

BACK ME UP!

Rights of Trans Children under the Convention on the Rights of the Child

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WORKING PAPER NR. 13

2016

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A collaboration of the Humboldt Law Clinic and Transgender Europe

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Title | Back me up! The UN Convention on the Rights of the Child and the Rights of Trans Children

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Date | October 2016

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This publication has been produced with financial support from the Rights, Equality and Citizenship Programme of the European Union. The contents of this publication are the sole responsibility of Transgender Europe and the Humboldt Law Clinic, and can in no way be taken to reflect the views of the European Commission.

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A. Introduction

Trans children¹ and youth whose gender identity varies from the sex assigned at birth form a distinct and particularly vulnerable group. Trans children are particularly vulnerable to having their rights violated through:

- Discrimination: Young persons are more likely to be discriminated against for being trans.² However, they often cannot obtain justice, through non-discrimination laws, in the same way that adults can.
- Violence: A significant increase in reported murders of trans children and young trans people in recent years has been found by TGEUs global research. Accordingly, 20% of victims were known to be under 20 years old and those younger than 18 years old made up 36.6%.
- Legal recognition: Only a handful of states in Europe allow minors to have their gender identity officially recognized without a minimum age barrier.
- Education: When the survey was conducted, 29% of trans students felt discriminated against in their school, based on their experiences in the last 12 months before the survey.³
- Healthcare: Legal age barriers alongside ignorant service providers and reluctant parents can become major obstacles for trans youth to access trans-specific medical services.
- Suicidality: Multiple studies found that younger transgender people were more likely to seriously consider and/or attempt suicide than older transgender people.⁴ Trans men seem to be at particular risk.

Many trans people, though not all, realize their gender identity before leaving primary school.⁵ The majority hide their gender identity from schoolmates, parents and other people in their lives. They might feel different without having words for it.⁶ At the same time, an "increasing numbers of adolescents have already started living in their desired

¹ We use „trans children“ in this document as an umbrella term inclusive of gender variant and gender exploring children.

² Fundamental Rights Agency 2014, p. 21.

³ Ibid.: p. 9.

⁴ Sebastian Barr 2015.

⁵ Kennedy Hellen 2010: p. 28.

⁶ Ibid.

gender role upon entering high school,⁷ highlighting the large number of trans adolescents showing gender identity continuity throughout adulthood.

Children who are visibly transgressing gender norms are often discriminated against through a variety of means. They are bullied and harassed at school, during their leisure time, in social as well as medical contexts, in the family and in specific situations where it becomes visible that the gender assigned at birth varies with the gender expressed. Additionally, the gender identity of trans children in Europe is by and large not given official recognition, (legal gender recognition).

However, every child has rights under the Convention ratified by all European states.⁸

With this paper we aim to identify the rights of trans children guaranteed in the Convention on the Rights of the Child (CRC) regarding legal gender recognition and education.

Furthermore, we highlight member states' obligations to actively identify individual children and groups of children who are in need of special protection and to imply special measures to reduce and ultimately stop structural discrimination. However, due to limited resources we were not able to look further into specific challenges trans children with disability, irregular migration status, ethnic minority background or with other intersecting personal characteristics, might face. More research on their needs and how the UN Convention on the Rights of the Child can help to protect their rights is urgently needed.

B. The Convention on the Rights of the Child – applicability, terms used and general principles

I. Applicability of the Convention in national contexts

The Convention on the Rights of the Child (CRC), adopted in 1989 and entered into force on 2nd September 1990, is the first binding codification of children's rights. The Convention strengthens the position of children as not only objects of legal protection but also as subjects with rights.⁹ The core principle of the CRC is the dignity of every

⁷ World Professional Association for Trans Healthcare, Standards of Care Version 7, 2011.

⁸ For an overview of all states having ratified the Convention and for further information concerning the dates of ratification see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en.

⁹ Schmahl 2013: p. 29, para. 2.

child and their equal and inalienable rights as human beings.¹⁰ All European states and nearly all states worldwide have ratified the CRC.¹¹ By the act of ratification, member states express their will to be bound by the international convention and thus are responsible for any violation of their obligations (if these are not excluded explicitly by valid reservations).¹² In accordance to art. 51 of the Convention member states have transmitted texts of reservations,¹³ which can change how the Convention is applicable in a given country.

