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Trans and intersex persons: What is the current state of play in the EU?

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Universiteit Leiden. University to discover.

Reading from the EU equality network on the subject

Two thematic reports in particular

- Marjolein van den Brink / Peter Dunne: Trans and intersex equality rights in Europe – a comparative analysis (2018), https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf
- Silvan Agius / Christa Tobler: Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression (2011), <https://www.equalitylaw.eu/downloads/2671-trans-and-intersex-people>

EU legal framework

Focus on anti-discrimination law

- New LGBTIQ Strategy: “**Legal protection** against discrimination **is key** to advancing LGBTIQ equality.”
- History:
 - From the EEC: main focus on economic matters; discrimination on grounds of nationality / origin of goods, equal pay for men and women ...
 - ... to the modern EU: more grounds, notably in the social field, but without explicitly mentioning trans or intersex (or more generally gender identity).
- Questions therefore:
 - Should these grounds be mentioned? – Clearly yes (but: Treaty revision ...).
 - Can they already now be included under the present law? – Yes, to some extent; see rest of the presentation.

A strategic approach under the present law

Interpretation of the law - **trans**

- The CJEU treats certain transgender cases as falling under the prohibition of discrimination on grounds of sex.
- Transgender fits if sex is defined not as the traditional (much too narrow) male - female dichotomy, but rather as a continuum (AG Tesauro in *P. v S.*).
- It does not fit easily if the definition is narrower than that - doable for what the CJEU terms “gender reassignment”, but potentially difficult for other aspects.

A strategic approach under the present law

Interpretation of the law - **trans**

- The Court's original approach: *P. v S.* (1996), relating to the dismissal of a male to female transsexual person in the context of gender reassignment.
- AG Tesauro:
“One fact is certain: P. would not have been dismissed if she had remained a man. So how can it be claimed that discrimination on grounds of sex was not involved? How can it be denied that the cause of discrimination was precisely, and solely, sex? To my mind, where unfavourable treatment of a transsexual is related to (or rather is caused by) a change of sex, there is discrimination by reason of sex or on grounds of sex, if that is preferred.”

A strategic approach under the present law

Interpretation of the law - **trans**

- CJEU on *P. v S.*:
 - “[T]he scope of the directive [76/207/EEC] cannot be confined simply to discrimination based on the fact that a person is of one or other sex. [...] the directive is also such as to apply to discrimination arising from the gender reassignment 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. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.”
 - Thus: comparison within one person, and between two sexes.

A strategic approach under the present law

Interpretation of the law - **trans**

- A different approach in *Richards* (2006):
 - CJEU: “The unequal treatment at issue in the main proceedings is based on Ms Richards’ inability to have the new gender which she acquired following surgery recognised with a view to the application of the Pensions Act 1995. Unlike women whose gender is not the result of gender reassignment surgery and who may receive a retirement pension at the age of 60, Ms Richards is not able to fulfil one of the conditions of eligibility for that pension, in this case that relating to retirement age. As it arises from her gender reassignment, the unequal treatment [...] must be regarded as discrimination which is precluded by Article 4(1) of Directive 79/7.”
 - Comparison with “non-reassignment” persons of the same sex.

A strategic approach under the present law

Interpretation of the law - **trans**

- *K.B.* (2004): “If R. had not undergone gender reassignment and if that did not prevent R. from marrying, R. would be entitled to a survivor's pension as a surviving spouse.”
- *MB* (2018): “[I]t must be held that the national legislation at issue in the main proceedings accords less favourable treatment, directly based on sex, to a person who changed gender after marrying, than that accorded to a person who has kept his or her birth gender and is married, even though those persons are in comparable situations.”
- Overall:
 - Certainly a useful approach, if with limited effect (focus on “gender reassignment”).
 - Somewhat difficult to place from the dogmatic point of view.

A strategic approach under the present law

Interpretation of the law - **intersex**

- No corresponding case law yet; term “intersex” appears in judgments usually in the context of the abbreviation “LGBTI”.
- Note the Court’s limited language in *P. v S*: “one or other sex”—does it still imply a binary thinking?
- Once a will case arise, will the Court have taken AG Tesauro’s “continuum” seriously? This would leave room for inclusion through interpretation also with respect to intersex.

A strategic approach under the present law

Interpretation of the law – gender identity more generally

- It all depends on the definition of sex (often called “gender”).
- European Commission in a report of (2015) on Directive 2004/113 (sex discrimination, goods):
“So far the CJEU has only ruled on gender reassignment. There is no case law concerning gender identity more generally speaking as covered by the protection against sex discrimination but the Commission considers that the approach should be materially similar.”
- So, one could argue along these lines before the CJEU.

Thank you for your attention!

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