

Legal Gender Recognition and the Best Interest of the Child

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1. Executive Summary

More young people start living out their gender identity at a younger age skipping years of ordeal and secrecy, and developing into confident young adults. Love, support and recognition of their gender identities are key for children and young trans people to flourish. States have an obligation to safeguard also a young person's right to identity. Traditionally, legal gender recognition has been only for adults, leaving minors out or creating huge hurdles for them. This contributes to social exclusion and stigma, poor school performance, worse health and suicidal tendencies. Identity recognition procedures can help reduce school drop-out rates, increase social acceptance, improve mental health issues, and result in overall better health and well-being of the minor¹, already from a young age. Different policy options for minors are currently used in Europe, often involving arbitrary age barriers or harmful medical requirements.

States should establish accessible and non-discriminatory legal gender recognition procedures without abusive pre-conditions for young transgender people. The best interests of the child should be a primary consideration in legal transition procedures, and the minor's view should be giving proper weight, taking into account their individual maturity and development.

2. Background

Procedures for trans people to change name and gender marker in identity documents (legal gender recognition - LGR) are in most European countries limited to adults. Where LGR is accessible for minors (those below age of 18) it is often only accessible from a certain age onwards and depends on a mental health diagnosis.

Historically, gender recognition has been tied to medical requirements such as a mandatory sterilisation or genital surgery. Since such procedures were not performed on minors gender recognition procedures were not available to them either. While procedures for adults change from a medicalised to a human rights approach minors are often left behind and remain exposed to human rights violations.

3. Analysis

More young people start living out their gender identity at a younger age skipping years of ordeal and secrecy. While self-determination has been accepted as the basis for legal gender recognition for adults, procedures for minors are often ill-regulated and overburdened with medicalisation.

It is recognised that automatic age-barriers and medicalisation are based on outdated medical standards and are not in line with human rights standards.²

¹ Olson et al., 'Mental Health of Transgender Children Who Are Supported in Their Identities', 137 *Pediatrics* (2016) e20153223.

² UN Committee on the Rights of the Child et al., 'Pathologization – Being Lesbian, Gay, Bisexual and/or Trans Is Not an Illness' For International Day against Homophobia, Transphobia and Biphobia - Tuesday 17 May 2016, 12 May 2016.

3.1. Impact

Gender recognition procedures that are only accessible for adults fail young people. It denies them the recognition of their identity, undermines their development of a healthy sense of self, and bars them from accessing basic rights and activities.^{3,4,5,6}

Automatic age barriers, such as enabling access only from age 6, 16 or 17 years, create artificial barriers. There is no age when one is “trans enough” for needing gender recognition. It is a very individual pathway.⁷ Rigid numerical age barriers do not allow accommodating to the needs of the minor according to their maturity and development. Some young children might already have a clearly established gender identity when entering kindergarten or school. Legal recognition can be important to give these kids a supporting environment to thrive in. Gender recognition is time sensitive for young people and should be therefore quickly available to help accommodate start or change of school, social trips, and sports activities to avoid social exclusion.

Automatic age barriers also do not take into account that a 17-year old might be well established in their gender identity and understand well consequences of legal transition. Age barriers also do not allow parents to take the best decision for their child, according to the development and needs of the child. They might also give ground for legal challenge (age discrimination).

Medicalised gender recognition procedures for minors often mean degrading, lengthy, expensive and medically unnecessary procedures. The World Health Organisation has recognised that declaring diverse gender identities as illnesses drives stigma and social exclusion. Demedicalisation has been accepted standard in gender recognition procedures for adults. However, mandatory psychological assessments and diagnosis are still too often required for minors, largely misunderstood as safeguards. Such assessments have been developed for adults, are often unsuitable for minors due to their intrusive nature, and create “pathologised” trans adults. Mental health assessments for the sake of legal transition have proven to rather be a burden and not a driver of good health for young trans people.

