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Recent Ethical Questions: Transgenders before the Belgian Constitutional Court

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On January 9, 2018, three Belgian NGOs belonging to the Belgian LGBTQI community petitioned the Court to seek partial annulment of the law of 25 June 2017, which deals with the rights of transgenders; formally known as the "Law of 25 June 2017 to reform the regulations applying to transgenders as far as the adaptation of the registration of sex in the legal acts of the civil register is concerned and their consequences" (Gender Recognition Act or GRA).

Other European Constitutional Courts and/or Supreme Courts have dealt with similar requests, namely the German Bundesverfassungsgericht, the Verfassungsgerichtshof Österreich and the French Cour de Cassation.

I will first discuss the facts and the arguments raised in the pending Belgian case, before taking a closer look at the judgments of other European Courts.

1. Genesis of the Belgian Gender Reassignment Act (GRA)

The contested Belgian 2017 Gender Recognition Act modified an earlier law, voted only 10 years before. According to the law of 10 May 2007, transgender people could have the mention of their sex at birth changed on their birth certificate, but only after they underwent gender reassignment surgery, including mandatory sterilization.

That requirement conflicted with the case law of the European Court of Human Rights, which, most recently, in its A.P. Garçon and Nicot vs. France judgment of 6 April 2017, held that a mandatory sterilization requirement violated the right to privacy protected by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

Referring to earlier case law, the Court in Strasbourg held that "elements such as gender identity or identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8 of the Convention (…)".

Emphasizing that the notion of personal autonomy underlies the interpretation of the guarantees of Article 8, the Court went on to say that "in the context of transgender persons, that (…) includes a right to self-determination (…) of which the freedom to define one's sexual identity is one of the most basic essentials". Whereas its previous case law dealt with the legal recognition of the gender identity of transgenders who

underwent gender reassignment treatment, the Strasbourg Court in A.P. Garçon and Nicot expressly stated that one cannot infer from this that "transgender persons who have not undergone (…) or do not wish to undergo such treatment do not come within the scope of application of Article 8 of the Convention."

Following this case law, the Belgian legislator adopted new legislation in which it dropped gender reassignment surgery as a precondition for having the gender registration of transgender people adjusted on their birth certificate. Henceforth, the Belgian legislator said, the self-determination criterion as used by the European Court of Human Rights would apply.

Article 3 of the Belgian Gender Reassignment Act of 25 June 2017 states that every person of age, whether Belgian or a registered alien, can make a declaration upon honor at the civil register to the effect that according to his or her inner conviction, the sex stated on the birth certificate does not correspond to their "inner experienced gender identity". The declarant then receives a receipt and an information brochure. If the Crown prosecutor, who is notified of the request, does not object within three months on the grounds of violation of the public order, that person, after a waiting period of three to maximum six months following said statement, can reconfirm their conviction, sign off on the fact that they are fully aware of the legal consequences of the request as well as the fact that, in principle, the change is irrevocable, and subsequently see their sex change registered in the civil register. First degree descendants also will see their legal descent changed.

2. Scope and arguments of the request for annulment of the Belgian GRA

According to the plaintiffs in the case before the Belgian Constitutional Court, the system set up by the GRA – I should mention that a change of the first name is also possible on these grounds, even for underage people from the age of 12 onwards – still violates the Articles 10, 11 (the constitutional principles of equality and non-discrimination) and 22 of the Belgian Constitution (right to the respect of private and family life), read together with Article 8 of the Convention, for two reasons, which can be summarized as follows.

First, and although the legislator's starting point is self-determination and equal rights for all transgenders, given that in principle the change can only be carried out once, and is hence irreversible, transgender persons with a fluid gender identity suffer a disproportionate difference in treatment as opposed to transgenders with a stable gender identity, whereas both categories are comparable, as they both consist of people whose gender identity does not correspond with the gender identity attributed by society to their sex.

Although the plaintiffs acknowledge the legislator's goal to avoid "fraud", they fail to see how multiple changes of gender identity could cause fraud, as the possibility for the Crown prosecutor to intervene should suffice. Furthermore, for the authorities to

have at their disposal a person's most recent gender identification is key to combating possible fraud. The law, plaintiffs add, attests of a "paternalistic attitude" of the legislator towards a group of people that should be protected against multiple "frivolous" gender identity changes.

