

How EU gender legislation can serve to protect transgender people rights

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Dimensions of Transgender Issues

- Protection from discrimination
 - In the workplace
 - Regarding access to goods and services (especially healthcare)
- Acquisition of gender of identification
 - Conditions for legal recognition (e.g. gender reassignment procedures; sterility)
 - Scope of recognition (ability to marry, gender-based retirement pension)

Protection from Discrimination European Court of Justice

- *P. v. S. and Cornwall County Council*, Case C-13/94, judgement of 30 April 1996
- *K.B. v. National Health Service Pensions Agency*, Case C-117/01, judgement of 7 January 2004
- *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, Case C-423/04, judgement of 27 April 2006

P. v. S. and Cornwall County Council

- Dismissal of a trans woman for a reason arising from gender reassignment
 - “life test”
 - Surgery
 - Discrimination on grounds of sex?
- ⇔ Does the **dismissal** of a transsexual for a reason related to a **gender reassignment** constitute a breach of [Directive 76/207/EEC]?

***P. v. S.* – the central reasoning**

- “[T]he right not to be discriminated against on grounds of sex is **one of the fundamental human rights** whose observance the Court has a duty to ensure” (*P. v. S.*, para 19)
- “Accordingly, the **scope** of the directive **cannot be confined** simply to discrimination based on the fact that a person is of one or other **sex.**” (*P. v. S.*, para 20)

***P. v. S.* – Safeguarding a fundamental right**

- “In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the **gender reassignment** of the person concerned.” (*P. v. S.*, para 20)

***P. v. S.* – Sex discrimination No “equal misery” comparison**

- “Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that **he or she intends to undergo, or has undergone, gender reassignment, ...**
- ... he or she is treated unfavourably by **comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.**”
(*P. v. S.*, para 21)

At stake: Dignity and freedom

- “To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the **dignity and freedom** to which he or she is entitled, and which the Court has a duty to safeguard.”
(*P. v. S.*, para 22)

***P. v. S.* – Subjects of protection**

- The European Court of Human Rights has held that “the **term ‘transsexual’** is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. **Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group**“. [*Rees v United Kingdom*, para 38]. (*P. v. S.*, para 16)

ECHR: Legally recognizing the gender of identification

- “[S]ociety may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in **dignity and worth** in accordance with the sexual identity chosen by them at great personal cost.” (*I. v. U.K.*, 2002, para 71)

ECHR: On the right to marry

- “The Court [...] finds that it is artificial to assert that postoperative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex.”
(*I. v. U.K.*, 2002, para 81)

ECHR: The “very essence” of the right to marry

- “The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court’s view, she may therefore claim that the very essence of her right to marry has been infringed.”
(*I. v. U.K.*, 2002, para 81)

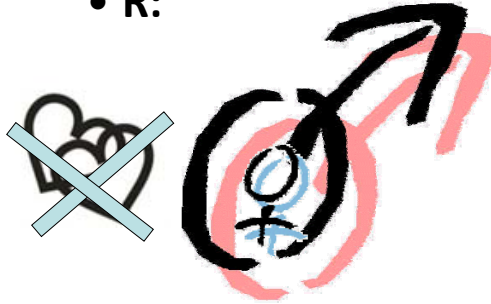
Heteronormativity

ECJ: *K.B. v. National Health Service Pensions Agency*

• *K.B.*:



• R:



No Marriage: No widower's pension

***K.B.* – a “hazy concept of equality” (Mark Bell)**

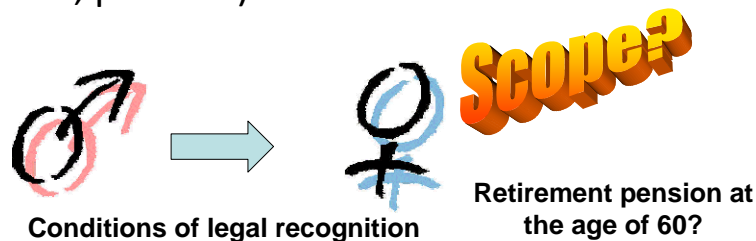
- “[T]here is **inequality of treatment** which ... affects one of the conditions for the grant of that right. ... the inequality of treatment does not relate to the award of a widower's pension but to a **necessary precondition for the grant of such a pension**: namely, the **capacity to marry.**” (*K.B.*, para 30)

Complexities of transgender recognition

- “Article 141 EC, in principle, precludes legislation, such as that at issue before the national court, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other.” (K.B., para 36)

Gender identity: The scope of recognition

- “[I]t is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person” (Richards, para. 21)



From the fundamentality of the principle to the scope of its applicability

- “Directive 79/7 is the embodiment in the field of **social security** of the principle of equal treatment of men and women which is one of the fundamental principles of Community law.” (*Richards*, para. 22)
- “The **scope of Directive 79/7** cannot thus be confined simply to discrimination based on the fact that a person is of one or other sex. ...