In art. 4 the member states of the Convention commit to "(...) *undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention on a national level.*" This obligation applies to all children within their jurisdiction.¹⁴

The CRC is amended by three optional protocols. The first optional protocol that was introduced in 2002, focuses on the involvement of children in armed conflicts. The second optional protocol which also came into force in 2002, deals with the sale of children, child prostitution and child pornography. The third optional protocol implemented in 2014, established an individual communications procedure. In the context of the enforcement of the rights of trans children codified in the CRC, it is especially the last (third) protocol which can be of importance because it allows individuals or groups of individuals to communicate concrete cases of violations of the CRC (or the other optional protocols) to the Committee. The third protocol is today ratified by 29 member states of the Convention. For state-specific information on the status of ratification of the third optional protocol and for state specific texts of reservations, see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en¹⁵

¹⁰ CRC/GC/2001/1 para. 1.

¹¹ Out of the total 196 state parties only the United States of America signed but not ratified the Convention. For an overview of states having ratified the Convention see also: <http://indicators.ohchr.org/>.

¹² To the validity of reservations in human rights treaties: International Law Commission (2011): Principles 3.1.5.6 and 3.2 in: Guide to Practice on Reservations to Treaties: http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf.

¹³ For a list of states that have brought reservations and texts thereof see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en.

¹⁴ CRC/GC/2003/5 para. 1.

¹⁵ Excerpt from OHCHR as of 20 June 2016.

II. Children according to the CRC and the non-discrimination obligation

Art. 1 UN CRC defines a child according to the convention as, "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." The term "children" according to the CRC is defined as anyone under the age of eighteen, from hereafter, we will refer to this legal definition when using the terms 'child' or 'children'. The CRC is applicable to all children but allows states to define an earlier majority, for example, in regard to marriage.¹⁶

Status of Ratification in Europe



Country Status
State Party (27) Signatory (28) No Action (143)

Optional Protocol to the Convention on the Rights of the Child on a communications procedure

According to art. 1, it is not possible to reduce a majority exclusively for special groups of children, such as foreigners or refugees;¹⁷ the Committee on the Rights of the Child (the Committee) stresses that all children in a member state's jurisdiction have to be granted the same rights in a non-discriminatory manner.¹⁸ This principle is included in art. 2 (1) CRC: "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

Furthermore, the Committee emphasizes that the non-discrimination obligation in art. 2 CRC requires states to actively identify individual children and groups of children, who may require special measures,

¹⁶ Schmahl 2013: p. 46.
¹⁷ Schmahl 2013: p. 49; Alston 1992: p. 5.
¹⁸ See General Comment No. 5 (2003).

to have their rights recognized and realized. Thus, states have the obligation to actively take special measures, "in order to diminish or eliminate conditions that cause discrimination." For instance, these measures might include data collection, changes in legislation, administration and resource allocation as well as educational measures to change attitudes.¹⁹

As a result of the intersectional identities of all human beings, we cannot fully comprehend the real and lived experiences of trans children in different contexts. For example, those in alternative care settings or people that are unaccompanied minor asylum seekers and refugees. In order to be able to ensure the full protection of specific vulnerable groups of trans children, states need to allocate more resources to study their specific situations and develop appropriate responses, taking into account their intersecting personal characteristics.

III. The core principle of the best interests of the child

The best interests of the child in art. 3 CRC is one of the core principles and fundamental values in the Convention.²⁰ Art. 3 (1) CRC states: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*" It does not matter whether the child is directly or indirectly affected or concerned by these actions.²¹

The Committee describes the core principle of the best interests of the child as a dynamic concept with three dimensions. Firstly, it is a *substantive right* which guarantees the best interests of a child, a group of children or children in general are taken as a primary consideration when interests are being considered. Art. 3 (1) CRC is directly applicable and can be invoked before a court.²² Secondly, it is a fundamental and interpretative *legal principle* which should be used for the interpretation of legal provisions.²³ Thirdly, the best interests of the child is seen as a *rule of procedure*. It applies

¹⁹ CRC/GC/2003/5 para. 12.

²⁰ General Comment No. 5 (2003) CRC/GC/2003/5 para. 12.

²¹ General Comment No. 5 (2003) CRC/GC/2003/5 para. 12.

²² CRC/C/GC/14 para. 6a.

