OF INTERSEX PEOPLE – ON HOLD**

### **5.1. Greece**

The registration of sex in the birth certificate is often the moment when intersex people are first confronted with a legal issue of bureaucratic nature. In Greece, Article 19 of Law 4958/2022 provides that „In the event of medical procedures or treatments referred to in Article 17, which have resulted in a discrepancy with the registered gender of the minor intersex person, the registered gender is corrected by the competent court“ (translated by author). In other words, while the law prohibits interventions that lead to intersex infants and children conforming to female or male, it does not provide a clear legal framework to cover the gender recognition of intersex children (or adults) who have not undergone any procedure or treatment and self-identify outside of the binary. The need to introduce a framework is also confirmed in the National Strategy for LGBTQI+ people as it states that „it is considered appropriate (for intersex persons) to facilitate the change of registered sex, on the basis of self-determination“ (Government of Greece 2021, 52, translated by author). At the same time, the National Strategy recognizes the diversity of intersex peoples' gender identity „the medical services offered to intersex people, and in particular to newborns, infants and children, should be provided with respect for their special needs and above all to ensure their right to decide for themselves, when they are of the appropriate age and maturity, with all possible versions of their identity open“ (Government of Greece 2021, 52, translated by author). This is because Law 4491/2017 on legal gender recognition can potentially be used by people who are not transgender, which creates several loopholes as these laws are not designed to meet the needs of people other than trans. Indeed, according to European Union research, 20% of intersex people identify as non-binary and 5% as „other“ (FRA 2020).

This legal gap creates pressure on the parents, since, according to the law, all births in Greece must be registered within 10 days of the child's birth. In case of late registration, a fine could be imposed as follows: for births registered from the 11<sup>th</sup> to the 100<sup>th</sup> day, a fine of EUR 100 is foreseen, and for births registered after the 100<sup>th</sup> day, this fine is increased to EUR 300 (see UNHCR undated). Interestingly, such legal gaps do not exist in any of the countries that have legally prohibited interventions on intersex people as they all have a clear legal framework for legal gender recognition that gives access to the right to self-determination (for a comparative presentation see Pikramenou 2019; OII Europe 2021). More specifically, Malta „Change of Gender Identity“ introduced the right to legal recognition in 2015 with the GIGESC Act, based on self-determination, and in 2017 it allowed access to category „X“ for intersex people in passports and identity documents (Ministry for European Affairs and Equality 2017). Portugal introduced the recognition of gender identity and gender expression based on the right to self-determination in Article 3 of the Law 38/2018, along with the ban of interventions. In 2013 Germany was the first country to amend the Civil Status Act (PStG, Section 22 (3)) so that the gender indicator on birth certificates is blank in the event of the birth of an intersex infant. Then, in 2018, it introduced a new law (*Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben*, 18 December 2018) designed for intersex people enabling them to request a „diverse“ gender marker, following the provision of the relevant medical certificates. This law followed the decision of the German Federal Constitutional Court published in 2017 (sup. 1 BvR 2019/16), which introduced the right to the registration of a third gender based on the rationale that the right to self-determination in terms of gender is linked to the free development of personality. In Iceland the 2019 Act on Gender Autonomy, together with the ban of medical interventions, ensured the right to legal gender recognition based on self-determination while also introducing the neutral gender marker which appears in passports as „X“ (Article 6).<sup>22</sup>

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<sup>22</sup> It is worth noting that in Spain, which is not included in this analysis as developments occurred after Greece, Law 4/2023, provides for the issuance of administrative documents with respect to the person's sex characteristics (Article 13).

## 5.2. Western Balkans

If we look at the Western Balkan countries, there is no clear legal framework on the gender recognition of intersex children and adults who have not undergone any procedure or treatment and self-identify outside of the binary. More precisely, it can be said that existing regulations are outdated and inflexible. This is very problematic for intersex children as it forces those involved in certifying and registering birth (parents or other family members responsible for the child, health professionals, and birth registry officials) to legally choose between the „male“ or „female“ options (FRA 2015, 4).

In Serbia, the Law on Registers requires parents to register their child in the register of births within 15 days of the child’s birth, thereby entering the sex of the child, which can be either male or female (Law on Registers Art. 48, para. 1).<sup>23</sup> This requirement stems from the position that sex is one of the main identity characteristics of every person, and that every newborn must be registered under one of the two sex categories offered. This kind of requirement, set by law, is a pressure on parents to determine the sex and/or gender of their child, not only legally, but also physically. Once registered, the sex of a child can be legally amended in Serbia since 2020, but only from the age of 18, and such change entails significant problems for the person in question (Commissioner for Protection of Equality of Serbia 2021).

The issue of registering the gender of a child after birth in Bosnia and Herzegovina is regulated at the level of the entity and the Brčko District, namely: the Law on Registers of the FBiH,<sup>24</sup> the Law on Registers of Republika Srpska,<sup>25</sup> and the Law on Registers of the Brčko District.<sup>26</sup> The FBiH Civil Registry Law distinguishes between two situations – when a child is born in a health institution and outside of it. In accordance with this fact, the Law determines different regulations. If the child was born in a health institution, the deadline for registering the child in the birth register is 15 days and the health institution where the child was born is responsible. If the child was not born in a health institution, the deadline for birth registration is 30 days.

