Trans & intersex equality rights in Europe

Marjolein van den Brink
ERA Trier, 3 June 2019

- 2012 publication 1st EU report on Trans and intersex people - Discrimination on the grounds of sex, gender identity and gender expression, by Silvan Agius (Malta) & Christa Tobler (Switzerland & the Netherlands)
  access: https://publications.europa.eu/en/publication-detail/-/publication/9b338479-c1b5-4d88-a1f8-a248a19466f1
  commissioned by: European Network of Legal Experts in the non-discrimination field

- nov. 2018: 2nd EU report on Trans and intersex equality rights in Europe - a comparative analysis, by Marjolein van den Brink (Netherlands) & Peter Dunne (Ireland & UK)
  commissioned by: European network of legal experts in gender equality [and non-discrimination]
outline

- terminology & major problems
- legal gender: attribution, registration, use of data
- common conditions to change legal sex + restrictions imposed by int. human rights law
- common problems in EU member states & the scope of EU equality law
- dilemma’s and future directions

terminology

- cisgender
- transgender
- intersex
- non-binary
- gender / sex
- SOGIESC
## sex or gender?

<table>
<thead>
<tr>
<th>issue</th>
<th>trans m/f</th>
<th>intersex m/f</th>
<th>non-binary (both trans &amp; intersex)</th>
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<tbody>
<tr>
<td>major problems (arguably)</td>
<td>- legal gender&lt;br&gt;- transition period&lt;br&gt;- daily confrontations with unfitting gender label</td>
<td>- surgery &amp; treatment of newborn babies&lt;br&gt;- invisibility &amp; lack of awareness others&lt;br&gt;- esp. in the past: secrecy re intersex status</td>
<td>- daily confrontations with unfitting gender label&lt;br&gt;- gender discrimination based on appearance</td>
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<td>legal gender label: national laws very diverse</td>
<td>- restrictive conditions for change (if possible at all)</td>
<td>- if possible, usually: medical declaration</td>
<td>- not possible in most countries; a few very recent exceptions (e.g. Germany, Malta)</td>
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<tr>
<td>subject to discriminatory treatment based on trans/intersex status</td>
<td>yes, esp. during transition period; before &amp; or after, at least partly depending on whether ‘passing’</td>
<td>- lack of info; probably relatively limited because of lack of visibility &amp; lack of awareness;&lt;br&gt;- ignorance may be painful to people concerned</td>
<td>yes, in all respects, especially when presenting as non-binary</td>
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<tr>
<td>subject to ‘regular cis-sex(m/f) discrimination’</td>
<td>if passing: ‘regular’ sex discrimination is likely to be similar to that of cisgenders, e.g. labour market, education etc.</td>
<td>as for (any other) cis people</td>
<td>likely in an exacerbated form because not fitting</td>
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<tr>
<td>subject to sexual orientation discrimination</td>
<td>yes, either before or after transition, unless orientation affected, or bisex etc.</td>
<td>like cisgenders, depending on their orientation</td>
<td>likely in an exacerbated form</td>
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<tr>
<td>medical issues</td>
<td>- surgery / hormones may be required to change legal sex&lt;br&gt;- access to treatment&lt;br&gt;- insurance / costs&lt;br&gt;- discriminatory treatment</td>
<td>- surgery &amp; other treatments for babies (often necessitating life-long medical care)&lt;br&gt;- discriminatory treatment (incl. ‘medical curiosity’)</td>
<td>- access to gender treatment may be limited (all or nothing)&lt;br&gt;- insurance / costs&lt;br&gt;- discriminatory treatment by medical staff generally</td>
</tr>
<tr>
<td>minors</td>
<td>minimum age to access treatment and/or change of legal sex</td>
<td>no possibility to consent to treatment as a baby</td>
<td>like trans (if there are possibilities at all)</td>
</tr>
</tbody>
</table>
the basics of registration

attribution of legal sex at birth
changing legal sex: requirements

male to female
female to male

requirements: marital status
**divorce requirement: ECtHR v HRC**

- ECtHR (GC) *Hamalainen v Finland*, 2014:
  - Married trans woman
  - Impossible to change gender on birth certificate and gender digit in personal identity number unless divorce
  - Alternative: civil union
  - Court: consequences of the available alternative not disproportionate + no implications for applicants family life
  - no violation of art. 8 & 14; no separate issue under art. 12
- However: *G. v Australia*, 2017:
  - HRC endorses G’s argument that ‘even though failure to provide access to marriage for same-sex couples may not constitute a violation of the ICCPR, consistency between birth registrations & Marriage Act is not a legitimate aim’, by finding the national policies inconsistent and discriminatory

**medical aspects: diagnosis & treatment**

**ECtHR: AP, Garçon & Nicot v France**, 2017

- medical declaration
  - proportionate
- physical interventions (‘irreversible changes’):
  - As much as possible as the
    - ‘opposite sex’
  - ‘sterilisation requirement’
  - disproportionate to demand someone to relinquish physical integrity in order to enjoy respect for private life (art. 8)
**EU legal framework**

