

TGEU Position Paper on Gender Markers

Summary

As the foundation of this position, Transgender Europe (TGEU) fully endorses Principle 31 of the Yogyakarta Principles +10¹, calling for the full abolition of gender markers on official identity documents, the curtailing of collection of gender and sex information wherever possible in public records, and where gender markers remain, creating a quick, transparent, and accessible method for amendments without any requirements or restrictions. Additionally, TGEU acknowledges the ongoing need for aggregate data on sex and gender as part of gender equity data monitoring by States. For this reason, sex and gender data, when collected for these purposes, should be collected voluntarily and on the basis of self-determination only, with at least one additional coding option in addition to the possibility for the code to be marked unspecified (e.g. X), and stored only in aggregate in fulfillment of the right to privacy.

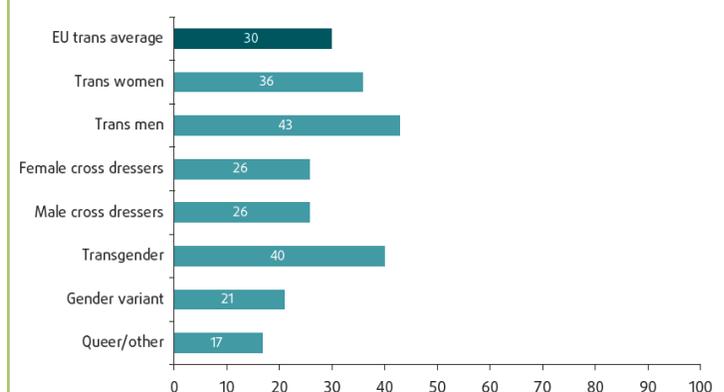
Background Information

The General Assembly at the 5th European Transgender Council in 2014 in Budapest tasked the TGEU Steering Committee to reflect on the removal of gender markers in identification documents and to come back with a report at the next council.² In 2016, a workshop discussed a first discussion paper and the TGEU General Assembly concluded with a wish for better and more visible coverage of the topic in TGEU's work. In their discussions and reflections, the Steering Committee and staff included the reflection on the situation of persons with a non-binary or non-gendered identity, and consulted with member organisations having extensively worked on gender marker questions.

TGEU has been advocating for better data protection and the right to privacy in general, for instance in regard to the EU Data Protection Package. TGEU has been actively promoting the right to self-determination in regard to gender recognition and in access to trans-specific healthcare. To this end, TGEU actively worked with the Council of Europe Parliamentary Assembly for the inclusion of an 'X' option in Resolution 2048(2015). In addition, TGEU has

since 2010 researched and published on questions of a third gender marker option in its global research, and in its health research.

Figure 51: Feeling discriminated against in the last 12 months in a situation where it was necessary to show an official document stating the owner's sex, by identity group (%)



Question: C4. During the last 12 months, have you personally felt discriminated against because of being trans in any of the following situations: - K. When showing your ID or any official document that identifies your sex.

Base: Trans respondents in the EU LGBT survey who had to show an official document stating the owner's sex in the 12 months preceding the survey.

Source: FRA, EU LGBT survey, 2012

30% of trans people report discrimination in situations where they had to present official ID, according to a 2012 EU Fundamental Rights Agency report (FRA, LGBT Survey, 2012). Gender markers on identity documents, such as ID cards or passports, can become a daily source of distress, discrimination and social exclusion, and can even lead to violence against persons who do not comply with societal norms of *male* or *female* for part or all of their lives.

The majority of respondents to the largest non-binary survey (895 total respondents) to date in Europe, carried out by the Scottish Trans Alliance, welcomed an option for a

gender marker besides male or female. 64% of respondents answered "Yes" to the question "Would you like to

¹ <http://yogyakartaprinciples.org/principle-31-yp10/>

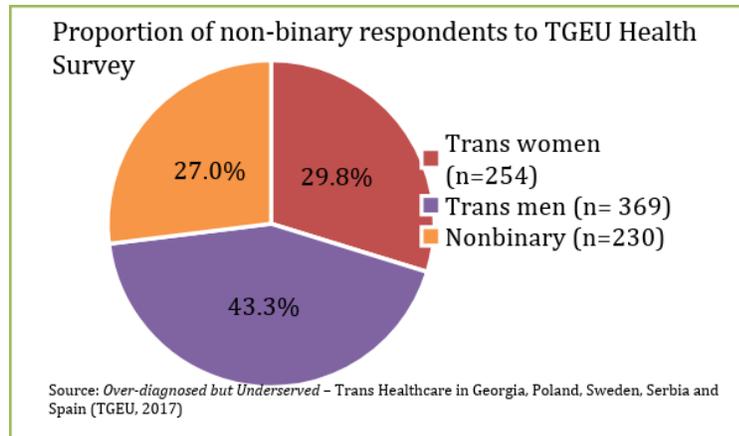
² „[The] Assembly asks the Steering Committee to come back with a reflection and report on this issue at the next Council“, minutes of the TGEU General Assembly in Budapest on 3rd May 2014, Agenda point 14 Any other business

change your legal gender/sex so that it is not recorded as 'male' or 'female' (i.e. on your birth certificate, passport, driver's licence etc.)?"* 14% of respondents would like to change it on some documents but not others, 16% were unsure and only 6% indicated that they did not want such an option.³

One respondent pointed to harmful health consequences of the inability to be properly legally recognised:

"I really want to [change the gender marker on my documents] but I cannot as there isn't an option – I have to choose and it makes me very gender dysphoric."

