

Copyright © 2021 by Cherkas Global University



Published in the USA
Population Processes
Has been issued since 2016.
E-ISSN: 2500-1051
2021. 6(1): 19-24

DOI: 10.13187/popul.2021.1.19
<https://pp.cherkasgu.press>



Right to Privacy of Transgender Persons (Reproductive Rights Aspect)

Anna S. Slavko ^{a, *}, Dalila A. Bondhas ^a

^aSumy State University, Ukraine

Abstract

LGBTQ + rights now protected and recognized as human rights, as by national legislation and international human rights instruments and other consensus instruments. However, the group of people that has been trying the longest to fight against oppression in their private life – are transgender people. Because of their «unresolved sex» in many parts of the world, they are banned from almost anything under private law, from adoption and childbirth and marriage to forcing gender reassignment through surgery, employment, or any kind of paperwork.

Today, there are many organizations whose activities are protecting or include protection and interpretation of the rights of transgender people, such as the Harry Benjamin International Association for Gender Dysphoria, the United Nations and others. Among the main acts in this area are the International Conferences on Transgender Law and Employment Policy, the International Bill of Gender Rights, and others. The rights of LGBTQ + individuals must, in one way or another, be enshrined for each member of the community in all constitutions of the world. However, despite the efforts of activists, the right to privacy of transgender people is quite often violated. In this paper, we propose to pay attention to the rights of transgender people in private life. The problems that arise in implementing reproductive rights of LGBTQ + people are also analyzed in the paper.

Keywords: human rights, right to privacy, LGBTQ+, transgender, transgender people rights, European law, European Court of Human Rights case law.

1. Introduction

Nowadays, the word «transgender» is quite common. It is so widespread – in the media, in academies and in the names of organizations, archives and resource centers - that it can be argued that it is currently the most common term to describe people who do not agree with their «sex at birth» (Rawson, 2014).

The earliest and best-known form of the combination of «trans-» and «-gender» can be found in the second edition of «Sexual Hygiene and Pathology» by psychiatrist John F. Oliven, published in 1965: «Where compulsive urge goes beyond women's clothing and becomes a tendency to change sex, «transvestism» becomes «transsexualism». This term is misleading; in fact, «transgenderism» is meant because «sexuality is not a major factor in primary transvestism» (Oliven, 1965). This term was used in a general sense for both transsexuals and transvestites until the third edition of the book in 1974.

In the 1970s, the combination of «trans» and «gender» began to gain its momentum. Oliven's term resonates with the popular remark of transgender pioneer Christine Jorgensen, who

* Corresponding author

E-mail addresses: a.slavko@uabs.sumdu.edu.ua (A. Slavko), dalilao8062015@gmail.com (D. Bondhas)

said in 1979, «If you understand 'transgender', then you understand that gender is not about bed partners, it's about identity» (Parker, 1979).

2. Materials and methods

The main sources for writing this article became the acts of international law, official documents of Ukraine, case-law of European Court on Human Rights and materials of the scientific publications.

The study used the basic methods of cognition: the historical and situational, formal-legal and the method of comparative law. The use of historical and situational method allows to understand the evolution of approaches to LGBTQ+ rights. The formal-legal method was used to analyze official documents and case law on the rights of transgender people. Method of comparative law defines the difference in models of regulating the rights of transgender people.

3. Discussion

With the emergence of the Harry Benjamin International Association of Gender Dysphoria (1997), Laisley Feinberg's popular magazine Tapestry TV-TS (1995) and the Internet as a whole, it has become easier for people to understand the difference between the «trans-» terms. One of the most popular medical definitions of the term «transgender» today is from the World Health Organization: «Transgender is an umbrella term that describes a diverse group of people whose internal sense of gender is different than that which they were assigned at birth. Transgender refers to gender identity and gender expression, and has nothing to do with sexual orientation. The term is increasing in familiarity globally, although other culturally specific terms may be used to describe people who have non-binary gender identities» (Kluge, 2011).

In Ukraine, the most widely used interpretation is from the Unified Clinical Protocol of primary, secondary (specialized) and tertiary (highly specialized) medical care: «the degree to which an individual's gender identity, role, or gender self-expression differs from the cultural norms ascribed to persons of a particular sex in a particular society» (Unified clinical protocol, 2016).