The difference in treatment between people with a fluid as opposed to a stable gender identity is therefore discriminating and violates the right to a private life, including self-determination.

Secondly, plaintiffs hold that by limiting the choice of gender identity registration to the binary male-female categories, the legislator violates the Articles 10 and 11 of the Belgian Constitution, coupled with Article 22 and Article 23 (the right to a life in keeping with human dignity), read together with Article 8 of the Convention.

They argue that this difference in treatment between binary transgender people (whose gender identity does not correspond to the sex registered at birth, but who self-define their identity as either male or female) and non-binary transgender people (who also have a gender identity that does not correspond to the sex registered on their birth certificate but who define themselves as neither male nor female) is discriminatory.

But, whereas - in the event the Court would side with the plaintiffs - the discrimination between transgender persons with a stable or a fluid gender identity could be remedied in a relatively simple way by striking down the parts of the law referring to the irrevocable character of their choice, the alleged difference in treatment between binary and non-binary transgender people is not caused by the law itself. It is caused by a void, an omission, or a "lacuna". entity registration.

Of the three possible strategies that can be used to fill the void (constitutional interpretation, action by the judge a quo or legislative action), legislative action would be required here to remedy this aspect of the alleged discriminations; again, in the hypothesis the Court decides that there is a violation of the Constitution.

The plaintiffs suggest two possible solutions: leaving out sex or gender identity as part of a person's civil status or, alternatively, adding a third, voluntary, gender option (the so-called "X") for which one could opt on the basis of self-determination when requesting an adaptation of one's gender identity.

The Council of Ministers disagrees with the plaintiffs' arguments.

The law, so it argues, is only meant to deal with people who consider themselves to be male or female but where this does not correspond to their sex registered at birth. The Council of Ministers contests the comparability of the categories that are allegedly being treated differently, and points to the fact that each of the solutions advanced by the plaintiffs would require a complete overhaul of many areas of the legal system. Furthermore, the European court of Human Rights has not yet rendered a judgment on the explicit recognition of other gender identities than male or female.

IFinally, if there is a difference between transgenders and persons the Council of Ministers defines as "inter-genders" (people who feel they are neither male nor female, whether fluid or non-binary), those differences are objective and reasonably justified, because of the necessity to combat fraud, to ensure that people are sufficiently made aware of the consequences of their decisions and to safeguard and uphold the principle of the inalienability of the civil status of a person (the set of elements of the status as a person and the place this person occupies in society and in a family context). One of the key elements of the inalienability of the "civil state" is, according to the Council of Ministers, the principle that a person cannot, by means of agreement or otherwise, adjust their status or discard it. To which it adds that repeated first name changes could also lead to more fraud.

The Council of Ministers further points out that the irrevocable character of a change in a person's gender registration is mitigated by the possibility of having the Family Court reverse the person's decision in exceptional circumstances, after which the gender registration corresponding to the original sex registered at birth is restored.

Finally, the Council of Ministers claims a broad margin of appreciation for the legislator in "sensitive societal matters", from which it follows that as soon as a measure is relevant vis à vis the pursued objective, and not apparently (marginal appreciation) discriminatory, it does not acquire a discriminatory character for the sole reason that a less far going measure could hypothetically achieve the same result.

3. Other European countries

Several other European high courts have dealt with similar questions.

In Germany, the Bundesverfassungsgericht on 10 October 2017 held that certain provisions of the Personenstandsgezetz or Civil Status Act were incompatible with the German Grundgesetz or Basic Law. "(I)t imposes an obligation on persons to state their gender and does not allow for a positive gender entry other than "female" or "male" for persons whose gender development deviates from female or male gender development and who permanently identify as neither male nor female" and hence violates the general right of personality which, the Court goes on to say, "also protects the gender identity of persons who can be assigned neither the male nor the female gender".

The Federal Constitutional Court has remained neutral with regard to the possible course of action to remedy the unconstitutionality: "The Basic law (…) neither requires that gender be governed as part of civil status, nor is it opposed to the civil status recognition of a third gender identity beyond male and female".

