

This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.



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



outline

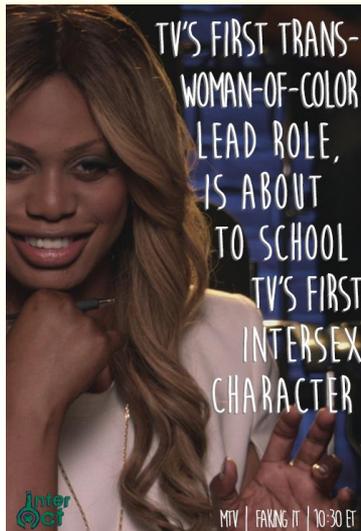
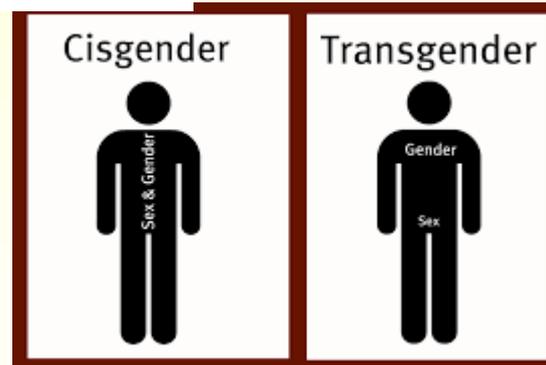
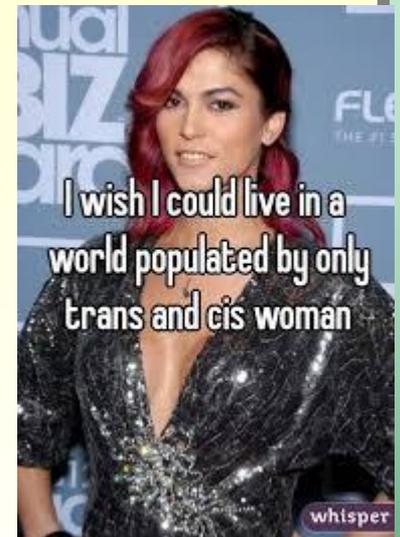
1. terminology
2. interests involved (individuals & state)
3. regulating sex/gender + international developments
 - a) attribution of legal sex
 - b) changing legal sex
4. EU law
 - sex-discrimination law
 - other areas of EU-law
5. what next?



"Can I be a boy today?"

1. terminology

- trans*
- intersex
- cis



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) 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

- Netherlands: Hof Leeuwarden, 23 Dec. 2010 (ECLI:NL:GHLEE:2010:BO8039)
- 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)
- discrimination because of gender reassignment: P v. S & Cornwall County Council (1996) → incl. Recast Dir. 2006, recital 3:

'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



terminology in EU law

	gender reassignment	gender identity	gender expression
employment & soc.sec.	yes	no	no
goods & services	yes	no	no
victims' rights	(implicit)	yes	no
refugees	(implicit)	yes	yes

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!



Marjolein van den Brink - m.vandenbrink@uu.nl