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The legal situation in the EU (and its Member States)

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(Trans)Gender Equality?
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Issue and legal context

Different levels of law on transgender issues

- The issue:
  The legal situation of transgender people in the European Union.
- The legal context:
  - The EU as a multilevel system:
    In the EU, many issues are regulated on more than one level, i.e. that of the EU and that of the individual Member States.
  - How much room for regulation is left to the Member States depends on the extent of EU regulation.
  - EU regulation is only possible where the EU has a competence.

EU competence

Limited competence in the transgender field

- In general:
  - As a consequence of the principle of conferral of powers, the EU does not enjoy competence in all areas of law.
  - Included are e.g. the free movement of persons and fighting certain types of discrimination; excluded is e.g. the civil status of persons, such as marriage or registered partnership.
- Specifically:
  - There is no specific provision in the Treaties (TEU and TFEU) on transgender issues (or more generally on gender identity).
  - Based on ECJ case law, certain transgender issues are conceived of as falling within the field of EU *sex* discrimination law.
  - Relevance in other contexts (i.e. free movement of persons)?

ECJ case law (1)

Transgender issues and discrimination on grounds of sex

- The ECJ treats certain transgender cases as falling under the prohibition of discrimination on grounds of sex.
- Sex or gender?
  - Note: EU law refers to „sex“ discrimination, not to „gender“ discrimination.
  - Transgender fits if sex is defined not as the traditional (much too narrow) male - female dichotomy, but rather as a continuum (AG Tesauro in *P. v S.*).
  - It does not fit easily if the definition is narrower than that - doable for gender reassignment, but difficult for other aspects.
- Raises the question of whether it should not be framed as a discrimination ground on its own.

ECJ case law (2)

The Court's original approach: *P. v S.* (1996)

- Facts:
  Dismissal of a male to female transsexual person in the context of gender reassignment.
- Legal context at the time:
  - In the field of employment, there was only EU law on discrimination on grounds of nationality (of another EU Member State) and of sex.
  - The EC Treaty (predecessor of the TFEU) did not contain any specific legal basis (competence) provision for other types of discrimination.
- Ms P. (applicant) claimed that there was sex discrimination.

ECJ case law (3)

Advocate-General Tesauro in *P. v S.*

- „One fact is certain: P. would not have been dismissed if she had remained a man.“
- „So how can it be claimed that discrimination on grounds of sex was not involved? How can it be denied that the cause of discrimination was precisely, and solely, sex? To my mind, where unfavourable treatment of a transsexual is related to (or rather is caused by) a change of sex, there is discrimination by reason of sex or on grounds of sex, if that is preferred.“

ECJ case law (4)

The Court in *P. v S.*

- Male - female comparison “within” the same person.
- ECJ: „[T]he scope of the directive [76/207/EEC] cannot be confined simply to discrimination based on the fact that a person is of one or other sex. [...] the directive is also such as to apply to discrimination arising from the gender reassignment 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. 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.“

ECJ case law (4)

A different approach by the ECJ in *Richards* (2006)

- Comparison with “non-reassignment” persons of the same sex.
- ECJ: „The unequal treatment at issue in the main proceedings is based on Ms Richards’ inability to have the new gender which she acquired following surgery recognised with a view to the application of the Pensions Act 1995. Unlike women whose gender is not the result of gender reassignment surgery and who may receive a retirement pension at the age of 60, Ms Richards is not able to fulfil one of the conditions of eligibility for that pension, in this case that relating to retirement age. As it arises from her gender reassignment, the unequal treatment [...] must be regarded as discrimination which is precluded by Article 4(1) of Directive 79/7.“

Background: discrimination grounds

Specific legal basis (competence) provision

- Amsterdam Treaty revision:
  Introduction of Art. 13 EC (today Art. 19 TFEU) on „discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation“.
- Transgender is not explicitly included - partially covered by „sex“.
- Inclusion would require a Treaty reform, which is unlikely after the Lisbon revision ...
- Therefore: live with the present construction and try to improve it through interpretation? Food for thought ...

Free movement of persons

Should transgender people be included?

- No mention so far, incl. Directive 2004/38/EC (movement and residence of EU cititzens).
- Argument based on case law that is used by analogy? Carpenter (2002)
  - Service provider‘s wife was not granted the right to residence in the service provider‘s state of origin; scondary law did not apply.
  - ECJ: the Treaty rules on the freedom to provide services mean that Ms Carpenter must be able to live with her husband in order to facilitate his economic activities.
- Could that be used for transgender people as well? Open question ...

National law

May cover many different issues

- Must cover what is prescribed by EU law (and by other international law), i.e. concerning transgender issues in particular (certain) non-discrimination law.
- May cover other issues, including in particular legislation on gender-reassignment and its legal consequences.
- The law of the Member States differs significantly; e.g. regarding the place of transgender discrimination in the legal system (no explicit mention at all, inclusion in sex discrimination or under sexual orientation discrimination - specific mentioning of transgender identity as ground on its own).

Thank you for your attention!

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