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# CASES

## Intersex interventions as human rights violations: The European Court of Human Rights sets out guiding principles in *M* v *France*

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In 2022, the European Court of Human Rights, for the first time, signalled that it regards non-consensual interventions on intersex individuals which are not motivated by medical necessity as human rights violations. This case note argues that the admissibility decision in question, *M* v *France*, albeit ruled inadmissible on procedural grounds, constitutes an important step towards binding supranational human rights standards, particularly regarding torture and ill-treatment. While *M* v *France* could inspire intersex people to further their claims as strategic litigation, the note reflects on the central questions invoked by the Court's decision and some of the legal hurdles that intersex people may face when approaching courts with claims for recognition and redress.

### INTRODUCTION

On 19 May 2022, the European Court of Human Rights (the ECtHR / the Court) communicated its admissibility decision in *M* v *France*.[1] The case concerns M,[2] who was born otherwise healthy but with an intersex condition,[3] – in other words, with variations of sex characteristics which made it difficult for medical professionals to determine whether to assign them to a

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1 *M* v *France* App no 42821/18 ECtHR 26 April 2022.
2 In this note, the applicant is referred to as 'M' or as 'they'. The choice of this non-binary pronoun is based on the claims presented by the applicant in the case as well as the reference to the applicant in question in the editorial OII Europe, 'M v. France Decision: The European Court of Human Rights Finds the Complaint Inadmissable, but Sets the Basis for the Qualification of IGM as Torture' at https://www.oiieurope.org/m-v-france-decision/ [https://perma.cc/RY6E-6UT7].
3 'Intersex' is used in this note as an umbrella term to depict people with variations of sex characteristics. The term is often used by human rights institutions and civil society organisations. However, the term is not generally preferred by medical practitioners, who tend to use the umbrella term 'Disorders of Sex Development (DSD)'. This term, in turn, stems from the Chicago Consensus Meeting among medical experts in 2005. It defines DSD as 'congenital conditions in

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'female' or 'male' sex/gender.[4] As a result of the variance, M was subjected to a series of medical interventions to 'feminise' their body, as depicted in the following section. While considered inadmissible on procedural grounds, the case is significant as the ECtHR originally laid down guidelines suggesting the basic criteria for legally evaluating these interventions as potential breaches of the prohibition of torture and ill-treatment in Article 3 of the European Convention on Human Rights (the ECHR / the Convention).

With a few exceptions, there are in general no medical emergencies when a child is born with an intersex condition.[5] Medical interventions motivated by cosmetic or social reasons to 'normalise' intersex bodies to the generally-accepted gendered corporeal binary started on an experimental basis in the United States of America in the mid-twentieth century.[6] While surgical techniques, genetic knowledge and medical research have advanced considerably since then, medical interventions which are non-consensual and not motivated by medical necessity are globally carried out to this date. Increasingly organising before the supranational human rights machinery, many intersex human rights defenders have demanded a moratorium on such interventions during the last decades, particularly since the late 2000s.[7] *M* v *France*, a case which was filed before the Court in 2018, presented the first opportunity to get a supranational legal ruling on the interventions. The potential magnitude of the case is also reflected in the number of *amicus curiae* interventions submitted to the court, as such interventions were presented by no less than 13 parties.[8]

This note argues that the Court's judgment in *M* v *France* is a first serious step in the direction of binding human rights standards in the field of intersex interventions, especially with reference to the prohibition of torture and ill-treatment. Providing normative guidance in line with existing supranational soft law, the decision can arguably have an impact on national regulation.[9] Furthermore, the Court also determined the basic premises for its future case law – nevertheless with some vagueness around the concepts of medical necessity and consent. This note claims that *M* v *France* is in line with recent legislative

which development of chromosomal, gonadal, or anatomical sex is atypical'. Ieuan A. Hughes, Christopher Houk, S. Faisal Ahmed and Peter A. Lee, 'Consensus Statement on Management of Intersex Disorders' (2006) 91 ADC 554, 554.

4 In this note, 'sex' is sometimes used as a medical and corporeal category, while 'gender' is used to refer to a socio-legal category. Nevertheless, since the two are intimately interconnected, they are also used as synonymous and together as 'sex/gender'.

5 S.F. Witchel, 'Disorders of Sex Development' (2018) 48 *Best Practice & Research Clinical Obstetrics & Gynaecology* 90, 98.

6 See K. Karkazis, *Fixing Sex: Intersex, Medical Authority, and Lived Experience* (Durham, NC: Duke University Press, 2008) particularly ch 2.

