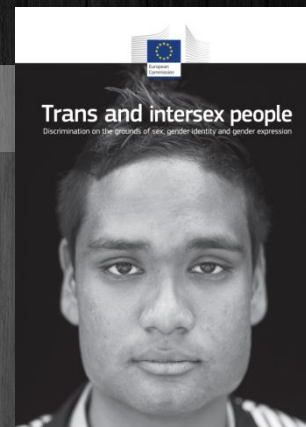


Trans and intersex people

Discrimination on grounds of sex, gender identity and gender expression

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Trans & Intersex People: Challenges for EU Law
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[1] Good afternoon,

It's a great pleasure to be here, and to be able to share the *Trans and Intersex* report with you.

This report was requested by the European Commission in 2010, and written jointly with Professor Christa Tobler during the first half of 2011.

In this presentation I will try to cover the key points that were highlighted in the publication, and then point towards possible measures that the European Union could put in place in order to address discrimination on grounds of gender identity and gender expression, and the ground of sex in relation to intersex people.

[2] Part I Definitions and key issues

[3] Many people mistakenly use the terms sex and gender interchangeably as though they were one and the same thing. In this report we consciously distinguished between the two so as to shed greater clarity on the discrimination experienced by trans and intersex people.

Sex refers to biological makeup – such as primary and secondary sexual characteristics, genes, and hormones.

Gender on the other hand refers to people's internal perception and experience of maleness and femaleness. It also refers to the social construction that allocates certain behaviours to male and female roles which vary across history, societies, cultures and classes.

[4] Gender is further subdivided into of two key elements: identity and expression.

Gender identity refers 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, modifications of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism.

[5] Gender expression refers to people's manifestation of their gender identity, and the one that is perceived by others. Typically, people seek to make their gender expression or presentation match their gender identity, irrespective of the sex that they were assigned at birth.

[6] Now we pass to the definitions of trans and intersex.

Trans is an inclusive umbrella term referring to those people whose gender identity and/or gender expression differ from the sex they were assigned at birth.

It 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/or 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.

[7] Intersex refers to those people who have genetic, hormonal and physical features that are neither exclusively male nor exclusively female, but are typical of both at once or not clearly defined as either.

These features can manifest themselves within secondary sexual characteristics such as muscle mass, hair distribution, breasts and stature; primary sexual characteristics such as reproductive organs and genitalia; and/or in chromosomal structures and hormones.

This term has replaced 'hermaphrodite' which was used extensively by medical practitioners during the eighteenth and nineteenth centuries.

[8] The sex/gender binary model is composed of a set of norms derived from the simplistic idea of a dichotomy of two mutually exclusive and biologically defined sexes – to whom different roles and behaviour are traditionally ascribed.

[9] The gender binary model classifies both sex and gender into two distinct and exclusive forms of masculine and feminine identities.

Gender stereotypes favour a particular form of 'masculinity' in relation to men, and a particular form of 'femininity' in relation to women, exposing many trans and intersex people to institutionalised discrimination.

Indeed, negative attitudes towards trans and intersex people are directly correlated to the importance that a determinate society places on the gender binary model, as well as the level of gender stereotypes, sexism and gender inequalities that are found within it.

This binary understanding of sex and gender is everywhere around us. By way of illustrating how far reaching this binary understanding is, I'd like to refer to some images:

[10] The origin of humankind is represented in our collective unconscious by Adam and Eve – the 'first man' and the 'first woman'.

[11] On most occasions when we go to the toilet – or use other sex segregated services – we are made to affirm our sex. We are asked to state if we are men or women, with no shades of grey in between.

[12] Even before we are conscious of the existence of different sexes and genders, we are passed on the binary norms of the gender that society believes is appropriate for us, through the toys that we play with, and the clothes that we are made to wear. We also learn that there are clothes and toys belonging to the other gender, and that they are not for us. If we cross the line, we risk being called a 'sissy' or a 'tomboy'.

[13] Most notably, even before we are born, people obsessively ask the same key question about us: "Is it a boy or a girl?"

This entrenchment of sex and gender in the ways in which our society is organised has a number of particularly severe consequences for trans and intersex people.

[14] Healthcare is a key concern for many trans people, especially in regards to gender reassignment services and related care. In most European countries, however, access to such healthcare is regulated by legal requirements that are entrenched in gender recognition legislation. Hence, it is often the case that trans people have very little control over the treatments that they receive.

