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Trans & intersex equality rights in Europe

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- 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)

<https://www.equalitylaw.eu/downloads/4739-trans-and-intersex-equality-rights-in-europe-a-comparative-analysis-pdf-732-kb>

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?

issue	trans m/f	intersex m/f	non-binary (both trans & intersex)
major problems (arguably)	<ul style="list-style-type: none"> - legal gender - transition period - daily confrontations with unfitting gender label 	<ul style="list-style-type: none"> - surgery & treatment of newborn babies - invisibility & lack of awareness others - esp. in the past: secrecy re intersex status 	<ul style="list-style-type: none"> - daily confrontations with unfitting gender label - gender discrimination based on appearance
legal gender label: national laws very diverse	- restrictive conditions for change (if possible at all)	- if possible, usually: medical declaration	- not possible in most countries; a few very recent exceptions (e.g. Germany, Malta)
subject to discriminatory treatment based on trans/intersex status	yes, esp. during transition period; before & or after, at least partly depending on whether 'passing'	<ul style="list-style-type: none"> - lack of info; probably relatively limited because of lack of visibility & lack of awareness; - ignorance may be painful to people concerned 	yes, in all respects, especially when presenting as non-binary
subject to 'regular cis-sex(m/f) discrimination'	if passing: 'regular' sex discrimination is likely to be similar to that of cisgenders, e.g. labour market, education etc.	as for (any other) cis people	likely in an exacerbated form because not fitting
subject to sexual orientation discrimination	yes, either before or after transition, unless orientation affected, or bisex etc.	like cisgenders, depending on their orientation	likely in an exacerbated form
medical issues	<ul style="list-style-type: none"> - surgery / hormones may be required to change legal sex - access to treatment - insurance / costs - discriminatory treatment 	<ul style="list-style-type: none"> - surgery & other treatments for babies (often necessitating life-long medical care) - discriminatory treatment (incl. 'medical curiosity') 	<ul style="list-style-type: none"> - access to gender treatment may be limited (all or nothing) - insurance / costs - discriminatory treatment by medical staff generally
minors	minimum age to access treatment and/or change of legal sex	no possibility to consent to treatment as a baby	like trans (if there are possibilities at all)



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:

- ▶ *P v S & Cornwall County Council* (1996)
- ▶ *KB v National Health Service Pensions Agency and Another* (2004)
- ▶ *Richards v Secretary of State for Work and Pensions* (2006)
- ▶ *MB v Secretary of State for Work and Pensions* (2018)

▶ 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: equality protection

- ▶ 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 pregnancy

- ▶ 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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