EXPLANATORY REPORT

Signed at Vienna on 12 September 2000

A. GENERAL REMARKS

The International Commission on Civil Status (ICCS) has looked into the complex and sensitive question of transsexualism on several occasions. Since the late 1970s, it has built up documentation on the legal provisions and administrative or court decisions on this subject in its member States and has inventoried the repercussions of transsexualism on the civil status of the persons concerned. This documentation was brought up to date for the Colloquy on European Law on the theme of *"Transsexualism, medicine and law"* which was organised by the Council of Europe in Amsterdam from 14 to 16 April 1993, at which the ICCS presented two reports, on *"Legal consequences of sex reassignment in comparative law"* and *"International aspects of sex reassignment decisions".*

Finding that there were problems over the recognition in one country of decisions concerning transsexualism taken in another, the ICCS pursued its work after the colloquy by setting up a special committee to carry out a detailed study of the question, paying particular attention to the consequences of such decisions as regards civil status and the administrative documents issued to the persons concerned. Transsexuals often find themselves in a difficult situation, particularly when their nationality is not that of the State in which the sex reassignment decision was obtained. The result may be, for example, that the sex stated on the person's passport or identity card is different from that shown on his or her driving licence, residence permit or social security card, which is a source of major difficulties in everyday life. Although there are not many of them, transsexuals meet with such serious practical problems, and suffer such acute psychological upset, that it was thought necessary to regulate the matter at international level.

The Council of Europe, which has also examined the problems of transsexuals on several occasions, considered that as sex reassignment decisions affect the civil status of those concerned, and in particular their birth certificates, the ICCS was the organisation best equipped to deal with the matter.

In 1994 the ICCS began working on a convention on the recognition of decisions concerning sex reassignment, a task that raised a number of tricky legal problems, especially since only a few countries have laws regulating the matter, most of the others leaving it to be dealt with by case-law.

In 1996 the ICCS drew up a detailed questionnaire to which all its member States replied. The information gathered as a result was summarised in an article entitled *"Transsexualisme, vie privée et familiale dans les États de la CIEC" ("Transsexualism, private and family life in ICCS member States")*, published in the review Droit de la famille (Editions du Juris Classeur, Paris 1998, No. 12). At the Council of Europe's request and using the information, supplemented by extensive documentation, that it had gathered during the course of its own work on the subject, this monograph was extended to include other States. It has been agreed that the Council of Europe will publish this second study under the title *"Transsexualism in Europe"*, in both English and French.

After studying the laws and case-law of its member States and following the detailed discussions needed because of the wide differences in their legal systems, the ICCS has drawn up this Convention, which is limited to laying down the conditions governing the recognition in one State of a sex reassignment decision taken in another State. It does not deal, except as regards civil status (see Article 3 of the Convention and the corresponding commentary), with the legal and practical consequences of such a decision. These consequences, which include the right of a person who has obtained a sex

reassignment decision to marry someone of the sex to which the person concerned previously belonged, are to be dealt with by the domestic law of the Contracting States.

In this way, the ICCS hopes to contribute to improving the legal and social situation of transsexuals in accordance with the case-law of the European Court of Human Rights (see, for example, the cases of Cossey v. the United Kingdom, ECHR, 27 September 1990, Series A No. 40, Botella v. France, ECHR, 25 March 1992, Series A No. 231C and Sheffield and Horsham v. the United Kingdom, ECHR, 30 July 1998, Reports 1998 – V).

B. COMMENTARY ON THE ARTICLES

Article 1

This Article lays down the conditions governing the recognition in a Contracting State of a sex reassignment decision taken in another Contracting State. Sex reassignment means a physical adaptation such that the person concerned must be considered from a legal point of view as no longer belonging to his or her original sex.

In most cases, sex reassignment decisions are handed down in the context of a judicial procedure. However, in some countries, such as Austria, the procedure is an administrative one. The Convention covers recognition of both categories of decisions once they are final, which implies, in the case of court decisions, that they can no longer be appealed and, in the case of administrative decisions, that they are irrevocable.

Such a decision will be recognised when it applies to a national of the State in which the decision was taken or to a person who habitually resides in that State; these conditions must have been fulfilled on the day on which the application for a sex reassignment decision was submitted to the competent authority. The Convention does not state whether recognition will follow ipso jure or whether it will be subject to a judicial or administrative procedure, this question being left to domestic law.

Article 2

This Article lists exhaustively manner the cases in which recognition of a decision recording a sex reassignment may be refused. The State in which recognition of the foreign decision is sought is entitled, but not obliged, to refuse recognition in three cases.

The first case concerns the transsexual's physical appearance. The body of the person concerned must have been adapted, before the decision recording the sex reassignment, as much as possible by medical treatment and surgery to give it the physical appearance of the sex to which that person claims to belong. This physical adaptation must not only have been carried out, it must also be expressly recorded in the sex reassignment decision. If it is, the requested State will not, in principle, have to check again that the physical adaptation has indeed been carried out; this will normally be certified or confirmed by medical certificates produced or a medical examination carried out during the judicial or administrative procedure.

The second case arises when such recognition is contrary to public policy in the State in which it is requested, although it is pointed out that sex reassignment in itself cannot be considered contrary to public policy.

The third and final case applies to decisions that have been obtained by fraudulent means. Although the notion of violation of public policy may cover fraud in a given State, the ICCS thought it best to make this explicit.

Article 3

This Article deals with the most important practical consequence of recognising a sex reassignment decision, namely updating the transsexual's birth certificate when that certificate was drawn up in the State where recognition has been obtained. As the Convention contains no specific provisions on this point, the updating will have to be requested by the person concerned. Updating will take the form of an entry in the margin or at the bottom of the birth certificate or by transcription into the civil status registers. Only the transsexual's birth certificate may be updated, not his or her marriage certificate or the birth certificates of his or her children, if any. Amendments to other documents concerning the transsexual, such as a driving licence or diplomas – which are possible in many countries – are not covered by this Convention. They are a matter for the domestic law of the State recognising the sex reassignment decision.

Articles 5 et 7

The question of the geographic scope of the Convention was the subject of lengthy discussions. Finally, it was decided to open the Convention to all member States of the International Commission on Civil Status or of the European Union without restriction. This principle is set out in paragraph 1 of Article 5.

As regards other States, given the sensitive nature of the subject of the convention, a more restrictive wording, based on that used in certain Conventions drawn up by The Hague Conference on Private International Law was adopted. Under Article 7, a State which is a member neither of the International Commission on Civil Status nor of the European Union may accede to the Convention after it has entered into force, but such accession will have effect only as regards the relations between that State and those Contracting States which have declared that they accept the accession. Such accession will likewise take effect as regards the relations between the acceding State and a State which becomes a party to the Convention after the said accession only if the latter has declared that it accepts the accession.

Article 8

Article 8 gives those States which consider that sex reassignment decisions must always be taken by the courts the right to enter a reservation whereby they will not apply the Convention to administrative decisions; such a reservation may be withdrawn at any time.

Articles 6, 9, 10 and 11

These Articles contain the usual final clauses in ICCS Conventions.

It should be noted that, under Article 6, two ICCS member States must ratify, accept, approve or accede to the Convention in order for it to enter into force.