

# ***Trans, Non-Binary and Intersex Rights: A European Perspective***

**European Network of Equality Bodies: Trans and Intersex Rights Seminar**

15 December 2020

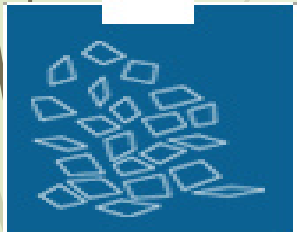
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# Acknowledgment

The material in these slides 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 27 EU Member States, 3 EFTA States and the United Kingdom. The work was generously funded by the European Commission and coordinated by Dr Alexandra Timmer for 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, as well as the foundational research of the 31 national experts.



# Presentation Outline



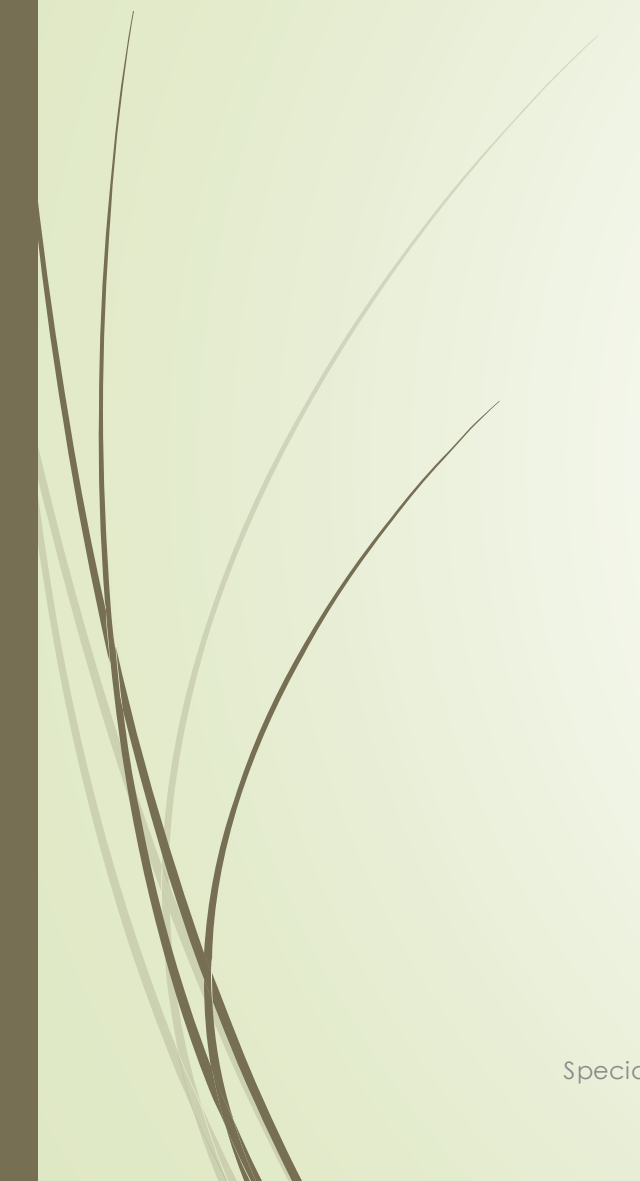
✓ Legal Gender Recognition

✓ Equality and Non-Discrimination

✓ Intersex



# Legal Gender Recognition



Special Thanks is Due to Dr Marjolein van den Brink for Her Equal Role in the Research which Underpins this Presentation

# Legal Gender Recognition

## Existence of a Right to Legal Gender Recognition

### Council of Europe

- *Goodwin v United Kingdom* ([2006] ECHR 548)
- *Rees v United Kingdom* (1987) 9 EHRR 56; *Cossey v United Kingdom* (1991) 13 EHRR 622; *X, Y and Z v United Kingdom* (1997) 24 EHRR 143; *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163
- **N.B.** *B v France* ([1993] 16 EHRR 1)