On the other hand, giving minors access to gender recognition can help reduce school drop-out rates, mental health issues and suicidal tendencies, improve performance in school and education, increase social acceptance, and result in overall better health and well-being of the minor.⁹

Today, policy makers increasingly have the best interest of the child at heart while seeking to design practical and responsible gender recognition procedures.

³ Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013, October 2013.

⁴ Schneider, 'An Insight into Respect for the Rights of Trans and Intersex Children in Europe', (2013) 56.

⁵ LGBTI Children Have the Right to Safety and Equality - Human Rights Comment, 10 February 2014.

⁶ UN Committee on the Rights of the Child (CRC) et al., Embrace Diversity and Protect Trans and Gender Diverse Children and Adolescents, 16 May 2018.

⁷ Kennedy, 'Gefangene Der Lexika : Kulturelle Cis-Geschlechtlichkeit Und Trans'-Kinder', in *Normierte Kinder : Effekte Der Geschlechternormativität Auf Kindheit Und Adoleszenz* (2013) 319.

⁸ *Erfahrungsberichte - Trakine e.V.*, 29 November 2018, available at <https://www.trans-kinder-netz.de/erfahrungsberichte.html> [last visited 29 November 2018].

⁹ Olson et al., *supra* note 1.

3.2. International Human Rights Standards

Gender recognition for children and young people touches on important principles from the UN Convention on the Rights of the Child (UNCRC):

- The best interests of the child are a primary consideration (Article 3)
- Non-discrimination (Article 2)
- The need to respect the growing capacity of a child to make decisions about their life (Article 5)
- The right to 'preserve' one's identity (Article 8)
- Children's views are to be listened to and given due weight, in accordance with the age and maturity of the child (Article 12).

The right to recognition before the law is an international human rights that is applicable for minors (Article 8 UNCRC) as it is for adults.¹⁰ The right to identity includes explicitly a child's name and is understood to cover also the right to legal recognition the child's established gender identity, similarly to adults.¹¹

Legal gender recognition can also impact a child's right to development (Article 6), to privacy (Article 16), to education (Article 28), and to the highest attainable standard of health (Article 24).

The European Convention on Human Rights Article 8.1 protects the private and family life of everyone, including children and young people. The European Court of Human Rights has reiterated repeatedly the right to legal gender recognition. Consequently, "if an adult has a right to gender recognition under Article 8 of the Convention, a child is equally entitled to respect for his or her right to gender recognition."¹² However, Human Rights institutions are worried that children and young people face "huge hurdles in most countries"¹³ and warn that full exclusion from recognition "is a disproportionate interference with young people's right to gender recognition"¹⁴ and could be vulnerable to a legal challenge. States should therefore establish "accessible and non-discriminatory legal gender recognition procedures without abusive pre-conditions, including for young transgender people."¹⁵ To this end, the Council of Europe asks member states to "ensure that the best interests of the child are a primary consideration"¹⁶ in legal gender recognition decisions, and to facilitate, "the changing of the entry as to first name or gender in school documents."¹⁷

¹⁰ (Yogyakarta Principles. 2007)

¹¹ Sandberg, 'The Rights of LGBTI Children under the Convention on the Rights of the Child', 33 *Nordic Journal of Human Rights* (2015) 337, at 343.

¹², *supra* note 3, at 2.13.

¹³, *supra* note 5.

¹⁴ Advice of the Ombudsman for Children 2013, para. 5.1.

¹⁵ UN Committee on the Rights of the Child (CRC) et al., Embrace Diversity and Protect Trans and Gender Diverse Children and Adolescents, 16 May 2018.

¹⁶ Resolution 2048(2015) 'Discrimination against Transgender People in Europe', 22 April 2015, para. 6.2.5.

¹⁷ (Council of Europe Committee of Ministers 2010)

4. European landscape

There is no unified approach in Europe. Out of those states that provide for legal gender recognition, three main approaches can be found on how minor's access is regulated: (1) no age limit, (2) staged age limits, (3) no access for minors.