²³ General Comment No. 14 (2013) CRC/GC/2013/14 para. 6b.

when the possible direct or indirect impact of a decision, on children in general or particular groups of children, is evaluated. It is also used to assess the justification of a state's action when considering the best interests of a child or a group of children.²⁴

This dynamic concept requires an assessment appropriate to the specific context. Its aim is to ensure the holistic development of the child, the physical, mental, spiritual, moral, psychological and social development in different national and local contexts.²⁵ The 'best interests' principle binds the state to allow for parent(s) or legal guardian to have the primacy regarding their children's education. Nevertheless, the Committee clarifies that an "adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention."²⁶

IV. The right of the child to be heard

The 'best interests' principle is linked to other fundamental values of the Convention, such as the right of the child to be heard.²⁷ Art. 12 para. 1 CRC postulates that "*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*" The Committee on the Rights of the Child notes that certain groups of children, especially younger children and children belonging to disadvantaged groups, "face particular barriers in the realization of this right."²⁸ The responsibility of states to protect the child's right to be heard is higher when the child belongs to a specifically vulnerable group. The right to be heard involves participation and it applies to individual children and to groups of children.²⁹ Linking art. 3 para. 1 CRC with art. 12 CRC, the best interests of the child can only be assessed by taking into account the child's view: "*The two articles have complementary roles: the first aims to realize the child's best interests, and the second provides the methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his or her best*

²⁴ General Comment No. 14 (2013) CRC/GC/2013/14 para. 6c.

²⁵ CRC/C/GC/14 para. 2.

²⁶ CRC/C/GC/2011/13 para. 61.

²⁷ CRC/C/GC/2009/12 para. 2.

²⁸ General Comment No. 12 (2009) CRC/C/GC/2009/12 para. 4.

²⁹ CRC/C/GC/2009/12 para. 13, 14.

interests.” Art. 3 para. 1, reinforces the functionality of art. 12, by facilitating the essential role of children in all decisions affecting their lives.”³⁰ Additionally, children who are in a vulnerable situation, for example due to a disability, migrant background or belonging to a minority group, should be supported to ensure they can fully participate in determining their best interests.³¹

C. Legal Gender Recognition, Trans children and the CRC

I. What is Legal Gender Recognition?

Legal Gender Recognition - LGR is the official recognition of a person’s gender identity, including gender marker and name(s) in public registries and key documents by the national state a person lives in.³²

II. Who are Trans Children?

This publication uses the umbrella term **trans children** to describe any person who is below the age of majority (usually 18 years) and whose gender identity and/or gender expression differs from their sex assigned at birth. This definition includes, for example, children and young persons who identify as gender variant, gender non-conforming, transgender or transsexual, as well as trans boys who identify simply as male and trans girls who identify as female.³³

Thus, trans children may also include those later in life who may develop a gender identity and/or gender expression in line with their sex assigned at birth. However, a possible (dis)continuity of a non-normative gender identity or gender expression is irrelevant for considerations in this paper. Rather, it focuses on the period when a child might be disadvantaged because its gender identity or gender expression is, or is perceived to be, different from standard expectations.

³⁰ CRC/C/GC/14 para. 43, CRC/C/GC/2009/12 para. 70-74.

³¹ CRC/C/GC/14 para. 54.

³² Köhler / Recher / Ehrt 2013: p. 9.

³³ See definition in Open Society Foundation 2015.

III. Why is Legal Gender Recognition important for Children?

Trans children face similar distress and discrimination because of their gender identity as their adult peers.³⁴ However, they are limited in their ability to claim their rights. Children who are visibly trans or transgressing gender norms can face different problems if official documents do not reflect their name and gender identity; access to gender/sex-segregated activities and facilities in schools and in the leisure-time may be denied. Institutions may refuse to respect the child's identity, for example when teachers keep using a previous name and prohibit the child to use (gendered) facilities corresponding to their gender identity. As a result, trans children might have to continuously explain their gender-identity and justify themselves. This constantly challenges the child's sense of integrity and signals that school is not a safe, enabling and welcoming place. In such an environment, bullying and violence by peers and potentially teachers can thrive, which may lead to negative effects on the physical and mental health of the child and can have an impact on school performance. According to the EU Fundamental Rights Agency's survey, 29% of trans students said they felt personally discriminated against by school or university personnel in the 12 months before research was conducted.³⁵

In Croatia, both peers and teachers had treated a trans boy badly in school because of his gender identity over a long period. As a result, change of schools was planned. However, it was not possible to change the data on gender in the child's personal documents according to then existing legal regulations for gender recognition. Therefore, staff at the new school learned about his passport gender exposing his trans identity. Given that personal documents are prompted when registering for extracurricular activities and on numerous other occasions, the child's private data is at display to a large number of people who have no legal interest in this.³⁶

There are even cases where trans children and their families were refused crossing a border because the official documents did not match with the child's outward gender appearance.