Including gender reassignment

- ... In view of its **purpose** and the **nature of the rights** which it seeks to safeguard, the scope of that directive is also such as to apply to discrimination arising from the **gender reassignment** of the person concerned”. (*Richards*, para. 24)

The *Richards* holding

- “Article 4(1) of Directive 79/7 must be interpreted as precluding legislation which denies a person who, in accordance with the **conditions laid down by national law**, has undergone **male-to-female gender reassignment** entitlement to a **retirement pension** on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.”
(*Richards*, para. 38)

Features of transgender recognition and protection from discrimination

- Subject of protection (according to ECJ judicature): A person intending to undergo, undergoing, or having undergone, **gender reassignment**
- Ground of protection (according to ECJ judicature): **gender** (*not* sexual orientation)
- ⇔ Level of protection (Directives 2004/117/EC, 2006/54/EC, etc.)

Transgender people in healthcare

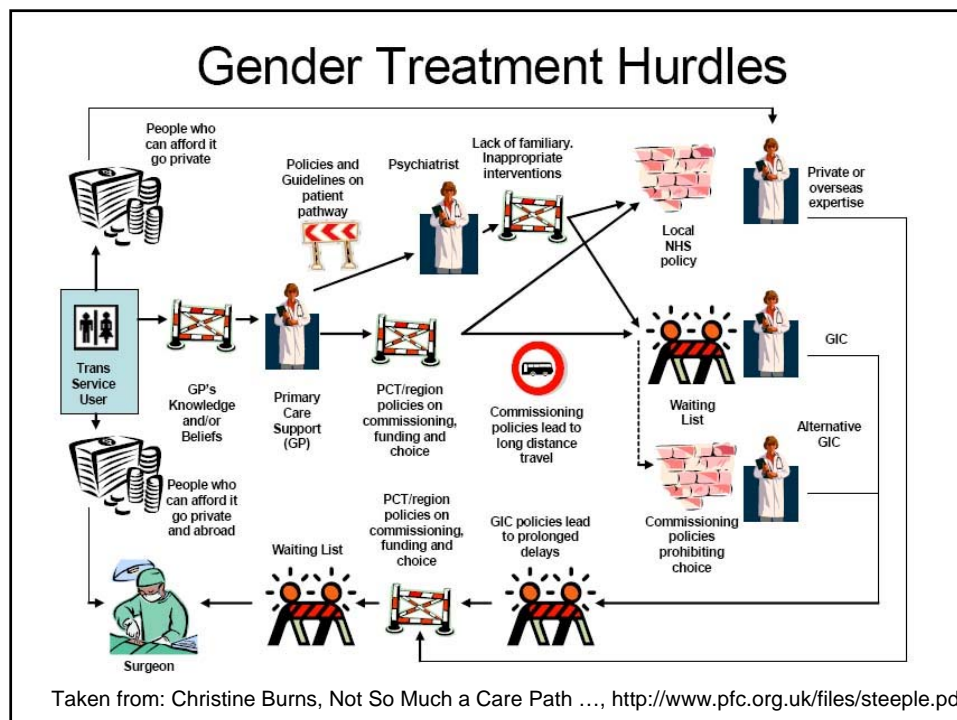
- No explicit mentioning of transgender needs in Directive 2004/117 EC
- “To prevent discrimination based on sex, this Directive should apply to both direct discrimination and indirect discrimination. Direct discrimination occurs only when one person is treated less favourably, on grounds of sex, than another person in a comparable situation. ...

Gender in healthcare

- ... Accordingly, for example, differences between men and women in the provision of healthcare services, which result from the physical differences between men and women, do not relate to comparable situations and therefore, do not constitute discrimination.” (Preamble, Recital 12)
- ⇔ Caring for special gender-related needs
- ⇔ Providing adequate healthcare resources to transgender people

Diagnosis: Transgender healthcare is in a bad condition

- Access to services depends on a diagnosis of a mental disorder (Gender Identity Disorder)
- Insurance plans often do not cover gender reassignment procedures (hormones, hair removal, surgery)
- Shortage of accessible, localised access to specialist care
- The services that are accessible often provide a poor experience for transgender people



**„Health care is not exempt, it is a service.“
– Proposals for change (Whittle)**

- Access to specialist services available to trans people in all areas
- Cross-boundary coordination
- EU travel fund
- ⇔ Continuity of care, quality treatment on a more equal basis
- Prioritising the needs of transgender patients in line with other important medical treatments

**Gender reassignment as precondition
for gender identity recognition**

- Changing names and documents other than birth certificates
- Changing birth certificates
- ⇔ Appearance
- ⇔ Legal requirement of sterility
- Extremely invasive and straining procedure
- Should be available but not obligatory for legal recognition

Protecting the rights of trans people by ensuring EU Member State compliance

- Conditions for legal recognition of the gender of identification
- Non-discriminatory access to healthcare resources
- Protection against discrimination in the workplace
- **Task of the EU** to ensure that Member States meet their obligations under the **Gender Equality Directives** as construed by the ECJ

The potential role of Equality Bodies according to their competencies

- independent assistance to victims of discrimination in pursuing their complaints;
- conducting independent surveys concerning discrimination;
- publishing independent reports and making recommendations on any issue relating to such discrimination;
- exchanging available information with corresponding European bodies.

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