

Transgressing gender – gender identity in EU discrimination law

Anna Śledzińska-Simon, LLM, SJD
University of Wrocław

Sex and gender

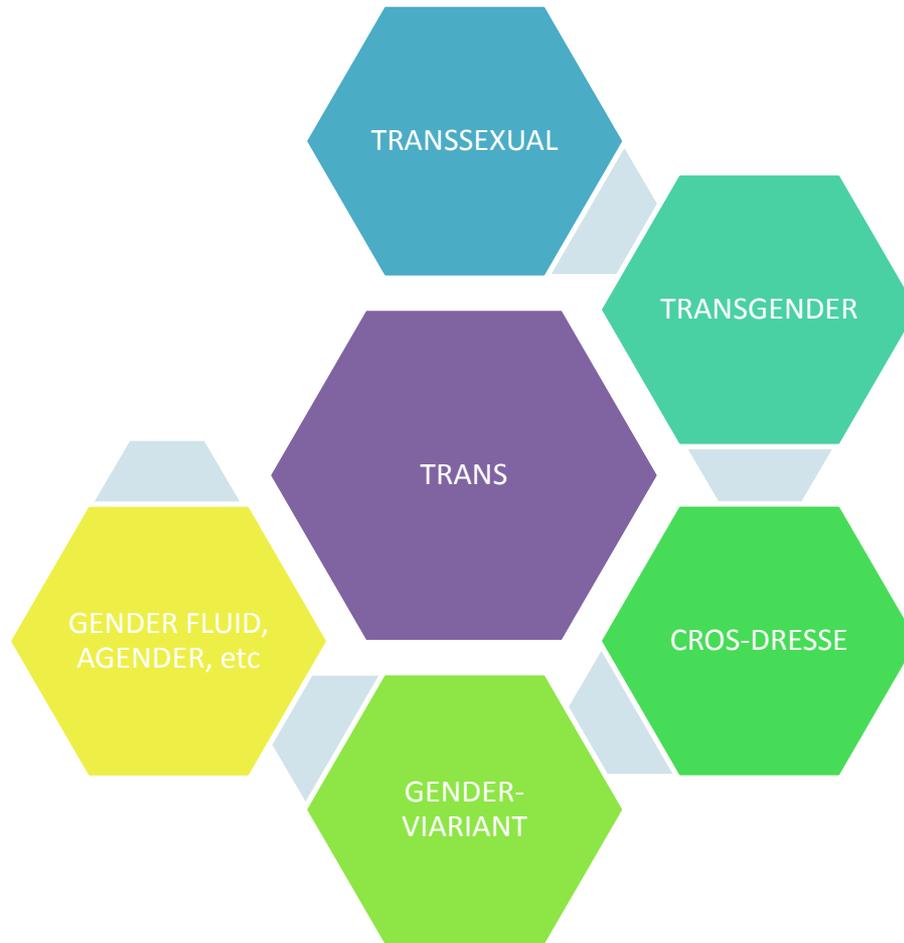
- How to tell a difference between men and women?
 - „I know when I see it” (*Jacobellis v. Ohio*)
- Sex is not legally defined
- Legal determination of one’s sex may include consideration of the following criteria:
 1. Internal morphologic sex (seminal vesicles/prostate or vagina/uterus/fallopian tubes);
 2. External morphologic sex (genitalia);
 3. Gonadal sex (testes or ovaries);
 4. Chromosomal sex (presence or absence of Y chromosome);
 5. Hormonal sex (predominance of androgens or estrogens);
 6. Phenotypic sex (secondary sex characteristics, e.g. facial hair, breasts, body type);
and
 7. Personal sexual identity (*Re Heilig*, 816 A.2d 68, 73 (Md. 2003)).
- Gender is not determined by any single criterion listed above
- Biology/sex used as a proxy for gender and gender identity
- Gender is a social/cultural construct.

Who is a Transgender?

- A transgender is a person who transgresses the binary gender model
- „the term trans is an umbrella term that includes, but is not limited to, men and women with transsexual pasts and people who identify as transsexual, transgender, transvestite/cross-dressing, androgyne, polygender, genderqueer, agender, gender variant or with any other gender identity and gender expression which is not standard male or female, and who express their gender through their choice of clothes, presentation or body modifications, including the undergoing of multiple surgical procedures” (Agius&Tobler 2012:12)
- „transgenderism may not have to be reduced to this narrow understanding, linking it to ‘gender reassignment’ defined as ‘a process which is undertaken under medical supervision for the purpose of reassigning a person’s sex by changing physiological or other characteristics of sex, and includes any part of such a process’ (FRA Homophobia Report 2008:131).

