

Sidiropoulou, Katerina

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Gender Identity Minorities and workplace legislation in Europe

Dr Katerina Sidiropoulou

Anglia Ruskin University, School of Management

Cambridge, UK

katerina.sidiropoulou@anglia.ac.uk

Abstract

It is a fact that transgender people experience severe discrimination in various forms not only in their everyday lives but also in their working lives, especially when transitioning. It seems that Europe is slowly changing over the years as there are constant calls to tackle this complex issue by considering the inclusion of a third gender option, the abolition of any abusive practices, recommendations for legal redress in cases of violation, and a more transparent and self-determined legal recognition procedure. There are national laws which offer protection on the basis of gender identity at national and international levels. Nevertheless, there is still a lack of uniformity due to a number of unresolved matters such as uncertainty about who is covered, whether gender identity should be covered as a protected ground, what is required to gain a legal change of name and gender marker in official documents, who is responsible for authorisation and uncertainty over the stages, nature and duration of the actual procedure. Fewer distressed transgender employees and transphobic incidents are observed when there is greater social acceptability, organisational effort and national intervention. Research and collective actions by movements, political leaders, academics, medical experts and non-governmental organisations are further required to minimise societal and employment exclusions of transgender people.

Keywords: legislation, gender identity minorities, transgender employees

Introduction

According to the OECD (2019) the size of the transgender population remains unknown. The only countries that appear to have collected data about gender identity minorities since 2013 are the United States, Chile and quite recently only one European country, Denmark. Amnesty International (2014) estimates that there are around 1.5 million transgender people in Europe.

The latest findings of an international ILO (2015) study on 'Promoting Rights, Diversity and Equality in the World of Work (PRIDE)' revealed that transgender people suffer the most severe forms of workplace discrimination, bullying and harassment - especially those who are transitioning. This occurs when they look for a job, during the interview stage, when they access the labour market or when they stay jobless despite a relatively high level of education or do voluntary work or are forced to leave their job after transition due to their gender identity or expression or appearance (FRA 2014; Agius and Köhler 2014; Schembri 2015; Davidson 2016).

Gender identity minorities tend not to disclose their identity to work colleagues and employers. There is a range of problems that they have to confront in their workplace. These include transphobic attitudes and inappropriate use of language in policies and documents. They also face marginalisation, issues with the use of toilet facilities and changing rooms, a sense of fear of being suspected of using fraudulent documents, and shame and exposure to the ignorance of colleagues and employers who do not know how to treat them while in transitioning due to lack of workplace procedures and effective transgender inclusive policies. Further issues include stigmatisation, difficulty conforming with gender-specific dress codes and the use of various facilities, breaches of the privacy of personal sensitive data, refusal of medical services and treatment, and refusal of access to social security schemes or to family-related leave. They may also face an inability to obtain identity documents that reflect their gender and name, loss of authority and pay, an inability to use their holidays for their medical treatments, issues regarding protection against pregnancy-discrimination, exclusion from formal employment, and denial of promotion and access to higher positions (Schilt and Wiswall 2008; FRA, 2014; ILO 2015; Ozturk and Tatli 2016; Davidson 2016; van den Brink and Dunne 2018; Bribosia and Rorive 2018). In addition to the above, this situation is also evident from the alarming statistics reported by some European countries on hate crime on the grounds of gender identity (Amnesty International 2014).

The surveys of the European Commission (2012, 2015) also confirm that there is great discomfort with transgender people in European OECD countries (Fig. 1).

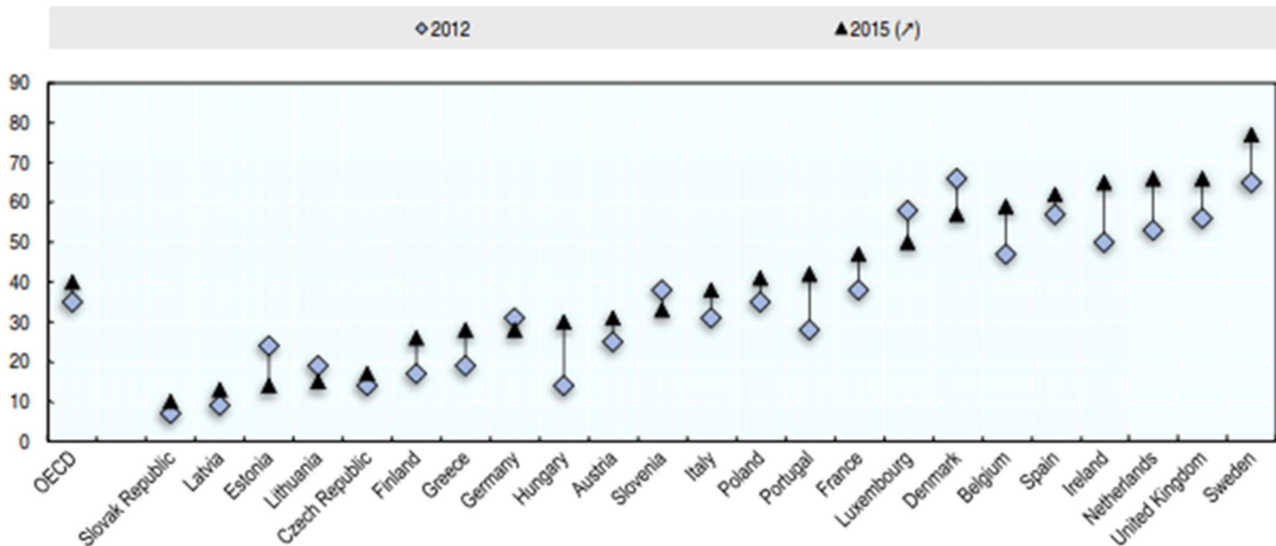


Fig. 1 Comfort with transgender people in OECD countries, based on the 2012 and 2015 Special Eurobarometer on Discrimination (Source: European Commission 2012, 2015).

When compared with LGB people it is observed that transgender people are less acceptable than LGB people (Fig. 2).