7 See M. Bauer, D. Truffer and D. Crocetti, 'Intersex Human Rights' (2019) 24 IJHR 724, particularly 728-730.

8 The interventions were presented by human rights law clinics, religious organisations and intersex and LGBTI organisations. Since the Court did not rule on the merits of the case, it also did not summarise the comments by third parties.

9 Supranational human rights have, for example, had an impact on the Icelandic decision to introduce a ban on non-consensual, non-therapeutic intersex interventions. See D. Alaattinoğlu, 'Intersex Rights in the Icelandic Gender Autonomy Act' Policy paper to the working group revising the legislation on legal gender recognition and bodily autonomy in Finland (2022) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4252270 [https://perma.cc/65NK-EABG.


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moves by some of the Council of Europe Member States. Yet, the case presents some inconsistencies in relation to the Court's own jurisprudence. Moreover, *M* v *France* has already been applauded by intersex human rights defenders as an important case.[10] As such, it could inspire hope in strategic litigation as a way to strengthen human rights standards, exert pressure on national authorities and provide access to remedies. Reflecting on the last point, this note ponders the questions of adequate remedies and the limits of legal liability, calling into question whether courts are the most appropriate venue for victims of similar 'normalising' interventions to access justice and redress.

## FACTS

The applicant M was born in France in 1977 with variations in sex characteristics, which meant that they could not be clearly defined as 'male' or 'female' according to contemporary medical definitions. This intersex condition was in M's case characterised by an inconspicuous penis, two testicles, a vaginal cavity, a single orifice, an XY karyotype, no uterus or Müllerian duct.[11]

This condition did not, as such, constitute any risks to M's health. However, on the advice of doctors, M underwent a series of 'feminising' surgeries and treatments during their childhood and adolescence. Based on the exchange of letters between the medical doctors who managed M's case when they were three months old, it appears that the decision to assign M to the female sex was based on the 'extremely rudimentary appearance' of the penoclitorial organ, which was considered 'incapable of any valid functional activity' (presumably, sexual penetration).[12] According to the same letter exchange, it was deemed appropriate that M was brought up strictly as a girl.[13] When M was three years old, they were subjected to bilateral castration. In the following years, they also underwent clitoplastic, vaginoplastic and vulvoplastic surgeries as well as hormone treatment. In addition, M's medical treatment included several years of interventions intended to enlarge and dilate their vagina, carried out through penetration with objects by the medical team, M's mother and M themself.[14]

M claimed that the medical interventions and the concealment of their intersex condition during their childhood and adolescence had resulted in extensive physical, psychological, emotional, social, sexual and reproductive harms.

## AN 'UNSURMOUNTABLE OBSTACLE': FRENCH LAW AND COURTS

In 2015, M lodged a criminal complaint with a claim for civil liability for damages against X (presumably one of the medical doctors) before the Angers Court of First Instance, referring to the Articles of the French Penal Code that regulate

10 See OII Europe, n 2 above.
11 *M* v *France* n 1 above at [4].
12 *ibid* at [8]. See also Alice Domurat Dreger '"Ambiguous Sex": Or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality' (1998) 28 *The Hastings Center Report* 24, 29.
13 *M* v *France ibid*.
14 *ibid* at [9]-[11].

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acts of violence causing mutilation or permanent disability (222-9), when such violence targets a minor under 15 years of age or a vulnerable person (222-10) and habitual acts of violence against a minor under 15 years or a vulnerable person (222-14).[15] The Angers Court of First Instance nevertheless dismissed the complaint as inadmissible, referring to the statute of limitations having expired in 2005.[16]

M appealed against the decision before the Angers Court of Appeal, emphasising that they and their parents only had received partial and misleading information about their condition. More specifically, M pointed out that the medical doctors had indicated that M's sex was undetermined, that the parents needed to choose between the two sexes and that the female option was preferable, since the surgery involved was less complicated. M stated that they themself had only begun to take stock of their condition and the interventions following the interception of medical correspondence in 2000. Until this date, M claimed that there was an 'unsurmountable obstacle' for prosecution, which effectively postponed the starting date of the limitation period. M added that a legislative amendment in 2006 had extended the limitation period for violence targeting minors under 15 years of age or vulnerable people to twenty years (Article 222-10 of the French Penal Code), which meant that the case was not, in fact, time-barred.[17]

The Angers Court of Appeal, however, upheld the decision to dismiss the case. It did not find an 'unsurmountable obstacle' for prosecution, considering it impossible that M was unaware of the interventions to which they were subjected, at least during adolescence. When M turned 18, the Court pointed out, they also had the right to access their own medical records and could discover the details of their condition and the interventions.[18] Following the same reasoning, the Court of Cassation also dismissed M's appeal.[19]