³⁴ Irish Ombud on the Rights of the Child 2013: p. 21.

³⁵ FRA 2014: p. 4.

³⁶ Kontra 2011.

In other cases, trans children had to undergo inhuman procedures of “proving”, or families deciding to restrict travels altogether: “We simply do not travel” (Mother of a trans child, Germany).³⁷

Recent studies have shown that social transition can improve trans children’s well-being, self-esteem and confidence.³⁸ Legal documents reflecting their gender-identity lower the risk of an involuntary exposure of previous name and/or gender-marker and can protect trans children from exclusion. Not surprisingly, 88% of young trans respondents (18 – 24 years)³⁹ expressed a desire for easier legal gender recognition procedures, as these would allow them to be more comfortable living as a trans person.⁴⁰ Legal gender recognition is much more than an administrative act. It is the recognition and respect of a child albeit its differences. Legal gender recognition can thus be essential for succeeding in school, participating in the everyday-life and in society and for growing up and living a life of dignity and respect.⁴¹ Andy, an 18-year-old transgender man living in Ireland, said: “For me [legal gender recognition] is something to back me up [...] and make sure that teachers and the headmaster accept my gender and allow me to use the [male] bathroom.”⁴²

On the contrary, denying a child the legal recognition of their gender identity can amount to violating the best interests of the child.

IV. Specific Vulnerabilities of Children regarding Legal Gender Recognition

Children are mostly excluded from legal gender recognition in Europe and “the legal recognition of trans [...] children’s sex or gender remains a huge hurdle in most countries” (Council of Europe Commissioner for Human Rights Nils Muižnieks).⁴³ Only six European states, Malta, Austria, Germany, Croatia, Switzerland and Moldova have no age restrictions in place; in the Netherlands and Ireland 16 year olds can apply for legal gender recognition and in Norway LGR is accessible from age six. In the remaining

³⁷ Trakine 2016.

³⁸ OSF 2014: p. 3.

³⁹ For legal reasons the study could only be completed by persons of age of majority.

⁴⁰ FRA 2014.

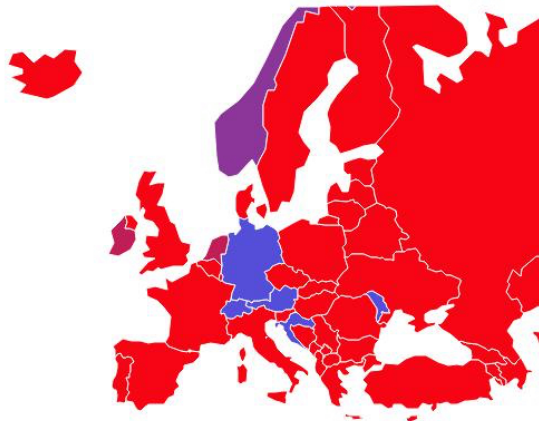
⁴¹ see: Köhler / Recher / Ehrh 2013: p. 6.

⁴² Amnesty International 2014: p. 28.

⁴³ Muižnieks 2014.

Age Limits in Legal Gender Recognition in Europe

Which countries allow a minor to have their gender identity officially recognised?



red - not possible for minors to access legal gender recognition
burgundy - open from age 16
purple - open from age 6
blue - no age limit (open for minors)

countries young trans people do not have the right to change their name or gender marker.

Children are prevented from legal gender recognition by age-restrictions, which appear directly (minimum-age) or indirectly (other requirements for legal gender recognition, such as surgery or hormone treatment, which might be only accessible at the age of majority). For example, Belgian legislation does not require a minimum age, but demands sterilisation, which is only available from age of majority. In Spain an individual can apply for legal gender recognition from age 18.⁴⁴ Consequently, a 16-year old trans girl in Barcelona, who had been using a female name since age four, was denied the right

to change her officially registered name to a female one. The provisions of the Spanish Civil Registry Act were interpreted in a strict manner stating a change of name would make her identification confusing and would be misleading about her sex.⁴⁵

In contrast to this strict position, the German Constitutional Court ruled that the age limit of 25 years was incompatible with the principle of equality as it discriminated against younger trans persons solely on grounds of their age.⁴⁶

Even where legal gender recognition is accessible for children, they often depend on the willingness of parents or legal guardian. Further barriers appear if parents or legal guardians do not agree in supporting the child's gender identity and quest for legal gender recognition. Contradicting opinions of parents can block access to legal gender recognition when judges and youth welfare social workers side rather with the transphobic parent than focusing on the best interests of the child. For instance, a school social worker refused to change a trans girl's name on the class roll, telling the mother:

⁴⁴ Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas, Article 1.