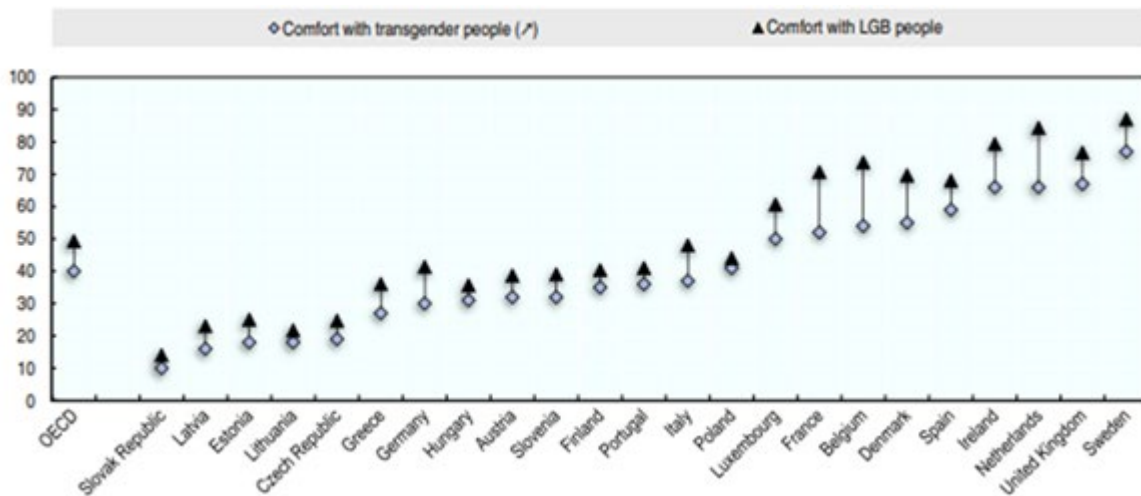


Fig.2 Comfort with transgender and LGB people based on the 2015 Special Eurobarometer on Discrimination, in OECD countries (Source: European Commission 2015).

This chapter aims to review the legislative protections offered to gender identity minorities as well as any legal developments and interventions that might have taken place in recent years in Europe.

All non-discrimination and equality legal instruments urge Europe to fight gender identity discrimination and show respect for gender identity minorities' dignity and equality issues. However, it seems that even after so many years there is still confusion about the uses of relative terms and the wording used in state legislatures. Also, 'gender identity' is not included under all EU Member States' list of protected grounds, there are no significant efforts or systematic measures to create inclusive workplaces, and a number of violations of

human rights and problems with the legal recognition procedures are reported. For this reason this chapter looks closely at in which ways some European laws are 'progressive' and whether there are any action plans to eliminate the stigmatisation, marginalisation and employment exclusion of transgender people.

Main Text

1 Understanding transgender people – defining gender identity

While currently none of the European countries collect information on gender identities in their censuses (ONS 2016) some online social networking service companies, airlines, banks and medical providers offer more than seventy (non-binary) gender options to their online users, passengers and patients in order to make their services more inclusive and eliminate any discriminatory incidents (Holzer 2018). This long list (Appendix 1) is proof of the complexity of categorising those whose gender is not viewed as a binary biological construct (Monro 2003). Professor Whittle, a British legal scholar and the vice-president of the transgender activist group 'Press for Change', has said that "gender identities are complex and for many people, describing themselves as just a man or just a woman has always been inadequate" (Williams 2014).

Transgender people stand for a very small minority compared to Lesbian, Gay and Bisexual (LGB) people (OECD 2019). 'Transgender' is an umbrella term that refers to people whose gender identity or expression differs from what is typically associated with the sex they were assigned at birth (GLAAD 2016). The term 'transgender', often found as 'trans' to cover transgender and transsexual individuals - the so-called 'third-gender' - includes those who desire (or not) to undergo sex reassignment surgery or hormone therapy if they can afford it, cross-dressing and not identifying themselves as either 'male' or 'female' (FRA 2014; Degner and Nomanni 2017a). The medical term for this 'mismatch' between gender identity and biological sex is 'gender dysphoria'; the individual experiences distress because "the hormones that trigger the development of biological sex may not work properly on the brain, reproductive organs and genitals, causing differences between them either due to additional hormones in the mother's system or the foetus' insensitivity to the hormones [known as androgen insensitivity syndrome (AIS)] or other rare conditions such as congenital adrenal hyperplasia (CAH) or intersex conditions" (NHS 2019). However, those who experience their gender identity or expression as falling outside or somewhere in between man and woman self-identify as 'non-binary' or 'genderqueer' (GLAAD 2016). The term 'intersex' -which covers a very small number of the population - describes a range of "different variations in a person's bodily characteristics (i.e. chromosomal, hormonal and/or anatomical) that do not match strict medical definitions of male or female" (FRA 2015, p. 2; United Nations-Office of the High Commissioner 2017).

The terms 'gender identity' and 'sexual orientation' are often used interchangeably but they do have different meanings. More than a decade ago a group of international human rights experts met in Indonesia and drafted the international so-called 'Yogyakarta principles on the application of international human rights law

relating to sexual orientation and gender identity or expression’, now known as the ‘Yogyakarta Principles plus 10 (YP+10) Principles’ after their 2017 amendment. These principles were endorsed by many European countries, including Sweden, Denmark, Germany, Belgium, the United Kingdom, Spain and Norway. More specifically, in the preamble of the aforementioned principles ‘gender identity’ (GI) is referred to as “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” (International Commission of Jurists 2007 p.6). ‘Lived gender’ is a newly introduced term under the Finnish Equality Act 2015 which covers “each person’s gender identity and its public expression over a sustained period of time” (Thomas and Weber 2019, p.27).

If one’s individual gender identity is externally manifested through masculine and feminine behaviour, names, pronouns, clothing, haircuts, voices and bodily characteristics are referred to as ‘gender expression’ (GLAAD 2016). A wide range of equality claims can be received in tribunals since there is a wide range of gender identities (i.e. transsexuals, cross-dressers, transvestites, those who identify with no gender at all or adopt a particular manner of speech or cosmetics or who have been given androgynous names) (FRA 2018). However, up to now, only those who have completed sex reassignment surgery (or the otherwise called ‘gender confirmation’ or ‘affirming’ surgery) have a good chance of proceeding with their claim (Bell 2012). On the other hand, any reference to the term ‘sexual orientation’ implies “physical, emotional, affectional and sexual attraction to individuals of a gender, whether it is the same, different or more than one gender” (International Commission of Jurists 2007; GLAAD 2016).

2 Exploring the general legal protection framework for gender identity minorities

By virtue of the doctrine of the supremacy of EU law all EU Member States should not only take into account articles 2 and 10 the Treaty of Lisbon (2007/C 306/01), as well as Article 21 of the Charter of Fundamental Rights (CFR) of the European Union (2000/C 364/01), but should also ensure that all organisations and individuals apply those provisions. Both the Treaty and the EU Charter remind all EU Member States of the significance of showing respect for human dignity, freedom, equality and rights, and the need to combat discrimination based on religion, sex, racial or ethnic origin, language, genetic features, nationality, disability, age or sexual orientation. In addition, based on Art. 14 of the European Convention on Human Rights (ECHR), all rights and freedoms shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. In confirmation of the above one of the oldest legal instruments, a multilateral treaty adopted by the Office of the High Commissioner for Human Rights (UN Human Rights), known as the International Covenant on Economic, Social and Cultural Rights (ESCR) (1976), states that all state parties should have access to work, and a protected right to gain their living by work which they freely choose or accept, without discrimination of any kind regarding race, colour, sex,

language, religion, political or other opinion, national or social origin, property, birth or other status (Art. 6 (1) and 2 (2)).