Trans (transgender)

INTERSEXUAL



Gender identity

- „each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”
- **Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006.**

Trans community

- a minority within the broad category of LGBTI
- subject to institutional and social homophobia and transphobia
- the main problem concern legal gender recognition and discrimination (harrassment / hate crime) on the basis of gender identity or expression
- likely to be also discriminated against with regard to sexual orientation
- transsexuals are often given more protection than other trans groups (like cross-dressers)
- transsexual men are often subject to more restrictive requirements related to gender recognition than transsexual women
- intersex people usually experience problems with forced medical treatment which aims to align their primary or secondary sex characteristics to the assigned gender without their consent or the consent of their parents.

Different approach to gender identity in the national laws

- According to the FRA Homophobia Report – Part I (2008)
- 13 EU Member States treated discrimination on grounds of gender reassignment as a form of sex discrimination (Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Latvia, the Netherlands, Poland, Sweden, Slovak Republic, the UK)
- In 11 other EU Member States (Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia) discrimination on grounds of gender reassignment did not have a clear status
- 2 EU Member States (Germany and Spain) treated discrimination on grounds of gender reassignment as sexual orientation or sexual identity discrimination.
- 2 EU Member States (UK and Hungary) treat gender reassignment or gender identity as a separate ground of prohibited discrimination.

Is a F/M a woman or a men?

- Social approach:
 - depending on the phase of the medical procedure (actual appearance)
 - a post-operative transsexual will be treated as a man provided he looks like a man
- Legal approach:
 - depending on the legal gender recognition
 - a transsexual will be treated as men only after legal recognition (based on a new identity card and change of gender marker)
- most MS will recognize F/M as a man provided that he is sterilized
- The status of post-operative transsexual excludes minors and transsexual persons who are not able to undergo SRS due to their age or health.

New approach to gender identity in the national laws

Sweden:

- a prohibition on discrimination based on ,transgender identity and expression” which is a situation where ‘someone does not identify herself or himself as a woman or a man or expresses by their manner of dressing or in some other way that they belong to another sex’
- transsexuals - those who have undergone or intend to undergo gender reassignment - are protected under the ground of sex
- Ombudsman: proposes a change from ,transgender identity and expression’ to ,gender identity and expression’

UK:

- gender reassignment as an autonomous ground in the Equality Act 2010

Czech Republic:

- discrimination on grounds of gender identification covered by laws on equal treatment between men and women

Other developments

- Equal Treatment Commission in the Netherlands (2007): the cancellation of the hotel room booking for a cross-dressers' party is direct discrimination on the ground of sex in the acquisition of goods and services
- Constitutional Court of Spain (2008): gender identity is covered by the prohibited grounds of discrimination
- Equality Commission in Finland (2009): proposes to include discrimination on the basis of gender reassignment and gender identity in the concept of gender discrimination
- Federal Parliament in Germany (2009): calls to include sexual identity among the forbidden discrimination grounds listed in Article 3(3) of the Basic Law
- Equality Tribunal in Ireland, *Louise Hannon v First Direct Logistics Limited* (2011): the constructive dismissal of a transsexual is the employment discrimination on the basis of gender and disability (GID)
- Constitutional Court of Germany (2011): abolishes the sterilization requirement for full legal gender recognition

EU anti-discrimination law

- Article 21 CFR

„Any discrimination based on any ground such as sex, 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 or sexual orientation shall be prohibited”.

- Article 10 TFUE

„In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

- Article 18 TFEU

„Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

EU anti-discrimination law

- Present EU primary and secondary law does not refer to gender identity and gender expression
- In the CJEU case-law discrimination against transsexual people, which is related to their gender reassignment, may amount to discrimination on the grounds of sex
- EU law does not explicitly provide the right to equal treatment of transgender people who have not undergone and do not intend to undergo gender reassignment surgery
- „EU anti-discrimination law should expressly prohibit discrimination on the ground of gender identity. This should protect all those who express a gender identity different to that assigned at birth such as cross-dressers and transvestites and not only those who have had or are having surgery” (FRA Homophobia Factsheet 2009).

Gender Equality Directive (Recast) 2006/54/EC

- Preamble, Recital 3
- “The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, **it also applies to discrimination arising from the gender reassignment of a person.**”

Victims' 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”

Preamble, Recital 17

- „Violence that is directed against a person because of that **person's gender, gender identity or gender expression** or that affects persons of a particular gender disproportionately, is understood as gender-based violence”

Preamble, Recital 56

- „ Individual assessments should take into account the personal characteristics of the victim such as his or her age, **gender and gender identity or expression**, ethnicity, race, religion, sexual orientation, health, disability, residence status, communication difficulties, relationship to or dependence on the offender and previous experience of crime. They should also take into account the type or nature and the circumstances of the crime such as whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive, sexual violence, violence in a close relationship”.