Specifically, treatments are often intertwined with unnecessary legal requirements (e.g. sterilisation), and are lengthy, involving a 'real life test' and a number of checks by medical professionals. Moreover, in some countries there is a great difficulty in access to such healthcare services due to refusal by professionals, long waiting lists, and other problems.

Intersex children are subjected to cosmetic surgery to be aligned as 'men' or 'women' very early on in their lives – without clear and informed consent or a particular need or urgency for such surgeries.

[15] Trans identities and intersex bodies are both regarded as disorderly.

The WHO's *International Classification of Diseases* has included trans identities as mental/behavioural pathologies since the 9th version (i.e. since the 1970s), while intersex bodies are formally pathologised following the adoption of the *Consensus Statement on Management of Intersex Disorders* and the *Clinical Guidelines for the Management of Disorders of Sex Development in Childhood* in 2006.

[16] National registration of all of us requires an 'M' or an 'F' as our corresponding gender marker.

Most countries in the EU allow for a change to this entry, but such a change is always linked to a number of requirements. These requirements vary, but often include (i) multidisciplinary opinion on one's gender identity disorder, (ii) irreversible genital surgery, (iii) sterility, (iv) the need to be single or to divorce one's partner, and other requirements.

[17] On the discrimination front, the situation of trans people has not been researched systematically as yet. In this respect the outcomes of the Fundamental Rights Agency's LGBT survey that was conducted earlier this year will surely be very useful once published.

The little data that exists though, already shows a bleak picture with chronic unemployment and under employment in the trans community.

During the period of transition – related to their gender reassignment – trans people are exposed to significantly higher risks with regard to the retention of their job. This is due to various factors ranging from degrading experiences on the workplace to layoffs during the recovery period.

The pay gap is also particularly severe for trans people. It is reported that male-to-female trans workers often face even bleaker prospects after transition related to a combination of their trans identity along with pay gap that is experienced by women generally.

Similar pattern of discrimination in other spheres of life are also reported due to social exclusion and marginalisation.

[18] Furthermore, harassment, violence and hate crime are a recurrent problem for the trans community. Studies show that up to 79% of trans people experience harassment in public. This is not surprising. Two groups of delegates of the last two Transgender Europe Councils, which took place in Malmö and Dublin respectively, have fallen victims to street attacks.

A number of transphobic murders have also been reported within the EU.

Unfortunately, there is no information on situation of intersex people both in terms of the prevalence of discrimination and in terms of violence.

[19] Part II International human rights law

[20] The *Universal Declaration of Human Rights* adopted in 1948 does not refer to gender identity or gender expression. However, a resolution on *Human Rights, sexual orientation and gender identity* – adopted by the Human Rights Council in 2011 expressed grave concern about acts of violence and discrimination against individuals because of their sexual orientation and gender identity.

Additionally, in 2010, the CEDAW committee adopted two General Recommendations – one on older women and human rights, and the other on the core obligations of State Parties. Both of these Recommendations affirmed that: *“The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as [...] gender identity.”*

[21] Like the Universal Declaration, the *European Convention on Human Rights* adopted in 1950 does not refer to gender identity or gender expression. Nonetheless, the European Court of Human Rights has ruled positively on a number of trans cases, most notably in regard to:

- (i) gender recognition of post-operative transsexuals,
- (ii) the right to marry in accordance with the acquired gender,
- (iii) the right to fair and proportionate requirements related to gender reassignment,
- (iv) the right to a pension in accordance with the acquired gender, and
- (v) the right to adequate and clear gender recognition procedure for change of name and legal gender.

In the case of *P.V. v. Spain* the Court also recognised 'transsexuality' as a ground covered by the Convention.

[22] The Committee of Ministers' *Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity* (2010) was the first international soft-law mechanism covering the ground of gender identity and various human rights issues. A review of the implementation of this Recommendation by Council of Europe Member States will take place during 2013.

Finally, the *Convention on preventing and combating violence against women and domestic violence*, adopted in 2011 is the 1st international Convention that refers to gender identity in its anti-discrimination article.

[23] Part III Present EU equality law

The list of grounds in EU equality law is closed and does not include gender identity or gender expression.

[24] However, in the case of *P v. S and Cornwall County Council* ([Case C-13/94](#)) the CJEU held that the right not to be discriminated against on the grounds of sex cannot be confined simply to discrimination based on the fact that a person is of one or other sex, and may include discrimination arising from the gender reassignment of a person.