Nearly two decades after the introduction of these legal instruments not only does the wording used in legislation remain ambiguous but also the non-exhaustive list of protected grounds does not include gender identity, gender expression, transgender identity or gender identification. Alternatively, the notion of 'sex characteristics' as a protected ground has not been incorporated into national laws (European Parliament report on equality between women and men in the European Union in 2014-2015 (2016/2249(INI)); FRA 2018; van den Brink and Dunne 2018). Also, any protections for transgender people from direct or indirect discrimination at work are not consistent but rather broad. This is evident from the absence of clear non-discrimination provisions in legislation at national level regarding actual or perceived gender identity and the lack of measures for creating inclusive work environments (Karsay 2018).

By 2009 only six European countries had banned gender identity discrimination and made the definition of 'gender reassignment' equivalent to that of 'gender identity' (Fabeni and Agius 2009). The latest rating of the European region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) depicts the overall picture of equality and non-discrimination (Fig. 3). Currently, only one third of European countries have explicit equality and non-discrimination laws. Around 20 European countries are in the process of introducing or have already introduced non-discrimination legislation on gender identity in employment (top scorers: Finland (93%), Malta (78%), Belgium (68%) and the UK (60%)) (ILGA-Europe 2019). The impact of discrimination (on sexual orientation grounds) in employment experienced by LGBTI individuals has now been calculated and estimated at €19-53 million (lost earnings), €1.5-3.1 billion (lost pension income) and €25-71 million (GDP loss) (van Balegoij and Moxom, 2018). At the time of writing Finland and Malta are among the few Member States which refer to gender identity, expression and sex characteristics in their equality legislation.

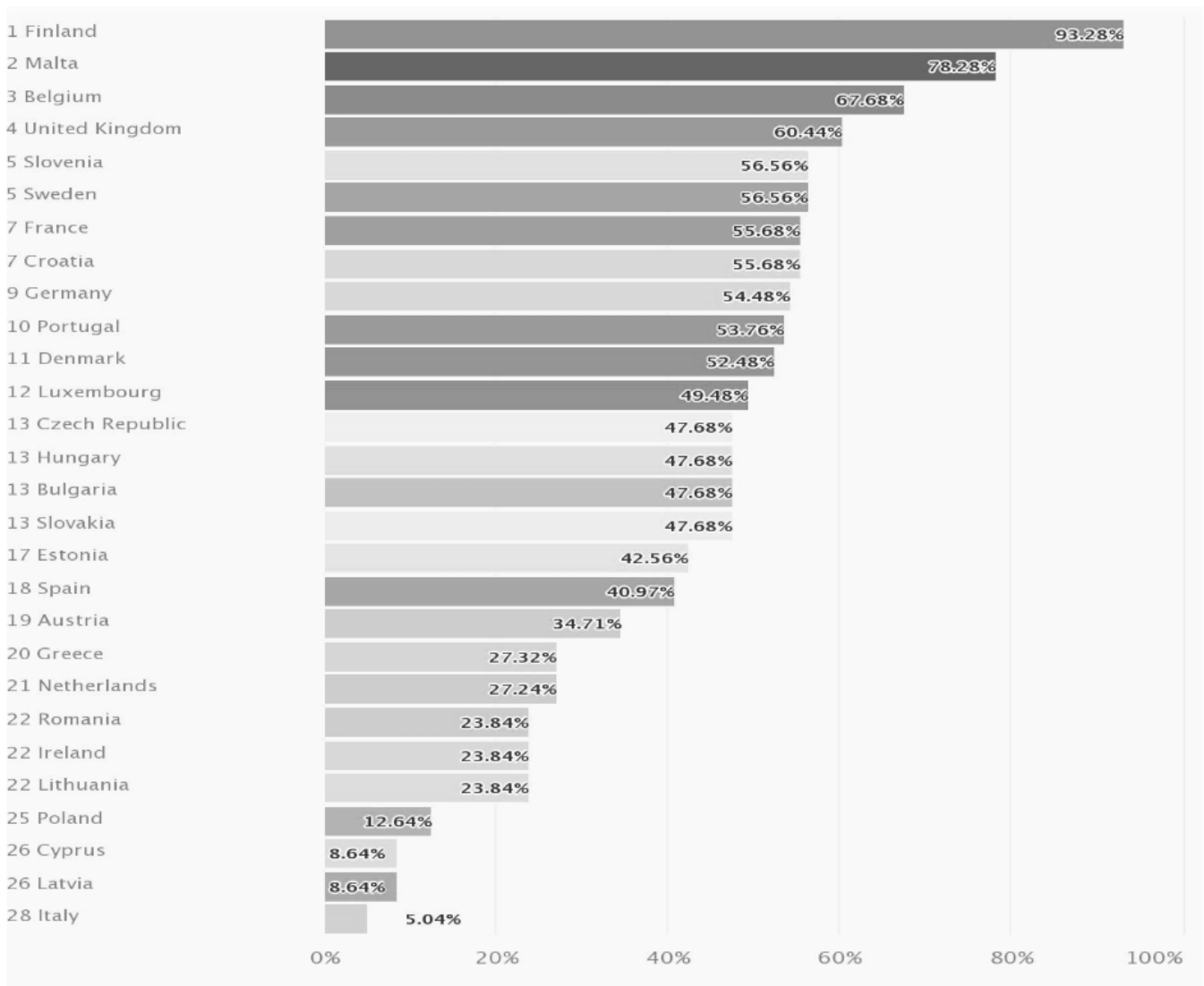


Fig.3 Country ranking regarding equality and non-discrimination in Europe on a scale between 0% (gross violations of human rights, discrimination) and 100% (respect for human rights, full equality) (Source: ILGA-Europe 2019).

Prior to the ruling in the leading case of *P v S and Cornwall County Council* (1996) ECR I-2143 (C-13/94), the Employment Framework Directive (2000/78/EC) and the Gender ‘Recast’ Directive (2006/54/EC) (Recital 3) on ‘the implementation of the principle of equal opportunities and equal treatment in matters of employment and occupation’ highlighted the importance of gender equality (between men and women) at a European level. However, Europe had to follow an anti-stereotyping approach for the first time by either passing new national laws or adapting its laws after the positioning of Advocate General Tesauro of the European Union Court of Justice (CJEU), who with his decision extended protection to all transgender people intending to undergo, undergoing or who had undergone gender reassignment or gender confirmation (Fabeni and Agius 2009; House of Commons 2016).