The right to privacy is a fundamental human right guaranteed both at the universal level (International Covenant on Civil and Political Rights) and at the regional level (European Convention for the Protection of Human Rights and Fundamental Freedoms). In the case law of the European Court of Human Rights, the right to privacy covers a wide range of relationships, including personal identity and bodily autonomy, the right to start a family, the right to paternity/maternity, and so on. Given the prejudice against transgender people in many societies, the right to privacy of such people is very often violated. The right of transgender people to found a family and have children is particularly often violated. At the same time, some governments justify restrictions on the reproductive rights of transgender people by saying that they have a mental illness (gender dysphoria is indeed recognized as a mental illness) and therefore cannot take care of children properly. Other governments argue that by prohibiting the adoption of children by transgender people and / or depriving transgender people of parental rights, they are in the child's best interests. In such cases, governments appear to violate international standards for the rights of transgender people. Therefore, it is the reproductive rights of transgender people that we will focus on in this study.

The largest legal instrument that is the basis for most of the rights and freedoms of transgender people around the world and contains only the basic principles of these freedoms is the International Conference on Transgender Law and Employment Policy, held in Houston, Texas, USA for the period from 1992-1996 (Gallagher, 1996).

We took the fifth conference (1996) for analysis, due to a broader interpretation of rights and freedoms. Although each of the conferences violated a specific legal right: the first conference defined the basic rights, in particular to employment; the second is the rights of transgender prisoners; the third concerned the topics of free recourse of trans persons to court; fourth, it identified a lack of privacy rights (Frye, 2000).

The phenomenon of this document is that the definition of transgender rights is based on another document that follows the preamble - the International Bill on Gender Rights. Articles of this document on: the right to define gender identity, the right to freely express gender identity, the right to secure and retain employment and receive fair compensation, the right to access and participate in gender activities, the right to control and change one's body, the right to proper and

professional medical care, the right to freedom from involuntary psychiatric diagnosis and treatment, the right to sexual expression, the right to love and marriage and the right to the upbringing and care of children, the exercise of parental authority. The latter law is of most interest to us in the context of this study, as it provides that «Given the right to form a committed, loving relationship with another, and to enter into marital contracts, together with the right to express a self-defined gender identity and the right to sexual expression, individuals have a corresponding right to conceive and bear children, to adopt children, to nurture children, to have custody of children, and to exercise parental capacity with respect to children, natural or adopted, without regard to chromosomal sex, genitalia, assigned birth sex, or initial gender role, or by virtue of a self-defined gender identity or the expression thereof» ([International Bill of Gender Rights, 1993](#)).

The next part is «Health Law Standards of Care for Transsexualism». The conference defines «transsexual» all those who have the opposite gender identity to the one they were born with, so we can take this part of the document according to our topic.

This part contains 5 principles:

- 1) Not to consider transsexualism as an illness or mental disorder;
- 2) The right to change the appearance, including hormone therapy and surgery;
- 3) Persons who have been denied control over their own bodies may experience psychological suffering and reduced ability to function socially, economically and sexually;
- 4) Medical services (including surgical) for transsexuals must cost, as for other people, be paid in advance and require the waiver of any tort liability other than negligence;
- 5) Prohibition to discriminate against anyone based on their sexual orientation and identity, material status and appearance ([Gallagher, 1996](#)).

The «Health Law Standards of Care for Transsexualism» also contains 5 standards, which state that: Physicians and surgeons involved in transsexual care should provide hormone therapy to patients who require a change in their sexual appearance only if:

- 1) Reasonable confidence of the doctor that the therapy will not worsen the patient's health;
- 2) The patient's compliance with periodic tests to monitor health
- 3) Signature of the patient informed consent and disclaimer. If the patient is married, the doctor may not require a divorce, but may also require the spouse to sign a disclaimer;
- 4) Doctors who provide hormone therapy for gender reassignment and surgeons who provide sex reassignment surgery annually collect and publish the number of hormone prescriptions they prescribe, the number and general nature of complications and complaints.
- 5) Physicians and surgeons should not disclose the name or identity of any patient who requests or receives gender reassignment services, except as expressly stated in the patient's notarized written request ([Gallagher, 1996](#)).