The Court ordered the legislature to enact provisions compatible with the German Constitution by 31 December 2018. A new law has meanwhile been adopted and as of

January 1, 2019, intersex people and parents of intersex babies can register as "divers", whereas before the choice was limited to male or female – or leaving a blank in case of uncertainty.

This judgment has been widely interpreted as revolutionary, as Germany became the first major European country offering an "X" option in civil status.

The discussion in Germany has not come to an end. Only intersex persons who are born with chromosomic differences, hormonal levels or genital characteristics which do not correspond to the given standard of "male" or "female" categories as for sexual or reproductive anatomy, benefit from this third option. In other words, there has to be a medical ground for the "X" category: inner conviction alone, as in Belgium, does not enter into play. At the risk of being a bit reductive, one could argue that the German legislator reverted back to the legacy of an old Prussian law of 1794, which already then dealt with the gender classification of hermaphrodites. German LGBTQI NGOs consider the new law to be discriminating, because it leaves out other transgender people and re-pathologizes intersex people.

Austria

Whereas the German Bundesverfassungsgericht based its judgment on a violation of the general right of personality, the judgment rendered on 15 June 2018 by the Austrian Verfassungsgerichtshof is based on Article 8 of the Convention, guaranteeing the respect for family and private life. The right to an individual gender identity implies that individuals only have to accept state assigned gender designations that correspond with their gender identity.

The Austrian Constitutional Court arrived at its conclusion by interpreting the Civil Register Act in conformity with the Constitution, so that none of the provisions of the Act had to be repealed. As to the terminology to be used, the Court referred to suggestions made by the Bioethics Commission of the Federal Chancellor's office and stated in its decision that "a sufficiently concrete and specific term can be found by reference to the common usage of the language".

Here too, the decision limits the scope to intersex persons.

France

In a judgment rendered on 4 May 2017, the first civil chamber of the French Cour de cassation upheld the binary classification in civil register acts. French law, it stated, does not allow for the registration in civil register acts of another sex than male or female.

With regard to the argument that this infringes upon the right to respect of private life, the Cour de cassation held that “cette binarité poursuit un but légitime, car elle est nécessaire à l’organisation sociale et juridique, dont elle constitue un élément fondateur.” Any interference with private life would not be disproportionate in light of the legal goal the law pursues.

Following this judgment, an appeal was lodged with the European Court of Human Rights.

It should be noted that already in its judgment *B. v. France* of 25 March 1992, where a male-to-female transsexual complained of the refusal of the French authorities to amend the civil-status register in accordance with their wishes, the European Court held that the refusal to amend the civil status register in their regard had placed the applicant “in a daily situation which was not compatible with the respect due to her private life”. It was also the first case where the Strasbourg Court concluded that there had been a violation of Article 8 of the Convention in a case concerning the recognition of transsexuals. The 1992 case did not involve the right to choose a third sex.

Other European and non-European Countries

Malta permits an "X" option on identification documents since 6 September 2017.

Several non-European countries have already introduced a so-called third sex option. Among them Australia, New Zealand, India, Malaysia, Nepal, Pakistan (2009). In some countries this is following legislative action, in others, the judiciary had to intervene.

4. Conclusion

To this day, the Belgian Constitutional Court has not yet dealt with the rights of transgender persons.

In 2004, in its judgment 159/2004, where the Court upheld gay marriage, it stated that the “fundamental binary categorization of the human being” (as the parties seeking the annulment of gay marriage called it), is neither a fundamental element of the Belgian constitutional order, nor can the Convention or other relevant international treaties be interpreted as imposing upon the parties to those treaties to treat it as such in their respective constitutional orders.

The current contested Belgian law goes beyond what Germany and Austria have introduced into their legal order, in that a change in gender identity registration is de-

coupled from any medical condition or exam: inner conviction that one's experienced gender identity does not correspond to the sex registered at birth is enough to obtain a change. This means that changes in gender identity registration in Belgium are not limited to intersex people, but cover a much wider group to include also transgenders. However, whereas Austria and Germany register a third sex, Belgian transgenders can only effectuate their choice within the limits of the binary male/female classification, and need to possess a stable gender identity because the choice, once made and except for exceptional circumstances, which need to be recognized in Family court, is irrevocable.

The Constitutional Court will hand down its decision on 19 June 2019.