In addition to the above, in 2010 the Steering Committee for Human Rights (CDDH), under the remit of the Committee of Ministers of the Council of Europe, prepared Recommendation CM/Rec (2010)5 on ‘measures to combat discrimination on grounds of sexual orientation or gender identity and protect the human rights of

lesbian, gay, bisexual and transgender persons'. This is first and only non-binding agreement between governments of the 47 Member States of the Council of Europe. As stated by the Sexual Orientation and Gender Identity (SOGI) Unit of the Council of Europe, which is comprised of policy-makers, legislators, public servants, governmental agents, international organisations, NGOs and stakeholders working or interested in SOGI, the Member States should implement measures that encourage access to the labour market, promotion and good working conditions despite the diagnosis or medical history of transgender (and intersex) individuals. Most importantly, they should protect the right to privacy in employment applications, and prevent irrelevant disclosures of gender history to employers and other employees (Council of Europe 2018; ILGA Europe 2018a). Later, the Council of Europe (2011) also published a report which compiled existing international and European legal instruments and human rights standards of tolerance and non-discrimination.

In 2013 and 2018 the Council of Europe reviewed the progress of the implementation of the Recommendation, identified the occurring trends and challenges and prepared 16 summary reports with the support of ILGA-Europe and Transgender Europe. These covered Armenia, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, Finland, Georgia, Hungary, Lithuania, FYR Macedonia, Montenegro, Poland, Portugal, Serbia, Sweden (Karsay 2018).

In recent years the Parliamentary Assembly of the Council of Europe (PACE) and other experts and special rapporteurs of the European Parliament have expressed concern in a series of Resolutions. This is not only with regard to constant violations of transgender and intersex people's rights (as reported in the first United Nations resolution on sexual orientation and gender identity [A/HRC/RES/17/19]) but also regarding the problems that occur during the process of legal recognition of preferred gender identity and the absence of any other comprehensive measures that may promote transgender equality.

Overall, there is a push for an agreed procedure which will be accessible, simple, transparent, non-medical and quick for all transgender people who seek to change their name and gender marker on their identification documents (namely, passports, social security cards, bank cards, ID cards, birth certificates, driving licences, job references, and educational and work certificates) and public registries based on self-determination (EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity 2013/2183(INI); FRA 2014; Resolution 2015/2048; Köhler and Ehrt 2016; Resolution 2017/2191; 2019/2573(RSP) on the future of the LGBTI list of actions (2019-2024)). Furthermore, there is a need to work jointly with the European Commission on a policy, roadmap, strategy or action plan which will aim at the protection of LGBTI fundamental rights, the abolition of abusive medical requirements and consideration of the inclusion of a third gender option. If this is not achieved transgender people will continue to experience discrimination, stigmatisation, marginalisation, pre-emptive exclusion from employment and under-representation in organisations due to the mismatch between their overall presentation and their legal gender identity (European Union: European Commission 2011; Ozturk and Tatli

2016). Characteristically, in a recent survey, participants shared that they were viewed as “fearsome or strange objects of fascination by colleagues as they underwent transition and started showing physical signs of change” (Ozturk and Tatli 2016, p.792).

Currently, there are three identified procedures for sex reassignment: an administrative procedure, a jurisdictional procedure and a procedure that is neither administrative nor jurisdictional (Fig. 4). The first type (as followed by Malta, Sweden, the Netherlands, Belgium, Denmark, England, Portugal and Ireland) is more efficient, quick and informal because a team of physicians, psychiatrists and psychologists decide whether surgery or hormone therapy will be undertaken (Cardaci 2015). No judge is involved in the process except if the public registry official refuses to amend the legal gender and name when provided with medical certification. On the other hand, the jurisdictional procedure (as followed by Italy, Bulgaria and Poland) is more formal, slower, expensive and bureaucratic since two authorisations need to be given, mainly by judges via substantive (mandatory or non-mandatory sterilisation) and procedural (modification of birth certificate) routes. One authorisation is needed for undergoing medical treatment (sterilisation, surgery) and another one at a later stage for rectifying civil status records (i.e. name correction, claim of legal gender) (Cardaci 2015). The last type describes the procedure which is followed by France and Spain in cases when these partly rely on jurisdictional authorisation as ordered by their civil codes for the rectification of records of transgender people’s civil status (Cardaci 2015). Cyprus does not yet offer any legal gender recognition procedures (TGEU 2019a).

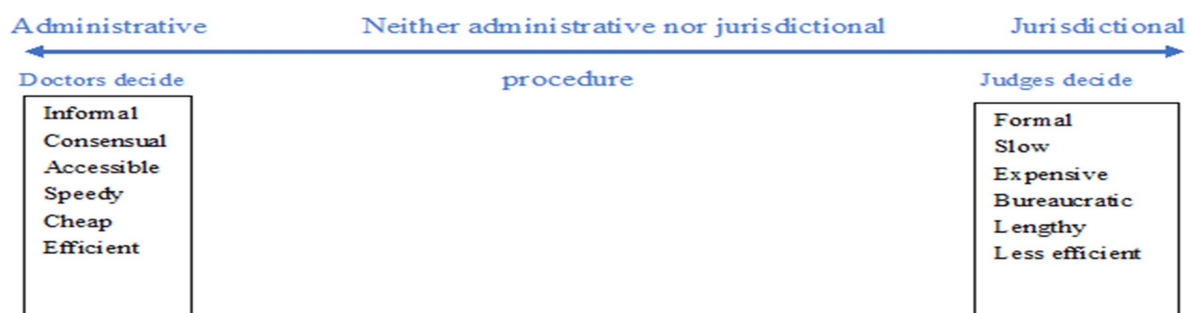


Fig. 4 Types and characteristics of sex reassignment procedures (Source: Author, 2019).

According to the latest Trans Rights Europe and Central Asia Index (TGEU 2019a) 21 European countries do not require forced and involuntary sterilisation (including the UK, Sweden, France and Belgium). Eighteen (18) countries (excluding Malta, Norway, Denmark, Belgium, Luxemburg, France, Greece, Ireland and Portugal) implicitly or explicitly require prerequisites to sterilisation and endocrinologic or surgical intervention (such as mental health, psychiatric or transsexuality diagnoses, psychotherapeutic therapies or

other harmful treatments) (Degner and Nomanni 2017a; ILGA-Europe 2019) as proof of individuals' intentions before adopting their preferred gender identity. This is based on the belief that they are dealing with mental illnesses, as previously found under 'HA60 Gender incongruence of adolescence or adulthood' of the International Classification of Diseases (ICD-11) of the World Health Organisation (WHO 2019). However, since May 2019, gender incongruence is no longer classified as a mental disorder; it has been removed from the mental health chapter and is listed in the sexual health chapter. As ruled by the European Court of Human Rights in 2017, the requirement to be sterile violates human rights laws. It is worth mentioning that quite recently a London-based clinic run by the National Health Service (NHS) that helps children as young as three years-old change gender piloted and applied the use of Skype and FaceTime to allow doctors to diagnose and prescribe treatment for patients via telemedical appointments in order to minimise long waiting times (Owen 2019). Professional associations and organisations which voice and protect the transgender community's rights report that the remaining countries are violating Article 3 of the UN Human Rights Convention, Article 5 of the Convention on Human Rights and Biomedicine and Article 8 of the European Convention on Human Rights, even if they still request voluntary and informed consent. Thus, all countries must comply with this legal principle (ILGA-Europe 2019).

