Pathologisation Through Law: Compulsory Assessments in Procedures for Changing Personal Status

article, legal gender recognition

by Anne Degner and Miriam Nomanni

Those in Germany (and almost all countries in Europe) who want to change their gender identity entry on their identification or any other official document must first, by law, be examined and identified as psychiatrically 'ill'. This state-imposed diagnosis stigmatizes and leads to exclusion. Working Paper Nr. 11, published on 13.01.2017 by The Basic and Human Rights Humboldt Law Clinic, investigates the interweaving of law and psychiatry in Europe and comes to the conclusion that the legal requirement to be assessed violates the European Convention on Human Rights.

The Interweaving of Psychiatry and Law

On January 1, 2017, Denmark became the first country to not consider transgender identity a psychiatric illness. The country's health ministry struck it from all relevant lists. This assessment currently puts Denmark in a unique position however: the World Health Organization's (WHO) International Classification of Diseases (ICD 10), the most widely used and best known classification system, still lists 'Transexualism' as a disorder of gender identity under section F64.0 of the Mental and Behavioral Disorders chapter. A review of the ICD 10 is currently taking place. Nevertheless, transgender identity is still currently a 'psychiatric disorder' in the view of the WHO, which leads to the stigmatization of Trans people and ultimately results in exclusion.

Another dimension of discrimination against Trans people is uncovered however, when one considers the tight interweaving of Psychiatry, psychiatric diagnoses, and the applicable laws. Having valid and gender/gender identity-correct identification and related official documentation is necessary in everyday life for transgender people (for example at passport control in airports). In order to be able to change the gender entry (or first name) in identification or corresponding official documents, the majority of states on the European continent call for a psychiatric expert testimony and a diagnosis. Through this interweaving of laws pertaining to changing personal status and psychiatric conditions, the necessity arises for individuals to be diagnosed as psychiatrically ill, despite not suffering from a psychiatric illness.

Requirements of the European Procedures for Changing Personal Status

In the framework of The Basic and Human Rights Humboldt Law Clinic and in cooperation with Transgender Europe e.V., this paper investigates the regulations for changing gender entries on official documents in all European countries with regard to psychiatric diagnosis requirements and compulsory assessments and examines their compatibility with the rights based in the European Convention on Human Rights.

The paper comes to the conclusion that in regards to the psychiatric prerequisites in the procedures to change gender entries in Europe, a lack of transparency, incongruence, arbitrariness, foreignness, and dependency are determining characteristics.

While in eight of 49 countries there is absolutely no possibility of changing gender entries in official documentation, in 37 countries psychiatric assessments are mandatory. Ultimately, procedures exist in only four European countries (Ireland, Denmark, Malta, and Norway) which allow for changing a gender entry through self-declaration.

In most of Europe, non-transparency, arbitrariness, and legal uncertainty rule in regard to the ability to change gender entries. Not only are the types of regulations incredibly variable, the procedures themselves are designed very differently. The regulations are only written in law in some countries, others are based in ordinances or have been established through case law or administrative practice, and still others differ regionally. The configurations of procedures are also divergent: sometimes court procedures are outlined; sometimes an application must be presented to a special committee. In other countries changing a gender entry can be carried out as part of a simple visit to an administrative office.

Relatedly, there is also no discernable unified way in which psychiatric requirements find their way into regulations. Here is an especially large opening for arbitrary exceptionality and case-by-case decisions. The obligation for psychiatric assessment is seldom explicitly anchored in law (for example in Iceland and the Ukraine), but in many places is implicit in requirements for operations for bodily gender adjustment, for which a diagnosis and assessment is required (for example in Italy and Portugal). Often the psychiatric requirements are not at all based in regulations but established and developed through case law and administrative practice.