## THE EUROPEAN COURT OF HUMAN RIGHTS

Following the dismissal of the case by domestic courts, M lodged a complaint before the European Court of Human Rights. The applicant maintained that the State's refusal to investigate their complaints regarding the 'feminising' interventions amounted to a procedural violation of the prohibition of torture (Article 3 ECHR). Moreover, the failure by the State to take effective measures to protect vulnerable individuals against such ill-treatment amounted to a substantive violation of the prohibition of torture and ill-treatment (Article 3 ECHR).[20] In addition, M claimed that the State's refusal to investigate the applicant's complaints raised before national courts constituted a violation of

15 *ibid* at [16].
16 *ibid* at [17]-[18].
17 *ibid* at [20].
18 *ibid* at [22].
19 *ibid* at [23]-[25].
20 *ibid* at [49].


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the right to a fair trial (Article 6(1) ECHR).[21] The State contested these claims, particularly emphasising that the case was inadmissible on procedural grounds.

The ECtHR declared the case inadmissible on procedural grounds. Regarding the claims presented by the applicant under Article 3, the Court pointed out that these arguments had not been presented before national courts, where the litigation had centred on prescriptibility and Article 6. National judicial authorities had, hence, not been given a chance to address the claims of torture and ill-treatment. Relying on the principle of subsidiarity,[22] the Court declared the application under Article 3 inadmissible based on the failure to exhaust national remedies (Article 35(1) and 35(4) ECHR).[23] With respect to the applicant's claims presented under Article 6(1) ECHR, the Court held that the right to a fair trial does not include a right to have third parties prosecuted or convicted.[24] The state's failure to judicially investigate the applicant's claims in the proceedings against X did not, moreover, obstruct M's possibilities to access judicial remedies, since there were also other possibilities to raise claims regarding liability for damages before national courts (for example, against the public hospital in question in administrative courts).[25] Consequently, the Court declared M's claims under Article 6(1) inadmissible based on Article 35(3) and 35(4) of the Convention.[26]

Yet, *M* v *France* differs from most inadmissibility judgments by the Court. While prevented from ruling on the merits of the case, the ECtHR remarkably decided to set out principles when assessing non-consensual interventions on intersex individuals which are not motivated by medical necessity with reference to Article 3 ECHR. The Court supported these guidelines by drawing on an impressive range of relevant national and supranational policy documents, including documents by the French Consultative Commission on Human Rights,[27] recommendations by several Council of Europe institutions,[28] the European Parliament,[29] UN bodies,[30] and the Yogyakarta

21 *ibid* at [50] and [75].
22 Enshrined in the Preamble to the Convention since the entry into force of Protocol No 15 on 1 August 2021.
23 *M* v *France* n 1 above at [68]-[74].
24 *ibid* at [78].
25 *ibid* at [83].
26 *ibid* at [85].
27 La commission nationale consultative des droits de l'homme, Avis du 22 mai 2018*, Agir contre les maltraitances dans le système de santé : une nécessité pour respecter les droits fondamentaux*. *M* v *France ibid* at [38].
28 Council of Europe Commissioner for Human Rights, *Human Rights and Intersex People* Council of Europe issue paper (2015); Parliamentary Assembly of the Council of Europe, *Children's Right to Physical Integrity* Resolution 1952 (2013); Parliamentary Assembly of the Council of Europe, *Promoting the Human Rights of and Eliminating Discrimination against Intersex People* Resolution 2191 (2017). *M* v *France ibid* at [39]-[41].
29 European Parliament, Resolution of 14 February 2019 on the Rights of Intersex People (2018/2878(RSP)). *M* v *France ibid* at [42].
30 United Nations General Assembly, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez* A/HRC/22/53, 12 March 2013; United Nations General Assembly, *Discrimination and Violence against Individuals based on their Sexual Orientation and Gender Identity. Report of the Office of the United Nations High Commissioner for Human Rights* A/HRC/29/23, 4 May 2015; United Nations Committee on the Rights of

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Principles.[31] Despite their different institutional affiliations, the message emerging from these soft law sources is unequivocal: non-consensual interventions on people with variations of sex characteristics which are not medically necessary constitute a violation of physical integrity, bodily autonomy, the right to health, the right to respect for private and family life, the right to non-discrimination and other fundamental rights, especially pertaining to children.