### Recent Case Law (2020):

- ❖ *YT v Bulgaria* (App. No. 41701/16, 9 July 2020) [violation of [art. 8 EHCR](#): failure to provide sufficient reasons for refusal of LGR; failure to properly balance public interest with right to LGR]
- ❖ *Rana v Hungary* (App. No. [40888/17](#), 16 July 2020) [violation of art. 8 ECHR: exclusion of individual who had obtained asylum in Hungary from the LGR process]

**N.B.** Hungary: ([May 2020](#), art. 33 of Omnibus Bill)

# Legal Gender Recognition

## Existence of a Right to Legal Gender Recognition

### European Union (Case Law of CJEU)

#### N.B. Lack of Union Competence

However...

- *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)

### LGR in Europe

- LGR Available in 31 Countries...But (N.B.)...Cyprus, Bulgaria, Latvia, Lithuania and Lichtenstein
  - Legal uncertainty
  - Inconsistent Interpretation + Application

# Legal Gender Recognition

## Conditions for Obtaining Legal Gender Recognition

*Goodwin v United Kingdom* ([2006] ECHR 548), [93]:

'...the Court finds that 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...'

➤ Medicalisation

➤ Sterilisation

- *AP, Garçon and Nicot v France* [App Nos. 79885/12, 52471/13 and 52596/13 (6 April 2017)]
- *YY v Turkey* [App No. 14793/08 (ECtHR, 10 March 2015)]

### N.B. Parental Status

- Germany: Federal Court of Justice, Case XII ZB 660/14 (September 2017); Federal Court of Justice, XII ZB 459/16 (29 November 2017)
- England and Wales: *R(McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559
- Sweden: Stockholm Administrative Court, Case No. 3201-14 (9 July 2015)

ECHR: *O.H. and G.H. v. Germany* (App. Nos. 53568/18 and 54941/18)

# Legal Gender Recognition

## Conditions for Obtaining Legal Gender Recognition

### Surgery

\*\* Absence of ECHR Case Law \*\*

- ❑ *L v Lithuania* ([2008] 46 EHRR 22)
- ❑ *Schlumpf v Switzerland* [App No. 29002/06 (ECtHR, 5 June 2009)]
- ❑ *Van Kück v Germany* ([2003] 37 EHRR 51)

### Divorce

- *Hämäläinen v Finland* [2015] 1 FCR 379
- Cf: *MB v Secretary of State for Work and Pensions* [Case C-451/16 (European Court of Justice, 26 June 2018)]
- *G v Australia* [Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017)]

### Age

- Legal Gender Recognition (Malta, Ireland, Netherlands, Germany, Spain)
- Access to Gender Affirming Healthcare



# Self-Identified Gender?

## ❖ Statutory Declaration Affirming Self-Identified Gender Without Requirement to Satisfy Additional Access Conditions

- See e.g. Ireland, Iceland, Malta, Denmark, Belgium, Portugal, Luxembourg, Norway

- ✓ ...Enact gender recognition systems concerning the rights of trans persons to change their name and gender markers on identification documents...**based on self-determination by the applicant...**

Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (12 July 2018) UN Doc No. A/73/152, [81]

- ✓ ...develop quick, transparent and accessible procedures, **based on self-determination...**

Parliamentary Assembly of the Council of Europe, 'Discrimination against Transgender People in Europe' (22 April 2015) Resolution No. 2048(2015) [6.2.1]

- ✓ ...The Commission will foster best practice exchanges between Member States on how to put in place accessible legal gender recognition legislation and **procedures based on the principle of self-determination** and without age restrictions...