It is noteworthy that the seventh version of the «Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People» also contains references to reproductive health. In particular, Section IX contains rules for maintaining the reproductive health of transgender people: «Many transgender, transsexual, and gender nonconforming people will want to have children. Because feminizing/masculinizing hormone therapy limits fertility, it is desirable for patients to make decisions concerning fertility before starting hormone therapy or undergoing surgery to remove/alter their reproductive organs. Cases are known of people who received hormone therapy and genital surgery and later regretted their inability to parent genetically related children» ([Standards of Care, 2012](#)).

A new step in affirming the rights of transgender people has been the so-called Yogyakarta Principles (Principles on the application of international human rights law in relation to sexual orientation and gender identity), which, among other things, enshrine the rights to equality before the law and non-discrimination, recognition before the law and privacy. In particular, principle 2 provides that everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected ([Principles ..., 2007](#)). The Principles also state that transgender people also have the right to found a family, including adopting or having children. In particular, Principle 24 provides that «states shall: Take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation

(including donor insemination), without discrimination on the basis of sexual orientation or gender identity» ([Principles ...](#), 2007).

Based on these documents, we can determine that trans people are constantly exposed to legal discrimination, in particular in the areas of medical and private rights. The Conference imposes on international law the obligation to respect, protect and respect the human rights enshrined in it.

An analysis of the resolutions of the Parliamentary Assembly of the Council of Europe, the Committee of Ministers of the Council of Europe recommendations and the European Court of Human Rights case law, suggests a pan-European consensus on guarantees for the right to privacy of transgender people, including family, parenthood and legal recognition.

For example, in its Resolution 2048 on discrimination against transgender people in Europe, the Parliamentary Assembly stated in particular: «The Parliamentary Assembly regrets that transgender people face widespread discrimination in Europe. This takes a variety of forms, including difficulties in access to work, housing and health services, and transgender people are frequently targeted by hate speech, hate crime, bullying and physical and psychological violence... The fact that the situation of transgender people is considered as a disease by international diagnosis manuals is disrespectful of their human dignity and an additional obstacle to social inclusion» ([Resolution 2048](#), 2015). In this document Parliamentary Assembly «calls on member States to ... as concerns legal gender recognition ... ensure that the best interests of the child are a primary consideration in all decisions concerning children» ([Resolution 2048](#), 2015).

In its Resolution 2239(2018) on private and family life: achieving equality regardless of sexual orientation, the Parliamentary Assembly states, that Council of Europe member States are obliged to: «4.5. protect the rights of parents and children in rainbow families, without discrimination based on sexual orientation or gender identity, and accordingly: ... in line with the case law of the European Court of Human Rights, ensure that all rights regarding parental authority, adoption by single parents and simple or second-parent adoption are granted without discrimination on the grounds of sexual orientation or gender identity ...» ([Resolution 2239](#), 2018).

The case-law of the European Court of Human Rights also shows a commitment to such positions regarding the protection of the right of transgender people to privacy. So, in case of *A.P. Garçon and Nicot v. France*, ECtHR underlines, that «... the Government observed that Article 8 imposed an obligation on the member States to legally recognise the gender reassignment of transgender persons; States had discretion only in determining the conditions to be met by persons seeking legal recognition of their acquired gender identity, for the purposes of establishing that they had actually undergone reassignment» (§ 97) ([A.P., Garçon and Nicot](#), 2017). Although the Court disagrees that a transgender person has the right to remain in a previous marriage if the other spouse objects (*Hämäläinen v. Finland*) ([Hämäläinen](#), 2014), it consistently protects the right of transgender couples to have and raise children (*A.M. and Others v. Russia*) ([A.M. and Others](#), 2021). In the latter case, the applicant's ex-wife claimed that she had been deprived of parental rights because she had made a transgender transition. According to the ex-wife, the applicant should have been deprived of parental rights because her contact with children «1) had caused irreparable harm to the mental health and morals of the children, 2) could distort their perception of family, 3) could lead to an inferiority complex and bullying at school, and 4) could expose them to information on «non-traditional sexual relations», such information being prohibited from distribution to minors» (§ 14) ([A.M. and Others](#), 2021). ECtHR states, that, «in the absence of any demonstrably harmful effect of contact between the applicant with her children, it is not necessary to speculate as to whether a particular restriction might have been appropriate in the event that such potential or real harm had been established. Similarly, the Court does not find it necessary to consider whether the possibility of reviewing the restriction, as mentioned by the domestic courts, provided an effective avenue for re-establishing contact between the applicant and her children or for ensuring the children's gradual adjustment to their changing family situation» (§ 60) ([A.M. and Others](#), 2021).