3 The legal and policy situation of transgender people in Europe

ILGA-Europe (2019) has produced the only informed 'Rainbow Europe Country Ranking Map' (Fig. 5). This reflects the latest legislative and policy changes that concern LGBTI people on a scale of 0% (gross violations of human rights, discrimination) to 100% (respect for human rights, full equality) based on a set of 66 criteria (ILGA-Europe 2019). These criteria are divided between six thematic categories: equality and non-discrimination, family, hate crime and hate speech, legal gender recognition and bodily integrity, civil society space, and asylum.

The top three European countries in this ranking, which have created positive policies on equality and human rights, are Malta (90%), Belgium (73%) and Luxembourg (70%). The countries that fail to pass these criteria are Latvia (17%), Poland (18%) and Italy (22%).

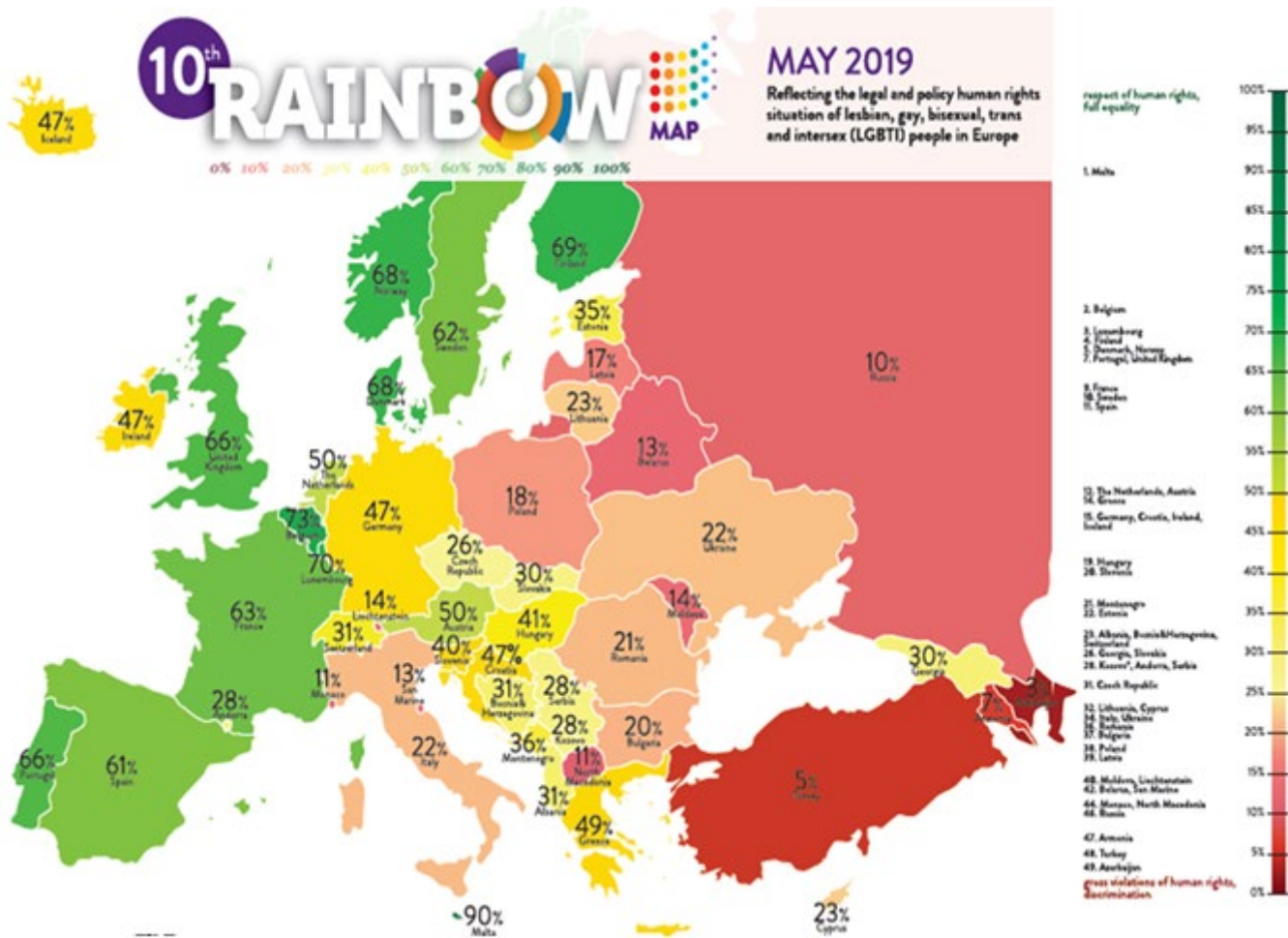


Fig. 5 Country ranking regarding laws and policies safeguarding the equality and human rights of LGBTI people (Source: Rainbow Europe, 2019a).

3.1 The most progressive gender identity laws and legislative approaches in Europe

With the literal meaning of ‘progressive’, Denmark became the first leading European country to adopt the self-determination model in its legislation and remove any medical intervention requirements in its legal gender recognition procedure, following Argentina’s example. This is considered good practice as it conforms with international standards which aim to promote ‘decent work’ for all people by satisfying the conditions of dignity, freedom, diversity and inclusion (ILO, 2015), and because it minimises employment and societal exclusions (Drydakakis 2017). Similarly, Irish and Luxembourgish transgender people have access to self-determined legal recognition (TGEU 2019a). Since the enactment of a new Danish law (‘Act on the Central Person Register 2014’ (the CPR law)), there has been an increase in the number of cases decided by the Minister of the Interior and Social Security after a six-month ‘reflection-waiting period’ for adult trans applicants (Köhler and Ehrt 2016). The Danish Central Persons’ Register might only operate a list of binary options of male and female names when a name change is requested but it is possible for an applicant to request their passport to disclose their sex as ‘X’ for “undetermined, unspecified, intersex” (Chiam et al. 2016; Scottish Government 2017). Furthermore, Denmark was the first county to declassify transgender identity

from the Danish Health and Medicines Authority's list of mental illnesses in 2017 (Degner and Nomanni 2017b).