Linking non-consensual, non-therapeutic interventions to torture and ill-treatment, the ECtHR adopted a similar stance in the case. Recalling that claims of non-consensual medical interventions also can be examined under the right to respect for private and family life (Article 8 ECHR),[32] the Court pointed out that to fall under the prohibition of torture and ill-treatment (Article 3 ECHR), a minimum level of severity must be attained.[33] The appreciation of this minimum level is relative and depends on the facts of the case, particularly taking into consideration the duration of the treatment, its physical and psychological consequences, sometimes also depending on the victim's sex, age, state of health and situation of vulnerability.[34] While the intention to injure, humiliate or belittle the victim in principle is required for a treatment to fall within the scope of Article 3, the Court contended that the absence of such an intention does not definitely exclude a treatment from being examined under the prohibition of torture and ill-treatment.[35]

The Court emphasised that a medical intervention which is carried out without medical necessity and without the informed consent of the patient is liable to constitute ill-treatment within the scope of Article 3.[36] Conversely, if the intervention is motivated by medical necessity, it cannot in principle be regarded as inhuman or degrading.[37] This medical necessity must be 'convincingly demonstrated'.[38]

the Child, *Concluding Observations on the Fifth Periodic Report of France* CRC/C/FRA/CO/5, 23 February 2016; United Nations Committee against Torture, *Concluding Observations on the Seventh Periodic Report of France* CAT/C/FRA/CO/7, 10 June 2016; Office of the United Nations High Commissioner for Human Rights et al, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Interagency Statement* (Geneva: WHO, 2014). *M* v *France ibid* at [43]-[47].

31 The Yogyakarta Principles, 'The Yogyakarta Principles' at https://yogyakartaprinciples.org/ [https://perma.cc/YD32-MUK7]. *M* v *France ibid* at [48].

32 Here, the Court referred to its case law in *VC* v *Slovakia* (2011) ECHR 1888 at [138]-[155]; *Vasileva* v *Bulgaria* (2016) ECHR 273 at [57]-[58]; *LF* v *Ireland* ECtHR 10 Dec 2020 at [93]-[98]. *M* v *France ibid* at [59].

33 *M* v *France ibid* at [60].

34 At this point, the Court referred to the cases *Nicolae Virgiliu Tănase* v *Romania* (2019) ECHR 491 at [116]; *Jalloh* v *Germany* (2006) ECHR 721 at [67]; *VC* v *Slovakia* n 32 above at [101]. *M* v *France ibid* at [60].

35 Here, the Court recalled its case law in *Nicolae Virgiliu Tănase* v *Romania ibid* at [122]-[123]; *Jalloh* v *Germany ibid* at [68]; *VC* v *Slovakia* n 32 above at [101] and [119]. *M* v *France ibid* at [60].

36 *M* v *France ibid* at [61].

37 *ibid*.

38 Author's translation from the original French: *démontrée de manière convaincante*. *M* v *France ibid* at [61]. This principle has been developed in the Court's case law regarding people who have been deprived of their liberty. See *Herczegfalvy* v *Austria* (1992) ECHR 83 at [82]; *Nevmerzhitsky* v *Ukraine* (2005) ECHR 929 at [94]; *Gennadiy Naumenko* v *Ukraine* (2004) ECHR 68 at [112]; *Jalloh* v *Germany* n 34 above at [69]. Nevertheless, the principle has been extended to interventions carried out in ordinary hospitals, such as in cases of forced sterilisation of Romani women in


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Regarding informed consent, moreover, the Court pointed out that even a refusal to accept a treatment which might have a fatal outcome, if the patient is an adult of 'sound mind' (*sain d'esprit*), must be respected under the right to physical integrity, protected under Article 3.[39] If the patient is a child, the informed consent of their legal representative must be obtained.[40]

Taking a principled stance on non-consensual intersex interventions not motivated by medical necessity, the Court particularly drew parallels with its case law on forced sterilisations of Slovakian Romani women,[41] and female genital mutilation under the prohibition of torture and ill-treatment.[42] Doing so, the Court pointed out that sterilisation or genital mutilation of a person which has no therapeutic purpose and is carried out without the patient's informed consent is incompatible with the respect for human freedom and dignity and, as such, constitutes treatment contrary to Article 3.[43]

## COMMENTARY

Providing normative guidance, the *M* v *France* decision by the Strasbourg Court is a clear step in the direction of binding supranational legal standards. The case importantly points out that non-consensual intersex interventions invoke questions both from the perspective of the right to respect for private and family life (Article 8 ECHR) and the prohibition of torture and ill-treatment (Article 3 ECHR). Laying out the legal criteria for any similar claims which it might face in the future under the prohibition of torture and ill-treatment – centring on the questions of consent and medical necessity – the Court's ruling adds institutional magnitude to the position already signalled in the soft law which it cites. The words of the Court remain general and non-specific – not, for example, elaborating on the standard of informed consent required or the concept of medical necessity as such,[44] or whether the absence of *both* consent *and* medical necessity are always required to evaluate the intervention as torture or ill-treatment. Yet, the Court's stance demarcates the solidifying legal limits to medical discretion in the subject area.