4. Results

Ukrainian legislation in relation to transgender people does not have full support for them but has provisions on which trans people can rely to protect their rights: the order of the Ministry of Health «On improving the provision of medical care to persons in need of gender reassignment»

([On improving..., 2011](#)) and the Law of Ukraine «On Principles of Preventing and Combating Discrimination in Ukraine» ([Principles of preventing..., 2012](#)).

Nevertheless, Ukraine's attitude towards transgender people can be called indifferent, due to rather large law gaps and non-compliance with even those two laws. Ukraine's desire to join the European Union, of course, affects the approach to LGBT rights, but not always country listens to everyone, and sometimes do not understand why trans people have rights.

The question of recognizing the «new» sex in Ukraine is quite difficult. In Ukraine for a long time has been in force order of Ministry of Health «On improving the provision of medical care to persons in need of gender reassignment». It states that it is necessary not only to be examined by a sexologist to confirm the diagnosis of «Transsexualism», which, as we understand, differs from the concept of «Transgender» desire to completely change sex, but also necessarily undergo endocrinological examination or surgical correction of sex ([Principles of preventing..., 2012](#)). Only after these procedures can a person officially, and then documented, change their gender.

Continuing the analysis of this order, we turn to the problems of family life of transgender people. According to the Order of the Ministry of Health № 60 (paragraph 4, part 3), correction is prohibited due to «the patient's marriage during the consideration of his application by the Commission» ([Principles of preventing..., 2012](#)). This paragraph was created in relation to Article 21 of the Family Code of Ukraine, which specifies the concept of «marriage» as a «family union of a woman and a man» ([Family Code, 2002](#)), because a complete change of sex means same-sex marriage, which is not provided by current legislation.

To undergo sex change, a person should not have children under 18 years old ([On improving..., 2011](#)). Introducing this requirement to the list of contraindications, the legislator interfered in the personal and family life of a person, violating the rights and freedoms of man and citizen, which are guaranteed by the Constitution of Ukraine ([Constitution, 1996](#)). Fortunately, there was no practice in Ukraine to sterilize transgender people. However, as we noted above, quite often, hormone therapy suppresses the person's reproductive functions, which leads to the inability to conceive and give birth to children. Adoption is often the only way for transgender people to become parents. But transgender people are prohibited by Article 212 of the Family Code from adopting children, as they are considered to be registered with a psychotherapist ([On improving..., 2011](#)). And although the order expired in 2016, there are still cases of a person being denied recognition of his/her new sex.

5. Conclusion

Although the problems we have listed sound more social and medical, in our opinion, they are still more in line with the law. Therefore, our proposals to overcome them will be partly legal and organizational. In particular, we believe that Ukraine needs to approve the registration of partnerships for same-sex couples, a ban on recognizing «transsexualism» at the legislative level as a mental illness that prevents the adoption of children.

In our opinion, taking these measures will help to realize the transgender's right to privacy more fully in Ukraine.