[25] The *P v. S* principle was confirmed twice in the cases of:

- (i) *K.B. vs. National Health Service Pensions Agency* ([C-117/01](#))
- (ii) *Sarah Margaret Richards v Secretary of State for Work and Pensions* ([C-423/04](#))

In *K.B.* the CJEU ruled that the denial of a pension scheme to trans woman who could not marry her male partner breached Art 141 of the EC Treaty. It also established that individuals are protected in their gender role and not only the sex given to them at birth.

In *Richards* a trans woman successfully argued that her pensionable age should be the same as that of other women, and not her birth gender.

[26] In short, the CJEU case law confirms that 'sex' covers both 'men and women' in the sex binary understanding and 'gender reassignment'.

This approach was later integrated in EU Gender Equality Directives, namely:

- (i) The 2004/113/EC Goods and Services Directive (2606th Council and Commission meeting [minutes](#))
- (ii) The 2006/54/EC Gender 'Recast' Directive (*Recital 3*)

Coverage of 'gender reassignment' within the meaning of sex is not uniformly applied across the European Union as was confirmed through the responses received to a questionnaire circulated among equality bodies. While some member states have exceeded the minimum requirements in this regard, others continue to disregard the CJEU's case-law. EQUINET acknowledged this gap following an internal review of the handling of cases of discrimination against trans people by national equality bodies.

Moreover, the protection afforded to transgender people who have not and do not intend to undergo 'gender reassignment' procedures remains unclear.

[27] Part IV Systematic legal analysis

[28] In this section, the report makes an assessment of different EU equal treatment provisions and explores how they can be useful in view of the grounds of gender identity and gender expression.

Firstly it reiterates that while gender identity and gender expression do not form part of the Treaty, they can still fall under the general principle of equal treatment on the ground of sex.

It then assess whether (on some occasions) these grounds may also be argued under the ground of sexual orientation as a relevant discrimination criterion, and concludes that it is likely to be weaker than if they are pursued under the ground of sex. It also assess whether following the *Coleman* case, a case of discrimination by association could be made.

As we know, all trans cases that reached the Court of Justice were cases of direct discrimination against transsexuals. The report takes the view however that since gender reassignment discrimination falls under the ground of sex, indirect discrimination, harassment and instruction to discriminate on personal characteristics – such as one's 'gendered voice' – is already covered by EU law.

The same should be true for positive action, which is particularly valuable instrument given trans people's vulnerable position in the labour market and society in general.

[29] Part V Case studies of national legislation

[30] Gladly the picture is not all bleak and there are a number of good practices that can be reported.

Sweden's anti-discrimination legislation is amongst the best in the EU. It is divided in the *Discrimination Act* which covers all spheres of life, and the *Act Concerning the Equality Ombudsman*. These laws cover 7 grounds, including the grounds of 'sex, transgender identity or expression' thus clearly covering all trans people. The Ombudsman has extensive powers and is able to propose legislative amendments as appropriate.

The equality bodies of Belgium and Finland are particularly noteworthy for the fact that they have initiated processes towards the inclusion of trans people in national anti-discrimination law even though the law was previously silent on the matter.

Great Britain's *Equality Act* is quite unique in that it provides protection against the dismissal of trans people undergoing gender reassignment due to their health related absences from work.

In Ireland, a trans woman who was dismissed after her employer had severely discriminated against her and humiliated her after declaring her intention to transition was awarded €35,000 in compensation by the Equality Tribunal making this case the most clear example of dissuasive measures against trans discrimination to date.

The German Federal Constitutional Court declared unconstitutional the requirements for permanent infertility and gender reassignment surgery for the purposes of change of legal gender - thus, significantly simplifying the legal gender recognition procedure. In Portugal, following a change in law in 2011, no requirements other than proof of a diagnosis of a gender identity disorder by a multidisciplinary team of experts is needed. Theoretically, new identity documents would be issued after 8 days, but unfortunately a number of problems have been reported. The best law in this regard is found in Argentina.

Scotland was the first European jurisdiction to provide trans people with legal protection against bias violence and hate crime. The law was developed in partnership with the Scottish Transgender Alliance and explicitly protects trans and intersex people.

Finally, Sweden's National Board of Health and Welfare decided to remove a number of diagnostic codes related to trans identities from the Swedish issue of the International Classification of Diseases. Finland and Norway have followed suit. This however, does not mean that all trans related diagnostic codes have been removed.

