gender identity & the registration of sex by public authorities

Marjolein van den Brink (UU, SIM & UCERF)
m.vandenbrink@uu.nl
Seminar ‘Current reflections on EU anti-discrimination law’
ERA, Trier, 6-7 June 2016
1. terminology
2. interests involved (individuals & state)
3. regulating sex/gender + international developments
   a) attribution of legal sex
   b) changing legal sex
4. EU law
   • sex-discrimination law
   • other areas of EU-law
5. what next?
1. terminology

- trans*
- intersex
- cis

Cisgender

Transgender

Shoved Against Wall, Called "Boy" in Women’s Bathroom

I'd rather you not call me cis.

I wish I could live in a world populated by only trans and cis woman.

I'm a girl who has testes and XY chromosomes.

TV’s First Trans-Woman-of-Color Lead Role, is About to School TV’s First Intersex Character

Jennifer Elms
2. objections to system of legal sex attribution & registration

- **trans***:
  - being ‘outed’ all the time, being mis-identified, having to change legal gender, running into problems because of laws being grounded in cisnormativity; conditions applying to legal change of gender etc.

- **intersex**:
  - esp. medical interventions

- **(some) women / men**:
  - idea of sex equality is reinforced by attribution and registration of legal sex; system also allows for direct sex discrimination in law
2. interests in retaining system of legal sex registration

- various purposes of government:
  - identification (both negative & positive), statistics & policy making, many laws relying on it (e.g. family law), sex-segregation (prisons, schools, toilets), sex-equality legislation & policies
  - change would mean a lot of work for a minor benefit
    - and many people* don’t mind at all, or indeed even like to be addressed as Mr., Mrs. or Ms.
      - esp. most cis and intersex people, and most transsexuals (i.e. f-to-m and m-to-f)
3. registration of legal gender
3a) attribution of legal sex at birth
3.b) changing legal sex: requirements

male to female
female to male

"I'd like to be a woman, please."
3.b) requirements: medical declaration

- medical declaration
  - why?
  - drop it?
  - final?

- case law ECtHR:
  - Van Kück v Germany (2003)
  - YY v Turkey (2015)
3.b) requirements: marital status

- legal framework regarding same-sex marriage applicable

**case law:**
- HRC: Joslin (2002)
- ECtHR:
  - Parry v UK (2006)
  - Hämäläinen v Finland (2014)
3.b) requirements: physical ‘adjustment’

- generally
- ‘sterilisation requirement’
  - national developments (Italy, Netherlands)
  - human rights case law (ECtHR: YY v Turkey, 2015)
3.b) pregnant fathers & fathering mothers

- the Netherlands:
  - art. 1:28c(2) Civil Code: legal sex change: effects ad nunc
  - art. 1:28c(3) Civil Code: exception for trans men
3.b) other family law solutions

- **Sweden**: Administrative Court of Gothenburg (no. 6186-14, 5 October 2015)
- **Australia**: ACT to introduce birth certificate which provides options: mother, father, parent 1, parent 2 (Canberra Times, 16 Feb. 2016)
4 & 5 EU law

- outline
  - state of play:
    - sex-discrimination law & case law
    - other areas of EU-law
  - what next?
    - sticking to the binary?
    - third box?
    - stop registration?
EU sex-discrimination law

- **Charter**: art. 21 on protection against discrimination: lists sex and sexual orientation but not gender (identity)


  ‘the prohibition of discrimination ... also applies to discrimination arising from the gender reassignment of a person’
EU sex-discrimination law

- P v S & Cornwall County, C-13/94, 1996
- K.B. v NHS, C-117/01, 2004
- Richards v Secretary of State, C-423/04, 2006

Interesting aspects:
- Comparator
- Qualification of the discrimination
- References to human rights (esp. Richards)
EU pregnancy protection

- protection of pregnant workers, Dir. 92/85/EEC
  - NB: in French: travailleuses enceintes, or in Dutch: ‘werkneemsters’

- protection against pregnancy-related discrimination: art. 2c Recast Dir. 2006/54/EC
  
  For the purposes of this Directive, discrimination includes: any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.
exceptions to direct discrimination

- genuine occupational requirements
- positive action & preferential treatment
other EU law aspects: victims’ rights
victims’ rights directive (2012/29/EU):
preamble recital 9:

victims of crime should be recognised and treated in a respectful, sensitive and professional manner **without discrimination** of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, **gender**, **gender expression**, **gender identity**, sexual orientation, residence status or health.
other EU law aspects: refugees

- recital 30 Qualif. dir. (recast, 2011, 2011/95/EU):
  "It is equally necessary to introduce a common concept of the persecution ground ‘membership of a particular social group’. For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation..."

- art. 10(1)(d):
  "Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. [...] Gender related aspects, including gender identity, shall be given due consideration..."
other EU law aspects: privacy

- New EU regulation on data protection, 2016/679, 27 April 2016
  mentions only race / ethnicity as ‘sensitive personal data’, but seems to leave room for states to provide specific protection
<table>
<thead>
<tr>
<th></th>
<th>gender reassignment</th>
<th>gender identity</th>
<th>gender expression</th>
</tr>
</thead>
<tbody>
<tr>
<td>employment &amp; soc.sec.</td>
<td>yes</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>goods &amp; services</td>
<td>yes</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>victims’ rights</td>
<td>(implicit)</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>refugees</td>
<td>(implicit)</td>
<td>yes</td>
<td>yes</td>
</tr>
</tbody>
</table>
what next?

- staying within the binary
  - not move (much) beyond gender reassignment
- moving beyond implies tackling distinctions based on sex, that so far are excluded from protective scope (e.g. ‘cross dressing’
what next?

- add third box and/or add gender identity as separate ground
  - advantages:
    - (political) feasibility / minor change / limited resistance
    - can be constructed as (half)-open system
    - solution for specific situations
    - ...
  - disadvantages:
    - third box risks stigmatisation
    - may enhance rather than diminish the ‘gender gap’
      - blurs interconnectedness gender / gender identity
      - enhances binary conception of sex (Geertje Mak)
    - ...

what next?

- a third box?
  - national case law:
    - K (Hoge Raad Netherlands, 2007)
    - Norrie (High Court Australia, 2014)
    - NALSA (Supreme Court India, 2014)
    - Oberlandesgericht Celle Germany, 2015
    - Cour d’Appel d’Orléans, 22 March 2016
no box?
thank you!

Sorry, Teacher, but where do the kids whose most salient identity isn’t gender and instead self-identify as “awesome” line up?