*VC* v *Slovakia* n 32 above at [103] and [106]-[120]; *NB* v *Slovakia* (2012) ECHR 991 at [73]-[81]; *IG and Others* v *Slovakia* (2012) ECHR 1910 at [119]-[124].

39 Here, the Court referred to *VC* v *Slovakia* n 32 above at [105] and *AP, Garçon and Nicot* v *France* (2017) ECHR 338 at [127]. *M* v *France ibid* at [61].

40 At this point, the Court pointed to its case law in *NB* v *Slovakia* n 38 above at [74] and *IG and Others* v *Slovakia* n 38 above at [122]-[123]. *M* v *France ibid* at [61].

41 *VC* v *Slovakia* n 32 above; *NB* v *Slovakia ibid*; *IG and Others* v *Slovakia ibid*; *M* v *France ibid* at [62].

42 *Izevbekhai and Others* v *Ireland* App no 43408/08 ECtHR 17 May 2011 at [73]; *ES* v *France* App no 59345/11 ECtHR 7 April 2015; *Sow* v *Belgium* (2016) ECHR 88 at [64]. *M* v *France ibid* at [62].

43 *M* v *France ibid* at [62].

44 Such an evaluation would also evoke questions such as the rights of children in biomedicine. On this topic, see Kavot Zillén, Jameson Garland and Santa Slokenberga, *The Rights of Children in Biomedicine: Challenges Posed by Scientific Advances and Uncertainties* (Strasbourg: Council of Europe Publications, 2017) ch 5.

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**The Court's position in a moving European legal landscape**

The Court's words, albeit somewhat vague, should be seen in the context of the recent move by some European legislators to ban – with or without criminal sanctions – non-consensual interventions on children who are born with variations in sex characteristics which are not motivated by medical necessity. The first country to embrace this approach in the region was Malta in 2015,[45] followed by Portugal in 2018,[46] Iceland in 2020,[47] Germany in 2021,[48] and, most recently, Greece in 2022.[49] In citing the 2019 Resolution by the European Parliament, which recognises the Maltese and Portuguese bans as positive developments,[50] the Court also references this trend. While such bans can be considered important symbolic developments, they have also been criticised by civil society organisations and by the United Nations Treaty Bodies as incomprehensive, ineffectively implemented or easy to circumvent. This has been the case, for example, if the bans only outlaw certain interventions or if violations of the bans are surrounded by impunity.[51]

Yet, most parties to the Convention have not established bans on similar interventions. One such example is the United Kingdom, which refrains from enacting special legislation, but rather maintains that the responsibility to evaluate the appropriateness and necessity of interventions lies in the hands of medical professionals.[52] In the words of Garland, Lalor and Travis, this ambiguity leads to a 'shift in responsibility' from the state and public authorities to the individual medical expert.[53] Such national approaches could come under further scrutiny in the light of *M* v *France*, which connects these interventions to the non-derogable prohibition of torture and ill-treatment, clearly prompting Member States' obligations of due diligence. However, the Court's words do not bring clarity to all situations. For example, the evaluation of cases where the legal guardians of a young intersex child consent to interventions which are not medically necessary and regarding which the child has no possibility to form or express their own opinion, remains unclear legal territory in the light of *M* v *France*, also limiting the impact of the Court's guidelines.

45 Act No. XI of 2015.
46 Decreto da Assembleia da República 203/XIII.
47 Lög nr. 154 29. desember 2020.
48 Gesetz zum Schutz von Kindern mit Varianten der Geschlechtsentwicklung Vom 12. Mai 2021.
49 Νόμος 4958/2022 - ΦΕΚ 142/Α/21-7-2022.
50 European Parliament, n 29 above at [2].
51 See StopIGM.org, 'Application no. 42821/18, M v. France: Written comments by StopIGM.org' at [25] at https://intersex.shadowreport.org/public/ECHR-42821_18-M-v-France-Written-Comments-StopIGM.pdf [https://perma.cc/JDS5-GKXA]; United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Third to Sixth Periodic Reports of Malta* CRC/C/MLT/CO/3-6, 26 June 2019 at [28]-[29]; United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Portugal* CRC/C/PRT/CO/5-6, 9 December 2019 at [28(b)]; United Nations Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Portugal* CCPR/C/PRT/CO/5, 28 April 2020 at [16]-[17].
52 See F. Garland, K. Lalor and M. Travis, 'Intersex Activism, Medical Power/Knowledge and the Scalar Limitations of the United Nations' (2022) 22 HRLR 1, 12.
53 *ibid*.