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<sup>23</sup> Law on Registers of the Republic of Serbia, *Official Gazette of the Republic of Serbia* 20/2009, 145/2014, and 47/2018.

<sup>24</sup> The Law on Registers of the Federation of BiH, *Official Gazette of the Federation of BiH* 37/2012 and 80/2014.

<sup>25</sup> The Law on Registers of Republika Srpska, *Official Gazette of Republika Srpska* 111/2009, 43/2013, and 66/2018.

<sup>26</sup> Law on Registers of the Brčko District of BiH, *Official Gazette of the Brčko District of BiH* 58/2011.

The Law on Registers of Republika Srpska prescribes a deadline of 15 days for registering the birth of a child. The provisions in the Brčko District are identical to the provisions in Republika Srpska.

In North Macedonia, the birth of a child must be reported, in writing or orally, to the Registrar of the Master Records Area where the child was born, within 30 days from the day the child was born (Law on Civil Registry Article 6 para. 1).<sup>27</sup> The Law on Civil Status of the Republic of Kosovo\*, adopted in 2011, stipulates that the birth of a child must be registered within 15 days of birth, or in exceptional cases within 30 days (The Law on Civil Status Article 34, para. 4).<sup>28</sup> In Montenegro, the deadline is significantly shorter; the birth of a child must be registered within three days from the date of birth, thereby entering the sex of the child (Law on Matrimonial Registers of Montenegro Article 20, para. 1).<sup>29</sup>

The solution in all these cases would be to amend the Law on Registers, in line with the recommendations of Resolution 2191.<sup>30</sup> If after birth, on the basis of medical documentation, it is determined that the sex of the person is not determinable, the Law on Registers should allow the postponement of the registration of the sex of the child in the register of births, until the moment when the child can independently participate in making decisions about these interventions, with the exception of special circumstances, when these interventions prevent the creation of a greater harm to the health of the intersex child.

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<sup>27</sup> Law on Civil Registry, *Official Gazette of the Republic of Macedonia* 8/95, 38/02, 66/07, 67/09, 13/13, 43/14, 148/15, 27/16, and 64/18, and *Official Gazette of the Republic of North Macedonia* 14/20.

<sup>28</sup> Law No. 04/L – 003 on Civil Status of the Republic of Kosovo.

<sup>29</sup> The Law on Civil Registry, *Official Gazette of Montenegro* 47/2008, 41/2010, 40/2011 – other laws, and 55/2016.

<sup>30</sup> See article 7 point 7.3.1. of Resolution 2191, Promoting the human rights of and eliminating discrimination against intersex people „ensure that laws and practices governing the registration of births, in particular as regards the recording of a newborn’s sex, duly respect the right to private life by allowing sufficient flexibility to deal with the situation of intersex children without forcing parents or medical professionals to reveal a child’s intersex status unnecessarily.“

## 6. CONCLUSION

From 2016 and onwards, a series of legal developments have occurred in the Balkan region with the aim of protecting the rights of LGBT and intersex people. In many cases, such developments occurred after „external pressure“ from the EU. For example, Greece started amending anti-discrimination frameworks to implement EU directives as an EU Member. At the same time, even though Montenegro is not an EU member, the anti-discrimination law was amended twice following negative opinions of the European Commission as Montenegro is among the Western Balkan countries that are planning to access the EU in the future.<sup>31</sup> The issues that need to be addressed in all the countries that were analyzed in this paper are the use of a human-rights based approach that adheres to international standards (for example the use of „sex characteristics“ and not other terms that might be derogatory, e.g., „intersexual characteristics“), provision of support to the intersex movement so that intersex people are empowered to organize and advocate for their rights, the introduction of flexible procedures when it comes to birth certificates, and the legal recognition of intersex people. In other words, it is important that all of the abovementioned countries follow what has been suggested for years by the CoE and the UN (of which all of them are members), as well as the EU, to guarantee that intersex people’s rights are not violated repeatedly.

More importantly, despite the introduction of measures that protect intersex people’s rights, a point that is often overlooked is the need to tackle high levels of stigmatization surrounding intersex people. When it comes to Western Balkan countries, stigma prevails especially in rural areas where the level of information about intersex issues is very low. Consequently, it is extremely challenging to collect data on the number of intersex people living in the Western Balkan countries, and due to the small number of activists working on the issue, the intersex community remains invisible to this today (Simić 2019a, 56). Interestingly, a high level of stigmatization against intersex is also reported in Greece, even though the country has introduced a series of laws and it tops the ILGA’s ranking as mentioned above. Given these points, Western Balkan countries could use Greece as a „good practice“

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<sup>31</sup> See European Union External Action, Western Balkans: „Accession talks are underway with Montenegro and Serbia. In March 2020, the Council agreed to open accession negotiations with North Macedonia and Albania. Bosnia and Herzegovina and Kosovo are potential candidates for EU membership“ [https://www.eeas.europa.eu/eeas/western-balkans\\_en](https://www.eeas.europa.eu/eeas/western-balkans_en), last visited April 30, 2024.

to introduce legal reforms on intersex issues but while doing so, it is equally important to consider all its „flaws“ and overcome them in order to ensure the protection of intersex rights in the region.

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Article history:

Received: 30. 4. 2024.

Accepted: 5. 9. 2024.