The first group enables gender recognition without an age limit, putting weight on the maturity and development of the child, such as in **Malta**¹⁸ or **Luxembourg**.¹⁹ Separate court procedure for those below age 16 (Malta) and for those below age 5 (Luxembourg) satisfy procedural safeguards. However, there are no artificial age barriers, which signals that all children are equally valid in their identity. It empowers the minor in their identity and enables parents to take the best decision for their child. Nevertheless, court procedures can produce additional hurdles (time, money).

A proposal developed for the **German** Family ministry discusses as an alternative to court-proceedings mandatory separate counselling session for parents and the minor. In separate sessions the minor and the parents would be advised on consequences, support services, peer-to-peer contacts, and can discuss related questions.²⁰

Gender recognition court-proceedings in **Germany** and **Switzerland** are accessible for minors as for adults, however they require psychological assessments and diagnosis. The mental health assessment plus court procedure can be burdensome, expensive, lengthy and difficult to access for a minor. Pathologisation of gender identity is often hard on the young person while having no medical utility in gender recognition proceedings. It also encourages arbitrariness in decisions.^{21 22}

The second group of states with staged age limits has set more or less arbitrary brackets when a minor can access the procedure. **Norway**²³ makes the procedure for adults available for minors from age six having parental consent. In case of parental dissent an application can be launched with an especially trained judge to assess whether the application is in the best interest of the child.

From age 16 a minor can access legal procedures in **Belgium**,²⁴ **Ireland**,²⁵ with parental consent and in **the Netherlands**²⁶ without parental consent, but they have to provide

¹⁸ Gender Identity, Gender Expression and Sex Characteristics Act (2015), XI of 2015, 14 April 2014, para. 7.

¹⁹ Loi du 10 août 2018 relative à la modification de la mention du sexe et du ou des prénoms à l'état civil et portant modification du Code civil., N° 797 du 12 septembre 2018, 2018, para. 99.1.

²⁰ L. Adamietz and K. Bager, *Report on Reform of the Transsexuals Act (Transsexuellengesetz)*., Begleitmaterial zur interministeriellen Arbeitsgruppe Inter-Transsexualität-Band 7a. (2017), at 3.1.2 Improved access for minors/peer counselling.

²¹ *Ibid.*, at 9.

²² BGE - Swiss Federal Court, *BGE 140 III 577*, available at http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F140-III-577%3Ade&lang=de&type=show_document (last visited 29 November 2018), at 579.

²³ Unofficial Translation Excerpt from: Prop 74 L (2015-2016) Proposition to the Storting (Proposal for a Legislative Decision) The Legal Gender Amendment Act, 2016, para. 'on §4', para 4.

²⁴ 5 JUIN 2017. - Loi Réformant Des Régimes Relatifs Aux Personnes Transgenres En Ce Qui Concerne La Mention d'une Modification de l'enregistrement Du Sexe Dans Les Actes de l'état Civil et Ses Effets (25 JUNE 2017. - Reforming Transgender Regime Act Regarding the Mention of a Change in Sex Registration in Civil Status Records and Its Effects), File Number: 2017-06-25 / 03, 7 October 2017, para. 11.

²⁵ Gender Recognition Act 2015 – No. 25 of 2015 – Houses of the Oireachtas, Ireland, 17 December 2014, paras 12.4(a)-(b).

proof of assessment by a mental health specialist. Because of the length of such procedures it is rather unlikely for the minor to complete the procedure before reaching majority when the demedicalised procedure becomes accessible. **Greece**²⁷ requires 15-17 year-olds to obtain a medical diagnosis and to be assessed by a medical commission, whereas the de-medicalised procedure becomes accessible from age 18.

Parental consent can become a serious obstacle. Safeguards need to be in place ensuring young people's right to identity recognition is secured without bias from those holding custody rights.

The third group, which forms the majority of states in Europe, excludes minors from accessing gender recognition procedures, no matter whether these procedures are demedicalised or not. Examples are the **Czech Republic, Denmark, Finland, Lithuania, Poland, and the United Kingdom**.