European Commission, LGBTIQ Equality Strategy (2020-2025), [3.3]

# Objections to the Supervision

- Inaccessible (barriers to medical care)
- Inaccessible (historical transitions)
- Encourages Gender Stereotyping
- Intersex
- Social Stigmatisation
- Symbolic Importance
- Legal Implications

# Critiques of Self-Determined Gender

- ❑ Legal Gender Status is Biological
  - *Goodwin v United Kingdom* [2002] 35 EHRR 18)
- ❑ Even if Legal Gender Status is not Biological, There has to be Something More than Self-Determination
- ❑ Self-Determination is Susceptible to Misuse by Vulnerable Applicants
- ❑ Self-Determination is Susceptible to Abuse (e.g. cisgender males)
- ❑ Self-Determination Disadvantages Cisgender Women in Sport
- ❑ Self-Determination Increases Barriers to Medical Transition (see: C. Dietz, 'Governing Legal Embodiment: On the Limits of Self-Declaration' (2018) 26 Feminist Legal Studies 185)



# Equality and Non-Discrimination Law

## EU & Council of Europe

### EU Case Law

- *P v S and Cornwall County Council* [1996] 2 CMLR 247 (CJEU)
- Court observed that, where an employer discriminates against an individual who undertakes a medical transition, '[s]uch discrimination is based, essentially if not exclusively, on the sex of the person concerned'
- Where a person is dismissed from employment 'on the ground that he or she intends to undergo, or has undergone, gender confirmation, 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 confirmation'
- '*...[t]o tolerate such discrimination would be tantamount to a failure to respect the dignity and freedom to which he or she is entitled...*'

### COE Case Law

- *PV v Spain* App No. 35159/09 (ECtHR, 30 November 2010) (ECHR)
- *Identoba and Others v Georgia* [2015] 39 BHRC 510 (ECHR)

## EU & Council of Europe

### EU Secondary Legislation

- **Directive 2006/54/EC** (implements the principle of equal opportunities and equal treatment of men and women in employment and occupation)

*'...[i]n view of [the] purpose and the nature of the rights which [the principle of equal treatment for men and women] seeks to safeguard, it also applies to discrimination arising from the gender confirmation of a person...'*

*(Recital 3 of Preamble)*

**!! No Reference to Intersex !!**

# Equality and Non-Discrimination Law

## National Laws

- explicitly inclusive
- partly explicitly inclusive
- implicit but presumably inclusive

(exception: Estonia)

# Equality and Non-Discrimination Law

## Explicitly Inclusive

- [Malta](#) ('gender identify, gender expression, sex characteristics')
- [Netherlands](#) (explicitly broad interpretation of 'sex')

## Partly explicitly inclusive

- ✓ 14 Member States (gender identity and/or expression or similar):
  - Bulgaria (gender confirmation)
  - Czech Republic, Germany and Slovakia (Gender Identity)
  - Belgium, Croatia and Slovenia (Gender Identity and Expression)

## Partly explicitly inclusive

- ✓ 16 Member States had no explicit reference to gender confirmation or gender identity. They were presumed to offer non-discrimination protection – partly (e.g. [Ireland](#)) or fully (e.g. [Italy and Liechtenstein](#)). There were Member States ([Latvia](#)) where it was at least possible to read national law as providing protection.



# Intersex



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# Intersex



Legal Invisibility

Misinterpretation of Priorities

Intersex and Non-Binary Gender Recognition

## Legal Invisibility

- EU + COE Case Law
- EU Primary + Secondary Legislation
- National Legislation

## However...soft law

### Parliamentary Assembly of the Council of Europe

- **Resolution 2191 (2017): Promoting the human rights of and eliminating discrimination against intersex people**

'...ensure that anti-discrimination legislation effectively applies to and protects intersex people, either by inserting sex characteristics as a specific prohibited ground in all anti-discrimination legislation, and/or by raising awareness among lawyers, police, prosecutors, judges and all other relevant professionals, as well as intersex people, of the possibility of dealing with discrimination against them under the prohibited ground of sex, or as an "other" (unspecified) ground...'

### European Parliament

- **Resolution of 14 February 2019 on the rights of intersex people (2018/2878(RSP))**

'...Deplores the lack of recognition of sex characteristics as a ground of discrimination across the EU, and therefore highlights the importance of this criterion in order to ensure access to justice for intersex people...'