Similarly, in 2016 another Nordic country, Norway, introduced progressive anti-discrimination ('the Gender Amendment Act') which is accessible to youngsters (aged 6 to 16) who wish to amend their legal gender by obtaining their parents' consent. If there is disagreement the transgender person can appeal to the County Governor of Oslo. Individuals who are 16 years old or older can proceed at their own will through a simple 'self-determination' procedure (TGEU 2019b). On the other hand, in 2018 the Portuguese Parliament - despite adopting a law ('Direito à autodeterminação da identidade de género e expressão de género e à proteção das características sexuais de cada pessoa' (no. 38/2018)') that bases legal gender recognition on adults' self-determination - decided not to allow minors to change their gender without submitting a medical statement that confirms their decision and their capacity to consent (Hines and Santos 2017; OII EUROPE 2018). Nevertheless, Portugal has become the second state in the world, after Malta, to ban medically unnecessary genital surgeries on intersex infants (Guilbert 2018).

Moreover, Finland is one of the few European countries whose legislation is tailored to protect transgender people from workplace discrimination. The Finnish Equality Act 2015 (609/1986) (*tasa-arvolaki*) and Non-discrimination Act (1325/2014) were revised to include non-discrimination protection for gender minorities and equality planning for workplaces. More specifically, the law clearly states that employers must prevent all discrimination (in hiring, dismissals, salary and promotions) based on gender identity. Non-governmental institutions and trade unions offer guidance to individuals, although the Ombudsman for Equality (<https://www.tasa-arvo.fi/web/en/>) is mainly in charge of providing instructions, advice and recommendations, and finds resolution in cases regarding discrimination (Ministry of Social Affairs and Health 2016). In addition, Finland's legislation allows non-Finnish transgender individuals to seek asylum if they experience discrimination and oppression due to their gender identity, after an investigation of the issue has been carried out by officials. However, NGOs have reported various problems such as unsafe living conditions in asylum centres, lack of LGBTIQ-specific support, inadequate assessment of asylum applications by officials, legal aid restrictions and a lack of training of personnel in reception centres (Valojää 2018).

In 2018 Sweden became the first country in the world to compensate transgender people who were forcibly sterilised between 1972 and 2013 (ILGA-Europe 2018e). Each one (~600-800 people) can apply for redress to Kammarkollegiet, the country's Legal, Financial, and Administrative Services Agency, before May 2020 and claim 225,000 Swedish Krona (~22,500 Euros) because, according to the Stockholm Administrative Court of Appeal, this practice was unconstitutional and found to be in violation of the European Convention on Human Rights (Ahlander 2017). In 2013 the Swedish Parliament also reformed the sterilisation requirement by revising the Gender Recognition Act 1972 (the first European enactment to formally acknowledge preferred gender) since it is no longer deemed a voluntary choice if someone is forced to

sterilise in order to change their legal gender (Rappole 2015). In addition, in recent years the Swedish Government, in consultation with the Swedish Federation for LGBTQ Rights (RFSL) and the Swedish Youth Federation for LGBTQ Rights (RFSL Ungdom), has decided not only to amend the wording of the existing Discrimination Act (Sw. Diskrimineringslagen (2008:567) by clearly including 'gender identity or gender expression' as a basis for unlawful discrimination but also to add this ground (together with those of sexual orientation, race and religious belief) into its current hate crime legislation by following Canada's initiative to make 'anti-transgender' speech a hate crime (Tomlinson 2017). From January 2019 the employers have a legal duty to take 'active' measures (that is, preventive and encouraging measures) to tackle discrimination and provide equal opportunities for all individuals within organisations (Bird and Bird 2017).

The introduction of Ireland's Gender Recognition Act 2015, which is currently undergoing a significant review, was just the starting point of this European effort to recognise transgender people's rights. A few years later Dublin Bus - one of the largest employers in the country with over 3,500 employees and the largest transport company in Ireland - launched one of the most comprehensive and progressive 'Workplace Gender Transition Policy and Guidelines' in consultation with Transgender Equality Network Ireland (TENI). According to the European Commission in Europe, the Irish Management Institute (IMI) and the Chartered Institute of Personnel and Development (CIPD) in Ireland these guidelines are put forward as a case study for best practice because they offer recommendations for employees, managers and human resource departments which aim at promoting an inclusive, equal, diverse and supportive workplace for transitioning employees (Dublin Bus 2017; TENI 2018).

Similarly, in the UK 'Guidance for Employers' was designed on behalf of the Government Equalities Office (GEO) (2015) in consultation with members of 'Inclusive Employers' (<https://www.inclusiveemployers.co.uk/>) to help them recruit and retain transgender employees from an operational perspective by offering practical suggestions and advice in order to ensure that a more inclusive work environment is created for all staff. According to Stonewall (<https://www.stonewall.org.uk/>) (2017) the top trans-inclusive employers in 2018 were Baker McKenzie, Berwin Leighton Paisner, Cardiff University, Gentoo, Lloyds Banking Group, the National Assembly for Wales, Pinsent Masons, Swansea University, The University of Manchester, Victim Support and Your Homes Newcastle. Furthermore, Stonewall (2016) has published a series of guides supporting trans staff in the workplace to 'create a transitioning at work policy', 'engage all staff in trans inclusion', 'ensure trans inclusive policies and benefits' and 'introduce trans inclusion in the workplace'. In Europe, *Christine Goodwin v. United Kingdom* [2002] ECHR 588 is a landmark case that sets a precedent regarding legal gender recognition. The applicant was a post-operative transgender woman who complained of her treatment in terms of employment, social security and pension rights (and her inability to marry). She also claimed that she experienced sexual harassment and humiliation at work during and following her gender reassignment. This case, which resulted in a government loss, triggered the

introduction of the pioneering Gender Recognition Act 2004, which allows transgender people to apply for a Gender Recognition Certificate (GRC) by enabling them to change their legal gender and receive a new birth certificate (House of Commons 2016). According to s.2 (1) (a), (b), (c) of the Act, they must have gender dysphoria, have lived in the ‘acquired gender’ for two years before the application and intend to continue to live in the ‘acquired gender’ until death. In addition to this they may be protected if they experienced discrimination because they were perceived to have the protected characteristic of ‘gender reassignment’ (s.7 of the Equality Act 2010). The latter term is outdated and must be amended to ‘gender identity’ as proposed by the Women and Equalities Committee. Also, there are plans to ask transgender people about their sexuality and gender identity for the first time in Census 2021 because there is lack of data on this population. Currently, there are discussions to update the Act and simplify the process (GIRES 2019).

3.1.1 The model of Malta, Belgium and Luxemburg

From a legislative perspective Malta is amongst the gay and transgender friendliest countries, together with Belgium, Norway, the UK, Finland and France (ILGA-Europe 2018b). In 2015 the Maltese Parliament enacted the right to gender identity, bodily integrity and physical autonomy for the first time (s. 3 (1) and 14) by unanimously passing one of the most radical pieces of legislation that complies with the above-mentioned soft laws, that is the Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC) Act. The only requirement for all transgender people is to register publicly with the notary their self-determined identity in the form of a declaratory deed (ss. 4(3) and 5). The successful implementation of such complex LGBTIQ equality standards is owed to the synergy of various factors - the comprehensive action plans of the political leadership, intervention by a local LGBT movement, activists and other experts and, most importantly, the participation and acceptance of civil society - which together helped to achieve ‘a culture of dignity’ (Feder 2015; Köhler and Ehrt 2016; GEO 2018). In addition, Malta is the only European country which offers gender non-binary recognition and prohibits non-consensual medical treatments (s. 14 GIGESC Act 2015) (TGEU 2019a); in cases of breaches the penalty is a fine (‘multa’) between 500 and 20,000€ (s. 11(3)).