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As pointed out above, the Court draws parallels with its case law on forced sterilisation and female genital mutilation, interventions which also fall under the prohibition of torture and ill-treatment. The parallel with genital mutilation is reminiscent of intersex activist statements, which continuously emphasise the similarities between intersex and female genital mutilations, with the difference that the first take place 'within hospital settings'.[54] Analogies to such grave human rights violations clearly reflect that the Court conceptualises the matter as a serious one, in which the State has the burden of proof to demonstrate medical necessity. Furthermore, these analogies also call into question the relationship between the Court's preferred requirements of medical necessity *and* informed consent, as parental or proxy consent is not given any considerable weight in the Court's own jurisprudence on sterilisation and genital mutilation.[55]

Refusing to defer by default to medicalised understandings of the intersex condition, instead requiring the State to demonstrate medical necessity, the Court relies more heavily on its case law regarding involuntary sterilisations of Romani women rather than those that target trans people. More specifically, sterilisation as a precondition for legal gender recognition, as well as other matters concerning trans people's right to gender identity, have generally developed under the Court's Article 8 jurisprudence.[56] Forced sterilisations targeting Romani women have, by contrast, in the most prominent cases also been considered violations of Article 3 ECHR.[57] Moreover, apart from being adjudicated as matters pertaining to the right to respect for private and family life rather than as torture or ill-treatment, the Court has quite readily accepted – and not seriously questioned – medicalised conceptualisations of trans people.[58] This being the case, the Court's stance in *M* v *France* raises questions concerning discrepancies in the ECtHR's own case law when it

54 OII Europe, 'STATEMENT of the 1st European Intersex Community Event' (Vienna, 30-31 March 2017) at https://www.oiieurope.org/statement-1st-european-intersex-community-event-vienna-30st-31st-march-2017/ [https://perma.cc/9U67-V2Y9]. The parallels between the two interventions can be seen, for example, in the term 'Intersex Genital Mutilations' which is used by intersex civil society organisations such as StopIGM.org.

55 The cases cited by the Court on this point were *NB* v *Slovakia* n 38 above at [74] and *IG and Others* v *Slovakia* n 38 above at [122]-[123]. *M* v *France* n 1 above at [61]. These cases only point out that no informed consent had been obtained from the legal minors or their legal representatives and that the interventions were therefore non-consensual.

56 *AP, Garçon and Nicot* v *France* n 39 above. See also *YY* v *Turkey* (2015) ECHR 257. The same applies to gender-affirming surgery as a precondition for legal gender recognition, see *Y and X* v *Romania* (2021) ECHR 41. The Court has, nevertheless, limited case law on involuntary sterilisation of trans people to date and its jurisprudence depends on the facts of the cases and the claims presented by the applicants. The Court has implied that cases of involuntary sterilisation of trans people could be tried under Article 3 in *AP, Garçon and Nicot* v *France* n 39 above at [127].

57 More specifically, in the cases *VC* v *Slovakia* n 32 above; *NB* v *Slovakia* n 38 above; *IG and Others* v *Slovakia* n 38 above. See Daniela Alaattinoğlu, 'Forced Sterilisation in the Istanbul Convention: Remedies, Intersectional Discrimination and Cis-exclusiveness' in Johanna Niemi, Lourdes Peroni and Vladislava Stoyanova (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention* (Abingdon: Routledge, 2020) 182.

58 The Court, nevertheless, recognises that pathologisation of trans people can lead to stigmatisation in *AP, Garçon and Nicot* v *France* n 39 above at [138]. See P. Dunne, 'Legal Gender Recognition in Europe: Sterilisation, Diagnosis and Medical Examination Requirements' (2017) 39 JSWFL 497. On the pathologisation of trans people in the Court's jurisprudence, see also P. Canoot, 'The Pathologisation of Trans* Persons in the ECtHR's case law on legal gender recognition' (2019)

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comes to involuntary medical interventions regarding intersex and trans people respectively. This inconsistency is particularly visible in the Court's fluctuating willingness to accept pathologisation as a legal argument – in other words, the extent to which it considers the applicant as an ill patient in need of treatment.[59]

## The multitude of harms, recognition and redress

Despite some lack of clarity, *M* v *France* signals that Council of Europe Member States ought to prevent early interventions on individuals with variations in sex characteristics unless they are medically necessary. While the limits of medical necessity remain a contested area, beyond the scope of this note, the Court's stance arguably discourages interventions which are motivated by aesthetic or social reasons. Furthermore, changing legal norms around such interventions begs the question of how to address interventions carried out in the past on individuals whose lives are still affected by them – a concern voiced by many intersex human rights defenders.[60] As seen in the case of M, courts might also present the only viable avenue for such individuals to access justice and redress. Albeit not addressed by the Court in its admissibility decision, the compound and long-term harms presented by the applicant call into question how – if admissible – such harms ought to be remedied.