With the majority of trans people (73%) in the EU not identifying within the gender binary spectrum (FRA, 2012), the taken-for-granted recording and display of a person's gender is increasingly critically examined.



46% of participants to the First European Transgender Council in 2005 supported the demand "In addition to the registration system of male/female, we suggest that we can opt out of both."⁴ Legal gender recognition (LGR) procedures in Europe usually only provide the options of choosing between "male" or "female"; LGR is rarely available to those who do not identify clearly with one of these. Consequently, most legal systems and LGR procedures leave out non-binary trans people and reinforce the social construct of binary gender.

In combination with other information which is considered highly confidential, for example medical and personnel records relating to a trans person's previous gender identity, an inaccurate gender marker on a ID document may risk exposing a person's private history of gender identification and assignment. An inaccurate gender/sex marker in a document such as a passport can not only cause significant emotional distress to gender diverse people but can also expose them to invasive questioning and/or harassment, for example if they are perceived not to look externally like their legal gender. Conversely, even after undergoing LGR procedures such that their documents and gender identity "match", many trans people continue to have trouble with identity documents based on the perceptions and bias of those evaluating their documents.

Definition of terms

There are several contexts and means of recording sex and gender information, both in public and private records. For the purposes of this Position Paper, TGEU will use the following definitions and concepts:

Visible gender marker refers to the indicator of sex or gender on public documents such as a birth certificate, identity card (ID card), passport, bus pass, etc.

Gendered data refers to private identification provided by the person which is typically assessed in aggregate, for example in the contexts of a census, when completing public opinion or public experience surveys, and when providing optional data (in addition to race, religion, or other classifications typically protected under anti-discrimination laws and statutes).

Legal gender recognition refers to the process and outcome by which a person changes either or both of their legal gender marker and gender data.

³ Scottish Trans Alliance's 'Non-binary people's experiences in the UK' report

⁴ Eva Fels, Common Goals of the First European TransGender Council A Summary Review, 2005 table 4 p.6 http://www.tgeu.net/PubAr/Documents/Co01/Vo_SumUp.pdf

Position underpinning: Yogyakarta Principles +10 Principle 31: The Right to Legal Recognition

Principle 31 of the Yogyakarta Principles +10, an application of international human rights law in relation to, *inter alia*, gender identity and gender expression, reads:⁵

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.

STATES SHALL:

- A. *Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;*
- B. *Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;*
- C. *While sex or gender continues to be registered:*
 - i. *Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;*
 - ii. *Make available a multiplicity of gender marker options;*
 - iii. *Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;*
 - iv. *Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.*

TGEU fully endorses this Principle.

Position underpinning: Rights to privacy, freedom from discrimination, and recognition before the law

TGEU's position is based the fundamental and universal human rights to privacy, freedom from discrimination, and recognition before the law, as described in the Universal Declaration of Human Rights.⁶ The European Court of Human Rights ruled that the freedom to determine one's gender is essential to the right to self-determination,⁷ and that a person's gender identity is "one of the most intimate areas of a person's private life".⁸ "Transsexual persons" have won the right to identity documents reflecting their gender identity under the Right to Privacy (Art. 8 ECtHR) since 1992.⁹

⁵ <http://yogyakartaprinciples.org/principle-31-yp10/>

⁶ UDHR

⁷ *YY v Turkey*, (Application no. 14793/08), [decided 10 March 2015]

⁸ *Van Kück v Germany*, (Application no. 35968/97) [2003]

⁹ *B. v. France* (Application no. 13343/87) [25 March 1992], *Christine Goodwin v. the United Kingdom* [11 July 2002], *I. v. the United Kingdom* (no. 25680/94) [11 July 2002], *L. v. Lithuania* (no. 27527/03) [11 September 2007]

Implications and consequences: Identity documents

Identity documents serve to solidify the relationship between the individual and the State, verifying the classification and identity of the bearer. These documents are, of course, integral to personal functioning in the modern world. However, the recording and display of a visible gender marker in an individual's identity documents infringe upon the right to privacy and the right to be free from discrimination. As these documents are used universally to verify identity, often with a biometric photograph as the primary means of verification, the display of sex or gender on these documents allows bias and assumption related to normative gender expression to hinder or even override an otherwise positive identification match. As technology progresses in terms of photography, printing, and other biometric means of identity verification, gender markers are an increasingly archaic means of verification which are prone to misuse and abuse (such as when an immigration control agent detains a person because the agent perceives that the bearer's manner of dress does not match the gender marker displayed on their passport).

Implications and consequences: Gendered data and equality metrics

Practices of automatic recording, display, processing and passing on of gendered data (e.g. in online forms, databases) of individuals from public actors to third parties might pose a threat to privacy, and particular to the privacy of trans and gender diverse people. For this reason, TGEU argues that gender, similar to ethnicity, religion, or health status, should be classified as sensitive data.

For the purposes of equality measures and State internal and external assessments on the grounds of gender equality, gendered data still play an important role. However, there is no necessity for these data to be linked to a person's identity documents, thus mitigating the need for visible gender markers. Classifying gender as sensitive data serves to minimize the impact of these data in protect of the privacy of trans persons while still providing the necessary information for assessment and monitoring bodies.

In this context, LGR procedures may still be necessary to change an individual's gendered data; in that case, it is imperative that any processes are in line with international human rights law, thus being quick, transparent, and accessible, and based solely on self-determination.