⁴⁵ Fundación Daniela 2016.

⁴⁶ German Constitutional Court: 1 BvR 938/81; 1 BvL 38/92, 40/92 and 43/92.

"The child's father was more than clear on this topic and I would like to keep my job."
(Mother of a trans child, Germany)⁴⁷

Progressive legislation, such as in Malta (2015) and Norway (2016), include the best interests of the child as core principle in all LGR-decisions concerning children. In Malta, child protection services are ready to take action against parents who are obstructing the free development of their child's gender identity. Similarly, the Norwegian law puts the rights of children before the parents' as a unit. It specifies that a minor can obtain LGR even if only supported by one parent, as long as it is in the best interest of the child.⁴⁸

V. Trans Children's Rights in the CRC concerning Legal Gender Recognition

We will now examine whether the restriction of access of trans children to legal gender recognition, through direct and indirect age-restrictions, violate their rights guaranteed in the CRC.

1. Preservation of the child's identity (Art. 8 para. 1 CRC)

Art. 8 para. 1 CRC postulates that, "*State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*" The listing of aspects of the identity is a non-exhaustive list that stays open for other personal characteristics, especially cultural, religious and gender identity.⁴⁹ Arguing that children under a certain age are generally too young to be aware of their gender identity is a position which ignores the 'best-interest-principle' guaranteed in art. 3 CRC and the children's 'right to be heard', guaranteed in art. 12 para. 1 CRC. Moreover, recent studies⁵⁰ have shown that trans children are just as aware of their gender identity as cis-children.⁵¹ As already described the 'best-interest-principle' and the child's 'right to be heard' in situations where their rights are infringed upon are core principles and fundamental values of the CRC that

⁴⁷ Trakine 2016.

⁴⁸ See legal reasoning and § 4 *Amending the legal gender of children* in the Maltese Legal Gender Amendment Act (2016).

⁴⁹ Schmahl 2013: p. 99.

⁵⁰ See: Olson / Key / Eaton 2015.

⁵¹ Olson / Key / Eaton 2015: p. 6.

have to be read as included in all of the rights guaranteed by the Convention. As the Committee stated in its General Comment No. 14, the evolving capacities of the child must be taken into consideration when the child's best interests and right to be heard are at stake: "The Committee has already established that the more the child knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing. Similarly, as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests."⁵² Thus, strict age limitations, whether they are direct or indirect, that exclude children in general from legal gender recognition without giving them the right to be heard can amount to a violation of art. 8 para. 1 CRC in connection with the aforementioned core principles. States Parties have to assure that trans children's identity is respected and enable their access to legal gender recognition.

2. Right to Health (Art. 24 CRC)

The Committee interprets the children's right to health as defined in article 24 CRC as "an inclusive right, extending not only to timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services, but also to a right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinants of health."⁵³

Bullying, harassment and violence faced by trans children often lead to health problems. In order to ensure the children's rights guaranteed in art. 24, the member states have to implement general measures to ensure that children are not exposed to violence, bullying and harassment by forcing them into gender structures that are not theirs.

Departing from the World Health Organization (WHO) Preambles' definition of health as a state of 'complete physical, mental and social well-being and not only the absence of disease or infirmity', the Committee stresses the extensive nature of the right to health as an umbrella term and at the same time as an indispensable basis for the other rights guaranteed in the CRC.⁵⁴ In connection with the non-discrimination obligation in art. 2 of the Convention, State Parties have an obligation to ensure that children's health is not undermined as a result of discrimination. The Committee explicitly stresses that

⁵² CRC/C/GC/14, para 44.

⁵³ CRC/C/GC/15, para 2.

⁵⁴ CRC/C/GC/15, para 4 and 7.

grounds of discrimination according to art. 2 CRC include sexual orientation and gender identity.⁵⁵

Trans children who are supported in their gender identity and who can live and express themselves accordingly, should not be considered as being any more prone to depression than cis-gender children, and are only slightly more likely to be anxious than their cis-gender peers. Moreover, socially transitioned trans children have notably lower rates of internalizing mental health issues in comparison to trans children who do not live in accordance with their gender identity.⁵⁶ Therefore, State Parties must make provisions to integrate and recognize trans children in society to prevent potential mental and physical health problems.