The respective requirements for assessment and diagnosis differ from country to country and extend to so-called ‘Real Life Tests’, in which one must first live their felt gender outwardly for a determined period of time, culminating in months-long supervision or psychiatric therapy. Sometimes the assessment is carried out by specially appointed teams (as in Ireland), composed of experts in Psychology, Endocrinology, Gynecology, and Urology. This is often only possible in one or a small number of certain clinics in a given country which can lead to significant burdens of time and finances for implicated individuals. In addition, the relationship to the assessor is often experienced as interdependent**.** The assessors thereby assume a role of ‘Gatekeeper’, as their judgment in regards to the assessment, and relatedly a diagnosis, determines whether a person can change their gender entry or not. Implicated individuals are often subjected to improper, embarrassing, or degrading inquiries or treatment during assessment procedures, but feel compelled to accept them in order to achieve their goal of changing their official documentation.

Compatibility with Human Rights?

While the states which have no regulations for the changing of gender entries already show an obvious violation of the ECHR, given the European Court of Human Rights’ established positive obligation for states to provide a way to change one’s personal status, it shows more that the legal requirement of a diagnosis of a psychiatric illness or to undergo a psychiatric evaluation to change a gender entry is in clear violation of the ECHR.

The abovementioned rules violate Article 8 (Respect for Family and Private Life) of the ECHR, which protects the free and self-determination of identity and the bodily and physical integrity of humans. In this sense, both the forced psychiatric treatment is called into question as well as the stigma resulting from its state imposition and the resulting discrimination. The experience of this discrimination can itself be a psychiatric burden and result in psychiatric illnesses. In this way, the dependence on psychiatric assessors in the framework of a legal process works in opposition to the fundamental function of psychiatric support. Transgender individuals should be able to have the opportunity to decide their own gender identity freely and with self-determination, without outside constraints.

These sweeping interventions on the protected areas of Article 8 and its spirit cannot be legitimately justified. They are not necessary for maintaining the public safety or order as the identity of a person who has changed their gender entry can be otherwise guaranteed through an ID number that has stayed the same or commercial or criminal registers. For these reasons, the possibility of some cases of misuse of entry changing procedures cannot

be seen as sufficient legal grounds. Article 8 specifies the possible legal grounds as a country's economic well-being and the protection of health and morals, none of which justify the requirements for psychiatric diagnosis or treatment to change a gender entry. The opposite is true – the assessment procedures are often cost-intensive and lead people to health liabilities.

In addition, the requirement of a compulsory assessment or therapy amounts to an unjust disadvantage in comparison to all those who hold identity documents with gender entries of their gender, or which correspond to their identity, without having to go through assessment procedures. In this way, the aforementioned regulations violate the ECHR non-discrimination clause of Article 14 (in conjunction with Article 8), which, according to the jurisprudence of the European Court of Human Rights, also extends to gender identity. Depending on the relative circumstances of particular cases (an especially degrading assessment practice for example), a violation of Article 3 of the ECHR's prohibition on inhumane treatment could even come into question.

Outlook

To be in accordance with the requirements of the ECHR, it is necessary to demand procedures to change gender entries be based on self-declaration and self-determination, as well as be fast, easy to initiate, cost-efficient, and transparent. Reform of the abovementioned regulations is not only desirable in numerous European countries, but from the view of human rights, necessary. Corresponding demands can also be found in numerous international documents, for example the Parliamentary Assembly of Europe and the European Parliament.

In Europe the countries of Ireland, Denmark, Malta, and Norway have already taken a step in this direction. In some countries, the need for reform is already known (for example in the United Kingdom). It remains for the rest of Europe (including Germany) to hope that reform of the aforementioned regulations will come soon.

The Working Paper

The results of the investigation are available in the working paper 'Psychiatry in Legal Gender Recognition Procedures in Europe', which has been produced in cooperation between the Humboldt Law Clinic "Grund- und Menschenrechte" and Transgender Europe.



Anne Degner and Miriam Nomanni study law at the Humboldt University of Berlin and are alumnae of the Hulmboldt Clinic Grund- und Menschenrechte.

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