

THE EFFECTS AND LEGAL CONTROVERSIES REGARDING GENDER IDENTITY AND NON- BINARITY OVER GENDER EQUALITY

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Abstract: *This article aims to analyze the implications and legal controversies pertaining to the legal acknowledgement of gender identity on European territory and within member states of the European Union. Initially, we will define the notion of gender identity and non-binarity, as well as the international law in this matter to fully understand the context of regulating these matters on European territory. Subsequently, we will present and examine the effects of legally acknowledging these notions in the matter of fundamental human rights and freedoms and gender equality. At the same time, we will analyze some controversies of international legal practice, such as assuming a new identity to elude the execution of certain punishment, the presence of biological men in sports competitions destined for women, gender neutral toilets and so on.*

Keyword: *gender identity, non-binarity, international laws.*

1. Gender Identity in the Present Context

1.1. Terms

Each person, regardless of age, sex, nationality, or religious beliefs has an interior experience personal to one's gender, which varies from one person to another and can be different from the sex attributed at birth, a concept known as "gender identity". For example, some people can identify with a gender which does not correspond with their biological gender and identify themselves with the notion of "trans"; however, this is only one of the identities which can be chosen, as there are other options. These personal "forms of expression" do not correspond, in some cases, with the traditional gender standards which functioned as such for centuries and are manifested through a concept known as "*presentation (by self-explanatory language, clothes, makeup and so on)*" (Giannakou, 2021) or by different aesthetic alterations likely to correspond to the gender identity of that person. The notion of "transgender" or "trans" references the

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situation in which a person does not identify with the gender attributed at birth, but with the opposite gender. To the same purpose, the people whose identity does not fall in any of the male or female genders, as it is a combination of both genders and does not entirely fall in any of the mentioned categories is identifies as a non-binary person [M. Brink, P. Dunne, 2018]. Gender expression is the means by which a person presents its gender on the outside, during interactions with other people, such as behavior, clothing, voice or any other characteristics associated with a certain gender (Wamsley, 2021). Another notion relevant to the subject of this article is that of “gender reassignment surgery” or “transition” which references the process undergone by a person in order to transform its body and gender to the gender they identify with; such a process can entail hormonal treatments and/or gender reassignment surgery. Given the previously mentioned notions, regardless of each person’s choice, whether it is socially accepted or not, we believe the laws must evolve in the same direction as the changes and needs of society. Furthermore, we believe that the main concern of both European and national lawmakers should be the protection of fundamental human rights. As a result, in the present context, the European Union and its member states should aim to adjust their laws in order to identify and regulate these matters so as to avoid controversy and at the same time, prioritize fundamental human rights. To the same purpose, we believe that the European lawmaker has an extremely important and difficult duty, given the numerous situations and deeds, which should be considered, in order to maintain the balance between justice and human rights. Thus, the main concern of this article is to sound an alarm regarding potential controversial situations which have already occurred in other states, such as the USA, and to prevent and maintain this equilibrium in the European space. Furthermore, we vigorously support the idea of learning from the mistakes of other states pertaining to this subject, as this article aims to be a means of preventing discriminatory and abusive situations. Regarding the Romanian society and its laws in this matter, they reflect a conservatory approach in many areas and particularly in this matter; this is the reason why we have chosen this subject, which is seen as “tabu” and is completely ignored. Although we advocate for the respect of any cultural and religious beliefs, we do not feel that ignoring certain topics which are not morally accepted is the solution to a fully developed society.

2. Non-binarity and its International Laws

Numerous states have already legally acknowledged non-binary people or other gender classifications, which are usually based on a person’s gender identity. As a result, in the last years, some states adjusted their laws regarding non-binary gender identity „*genderqueer or the third gender*” (Byrne, 2014). Furthermore, it is believed that „*from the perspective of human rights, (...) those who identify as the third sex/gender should have the same rights as those who identify as male or female*” (Byrne, 2014). As a consequence and given the changes of a certain part of the population, the lawmaker should provide the necessary legal context for these people to be able to express themselves and have the same rights as those who identify as male or female. Also,