M presented a statement by a psychologist testifying to the post-traumatic stress disorder caused by the many medical interventions in childhood which they had little or no possibility to consent to or understand at the time.[61] Adding to M's trauma was, according to the statement, that their condition was kept a secret from them during their childhood and adolescence.[62] The statement particularly highlighted that the 'multiple hospitalisations' which involved 'painful surgeries' resulted in the 'mutilation' of the applicant's body, and had ruined their childhood and family relationships.[63] Other direct harms listed were involuntary infertility caused by the medical interventions (a consequence of the bilateral castration), and pain during vaginal penetration, which rendered the applicant unable to have a fulfilling sexual life.[64] As a result of their physical and psychological trauma, M was unable to finish their studies or to find a stable job.[65] M was officially recognised as disabled and lived on their disability allowance, reporting difficulties in social and economic integration.[66]

As demonstrated by M's case, adequate remedies for these physical, mental, social, sexual and reproductive harms are unlikely to be limited to finding a legal

37 NQHR 14; D.A. Gonzalez-Salzberg, 'An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *AP, Garçon and Nicot* v *France*' (2018) 81 MLR 526.

59 *ibid*. On the pathologisation of intersex people in general, see Morgan Carpenter, 'Intersex Variations, Human Rights, and the International Classification of Diseases' (2018) 20 HHR 205.

60 See for example Intersex Justice Project, 'A Framework for Intersex Justice' at https://www.intersexjusticeproject.org/intersex-justice-framework.html [https://perma.cc/26PL-97H3].

61 *M* v *France* n 1 above at [12].

62 *ibid*.

63 *ibid* (translated from French by the author).

64 *ibid*.

65 *ibid* at [12]-[13].

66 *ibid* at [13].


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violation. When ruling on the merits of similar cases in the future, the Court will most likely also face the question of just satisfaction according to Article 41 ECHR. When pondering possibilities for satisfaction that is considered just, the Court may wish to go beyond the usual modality of compensation. Here, it could, for example, find remedial inspiration from the Inter-American Court of Human Rights. For example in the case *IV* v *Bolivia*, in which a refugee woman had been subjected to involuntary sterilisation, the Inter-American Court ordered the state to provide medical rehabilitation tailored to the direct victim's needs.[67] It also considered it necessary to include the direct victim's family as indirect victims in the psychological therapy.[68] Moreover, the Court ordered the State to compensate the direct victim for her monetary and non-monetary damages,[69] and to publish the judgment and publicly acknowledge its responsibility.[70] As a guarantee of non-repetition, moreover, Bolivia was required to secure that consent to sterilisation is always prior, free, informed and full.[71]

While restitution,[72] – in other words, undoing past medical interventions – is not possible in M's case or similar cases, the Court may, on future occasions, consider multiple forms of remedies in order to recognise and redress victims' extensive harms as fully as possible. Possible remedies include compensation,[73] rehabilitation,[74] or victim satisfaction such as public investigations of medical practices, public apologies to the people harmed by these practices, or facilitating access to assisted reproduction technologies or adoption.[75] Moreover, other remedies could be guarantees of non-repetition,[76] such as establishing legal bans on non-consensual, non-therapeutic interventions on children born with variations in sex characteristics, redesigning medical schools' curricula and providing specialised training for professionals in the area. As these interventions, once carried out, might constitute enduring harm in the victims' lives, it would be important for states not only to ensure that no future interventions are carried out, but to also remedy the people it has harmed through previous practices.[77]

67 *IV* v *Bolivia* (2016) IACtHR Series C 329 at [332].
68 *ibid*.
69 *ibid* at [354]-[358].
70 *ibid* at [334]-[336].
71 *ibid* at [340]-[342]. This should be done by providing hospitals with printed leaflets on the reproductive and sexual rights of women and through establishing permanent programs for medical students and professionals on informed consent, stereotyping, gender discrimination and violence. See also D. Alaattinoğlu, 'Gender-Sensitive Reparations in the I.V. v. Bolivia Case: A Missed Opportunity?' *IntLawGrrls* 24 March 2017 at https://ilg2.org/2017/03/24/gender-sensitive-reparations-in-the-i-v-v-bolivia-case-a-missed-opportunity/ [https://perma.cc/9SBB-H54P].
72 For a definition of restitution, see United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* Resolution 60/147 (2005), Art 19.
73 *ibid*, Art 20.
74 *ibid*, Art 21.
75 *ibid*, Art 22.
76 *ibid,* Art 23.
77 See, *mutatis mutandis*, D. Alaattinoğlu and R. Rubio-Marín, 'Redress for Involuntarily Sterilised Trans People in Sweden against Evolving Human Rights Standards: A Critical Appraisal' (2019) 19 HRLR 705.

