

## Transgender and Intersex rights Current legal challenges

Isabelle Rorive

*Law professor and president of the Centre Perelman  
University of Brussels (ULB)*

*Co-director of the Equality Law Clinic*

*Senior expert of the European Equality Law Network*

[www.philodroit.be](http://www.philodroit.be)

ERA  
Current Reflections on EU Anti-Discrimination Law  
Online seminar for University professors and law lecturers  
3 February 2021

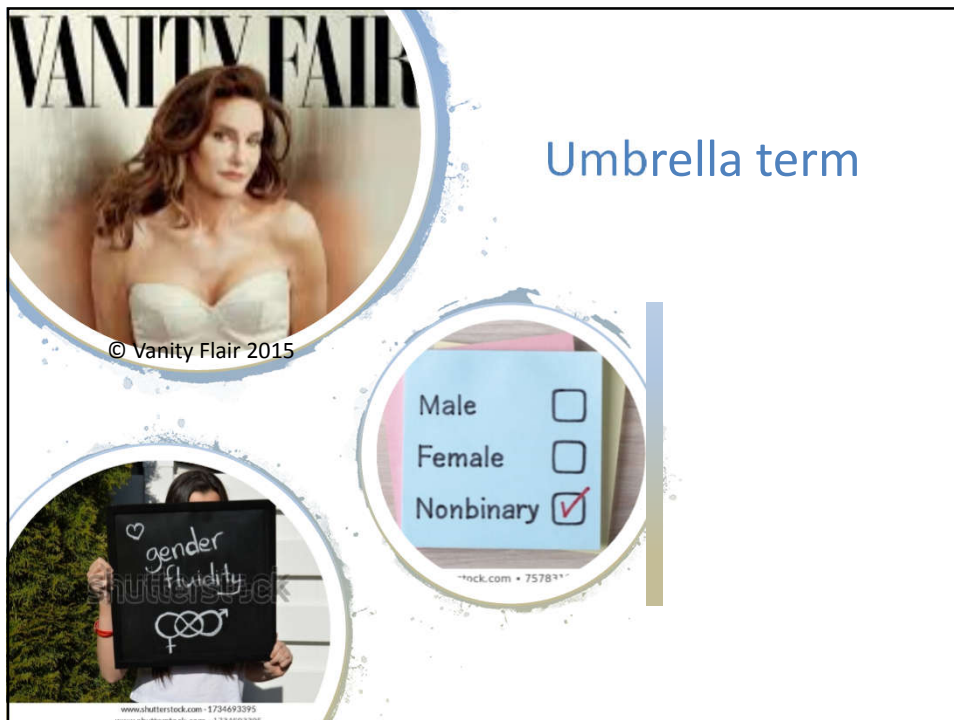
[www.philodroit.be](http://www.philodroit.be)

*To be clear on terminology*



## Trans / Transgender people

*« The term trans includes those people who have a gender identity and/or a gender expression that is different from the sex they were assigned at birth. 'Trans' is an umbrella term »* ([EU 2018 report](#), p. 34)



## Intersex people

« *Intersex people are born with physical, hormonal or genetic features that are neither wholly female nor wholly male; or a combination of female and male; or neither female nor male. Many forms of intersex exist; it is a spectrum or umbrella term, rather than a single category.*

*An intersex individual is born intersex. Some common intersex variations are diagnosed prenatally (...). Intersex differences may be visibly apparent at birth. Some intersex traits become apparent at puberty, or when trying to conceive, or through random chance. Other instances may only be discovered during an autopsy. »*  
([Ilga Europe](#))



Caster Semenya in  
800m Final, Rio  
Olympics 2016



A film directed by Lucia  
Puenzo (2007)



CENTRE PERELMAN  
DE PHILOSOPHIE DU DROIT

## *Human Rights Framing*



[www.philodroit.be](http://www.philodroit.be)

©Time magazine  
2014

the Yogyakarta Principles on  
the application of international  
human rights law in relation to  
sexual orientation and gender  
identity



the Yogyakarta Principles +10:  
principle 31 on legal gender  
recognition and principle 32  
on the right to bodily and  
mental integrity



Council of  
Europe

2010: the Committee of Ministers  
of the Council of Europe proposed  
that “*legislative and other measures  
[should be] adopted and effectively  
implemented to combat  
discrimination on grounds of (...)  
gender identity, to ensure respect  
for the human rights of (...)  
transgender persons*”  
(Recommendation CM/Rec(2010)5)

## Council of Europe

2017: the Parliamentary Assembly of the Council of Europe called upon countries to “*prohibit medically unnecessary sex-‘normalising’ surgery, sterilisation and other treatments practised on intersex children without their informed consent*”

(Resolution 2191 (2017))

## UN Human Rights Council

2016: the UN Human Rights Council appointed an Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity (SOGI)

## UN Committee against torture

« On numerous occasions, the Committee has expressed concern about 'unnecessary and in some cases irreversible surgical procedures that have been carried out on intersex persons' without informed consent. The Committee has called upon state parties to adopt 'legislative, administrative and other measures to guarantee respect for the physical integrity of intersex individuals' and to ensure that 'no one is subjected during childhood to non-urgent medical or surgical procedures intended to establish one's sex'. » ([EU 2018 report](#), p. 41)

## European Parliament

2019: the European Parliament adopted a resolution which  
« Strongly condemns sex-normalising treatments and surgery; welcomes laws that prohibit such surgery, as in Malta and Portugal, and encourages other Member States to adopt similar legislation as soon as possible »  
and which « Stresses the importance of flexible birth registration procedures »  
(2018/2878(RSP))