Gender identity in other human rights documents

CoE Istanbul Convention:

- „The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, **gender, [...]** **gender identity, [...]** or other status.”

CJEU case-law concerning transsexuals

- people who intend to undergo, are undergoing and have undergone gender reassignment
- Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143
- „the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment” (para. 20-22).
- Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004], ECR I-541
- „legislation such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as the claimants from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other, must be regarded as being, in principle, incompatible with the requirements of Article 141 EC” (para. 34).
- Case C-423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2004] ECR I-3585
- Art. 4(1) of Directive 79/7 “must be interpreted as precluding legislation which denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law” (para. 38).

P v. S

- Limited to transsexuals – people who intend to undergo, are undergoing and have undergone gender reassignment
- gender reassignment = sex
- no concept of indirect discrimination involved

- (1) Transsexuals protected because they do not challenge the dominant perception of the gender roles and conduct

- (2) Transsexuals protected against discrimination because they do not share the dominant perception of the different roles and conduct assigned to men and women –

- in consequence other categories of trans people should be covered by this protection as well

No need for a comparator?

- *P v. S*

Claimant: a transsexual

Comparator: the opposite sex non-transsexual / the intra-person comparison

M/F compared to a man / compared to herself before gender reassignment

- At the material time under the British law even a post-operative transsexual was not legally recognized in the assigned sex, thus legally speaking a man was compared to a man (intra-sex comparison)
- Court: inter-sex comparison (para. 21)
- 2-step analysis:
 - (1) Dismissal based essentially, if not exclusively, on the grounds of sex
 - (2) Less favourable treatment than a person of an opposite sex.
- Adopt 1-step analysis?

1-step analysis

- Dekker case - the reason for the disadvantageous treatment is sex
- Advocate General Tesouro's opinion in *P v. S*.
- “to maintain that the unfavourable treatment suffered by P. was not on grounds of sex because it was due to her change of sex or else because in such a case it is not possible to speak of discrimination between the two sexes would be a quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value which is equality” (para. 20).

No equal misery !

- a symmetrical comparison
- Claimant: M/F transsexual
- Comparator: F/M transsexual

- No case of different treatment because other transsexual persons would be dismissed

„But for” test

Advocate General Tesauro:

- Both discrimination based on sex and connected to sex (such as discrimination based on sex stereotyping) should be prohibited

US Supreme Court:

- Sex discrimination entails not only stereotype-based discrimination against men and women but also discrimination based on individual failure to conform to the stereotypes associated with this groups (Price Waterhouse v Hopkins, 490 US 228 (1989)).

Other US courts

- Rare cases when courts recognize that non-conformity to sex stereotypes resulted in discrimination of transsexuals
- Discrimination based on gender identity (transvestitism) not recognized as discrimination on the basis of sex or even sex stereotypes
- Distinguishing the language of „sex discrimination” and „gender discrimination”

„But for sex+” test

- Discrimination by association
- Advocate-General Elmer’s opinion in *Grant*:
 - „a decisive step away from an interpretation of the principle of equal treatment based on the traditional comparison between a female and a male employee”.
 - discrimination on grounds of sex prohibits „discrimination against employees not solely on the basis of the employee’s own gender but also on the basis of the gender of the employee’s child, parent or other dependent” (para. 15 and 16).
- Discrimination on the basis of the perceived sex
- *Doe v. Yunits*, 2000 Mass. Super.
- Sex as perceived by the discriminator but different from the self-identified gender

Third sex?

- Third sex – India, Nepal, Australia, South Africa, New Zealand
- *P v. S.* - emphasis on the right to self-determination of a transsexual (in transition from male to female sex)
- P. treated by the Court according to her asserted gender
- A transsexual in the process of gender reassignment is not a person in an intermediate (third) category
- Does this principle extend to such categories of trans people who do not intend to permanently transit to the opposite sex like cross-dressers, gender-variant or agender persons?

K. B.

- A heterosexual couple: a woman + a transsexual man
- Recognition of the partner's post-operative sex, otherwise same-sex
- Individuals protected in their preferred gender role
- No right to marry in the asserted gender yet
- A denial of widower's pension scheme to the partner of the employee in case of her death constituted a breach of Article 141 TEC and Directive 75/117/EEC
- Benefits under occupational pension schemes are payment
- Indirect discrimination

Richards

- Respect for a post-operative transsexual's preference to be treated according to the asserted gender
- Comparing two persons of the same legal sex (M/F and a woman)
- Not a traditional discrimination case
- Equality before the law

ECHR

non-discrimination clause

- Art. 14 ECHR
- „The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.
- Non-exhaustive list – interpreted to include:
 - sexual orientation (*L. and V. v. Austria* (2003))
 - transsexuality (*P. V. v. Spain* 2010).