4.1. Other Alternatives – Change of Name

Some states have also provisions enabling a minor to change their name, independently from their gender marker. Like this, children and young people can use the name corresponding to their gender identity in most areas of social life, such as school, leisure time, travel etc. For example, in **Belgium**,²⁸ change of name is possible from age 12, and change of gender marker is available from age 16 (with parental consent and pathologisation). In **Spain**,²⁹ the Ministry of Justice instructed on 24 October 2018 registries and notaries to enable the change of name in the Civil Registry also for minor trans persons. Parents (or those who exercise guardianship), may jointly request registration of the name change in the Civil Registry. For this a joint declaration is required stating that the minor expresses their gender identity in a clear and incontestable manner that corresponds with the gendered nature of the chosen name. If above age 12, the minor has to sign the request as well. If the minor is of lower age, the child must be heard by the civil registry. Communication must be adapted to the child's age and degree of maturity in such a way that the child understands the matter.

In the **United Kingdom**,³⁰ a minor from age 16 years can change their name by the administrative procedure of "deed poll". For those younger than 16 years the agreement of everyone with parental responsibility or a court order are required.

²⁶ M. van V. en Justitie, Wet van 18 december 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek en de Wet gemeentelijke basisadministratie persoonsgegevens in verband met het wijzigen van de voorwaarden voor en de bevoegdheid ter zake van wijziging van de vermelding van het geslacht in de akte van geboorte, 10 January 2014, para. Article 1 (B).

²⁷ Law 4491/2017 (Greece), 4491 Government Gazette A 152 / 13.10.2017, 13 October 2017, para. 3.2.

²⁸ 5 JUIN 2017. - Loi Réformant Des Régimes Relatifs Aux Personnes Transgenres En Ce Qui Concerne La Mention d'une Modification de l'enregistrement Du Sexe Dans Les Actes de l'état Civil et Ses Effets, (Belgium), File Number: 2017-06-25 / 03, 7 October 2017.

²⁹ Spanish General Directorate of Registries, Instruction of October 23, 2018, of the General Directorate of Registries and Notaries, on change of name in the Civil Registry of transsexual persons., BOE núm. 257 de 24 de Octubre de 2018, 23 October 2018.

³⁰ *Change Your Name by Deed Poll*, GOV.UK, available at <https://www.gov.uk/change-name-deed-poll/change-a-childs-name> (last visited 29 November 2018).

5. Recommendations

Interested policy makers should take the Maltese law as a starting point in creating human rights compatible gender recognition procedures for minors. In general the following principles should be respected:

1.) Procedures ought to be fast, quick, transparent and based on self-determination.

Gender recognition is time sensitive for young people and should be therefore quickly available to help life changes, such as accommodate start or change of school, social trips, and sports activities. Children and young people are particularly at risk for having their rights violated and hence need procedures protecting their human rights.

2.) Best interest of the Child as primary consideration

Ensure the best interest of the child is the primary consideration in all proceedings involving minors. This includes that the minor is heard taking into account evolving maturity and development of the child.

3.) No automatic age barriers

Procedures with no or low age barriers provide minors and their parents with the best possibilities to decide when to apply for identity recognition. It also pre-empt legal challenge on grounds of age-discrimination.

4.) No medicalisation

No proof of medical treatment, mental health diagnosis, surgery or sterilization should be requested in order to protect children from life-long consequences of having an inherent and intimate part of their identity medicalised.

5.) Ensure safeguards protecting the child's right to identity

Separate proceedings should be introduced in case parental consent is missing. These can be automatic notification of child protection services, or application before an especially trained judge or any other measure that ensures the child's right to the free development and protection of their gender identity.

6.) Facilitate easy name change

Name change procedures allowing a minor to quickly have the name officially recognised that corresponds to their gender identity can be valuable alternatives to gender recognition procedures. This helps eliminate many practical problems in daily life and gives important recognition to children and young people.

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