[31] Part VI Future EU law

[32] A formal revision of the Treaty in order to include new grounds would be the best way to protect trans and intersex people against discrimination. However, as we know, such a formal revision is highly unlikely.

In view of this, the more realistic way to tackle discrimination on the basis of gender identity and gender expression would be through a broad interpretation of the already existing law referring to discrimination on the ground of 'sex'.

Moreover, Member States can be encouraged to transpose EU law well in excess of the minimum standards set in EU law.

[33] No opportunity exists for the inclusion of gender identity and gender expression as independent grounds in legislation based on Articles 19 and 157 of the Treaty. However, on a more positive note, there is no impediment for the inclusion of gender identity and gender expression within the meaning of sex. Parallel grounds such as pregnancy, maternity and paternity, and family responsibilities are already included in EU law.

[34] Part VII Intersex

[35] Discrimination against intersex people is a particularly complex form of sex discrimination. Unfortunately, little work has been undertaken to explore the human rights issues and how to address them. Even when intersex people are referred to, such references are often done incorrectly either under the trans umbrella or in a pathologising way.

It is unclear whether current EU anti-discrimination legislation already covers intersex people. This is due to the sex binary model on which it is built and the fact that no intersex cases have reached the European Court of Justice. On the other hand, the *P v S* case is encouraging as it went beyond “the fact that a person is of one of the other sex”.

At Member State level, Germany is the only country that takes this approach in the interpretation of the ground of ‘sexual identity’. Furthermore, the Finnish Ombudsperson has made a call for national legislation to follow this approach.

Scotland is most probably the only jurisdiction that provides intersex people with direct legal protection in its hate crimes legislation.

[36] The two known court cases brought forward by intersex persons in Europe were brought forward in Germany.

The first at the Munich Court in 2003 regarded a request to have an intersex classification on civil status documents – a request which the Court declined.

The second was brought forward in Cologne in 2008 regarding operations performed on an intersex person during childhood with the aim of aligning the person as male – which operations had particularly devastating effects on the intersex person. This time the court ordered the surgeon to pay €100,000 in damages for having “culpably violated her health and self-determination.”

[37] Conclusions and recommendations

[38] It is very encouraging that two recent developments in EU law – the Recast Asylum Qualification Directive and the Victims’ Rights Directive – cover both the grounds of ‘gender’ and ‘gender identity’. It is also very significant that the ground of ‘gender expression’ is likely to enter EU law for the first time once the Council adopts the Victim’s Rights Directive. This is significant progress especially since both have been concluded in the past year!

[39] Such an approach is more difficult on for legislation based on Article 19 and 157 of the Treaty due to the fact that the list of grounds is closed. However, progress can still be achieved. Firstly, sex can be interpreted more widely beyond the sex/gender binary. The ground of sex can therefore include ‘gender’ (covering both ‘gender identity’ and ‘gender expression’) as well as protect intersex people against discrimination.

This approach could be applied both in the application of existing legislation and in future recasting processes of existing gender equality legislation.

It can be similarly applied in gender equality strategies, public awareness campaigns and so on.

[40] Secondly, the EU can initiate a process on trans and intersex health, and the depathologisation of their identities. While the EU may not have the competence to demand legislation in this domain, the EU can still work with WHO with regard to the ICD and provide input towards the depathologisation of trans and intersex identities. The EU can also facilitate a process of best practice sharing among Member States and promote the highest standards of healthcare, while at the same time assisting the removal of trans and intersex related pathologies in national classification of diseases.

[41] Thirdly, the EU could assess the compatibility of current gender recognition legislation against existing EU law in spheres of competence.

The EU could indeed also facilitate a process for the review of national laws/practices with regards to legal gender recognition legislation, while taking into account a look at the impact of such requirements on areas of competence such as access to the labour market, freedom of movement, access to goods and services and so on.

[42] The EU could introduce employment equality measures specifically targeting trans and intersex people and their increased presence in the labour market.

Positive action measures could also be promoted in such a framework.

[43] The EU could explore the coverage of trans and intersex people in the future recast of the *Framework decision on combating racism and xenophobia*.

[45] Finally, since we know so very little with regard to intersex people's situation, and since the FRA LGBT survey did not include intersex people in its scope, it would seem appropriate that a specific study on the situation of intersex people is conducted.

[46] Thank you