ECtHR case-law concerning transsexuals

- *B. v. France* (Application no.13343/87), judgment of 25 March 1992.
- *Goodwin and I. v. UK* (Application no. 28957/95) and (Application no. 25680/94), respectively, judgment of 11 July 2002
- *Van Kück v. Germany* (Application no. 35968/97), judgment of 12 June 2003.
- *Schlumpf v. Switzerland* (Application no. 29002/06), judgment of 8 January 2009.
- *Grant v. United Kingdom* (Application no. 32570/03), judgment of 23 May 2006.
- *L. v. Lithuania* (Application no. 27527/03), judgment of 11 September 2007.

UN/CoE approach to gender identity

- UN Human Rights Council resolution of 17 June 2011 on human rights, sexual orientation and gender identity.
- Recommendation Rec(2010)5 of 31 March 2010 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity
- PACE Resolution 1728 (2010) of 29 April 2010 on discrimination on the basis of sexual orientation and gender identity.
- PACE Recommendation 1915 (2010) of 29 April 2010 on discrimination on the basis of sexual orientation and gender identity.
- Commissioner for Human Rights (2009), Issue Paper: Human Rights and Gender Identity.

Medical classification and pathologization

WHO ICD-10

- Gender Identity Disorder is classified as Mental and Behavioural Disorder by the WHO in the International Classification of Diseases-10 (ICD-10)
- It includes: Transsexualism; Dual-role transvestism; Gender identity disorder of childhood; Other gender identity disorders ; Gender identity disorder, unspecified

APA DSM-IV-TR

- Gender Identity Disorder is a mental disorder in the 4th edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) published by the American Psychiatric Association

From GID to gender dysphoria / gender incongruence

- Gender dysphoria is a medical condition of a person who is persistently distressed with his or her physical sex characteristics or with the limiting gender-based roles imposed by the society.

Consequences of medical classifications

- In some cases (severe GID) if not clinically treated, it can result in significant psychological distress, dysfunction, debilitating depression and, for some people, self-mutilation, thoughts and attempts of suicide, and death
- in most national systems legal gender recognition and access to medical service (insurance coverage) depend on the GID diagnosis
- reclassification - transsexuality is not a long term psychiatric condition (Sweden and France), otherwise transsexuals are declared:
 - Unfit for the military service (Bulgaria)
 - Unfit for the police service (Germany)

Who is a F/M...

- a sick woman – if intends to undergo gender reassignment?
- a cured man – if already underwent gender reassignment?
- however depending on the jurisdiction not all physical – primary and secondary - sex characteristics will be in compliance with male sex
- a person with disabilities – if the long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers hinder full and effective participation in society on an equal basis with others (life-long cross-sex hormonal treatment)
- However some gender-variant conditions may be explicitly excluded from disability discrimination law (ADA)
- the above approach is likely to produce even greater stigmatization

Selected sources

- Silvan Agius & Christa Tobler,(2012), Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression, European Network of Legal Experts in the non-discrimination, Brussels: European Commission.
- Commissioner for Human Rights (2009), Human Rights and Gender Identity, Strasbourg: Council of Europe.
- Council of Europe (2011), Discrimination on grounds of sexual orientation and gender identity, 2nd edition., Council of Europe Publishing.
- European Parliament's Committee on Civil Liberties, Justice and Home Affairs (2010), Transgender Persons' Rights in the EU Member States, Brussels: European Parliament.
- European Parliament Resolution of 17 June 2010 on assessment of the results of the 2006-2010 Roadmap for Equality between women and men, and forward-looking recommendations.
- European Parliament Resolution of 12 September 1989 on discrimination against transsexuals.
- European Union Agency for Fundamental Rights (2008), Homophobia and Discrimination on the grounds of Sexual Orientation in the EU Member States: Part 1 - Legal Analysis, Luxembourg: Publications Office of the European Union.
- European Union Agency for Fundamental Rights (2009), Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation.
- European Union Agency for Fundamental Rights (2010), Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - 2010 Update: Comparative Legal Analysis.
- Stephen Whittle, Lewis Turner, Ryan Combs & Stephenne Rhodes (2008), Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care, Brussels: ILGA-Europe