- no explicit references in EU primary legislation
  - [art. 21(1) lists sexual orientation]
  - but: ‘sex’ may be interpreted inclusively, or
  - gender identity and expression and sex characteristics could be introduced because the list of grounds is not exhaustive
- references in secondary law:
  - Equality directives:
    - Recital 3 of the Recast Directive (2006/54): directive also applicable to discrimination arising from ‘gender reassignment’ (codification of *P v S and Cornwall County Council* (1996)).
  - Other directives:
    - acknowledgment of gender identity and other gender-related aspects in:
      - Art. 10(1)(d) Recast Qualification Directive (2011/95)
      - Recitals 9, 17 & 56 Victims’ Rights Directive (2012/29)
  - no references in: General Data protection Regulation (2016)
    - sexual life and sexual orientation is listed as a ‘special category of personal data (art. (9(1))
    - GI, GE & SC to be interpreted into ‘genetic or biometric data’?
    - inclusive interpretation of ‘sex’ impossible because not listed as ‘sensitive ground’

**EU case law**

- judgments on trans issues:
  - *KB v National Health Service Pensions Agency and Another* (2004)
- limitations:
  - so far no judgments on intersex or non-binary individuals
    - *can existing EU equality law be stretched to include gender identities beyond the binary m/f?*
    - *do the problems faced by intersex people fall within the scope of EU competence?*
    - reading of equality protection through ‘gender reassignment’ lens, resulting in a medicalized discourse; repeated references to surgical transitions
      - *will EU law offer protection against discrimination of trans individuals who cannot or will not access medical treatment?*
common equality problems in EU member states + scope of current protection by EU law

Issues explored and compared in the report:

- **protective scope of non-discrimination legislation** (limited obligation under Dir. 2006/54)
- access to health care (Dir. 2004/113)
- **single sex facilities** (Dir. 2004/113)
- education (EU law only covers vocational training: 14(1)(b) Dir. 2006/54)
- **retirement pensions** (art. 157 TFEU, art. 7(9)(iii) Dir. 2006/54 + Dir. 79/7 covers statutory retirement benefits)
- labour market discrimination (Dir. 2006/54)
  - absence due to trans or intersex-related treatment
  - discriminatory treatment at work
  - harassment
  - pregnancy protection
- sanctions & remedies: very little national case law or other information available

problems, dilemma’s, solutions:

- protective scope of equality legislation:
  - how to construct protection against discrimination on the basis of gender identity, gender expression and sex characteristics?
  - 3 options:
    - broad interpretation of sex
    - adding non-discrimination grounds
      - in gender equality directives or in the ‘other-grounds’ directive (2000/78)?
      - middle road: explicit clarification that ‘sex’ includes GI, GE & SC
  - dilemma’s & questions:
    - emphasise common root causes for gender-related discrimination by broad interpretation of sex?
    - separate mention or protection to raise awareness?
    - separate protection to ensure that specific problems can be dealt with?
    - separate protection might also help avoid problems caused by closed system?
      (although arguably a strict reading of the sex equality provisions might already raise such problems, e.g. regarding dress codes m/f)
problems, dilemma’s, solutions:
single sex spaces

*a perfect example of a sphere that is strictly regulated and controlled by society without much legal back-up*

solutions:
add a group (e.g. men / women / other bathrooms), make all facilities gender neutral, or add a few exceptional facilities?

*how to understand / apply art. 4(5) of Dir. 2004/113 with regard to non-binary persons?*

This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

problems, dilemma’s, solutions:
tensions between women’s & trans interests?

* example: MB v Secretary of State for Work and Pensions (2018)*

- access for trans women to ‘positive action-ish’ types of treatment, e.g. lower retirement ages, preferential treatment for jobs etc.
  - no problem; issue is to prevent forced ‘outing’?
  - problem because such (preferential) treatment is meant to compensate for disadvantages, suffered typically by cisgender women (or men: military service)
    - or: no problem because trans people suffer significant disadvantages
    - or: no problem because the group of trans people is very small?
  - problem because such preferential treatment should be targeting the group that actually suffered the disadvantage and not rely on gender stereotypes
  - etc...
problems, dilemma’s, solutions

- EU law: discrimination related to pregnancy or maternity = direct discrimination of Women
  (Dekker Dekker and Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus (C-177/88, 1990))

- will pregnant men and non-binary persons be protected against pregnancy-related discrimination?

- should the construction of pregnancy discrimination as women’s discrimination be abandoned
  and replaced by separate grounds (pregnancy, giving birth, lactation)?
  - arguably additional benefit of the continuous emphasis on ‘women & pregnancy’

- likely that protection of pregnant men and non-binary individuals under the ‘pregnant workers
  directive’ (Dir. 92/85) will not cause problems

specific questions

The evaluation of Dutch transgender act (2017) brought to light 2 issues that may or may not be in conflict
with EU law:

- Can an insurance company refuse to lower the insurance premium for a trans woman after transition,
  when men pay more than women?
  is Association belge des Consommateurs Test-Achats ASBL v. Conseil des Ministres (C-236/09, 2011)
  applicable?

- The Netherlands (still) demands a declaration (about the conviction that someone is trans) issued by an
  authorised professional:
  violation of free movement of services?

General: should the General Data Protection Regulation start to treat
information on gender as ‘sensitive’? Generally or just in relation
to trans & intersex people?
that’s it - thank you

any questions?

- One last question for you:

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