



Funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission

Legal Gender Recognition in Europe: Choices, Challenges and Consequences

Current Reflections on EU Anti-Discrimination Law

European Rights Academy

25 May 2020

Dr Peter Dunne

Senior Lecturer

University of Bristol Law School

General Information

Dr Peter Dunne

Email: pd17563@Bristol.ac.uk

Twitter: [@PeterDunneLaw](https://twitter.com/PeterDunneLaw)



If you have follow-up questions, please feel free to make contact

Recognition



The material in this presentation is drawn from research undertaken by Dr Peter Dunne and Dr Marjolein van den Brink during the period 2017-2018. The research was carried out in partnership with 31 national experts from the 28 EU Member States and 3 EFTA States. The work was generously funded by the European Commission and coordinated by the European Equality Law Network. The research was published in a report, *Trans and Intersex Equality Rights in Europe – A Comparative Analysis*, by the European Commission in November 2018. Dr Dunne wishes to acknowledge the equal contribution of Dr van den Brink in the research underpinning this presentation. The presentation should be understood as containing research which has been completed and produced by both Dr Dunne and Dr van den Brink. Dr Dunne also acknowledges the foundational research of the 31 national experts.

Seminar Overview

- Terminology
- Legal Gender Recognition in Europe
- Medicalisation (Physical) Requirements
- Divorce Requirements
- Age Requirements
- Future Issues



Terminology

N.B. Language relating to gender and sexuality is uniquely personal. There is no definitive or correct definition or usage of terminology. The terms used within this presentation may not reflect individual experiences of gender

- Transgender / Trans
- Gender Identity
- Gender Expression
- Cisgender
- Sexual Orientation
- Transition
- Gender Affirmation Healthcare



Terminology

Yogyakarta Principles (2006)

...Gender identity is understood to refer to 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...

Introduction

Yogyakarta Principles plus ten (2017)

...Understanding 'gender expression' as each person's presentation of the person's gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person's gender identity...

Preamble



Legal Gender Recognition in Europe – I

Legal Gender Recognition: Capacity to Legally Amend Gender Status under National Law

Importance

- Rights and Social Benefits (e.g. marriage, social security, etc.)
- Services, Accommodations and Utilities (e.g. transport, banking, post office)
- Privacy / Safety (e.g. public outing, risk of violence)
- Symbolic Recognition / Self-Actualisation



Legal Gender Recognition in Europe – II



European Court of Human Rights

Pre-Goodwin Case Law

Rees v United Kingdom [1987] 9 EHRR 56; *Cossey v United Kingdom* [1991] 13 EHRR 62; *X, Y and Z v United Kingdom* [1997] 24 EHRR 143; *Sheffield and Horsham v United Kingdom* [1999] 27 EHRR 163 (N.B. cf. *B v France* [1993] 16 EHRR 1)

Goodwin v United Kingdom

.....the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.

[2002] 35 EHRR 18, [para: 93]

Legal Gender Recognition in Europe – III

Legal Gender Recognition in the European Union

- Evidence of Individuals Obtaining LGR in all 27 Member States (plus UK)
 - N.B. Latvia, Lithuania, Bulgaria, Cyprus
 - *L v Lithuania* [2008] 46 EHRR 22
- Across EU, there exist: *judicial, administrative* and '*mixed procedure*' application processes for LGR:
 - Judicial: e.g. Italy, Greece, France, Germany
 - Administrative: e.g. UK, Luxembourg, Hungary
 - Mixed-Procedure: e.g. Ireland, Finland

Is there a preferable application method?



Legal Gender Recognition in Europe – IV

Points to Consider

- ❖ Conditions for obtaining Legal Gender Recognition fall outside the scope of EU Law

(KB v National Health Service Pensions Agency and Another [2004] 1 CMLR 28; *Richards v Secretary of State for Work and Pensions* [2006] 2 CMLR 49); c.f. *MB v Secretary of State for Work and Pensions Case C-451/16* (European Court of Justice, 26 June 2018))
- ❖ Across the Council of Europe and Central Asia, there is restricted access to Legal Gender Recognition (41 out of 54 European and Central Asian States, TGEU Index 2020)
 - See e.g. *X v Former Yugoslav Republic of Macedonia*, App. No. 29683/16 (ECtHR, 17 January 2019)
 - Article 33 of Draft Omnibus Bill 2020 (Hungary)
- ❖ Difficulty of Accessing Data on Legal Gender Recognition in Europe



Medicalisation (Physical) – I

Sterilisation and Surgery Requirements

- Sterilisation

e.g. *Finland, Slovakia*

- Surgery

e.g. *Romania, Czech Republic, Estonia*

(See also: Hormone Therapy Requirements: e.g. *Italy, Slovenia, Bulgaria, Spain*)