On the other hand, Belgium is considered the most progressive country in terms of LGBT rights and general acceptance because of the passing of several equality laws since 1795. Since 2007 adult transgender people have been protected on the ground of ‘sex’ based on the Gender Act and can change their first gender and name under the Transsexuality Act (‘Wet betreffende de transseksualiteit’) - both fall under the General Anti-discrimination Federal Act - after sex reassignment surgery and the submission of various certification documents from psychiatrists, endocrinologists and surgeons. In fact, many Belgian, as well as French, transgender people visit the Centre for Sexology and Gender of the Ghent University Hospital (UZ Gent). However, in 2014 gender identity and expression were added to the prohibited grounds in various anti-discrimination laws at federal, community and regional levels, including the Wellbeing Act (Chulze et al.

2015). After numerous consultations with politicians, activists, academics and NGOs, the legislator replaced the former Act of 2007 with the Legal Gender Recognition Law (2017) to bring into effect a law with more positive effects on transgender people's lives by removing the previous requirements of forced sterilisation and mental health diagnosis, and reducing the overall time limit of the procedure from years to few months. In addition, minors (above the age of 16) can partially complete the gender reassignment procedure (after showing 'exceptional' circumstances for doing so) by registering their names with the *État Civil* office (based on self-determination) with the consent of their legal guardians, and by supporting their applications with a medical statement. Despite this simplification of the law and procedure two main issues are still under consideration: 1) non-binary identities are not covered by law because of the absence of the third option, and 2) until the transgender employees become familiar with the overall application process and the legal consequences of the change marker, the progress of the process might be possibly affected because of unexpected or negative reactions, threats and assaults that they might experience from colleagues at work during the three-month waiting period (Motmans et al. 2017). In January 2019 Germany became the first European country to offer a third gender option ('divers'=diverse) on official documents to gender non-conforming, intersex, and non-binary people after the issuance of a medical certificate. According to Germany's Constitutional Court (Bundesverfassungsgericht) decision 1 BvR 2019/16 of 10th October 2017 it was unconstitutional to deny people a gender or force them to choose if they were either male or female after having a chromosome test confirming they were neither sex.

Compared with the other two countries Luxemburg can be described as the epitome of all the legislative works that have been attempted up to now after the introduction of one of the simplest, self-determined, non-judicial gender recognition procedures in Europe. This is available to transgender minors (Art.6), transgender adult foreigners living in Luxemburg at least for a year (Art.5), transgender Luxembourgers who live abroad (Art. 12 (3)) and transgender refugees (Art.7). In 2018, almost with a unanimous vote, the Chamber of Deputies passed a law to amend an existing Civil Code on legal sex changes ('Loi relative à la modification de la mention du sexe et du ou des prénoms à l'état civil et portant modification du Code civil'). Currently, transgender people can register their name and gender marker without undergoing any medical or surgical treatment, or sterilisation (Art.2) but by sending their application together with relevant documentation (5) to the Minister of Justice (Art. 17; Art.1).

Table 1 below summarises the current positive legislative actions that are taken with regard to gender identity legislation.

Table 1: Countries with the most positive legislative actions with regard to gender identity minorities' rights (Author, 2019). Compilation from the data available from van den Brink and Dunne (2018, p.97), ILGA-Europe (2019) and TGEU (2019a).

Countries	Equality Non- discriminat ion Employment (gender identity)	Legal Gender Recognition	Self- determinat ion	No diagno sis	No compuls ory sterilisation	No compuls ory surgical intervention	No compuls ory medical intervention	Nam e chan ge	Case law addressing discriminat ion because of actual or perceived GI	Protecti on against transiti on- related absence s?
Finland	X					X		X		X
Malta	X	X	X	X	X	X	X	X		X
Belgium	X			X	X	X	X	X	X	X
UK	X				X	X	X	X	X	X
Sweden	X				X	X	X	X		X
Denmark		X	X	X	X	X	X	X		X
Ireland		X	X	X	X	X	X	X	X	
France		X		X	X	X	X	X	X	X
Portugal		X		X	X	X	X	X		X
Luxemb urg			X	X	X	X	X	X		X
Norway	X	X	X	X	X	X	X	X	X	X

2.1.2 Slower legislative progress in transgender rights protection

On the other hand, there are some other European countries (such as Latvia, Poland, Italy and Cyprus) which are at the bottom of the Rainbow continuum regarding the possible legal and policy actions they may take for the protection of the human rights of LGBTI people. The common characteristic among these countries is the occurrence of incidents of transgender hate crime and hate speech, even though there is a minimum protection at European level from the 'Framework Decision (2008/913/JHA)' on 'combating certain forms and expressions of racism (not specifically against transgender people) and xenophobia by means of criminal law'. Unfortunately, few reports are released on transphobia, hate crime and hate speech, either because the victims hesitate to disclose any transphobic crime to the police or because they are afraid of trusting the law enforcement authorities (ILGA-Europe 2018d).

The general picture is that there are still some European countries (i.e. Poland, Latvia, Italy, Bulgaria, the Czech Republic and Germany) in which transphobia is accelerating over the years in its effects transgender people's daily and work lives or where there is a serious lack of zero-tolerance workplace policies on transphobic bullying or minimum effort to minimise hate crime incidents (ILGA-Europe 2019). Not only are people physically attacked by colleagues and clients or subjected to verbal abuse in public spaces but they are

constantly questioned and exposed to prejudice based on their gender identity (GI). They also hide their true gender identity for fear of discrimination from their employers and colleagues, they are treated hostilely and ridiculed by political, religious and conservative movements and organisations, as well as society in general, which is confused about their needs, and they are exposed to hatred and criticism in the media (Bachmann and Gooch 2018; Crossland Employment Solicitors 2018).