3. Conclusion

Excluding children from being taken into account and being heard through strict age limitations for legal gender recognition violates their rights in art. 3 para. 1, art. 8 para. 1, art. 12 para 1, art. 24 and art. 6 para. 2 of the Convention. To ensure the fulfilment of children's rights, trans children must have access to legal gender recognition in quick, easy and accessible procedures that are based on their right to self-determination.

Trans children must be recognised as a vulnerable group that is potentially affected by all actions of a state regarding legal gender recognition. In this context, provisions are mandatory to ensure children are heard. Decision-makers must take into account the impact that laws and regulations have on a child's best interests.

D. Education, Trans Children and the CRC

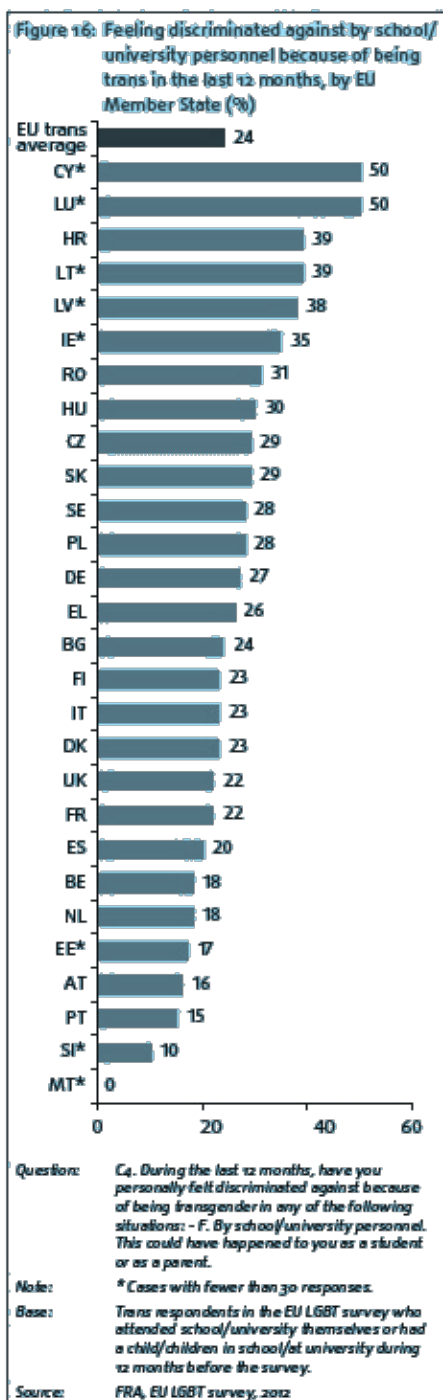
I. Specific vulnerabilities in educational institutions and contexts

Children who break gender norms often experience bullying, harassment and even death threats in school – by teachers as well as by their classmates.⁵⁷ As foremen-

⁵⁵ CRC/C/GC/15, para 8.

⁵⁶ Olson / Durwood / DeMeules 2016.

⁵⁷ Schneider 2013: p. 19.



tioned, discrimination against trans students is widespread in schools. Teachers themselves are often ill-informed about gender identities. Kindergartens and schools often refuse to respect the child's identity by denying access to (gendered) facilities that the child identifies with and allowing participation at single sex/gender-activities only on the basis of the legally registered gender. The use of gender-segregated facilities further poses significant difficulties for trans students. Bathrooms, gendered uniforms, segregated classes and simply the calling out of names from the class roll are daily sources of stress and trigger for discrimination. "Bathrooms cause me so much stress! Other students question me and make it difficult." (Participant to the Irish Trans Youth Forum, 2015).⁵⁸ As a consequence, many reduce their liquidity intake, or "hold it in" to avoid going to the bathroom in school. This can have severe effects on their physical health, but also on their ability to concentrate and focus on their education. Another key issue is that educational authorities may refuse to prepare diplomas in accordance with a child's socially-used name. The difference between the name on a leaving certificate and how a child or young person presents themselves can negatively impact further education and employment opportunities.

However, legal gender recognition can also become an obstruction to the free development of a child's gender identity, if schools and institutions insist on

legal gender recognition before accepting the child's (self-determined) name and gender identity. Families report they are thus pressured into taking a complicated and expensive step too early.⁵⁹

⁵⁸ Dunne 2016.

⁵⁹ Trakine 2016.