References

- [A.M. and Others, 2021](#) – Case of A.M. and Others v. Russia (2021) European Court of Human Rights. [Electronic resource]. URL: <https://hudoc.echr.coe.int/fre?i=001-210878>
- [A.P., Garçon and Nicot, 2017](#) – Case of A.P., Garçon and Nicot v. France (2017). European Court of Human Rights. [Electronic resource]. URL: <https://hudoc.echr.coe.int/eng?i=001-172913>
- [Hämäläinen, 2014](#) – Case of Hämäläinen v. Finland. European Court of Human Rights. 2014. [Electronic resource]. URL: <https://hudoc.echr.coe.int/fre?i=001-145768>
- [Frye, 2000](#) – *Frye, P.R.* (2000) History of the international conference on transgender law and employment policy, inc. International conference on transgender law and employment policy: annual proceedings and newsletters. [Electronic resource]. URL: <https://www.digitaltransgenderarchive.net/files/wd375w32h>
- [Gallagher, 1996](#) – *Gallagher, M.* (1996). Proceeding from the fifth international conference on transgender law and employment policy. International conference on transgender law and employment policy: annual proceedings and newsletters. [Electronic resource]. URL: <https://www.digitaltransgenderarchive.net/files/og354f33w>

International Bill of Gender Rights, 1993 – International Bill of Gender Rights, adopted by the International Conference on Transgender Law and Employment Policy in 1993, and was revisited and revised in 1994, 1995 and 1996 [Electronic resource]. URL: <https://www.learningforjustice.org/classroom-resources/texts/international-bill-of-gender-rights>

Kluge, 2011 – Kluge, D.H. (2011) WHO/Europe brief – transgender health in the context of ICD-11. World Health Organisation. [Electronic resource]. URL: <https://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/whoeurope-brief-transgender-health-in-the-context-of-icd-11>

Constitution, 1996 – Constitution of Ukraine from 28.06.1996. [Electronic resource]. URL: <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> [in Ukrainian]

Oliven, 1965 – Oliven, J.F. (1965). Sexual hygiene and pathology. 2nd ed. University of California Lippincott. [Electronic resource]. URL: https://books.google.com.ua/books/about/Sexual_Hygiene_and_Pathology.html?id=gw4-AQAIAAJ&redir_esc=y

Parker, 1979 – Parker, J. (1979). Christine recalls life as boy from the Bronx. Winnipeg free press. [Electronic resource]. URL: <http://research.cristanwilliams.com/2011/08/21/christine-jorgensen-transgender-woman/>

Principles..., 2007 – Principles on the application of international human rights law in relation to sexual orientation and gender identity. 2007. [Electronic resource]. URL: <https://www.refworld.org/pdfid/48244e602.pdf>

On improving..., 2011 – On improving the provision of medical care to persons in need of gender reassignment. Order of Ministry of health of Ukraine (2011), № 239/18977. [Electronic resource]. URL: http://search.ligazakon.ua/l_doc2.nsf/link1/RE18977.html [in Ukrainian]

Principles of preventing..., 2012 – On the principles of preventing and combating discrimination in Ukraine. Law of Ukraine. № 5207-VI. 2012. [Electronic resource]. URL: <https://zakon.rada.gov.ua/laws/show/5207-17#Text> [in Ukrainian]

Rawson, 2014 – Rawson, K.J. (2014). Transgender: the rhetorical landscape of a term. *Present tence*. 3: 1-9.

Resolution 2048, 2015 – Resolution 2048 (2015) Discrimination against transgender people in Europe. [Electronic resource]. URL: <http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=21736>

Resolution 2239, 2018 – Resolution 2239 (2018) Private and family life: achieving equality regardless of sexual orientation. [Electronic resource]. URL: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25166&lang=en>

Family Code, 2002 – Family Code of Ukraine (2002), № 2947-III (In Ukrainian). [Electronic resource]. URL: <https://zakon.rada.gov.ua/laws/show/2947-14#Text>

Standards of Care, 2012 – Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th version. The World Professional Association for Transgender Health. 2012. [Electronic resource]. URL: <https://www.wpath.org/media/cms/Documents/Web%20Transfer/SOC/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf>

Unified clinical protocol, 2016 – Unified clinical protocol of primary, secondary (specialized) and tertiary (highly specialized) medical care gender dysphoria. Order of Ministry of health of Ukraine. № 927. 2016. [Electronic resource]. URL: https://www.dec.gov.ua/wp-content/uploads/2019/11/2016_972_ykpmg_gendysfor.pdf [in Ukrainian]