## European Commission

2020: in November, the Commission presented its the first-ever EU Strategy for lesbian, gay, bisexual, trans, non-binary, intersex and queer (LGBTIQ) equality. According to the Commissioner for Equality, Helena Dalli, « *Equality and non-discrimination are core values and fundamental rights in the European Union. This means that everybody in the European Union should feel safe and free without fear of discrimination or violence on the grounds of sexual orientation, gender identity, gender expression or sex characteristics.* »

## Discrimination, violence and inappropriate legal framework



« *The results show little progress over the past seven years. The results make clear that trans and intersex people face an even more uphill struggle.* »  
([FRA report 2020](#))



## *Legal gender recognition*



## The ECtHR and trans people

- 2002 – *Goodwin v. UK* (GC)

“clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of postoperative transsexuals” (violation of Article 8 ECHR)

## The ECtHR and trans people

- 2015 – *Identoba v. Georgia*

Gender identity is a protected ground under Art. 14 ECHR

## Issues of concern

When a procedure for changing the registered sex is allowed, deterrent requirements are often provided for in national law :

- Sterilization
- Gender reassignment surgery
- Mental health diagnosis requirement

## Sterilization

- 2017 – *A.P., Garçon and Nicot v. France*

The condition of compulsory sterilizing surgery or treatment violated Article 8 ECHR

- // 2018 – ECSR, *Transgender Europe and ILGA-Europe v. the Czech Republic*, Complaint No. 117/2015 (violation of the right to health + non-discrimination clause)

## Gender reassignment surgery

- 2021 - *X and Y v. Romania*

« *The domestic courts had presented the applicants, who did not wish to undergo gender reassignment surgery, with an impossible dilemma* »

« *Either they had to undergo the surgery against their better judgment – and thus forego full exercise of their right to respect for their physical integrity – or they had to forego recognition of their gender identity, which also came within the scope of the right to respect for private life* » (violation of Article 8 ECHR)

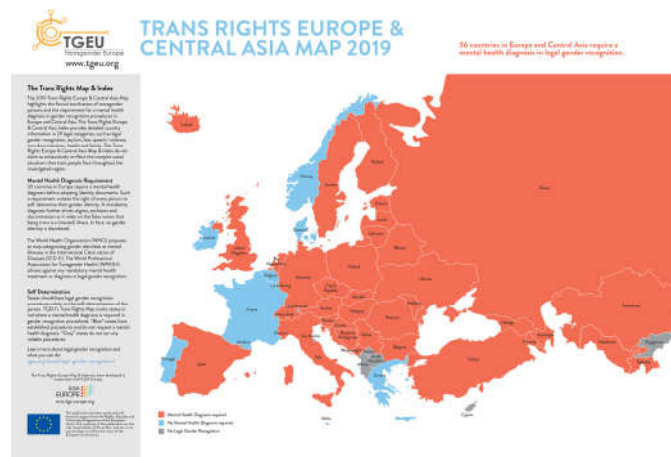
# Mental health diagnosis

- 2017 – *A.P., Garçon and Nicot v. France*

National margin of appreciation (no violation of Article 8 ECHR) :

« *prior psychodiagnosis is one of the conditions for legal recognition of the gender identity of transgender persons in the overwhelming majority of the forty States Parties in which such recognition is possible* » (para. 139)

# Mental Health Diagnosis Requirement



## *Gender markers beyond binary*



### Trend in European national courts

- **German Federal Constitutional Court**  
10 October 2017 (1 BvR 2019/16) on intersex people
- **Austrian Constitutional Court**  
15 June 2018 (G77/2018-9) on intersex people
- **Belgian Constitutional Court**  
19 June 2019 (judgment no. 99/2019) on non-binary people

## Policy report in Belgium

### More categories next to “male” and “female” or deletion of these categories?

Comparative Law approach  
Gender equality and discriminations against women  
Data law (personal and sensitive data)

[See](#) the 50 pages report (in French) on the website of the Equality Law Clinic

## Beyond Europe

On 28 January 2021, the [Superior Court of Quebec](#) has invalidated several articles of the Civil Code of Quebec that discriminated against trans and non-binary people. Among others the requirements:

- that people can only be designated either male or female
- to be identified as a mother or a father on a declaration of birth, rather than being referred to as a parent.

## Pending case before the ECtHR

*Y v. France* (Appl. no. 76888/17)

[See](#) the Third Party Intervention by the Human Rights Centre at Ghent University in collaboration with the Equality Law Clinic at the ULB (Université Libre de Bruxelles)



CENTRE PERELMAN  
DE PHILOSOPHIE DU DROIT

*Medically unnecessary surgeries  
on intersex children*



[www.philodroit.be](http://www.philodroit.be)

## Genital “normalising” surgeries

In 2015, Malta became the first country to outlaw

*« any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent »*

Art. 15(1) on the right to bodily integrity and physical autonomy

## Pending case before the ECtHR

*M v. France* (Appl. no. 42821/18)

Numerous invasive medical procedures on M (born intersex and in good health) during early childhood and teens, including five surgeries

The court should examine whether there has been a discriminatory interference with the physical and mental integrity of M, an intersex persons, which is contrary to Articles 3 and 14 of the Convention

Additional issue: « sex characteristics » as a protected ground included in the open list of Article 14 ECHR

(the Equality Law Clinic at the ULB is currently drafting a Third Party Intervention in collaboration with the Human Rights Centre at Ghent University)



*Other issues of concern I could not  
address in a 30' presentation*

[www.philodroit.be](http://www.philodroit.be)

- Access to trans specific health care
- Limits of a progressive interpretation of sex equality standards in the EU
- The added value of an intersectional approach

*Thank you*

*I am looking forward to your questions*