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## The limits of legal liability

When legally evaluating past medical practices and – if considered to constitute breaches of legal principles or rules – pondering adequate remedies for them, any judicial authority faces legal questions that relate to the passing of time. This is not only the case when trying the civil, administrative or criminal liability of individual violators, but also when evaluating state responsibility.[78]

The first of these questions, which are also discussed in *M* v *France*, is that of statutory limitations. Here, a general principle of international law – also expressed in the question of admissibility in Article 35 ECHR – is to accept national rules on prescriptibility. One important matter which arose in M's case is how limited access to information and medical records – which might affect many intersex people – impacts prescriptibility.[79] Another important issue, also brought up by the Court in the case of M, is that of prescriptibility and enduring harms. Should statutes of limitation also be applied when the physical and mental harms caused by torture or ill-treatment are continuous? In M's case, the national statute of limitations was counted from the time when the bodily injury was consolidated, a moment which according to the applicant had not yet taken place, as also pointed out by the ECtHR.[80] Looking beyond M's case, nevertheless, many other similar interventions on people born with an intersex condition might be regarded statute-barred according to national rules, which eventually begs the question of whether an exception to the general rule should be warranted in these cases.[81]

The second major question regarding temporality is that of the retroactivity of legal norms. If these interventions constitute violations of human rights norms which warrant redress, what are the temporal boundaries of such a finding? In the light of developing medical practices and evolving bioethical principles – which to some extent may vary from one country to another – when were these interventions established as human rights violations? On the one hand, a general international legal principle is that of treaty non-retroactivity, expressed in Article 28 of the Vienna Convention of the Law of Treaties. Following this principle, it would be important to determine a specific point in time when non-therapeutic, non-consensual interventions were considered contrary to treaty obligations. In *M* v *France*, the Court signals that such interventions violate several of the rights protected in the Convention. Yet, it should be kept in mind that this is not a ruling on the merits of the case. Accordingly, while this statement carries interpretative value, it is not legally binding. On the other hand, if non-consensual intersex interventions which are not motivated

78 See United Nations General Assembly, *Responsibility of States for Internationally Wrongful Acts*. Resolution 65/19 (2010).

79 Similar experiences of limited access to information are shared by other intersex people. See Amnesty International, 'First, Do No Harm: Ensuring the Rights of Children who are Born Intersex' at https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/ [https://perma.cc/V38F-XCKW].

80 *M* v *France* n 1 above at [83].

81 The United Nations Committee against Torture has considered that statutes of limitations should not be applicable in case of enduring harms caused by torture. See United Nations Committee against Torture, *General Comment No 3*, CAT/C/GC/3, 19 November 2012 at [40].


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by medical necessity are considered contrary to the prohibition of torture, a possibility which *M* v *France* clearly suggests, they could also be considered a breach of *jus cogens* – by definition non-temporal.

These questions demonstrate some of the legal conundrums which courts may face when evaluating intersex interventions, particularly those that date back in time. A judicial road to recognition and redress could also be a difficult one for individual intersex people, since the proceedings might be lengthy, costly and their outcome uncertain. This said, strategic litigation, particularly before supranational courts, might also present one way to break national deadlocks on these questions.

## CONCLUSION

The ECtHR's stance in *M* v *France* implies a strengthening of human rights standards regarding early intersex interventions, centring the legal evaluation on the questions of informed consent and medical necessity under the prohibition of torture and ill-treatment (Article 3 ECHR). Yet, the Court's guidance remains unclear as to the definitions of informed consent and medical necessity, the relationship between the two as necessary requirements, and the internal inconsistencies in its own jurisprudence. While it seems that *M* v *France* inspires hope among intersex human rights defenders to mobilise legally, this note has pondered some of the questions surrounding recognition and redress that courts may face when evaluating claims of rights violations. In the future, the ECtHR will face more cases brought by intersex applicants,[82] presenting a chance for it to bring more legal clarity to the questions evoked by *M* v *France*.

82 Pending cases regarding intersex-related human rights questions are, at least, *LB* v *France* App no 67839/17 and *Semenya* v *Switzerland* App no 10934/21. In 2023, the ECtHR decided that there was no violation of the right to respect for private and family life (Article 8 ECHR) for the failure by the state to provide non-binary legal recognition for an intersex applicant. *Y* v *France* App no 76888/17 ECtHR 31 January 2023.

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