"We had to apply for the change of civil status and the change of name because the school and the youth welfare office needed something in written form. So we applied for it [...]. Both reports confirm that Julia is a girl and that this won't change even in puberty – with a certainty of 99%. The Court followed these assessments in its decision. With this the school and the youth welfare office forced us to take this complicated and expensive step too early." (Mother of a 10 year old trans girl)⁶⁰

There is a lack of education about gender identity and gender expression in the curricula and in the classrooms. If children do receive information it is through trans identities being presented as deficient, a norm deviation in the binary gender-system. For example, when Polish Max was in the second grade at junior high school, during a school lesson on family life the teacher asked him to stand up and asked how he was dressed: "I looked at myself - yellow T-shirt, green sweatshirt, jeans - but I thought it might have been some school holiday and I should have worn a uniform", says Max. As it turned out, that was not the teacher's concern. She replied that he was wearing men's clothes, and that he should wear girls' clothes to bring out his femininity. The class continued to discuss the theme for nearly 45 minutes until he could not stand it any longer and cried out.⁶¹

As a result of direct and indirect discrimination, there have been high rates of absenteeism and drop-outs in schools⁶² and high rates of suicide attempts amongst trans children and youth.

The young trans person, who is forming their identity in school, faces bullying and harassment. Some 64% of young trans men and 44% of young trans women will experience harassment or bullying at school, not just from their fellow pupils but also from school staff including teachers. These are higher rates than shown in many studies on young lesbians and gay men at school. The research also counters the commonly held belief that there is less tolerance of 'sissy' boys than tomboys, finding that females who become trans men later in life faced the most harassment and bullying at school.

The research shows a major difference in final educational achievement levels in the trans population compared to the UK average. Many trans people leave school after completing Level 2, but 34% obtain a degree or higher degree (later in life), compared to the UK national average of only 27%.

Source: Whittle S. et al. *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*, 2007

⁶⁰ Trakine 2016.

⁶¹ Raczyńska 2015.

⁶² Schneider 2013: p. 20.

II. Trans Children's Rights in the CRC concerning Education

1. Trans children's right to access to education free from discrimination (Art. 28 CRC)

According to art. 28 para. 1 of the Convention, "*States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity [...]*". Education in this sense is meant broadly to include educational institutions and informal educational contexts.⁶³ Reading art. 28 para. 1 CRC with the non-discrimination principle in art. 2 of the Convention the states are obliged "[...] to take protective measures in order to prevent or combat discrimination in education by third parties [...]".⁶⁴ Discrimination according to the Human Rights Committee is "[...] any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, [...] birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."⁶⁵

As a result of violence, exclusion and stigmatization trans children have avoided attending school. Thus, they are excluded from growing up and learning in respect and dignity. It does not only deprive children from possibilities for their future but also from their right to access education without discrimination.

States are obliged to, "*take measures to encourage regular attendance at schools and the reduction of drop-out rates*".⁶⁶ In this context trans children should be recognized as a vulnerable group and states should undertake specific measures to reduce discrimination, violence and stigmatization against them and thus reduce drop-out-rates. This might include awareness raising programs, changes in pedagogical curricula,

⁶³ CRC/C/58, 1999 para. 106. The UNESCO Convention against Discrimination in Education is the most specific convention on discrimination in education (Verheyde 2006: 37); See: http://portal.unesco.org/en/ev.php URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html; For status of ratification see: <http://www.unesco.org/eri/la/convention.asp?KO=12949&language=E&order=alpha>.

⁶⁴ Verheyde 2006: p. 39.

⁶⁵ HRC/GC/1989/18 paras. 26-27; paras. 7-8, 13.

⁶⁶ Art. 28 para. 1 lit. e.

changes in textbooks and other teaching material content and in school curricula, resource re-allocations and a broad variety of complementary inclusive educational measures.

Every child should be safe in schools, as well as in any other area of life, and should be able to express their gender identity without fearing negative consequences.

2. Trans children's right to the preservation of human dignity in schools/protection from violence (Art. 28 para. 2, Art. 19 CRC)

Art. 28 para. 2 and Art. 19 of the CRC prohibits violence against children in educational institutions and other informal educational contexts. In this context, violence does not only refer to physical violence but also to forms of emotionally violent behaviour such as bullying and harassment.⁶⁷ CRC-State Parties must take preventative measures to protect children from violence in schools by classmates as well as by other students.⁶⁸ There is a glaring inadequacy in terms of protection from violence in schools for trans children. By no-action, states violate trans children's right in CRC art. 28 para. 2 and art. 19. Trans children must be recognized as a vulnerable group in schools.