some studies of western researchers concluded that „*a more inclusive approach would result in the increase of options so as people would be able to define their own sex and gender identity*” (Byrne, 2014). In regard to the European territory, the ECHR feels that „*elements such as gender identity, sexual orientation and sex life are personal rights protected under article 8*”. [ECHR, 2015], as gender identity is an essential aspect of self-determination. Furthermore, in *P vs. Spain* (2010), the ECHR claimed that „*transgender is a notion which is, without a doubt, regulated in article 14*”, and subsequently in *Identoba and others vs. Georgia* (2015), the ECHR used more concepts and terms stating that article 14 „*covers matters pertaining to gender identity*” (Giannakou, 2021). In addition, Resolution 1728 (2010), Resolution 2048 (2015) and Resolution 2191 (2017) of the Parliamentary Assembly of the European Council brought significant reform in numerous states and, in present times, sex/gender registration is becoming more and more controversial. Thus, people from multiple states can choose „gender markings” within governmental documents or „with or without binary option” based on Resolution 2048. Resolution 2048 encouraged European states to offer „*speedy and accessible procedures for the change of name and registered gender*” [ECHR, 2015] and suggested more options regarding gender. Resolution 2191 was more specific regarding available options. The people who identify with a gender identity which is different from the traditional one, phrased numerous claims for protection before the ECHR. A reference case is that of *Goodwin vs. UK* (2002), in which the court established “*a positive obligation to implement a procedure of legal acknowledgement of gender*”. Furthermore, in a similar situation, *A.P. Garçon et Nicot vs. France* (2017), the Court established that “*all people are and should be free to define their own gender identity, as gender is an essential aspect of the intimate identity of all people and their existence*”. The relevance of this topic was underlined in *S.V. vs. Italy* (2018), in which case the court signaled „*the importance of matters pertaining to the most intimate part of one’s life, namely the right to gender identity, a matter in which member states have a narrow margin of appreciation*”. To the same purpose, the basic principle of autonomy of personal identity choice was meant to interpret the guarantees needed to respect human fundamental rights (*Van Kück vs Germany*, 2003), and the need for a “*speedy, transparent and accessible procedure*” was expressly stated in *X vs. the former Yugoslav Republic of Macedonia* and *Y.T. vs. Bulgaria*.

2.1. Austria

In Austria, on June 15th, 2018, the Austrian Constitutional Court established that “*article 8 of the European Convention on Human Rights guarantees gender acknowledgement and people with gender variation, other than male or female, should be allowed to leave a blank space in gender registration and should be allowed another regulated option*”. Furthermore, the Austrian court, in the same decision, stated that “*current law is not in contradiction with these regulations and can be interpreted in accordance with the constitutional right of gender identity regulated in article 8 of the ECHR*”. Alex Jürgen, an activist for people with different gender identity, undertook numerous efforts in order to obtain the acknowledgement of the right to belong to a

non-binary category in his passport and he was the first person in Austria who obtained the acknowledgement of this right.

2.2. Germany

Germany is known as the first European country who offered its citizens the right to choose an “undetermined” gender on birth certificates, namely the absence of any *gender marker since 2013*. The German studies in this matter pointed out that the law was passed because *“many people who were subjected to “normalization” surgery in their childhood later felt they were mutilated and would never have consented to such surgery as adults”*. To the same purpose, in 2015 Celle Appeal Court decided, in another case, that *„ intersexual people can’t obtain a gender marker other than male or female in their birth certificate, but only the absence of such a marker”*. In addition, the same court noted that *“an intersexual adult person who was registered with a gender marker at birth can obtain the deletion of the gender marker”*.

2.3. The United States of America

In the USA, on the occasion of the Day of Intersex Awareness, on October 26th, 2015, the “LGBT Lambda Legal organization for civil rights filed a lawsuit for discrimination against the State Department for refusing the Navy veteran Dana Zzyym, associate director of Intersex Campaign for Equality, the right to obtain a passport as they do not identify with any of the predefined genders, but as intersexual” [Lambda legal, 2017], and on September 19th, 2018, the American Court of Law ruled for the second time in favor of Zzyym, *“by stating that that the refusal of the US State Department to grant a passport overruled its authority”* (Lambda legal, 2018).

3. The Effects and Legal controversies regarding Gender Identity and non-binariness

3.1. Neutral toilets

When we discuss gender inclusion, one of the most controversial topics is that of neutral toilets, which gave rise to numerous debates and oppositions. Surely, we must consider the fact that for transgender people, the choice of a toilet belonging to any of the traditional genders is a delicate matter. Studies in this matter show that 70% of transgender people, especially trans women, were verbally abused for using a gender separate toilet and over 10% were physically abused. This is why, the supporters of “sexually neutral toilets” suggested this concept to prevent such discriminatory situations and states such as the USA, Canada, China, India, Nepal, Thailand, Brazil, Japan have already adopted this concept. The gender-neutral toilet represents a public toilet “accessible and conceived for the use of any gender group” (Gattupalli, 2022). Surely, there is some discomfort towards such an idea and some concern regarding the safety of vulnerable people, especially unaccompanied children. We believe that the gender-neutral toilet is difficult to implement in some countries, such as our country, not only because of the different cultural and religious ideas, but also because of the

controversy which it will bring. Furthermore, the lawmaker has an extremely difficult task, that of maintaining a safe environment for all people, whether they identify with a gender or another. The main challenge is that of offering all categories a safe space and we believe that only by implementing a third type of toilets (neutral) and maintaining the traditional toilets we can achieve and maintain this balance and avoid human rights violations.