For example, Latvia, one of the most socially and culturally conservative Baltic countries, as reported by a policy analyst at Providus, is behind Estonia (35%) and Lithuania (25%) on this matter (Economist, 2014). This is evident when massive police forces that are trained to tackle homophobic and transphobic hate crime intervene to minimise such incidents in pride parades. At other times these parades are prohibited on 'public morality', 'public safety' or 'security threat' grounds (Amnesty International 2006; ILGA-Europe and Mozaika 2011). Apart from a brief reference to gender and name change under Art. 2 (1) of the Law on the Change of a Name, Surname and Ethnicity Entry ('Likums Par vārda, uzvārda un tautības ieraksta maiņu') and Art.134 (11) of the Rules on Civil Status Records 2013 ('Noteikumi par civilstāvokļa akta reģistriem') there are no clear or specific provisions on gender identity, rules on a formal procedure or minimum requirements for gender recognition or legal protection from hateful comments under Latvian Criminal Law (Kamenska and Laganovska 2014). Overall, despite constant updating of the legislation, which shows some legislative progress, there is chaos in the use of legal terms, the number of relative laws, endless bureaucratic procedures with regard to the issuance of certifications and the involvement of various medical experts. Based on a discrimination case (no. A42229505 SKA – 5/2008, 14 Januairland,ry 2008) on a change of sex it was understood that the discrimination was on grounds of 'gender'. In practice, transgender people are required to present –before surgery – a psychiatrist's diagnosis of gender dysphoria and confirmation that they do not suffer from a mental disorder (ILGA-Europe 2019).

In Poland, gender recognition is unregulated. For years, greater emphasis has been placed on how transphobia and hate crimes will be combatted (Amnesty International 2006, 2014). In 2015 Polish transgender people lost an opportunity to protect their rights. The Gender Marker Change Bill failed to come into force because the Parliamentary Committee did not produce the required report before voting on the passing of a law on 'transsexual identity' (ILGA-Europe 2018c). Earlier, the president of the Republic of Poland at that time vetoed the draft due to legal inconsistencies with existing practice. Now, if transgender Polish people wish to change the name and gender, according to Art. 189 of Civil Code 1964 they have to be assessed by the courts by filing against their parents (Fundacja Trans-Fuzja, Polskie Towarzystwo Prawa Antydyskryminacyjnego 2014). Lengthy and numerous examinations (i.e. psychological, psychiatric and physical) need to be completed as part of a gender dysphoria diagnosis. In 2016 there was a case of a Polish transgender person whose gender was recognised (gender marker and name) in Poland despite having transitioned in Germany, without undergoing a diagnosis or trial period

(http://transfuzja.org/en/artykuly/press_releases/groundbreaking_court_decision_in_poland_on_gender_recognition_abroad.htm).

On top of this, in practice a two-year real-life test (no prescription of cross-sex hormones) is recommended (Chiam et al. 2016). In general, there is no accepted procedure to be followed before the trial regarding whether to undergo surgeries or a mastectomy; what is certain is that sterilisation is illegal in Poland. According to Art.156 (1) of the Polish Penal Code 1997 whoever causes grievous bodily harm in a form which deprives an individual of the 'ability to procreate' will receive a sentence of up to 10 years.

Similarly, several incidents of hate speech have been observed in Italy which have reached the courts (TGEU 2014). In general, Art. 3 of the Italian Constitution mentions that all citizens have 'equal social dignity' and are 'equal before the law'. More specifically, Art. 1 of the Sex Reassignment Act 1982 (no.164) ('*Nor otarizeateria di rettificazione di attribuzione di sesso*') only refers to the requirements for rectification of the sexual characteristics of an individual upon a court decision that authorises surgical intervention 'only where it is necessary' (as in Court of Rome 05/31/2013 n. 271; Court Rome 6.8.2013 n. 374; Court of Rome 02.11.2014 n. 32; Rovereto Court 3.5.2013 n. 194, Court of Siena 12/06/2013 No. 412, 20.07.2015 n. 15138 (Court of Cassation), 05.11.2015 n. 221 (Constitutional Court)) after advising medical reports on the psycho-physical condition of the individual (Tonioni 2017). Further court authorisation is needed for relative amendments of the civil status in the civil registry. Nationals and foreigners can apply for gender recognition in Italy (Court of Milan, 17.08.2000 (2000) Fam. Dir. (Famiglia e diritto)).

Finally, it seems that the number of transgender hate crimes has risen (even by 81%), as recorded by police forces in countries such as the United Kingdom, where there is legislative progress with regard to non-discrimination and legal gender recognition; (BBC News 2019). It is worthy to note that Malta, Greece, Luxemburg and France score very highly as they have taken reasonable steps to reduce transphobic incidents (ILGA-Europe 2019).

Summary

All people expect to be equally treated and respected under law. Yet it seems that transgender people receive less clear protection - with the exceptions of those countries that follow more progressive legislative approaches than others - in existing non-discrimination national laws in Europe or less equal rights and equal access to work or they face unclear procedures when attempting to receive legal recognition of their preferred gender. There are still some European countries that accept forced sterilisation or medical intervention requirements when transgender people seek to change their legal gender. The well-established treaties, charters, conventions, directives, resolutions and recommendations on equality issues always remind the EU Member States of the need not to discriminate on any ground or to violate people's human rights and to offer equal opportunities in employment to all.

Literature has shown that the grounds of gender identity, gender expression or sex characteristics should be explicitly mentioned, not implied, in the relative pieces of legislation, without requiring further interpretation. If such provisions are part of , legislation, and gender identities which fall outside the gender binary are not categorised as ‘other’, then it is possible to understand people’s needs, offer greater legal anti-discrimination protections and prevent any form of discrimination that results from stereotypical thinking on gender roles, gender bias etc.

To this extent organisations would then realise the seriousness of tackling employment-related transgender issues. They would identify and foster effective diversity management policies, strategies, practices and codes of conduct (such as applying more gender-neutral wording in contracts, offering gender-neutral facilities, respecting pronoun choices including the gender-neutral ones ‘ze’, ‘xe’ and ‘they’, introducing zero-tolerance policies, supporting teams/systems and complaint systems, ensuring that all necessary measures are taken and victims are afforded appropriate remedies and redress in case of a discriminatory incident, and providing inclusion and diversity and awareness training programmes to educate all staff about gender identity and all human rights issues relating to gender minority identities). They would also implement action plans to accommodate specific transition-related issues by creating more inclusive workplace environments and promoting the wellbeing of transgender employees. Currently, all the above are offered at minimum levels.

However, the equality laws and company policies and regulations described above do not alone bring about desirable results. The examples of those EU countries with slower legislative progress reveal society’s ignorance about gender identity minorities’ needs, and a lack of understanding and support respect for their choices and acceptance. What is needed is more willingness to show acceptance and less discomfort or worry that transgender people are a ‘threat’. Currently, the lack of relevant case law and the absence of consistent reporting of transgender people’s experiences at European level, and particularly in the employment sector, will not change or improve the situation. Perhaps improvements in the situation could be achieved if greater participation through dialogue and continuous research is accommodated by all (governments, society, representatives of those who support transgender people’s rights, media, academics and medical experts) so as to reduce any challenges, and eliminate any barriers and organisational unpreparedness, as well as reviewing, repealing and reforming any laws that discriminate against transgender people at organisational, societal, national and European levels

Cross-References

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