3. Goals of Education (Art. 29 para. 1 CRC)

Education in the broad sense includes the provision of basic skills⁶⁹ as well as the broader development of the personality.⁷⁰ Art. 29 para. 1 lit. a CRC confirms that State Parties agree that the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities in order to achieve their fullest potential. States in Europe are requested by the Council of Europe to provide students with the necessary information, protection and support to enable them to live in accordance with their gender identity,⁷¹ and specifically, demands "facilitating the

⁶⁷ CRC/C/111, 2001 para. 679b.

⁶⁸ Schmahl 2013: p. 238.

⁶⁹ Such as: literacy, numeracy, making decisions, resolve conflicts in a non-violent manner and other abilities which help children to pursue their options in life (Verheyde 2006: 11-12).

⁷⁰ Ibid.

⁷¹ Committee of Ministers 2010 para. 31.

changing of the entry as to first name or gender in school documents” to adequately meet the special needs of transgender students in their school life.⁷²

Good practice examples:

The Maltese Ministry for Education and Employment education policy and practical guidelines “Trans, Gender Variant and Intersex Students” from June 2015 create a supportive framework for young trans children. They form part of the *Respect for ALL* framework.

Dutch schools have mandatory educational targets since 2012 on sexuality and sexual diversity. The Schools can access guidelines and good practices that help in the implementation. Classes with trans children receive custom-made education and guidance. This includes training for the class’ teachers and can be extended to siblings’ classes. Since September 2015 the law on social safety provides for a social safety plan that every school has to have. Accordingly, incidents and perception of social safety for teachers and students need to be monitored.

Still, in most European states there is a greater need for objective information on gender identity and gender expression in curricula. Teachers need more information and sensitivity in the interaction with trans children and more awareness regarding their needs and vulnerabilities. Schools need clearer instructions that aim to respect the gender identity of a student and make prevention of transphobic violence as part of their duty. These tasks require adequate policies supported by resources for comprehensive and extensive training of teachers as well as administrators.

4. Conclusion

In Europe, the right of trans children to be free from discrimination in education is widely violated. CRC member states are obliged to take positive action that will enable trans children to learn in a safe and respectful environment. They also have to actively end any further discrimination by state actions or by omitting discriminatory rules and practice.

⁷² See Explanatory Memorandum to Rec Com 2010(5), p. 18.

E. Results and Claims

Trans children's rights guaranteed by the CRC are currently violated throughout Europe in the field of education and concerning Legal Gender Recognition.

As art. 28 CRC and 24 CRC together with art. 3 CRC guarantee, all children, irrespective of their perceived gender identity, have the right to a safe and healthy childhood free from discrimination. State Parties have the obligation to implement adequate measures to assure the full enjoyment of children's rights in the field of education by all children irrespective of their gender identity. The best interests of the child must be assured by age-adequate forms of hearings and participations in all proceedings that concern them. Direct or indirect age limitations in legal gender recognition have to be critically assessed in case there is a potential conflict concerning the best interests of the child. Age limits should be either dropped altogether or adequate measures should be introduced ensuring that trans children's right to their identity and dignity are effectively protected.

European governments have an obligation under the CRC to identify specific vulnerabilities of trans children. According to art. 2 CRC they have to adopt a variety of general implementation measures to ensure the protection of trans children under the CRC. These may include data collection, legislative measures, different resource allocation or educational measures to change attitudes.

To protect and realize the best interests of trans children's rights, states should ensure:

1. Access to Legal Gender Recognition procedures without age limit;
2. Support and resources outside of clinical settings for parents and family members of trans children;
3. Clear and legal instructions for all schools, administrations and professionals who are likely to come into contact with trans children.
4. Comprehensive guidelines for educational institutions emphasising transrespect and affirmation, particularly in areas such as respect for a child's name/pronouns, use of gendered facilities, uniform requirements, anti-bullying and no hate speech measures etcetera.

5. The amendment of certificates, diplomas and other educational documents to correlate with a child's gender identity, irrespective of medical diagnosis or legal gender recognition status, and to do so retroactively if needed;
6. Non-discrimination frameworks that are inclusive of gender identity, and mandatory equality and non-discrimination policies for educational institutions,
7. Revision of state curricula and educational materials to reflect positively on diverse gender identities and expressions
8. Training of relevant professional groups by means of mandatory education and training in the fields of education, children's rights, judiciary, youth welfare, child protection services etcetera.
9. Research (outside clinical settings) on the situation of young trans persons, their needs and access to support.

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