3.2. Biological men in sports competitions destined for women.

3.2.1. In the European space

Another controversial subject which gives rise to intense debate is that of the participation of men in sports competitions destined for women. To this end, in July 2023, the European Court of Human Rights (ECHR) ruled in favor of Caster Semenya and ruled that *„sexual characteristics is an issue protected against discrimination based on article 14 of the European Convention on Human Rights”* (Law, discrimination & human rights, Legal actions, 2023). The ECHR stated that the participation of trans athletes in international competitions had already been regulated in a series of – *„The 2019 World Athletics Regulations which govern the eligibility of transgender athletes”*. In this context, the ECHR establishes a condition similar to the above-mentioned regulation, namely that *“athletes who compete in international sports for women must maintain a testosterone level below 5 nmol/L for at least 12 consecutive months before competing”* and *“at the same time, they must maintain this level of testosterone for as long as they wish to participate in international competitions for women”* (Law, discrimination & human rights, Legal actions, 2023). In regard to maintaining gender equality, it is a well-known fact that, in case of trans women, the sports advantage is based on biological traits, as they were born as males. Surely it is the responsibility of the lawmaker to examine if the solutions which were implemented in order to include (or exclude) athletes from certain categories respect their fundamental rights and freedoms. Regarding current regulations for trans athletes, in 2023, World Athletics changed regulations in this matter. Thus, after these changes, regulations became stricter for trans women and, as a result, *“All trans women who underwent male puberty are excluded from female competitions, and any trans woman who wants to participate in female categories must meet three conditions: not to have experienced male puberty after stage Tanner 2 or the age of 12, whichever occurs sooner. From puberty on, they must have maintained a concentration of testosterone under 2,5 nmol/L”* (Law, discrimination & human rights, Legal actions, 2023)). Regarding this subject, World Athletics claimed that *“they have decided to grant priority to fairness and integrity in women competitions before inclusion”* (Law, discrimination & human rights, Legal actions, 2023).

3.2.2. In the United States of America

After numerous debates on the presence of trans people in sports competitions destined for women, in April 2023, the US House of Representatives passed a bill of federal law called HR 734 which rules that *“it was a violation of Title IX to allow a male person to participate in programs and activities which are destined for women or girls”*. (Law, discrimination & human rights, Legal actions, 2023). Also, in this context, the

House stated that “*gender will be acknowledged based on the reproductive biology and genetics of a person at birth*” (Law, discrimination & human rights, Legal actions, 2023). However, HR 734 was not acknowledged by the Senate and it is uncertain if it will come into force and become mandatory. We must mention that, given the information available at this time in the media, on the occasion of a personal study on the implications of this phenomenon, the large majority of females in the US feel their rights are violated and some believe that this could be the beginning of the end in regard to the participation of women in sports competitions.

3.3. The interference of different genders in beauty competitions

It is a well-known fact that a series of beauty competitions have included trans women over the last years. In 2018, Angela Ponce became the first trans female who competed in the Miss Universe competition. Then, in 2021, Kataluna Enriquez became the first trans woman who competed in the Miss USA competition, while some countries, such as Mexico and Thailand organized separate beauty competitions for trans women (Yurcaba, 2023). In 2023, the title of Miss Universe was won by a trans woman, representative of the Netherlands. Given all these, the Miss Italy beauty contest announced that it will not allow the participation of transgender people, as all participants must be “born female”. This is also a topic of controversy, but we believe the lawmaker is entitled to decide which is the correct and sensible approach regarding the inclusion of trans women in such competitions. Inclusion and gender equality must be treated with sensitivity and each state must be given the possibility to regulate this situation based on the moral, religious, and cultural beliefs of its citizens.

The adjustment of European laws in this context and its consequences over Romanian laws and the possible controversy likely to occur in the near future.

Considering that gender is a vital part of personality, there are many human rights which are affected and likely violated if gender acknowledgement is not respected. This analysis is focused on “personal autonomy, information confidentiality, mental health and body integrity” (Chamberuk, 2022). Subsequently, we will refer to the principle of proportionality. Regarding the European space, the ECHR feels that “elements such as gender identification, sexual orientation and sex life are personal matters protected under article 8” as gender identity is an essential aspect of self-determination. Furthermore, in *P vs. Spain* (2010), the ECHR claimed that “*transgender is a notion which is, without a doubt, regulated in article 14*”, and subsequently in *Identoba and others vs. Georgia* (2015), the ECHR used several concepts and terms stating that article 14 „*covers matters pertaining to gender identity*” (Giannakou, 2021). Furthermore, Resolution 1728 (2010), Resolution 2048 (2015) and Resolution 2191 (2017) of the Parliamentary Assembly of the European Council brought significant reform in numerous states and, in present times, sex/gender registration is becoming more and more controversial. Thus, people from multiple states can choose „gender markings” within governmental documents or „with or without binary option” based on Resolution 2048. Resolution 2048 encouraged European states to offer „*speed and accessible procedures for the*

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4. Conclusions

Surely gender is a vital part of personality, as there are numerous human rights which can be violated in regard to "*personal autonomy, information confidentiality, mental health and body integrity*" (Giannakou, 2021), in situations in which gender acknowledgement is not considered by the lawmakers of European states; however, what we have attempted to point out by this article is that the European lawmaker must consider all implications of this subject, so as to offer inclusion and acceptance of all non-gender people without violating the rights of other citizens.

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