

Transgender persons and the right to protection of health under Article 11 of the Social Charter

Coerced medical treatment
Access to gender reassignment
treatment

Legal gender recognition and gender reassignment treatment

Gender reassignment involves:

- Legal process (“legal gender recognition”) (change of name, birth certificate, other documents)
- Medical process (“gender reassignment treatment”) (hormone therapy, sex reassignment surgery, psychological counselling)

Human rights principles require that separate

Issues

- Legal gender recognition made conditional upon medical diagnosis and gender reassignment treatment (hormone treatment, surgery, sterilisation – in 29 member states);
= “coerced”
- Where individuals need medical treatment, often not available (13 not at all), or costs not covered (16)

Legal gender reassignment

Coerced medical treatment - Human rights principles (1)

Forced medical treatment – generally

- Prohibited under international law.
 - Right to health includes the “right to be free from [...] forced sterilisation.” (UN High Commissioner for Human Rights)
 - Coerced medical treatment may give rise to “cruel, inhuman or degrading treatment”(Article 3, ECHR)

Forced sterilisation in the context of legal gender recognition (“coerced sterilisation”)

- Any medical intervention requires “full and informed consent”[*ECtHR – V.C. v. Slovakia*]
- Making medical treatment a requirement for legal gender recognition fatally undermines “full and informed consent”.

Legal gender recognition

Coerced medical treatment – human rights principles (2)

Growing consensus that serious human rights violation:

- Council of Europe Human Rights Commissioner:
 - “great concern that transgender people appear to be the only group in Europe subject to legally prescribed, state enforced sterilisation”(2009).
- Austria (2006), Germany(2011), Sweden(2012): courts rule that sterilisation unconstitutional.
- UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment:
 - States “to repeal any law allowing intrusive and irreversible treatments .. without free and informed consent..... to outlaw forced or coerced sterilisation”.(2013)

Legal gender recognition

Coerced medical treatment - Council of Europe standards

- CM Recommendation on combating sexual orientation/gender identity discrimination:
Requirements for legal recognition to be reviewed, to remove any that are “abusive”
(Expl Memo = sterilisation, hormonal treatment, preliminary surgical procedures etc)
- Parliamentary Assembly: legal recognition “without any prior obligation to undergo sterilisation or other medical procedures”
- Human Rights Commissioner: abolition of “sterilisation and other compulsory treatment”
- Cases pending at ECtHR

Coerced medical treatment and Social Charter Article 11 right to health obligations

- Parties must “remove as far as possible the causes of ill-health”.
- “health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.

Issue not tested yet by Social Charter committee. But:

- Coerced medical treatment a violation of the right to health
- Cruel, inhuman or degrading treatment cannot but be a violation of the right to health

Case under collective complaints procedure in preparation

Access to gender reassignment treatment – ECtHR cases

Van Kück v. Germany:

- unreasonable to require applicant to prove the medical necessity of gender reassignment during court proceedings.
- Defining herself as a female person was “one of the most basic essentials of self-determination”

L v. Lithuania:

- in the absence of legal provisions regulating surgery, the State required to pay the applicant 40,000 euros to enable necessary surgery to be performed abroad.

Access to gender reassignment treatment

Council of Europe standards(1)

CM Recommendation:

Access to services:

“MS should ensure that transgender persons have effective access to appropriate gender reassignment services including psychological, endocrinological and surgical expertise ...”

Explanatory Memo: “the Court’s case-law requires Contracting States to provide for the possibility to undergo surgery leading to full gender reassignment”

Coverage of costs:

“MS shouldEnsure that any decisions limiting the costs covered by health insurance for gender reassignment procedures should be lawful, objective and proportionate”

Explanatory Memo: “the Court’s case law requiresthat insurance plans should cover “medically necessary” treatment in general, which gender reassignment surgery may be part of. Where legislation provides for coverage of necessary health-care costs by public or private social insurance systems, such coverage should be ensured in a reasonable, non-arbitrary and non-discriminatory manner....”

Access to gender reassignment treatment

Council of Europe standards(2)

- Parliamentary Assembly:

“ensure in legislation and in practice [the right of transgender persons] to access gender reassignment treatment and equal treatment in health care areas”

- Human Rights Commissioner:

“Make gender reassignment procedures, such as hormone treatment, surgery and psychological support, accessible to transgender persons and ensure that they are reimbursed by health insurance”.

Social Charter – Article 11 rights to health obligations

- “health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.
- “health care system must be accessible to everyone ... Article 11 may not be interpreted in such a way as to impede disadvantaged groups’ exercise of their right to health.” (Article E)
- “the right of access to health care requires that the cost of health care should be borne, at least in part, by the community as a whole. This also requires that the cost of health-care must not represent an excessively heavy burden for the individual. Steps must therefore be taken to reduce the financial burden on patients, in particular those from the most disadvantaged sections of the community.”

Social Charter Committee Conclusions on Malta

"According to another source, the Maltese authorities **do not offer the possibility of hormone therapy or sex change surgery**, some health professionals **know nothing about the specific health issues faced by transgender persons** thus jeopardising the quality of the care provided in this sphere and **discrimination** has been experienced by transgender people when attempting to **access routine health care**.

The Committee asks for the next report to describe the situation as regards access to health care for all people in marginal situations, particularly transgender people."