'...Calls on the Commission to enhance the exchange of good practices on the matter; calls on the Member States to adopt the necessary legislation to ensure the adequate protection, respect and promotion of the fundamental rights of intersex people, including intersex children, including full protection against discrimination...'

**\*\* Erasure of Intersex Experiences and Needs within Wider Policies Around GIGE \*\***

# Intersex

## Misinterpretation of Priorities

- Focus on equality/recognition of gender identity
- **\*\* Surgical Interventions on intersex youth \*\***

### Parliamentary Assembly of the Council of Europe

- **Resolution 2191 (2017): Promoting the human rights of and eliminating discrimination against intersex people**

'...prohibit medically unnecessary sex-“normalising” surgery, sterilisation and other treatments practised on intersex children without their informed consent...'

### European Parliament

- **Resolution of 14 February 2019 on the rights of intersex people (2018/2878(RSP))**

'...Strongly condemns sex-normalising treatments and surgery; welcomes laws that prohibit such surgery, as in Malta and Portugal, and encourages other Member States to adopt similar legislation as soon as possible...'

### Committee against Torture (**\*\*note engagement of UN Treaty Bodies\*\***)

- **Concluding observations on the seventh periodic report of France (10 June 2016), UN Doc No. CAT/C/FRA/CO/7, [35(a)] (example)**

The Committee has called upon state parties to adopt 'legislative, administrative and other measures to guarantee respect for the physical integrity of intersex individuals' and to ensure that 'no one is subjected during childhood to non-urgent medical or surgical procedures intended to establish one's sex'

# Intersex

## Gender Identity, Gender Expression and Sex Characteristics Act 2015, art. 14:

1. It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent: Provided that such sex assignment treatment and, or surgical intervention on the sex characteristics of the minor shall be conducted if the minor gives informed consent through the person exercising parental authority or the tutor of the minor.

2. Medical practitioners or other professionals in breach of this article shall, on conviction, be liable to the punishment of imprisonment not exceeding five years, or to a fine (multa) of not less than five thousand euro (€5,000) and not more than twenty thousand euro (€20,000).(3)

3. In exceptional circumstances treatment may be effected once agreement is reached between the interdisciplinary team and the persons exercising parental authority or tutor of the minor who is still unable to provide consent: Provided that medical intervention which is driven by social factors without the consent of the minor, will be in violation of this Act.

6. When the decision for treatment is being expressed by a minor with the consent of the persons exercising parental authority or the tutor of the minor, the medical professionals shall: (a) ensure that the best interests of the child as expressed in the Convention on the Rights of the Child be the paramount consideration; and (b) give weight to the views of the minor having regard to the minor's age and maturity.

Portugal: Law No. 75/XIII/2 (although subject to critique)

**N.B.** Germany [Personenstandsgesetz [PSTG] [LAW ON CIVIL STATUS], Feb. 19, 2007, BGBl I at § 22 para. 3 (Ger.)]

# Intersex

## \*\* Question of Competence \*\*

European Commission, *LGBTIQ Equality Strategy (2020-2025)*, [2.4]

‘...Harmful practices such as non-vital surgery and medical intervention on intersex infants and adolescents without their personal and fully informed consent (intersex genital mutilation)<sup>57</sup>, forced medicalisation of trans people and conversion practices targeting LGBTIQ people<sup>58</sup> may have serious bodily and mental health repercussions. The Commission will foster Member States’ exchange of good practice on ending these practices...’

# Intersex

## Intersex and Non Non-Binary Gender Recognition

**Argument:** *The existence of intersex variance undermines both the biological and gender binary, and requires state authorities to provide gender categories beyond male and female*

### Problems:

- Intersex and gender identity are Different (appropriation of identities, intra-community tension, etc.)
- Imposition of Gender Identity (many intersex individuals identify as male or female; overly inclusive + exclusive)
- Biological Essentialism



**Thank you!**

Questions?

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