Medicalisation (Physical) – II

Rationales for Surgery and Sterilisation Requirements

- Biological Essentialism
- Assumed Desire/Inevitability of Medical Transition
- 'Pregnant Man'
- 'True Transsexual'/Commitment to Transition

However:

Large section of trans population in Europe cannot or will not submit to gender confirming medical treatments for reasons relating to health, age, finances, geography and personal preference

[see e.g. *Schlumpf v Switzerland* App No. 29002/06 (ECtHR, 5 June 2009)]

Medicalisation (Physical) – III

Response to Surgery and Sterilisation Requirements – ECtHR

AP, *Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017)

...French positive law as it stood at the material time presented transgender persons not wishing to undergo full gender reassignment with an impossible dilemma. Either they underwent sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – against their wishes, thereby relinquishing full exercise of their right to respect for their physical integrity, which forms part of the right to respect for private life under Article 8 of the Convention; or they waived recognition of their gender identity and hence full exercise of that same right. In the Court's view, this amounted to disrupting the fair balance which the Contracting Parties are required to maintain between the general interest and the interests of the persons concerned... [para: 132]

□ *YY v Turkey*, App No. 14793/08 (ECtHR, 10 March 2015)

□ *Transgender Europe and ILGA-Europe v the Czech Republic*, Complaint No. 117/2015 (European Committee of Social Rights, 15 May 2018)

However....

□ *X v Former Yugoslav Republic of Macedonia*, App. No. 29683/16 (ECtHR, 17 January 2019)

Medicalisation (Physical) – IV

Response to Surgery and Sterilisation Requirements – Member States

Member State (Judiciary)

- ✓ Stockholm Court of Administrative Appeal, *Socialstyrelsen v NN M.I nr 1968-12* (19 December 2012)
- ✓ Constitutional Court of Croatia, *U-IIIB/3173/2012* (18 March 2014)
- ✓ Equality Ombudsman of Norway, *Case 14/840* (9 September 2014)
- ✓ Administrative Tribunal of Luxembourg (Civil Affairs), *Judgment NÅ173/2016* (1 June 2016)
- ✓ High Administrative Court of Austria, *Verdict 2008/17/0054* (27 February 2009)
- ✓ Court of Cassation of Italy, *No. 15138* (20 July 2015)
- ✓ Constitutional Court of Italy, *Decision No. 221* (2015)

Member State (Legislative/Administrative)

UK (2004), Spain (2007), Portugal (2011), Netherlands (2013), Denmark (2014), Croatia (2014), Malta (2015), France (2016); Belgium (2017)

Divorce Requirement

Divorce Requirement: Applicant must be single or divorced before submitting a request for LGR (to avoid the unintended circumvention of national prohibitions on same-sex marriage)

Existence of Divorce Requirement in Europe:

- ✓ Greece, Slovakia
- ✓ Poland, Croatia, Italy

Supra-National Responses to Divorce Requirement:

- ECtHR: *Hamalainen v Finland* [2015] 1 FCR 379

However...

- CJEU: *MB v Secretary of State for Work and Pensions* Case C-451/16 (European Court of Justice, 26 June 2018)
- UN HRC: *G v Australia* Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017)

Member State Responses to Divorce Requirement:

- (Repeal) Northern Ireland, Ireland, Finland, Sweden
- (Judiciary) Germany, France, Austria

Age Requirement

In a majority of EU Member States, LGR is restricted to adults

- **Explicit Prohibition:** e.g. Spain, Poland, Finland, Denmark, France, Sweden, Lithuania
- **Implicit Prohibition:** e.g. Czech Republic, Slovakia

Justifications for Restricting access to Adults?

Extending LGR to Minors:

- Malta, Germany, Croatia (no lower limit)
- Belgium, Ireland, Portugal, Netherlands, Greece (lower limit + additional supervision)

Recent Developments:

- ✓ Spain [Judgment 99/2019, Constitutional Court, 18 July 2019]
- ✓ United Kingdom, Sweden

Future Issues

Self-Determination

What is SD? Right to amend legal gender on the basis of self-identification

- Denmark, Ireland, Belgium, Portugal, Luxembourg, Iceland, Malta
- *AP, Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017) (c.f. international and regional human rights soft law)
- Arguments for/against

Non-Binary LGR

What is NB LGR? Right to be legally recognised outside 'M' or 'F' gender options

- Case Law: Germany, Austria, Belgium, Netherlands, France, England and Wales
- Legislation: Germany, [Malta](#)

Transgender Parental Status

- *AP, Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017)
- Germany, England and Wales, Netherlands, Belgium, Denmark (birth 'mother')
- Belgium, Netherlands ('co-mother')
- Sweden [Stockholm Administrative Court, Case No. 3201-14 (9 July 2015)]
- *OH and GH v Germany* (53568/18 and 54941/18, communicated to ECtHR)

Thank you!

Questions?

pd17563@Bristol.ac.uk

@PeterDunneLaw