

BACK ME UP!

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RIGHTS OF TRANS CHILDREN
UNDER THE CONVENTION ON
THE RIGHTS OF THE CHILD

AUTHOR: LINA HENZEL

A COLLABORATION OF THE
HUMBOLDT LAW CLINIC AND
TRANSGENDER EUROPE

BERLIN, OCTOBER 2016

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

Working Document

A collaboration of the Humboldt Law Clinic and Transgender Europe

Author: Lina Henzel

Berlin, October 2016

Impress

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

Author | Lina Henzel

Contributors | Richard Köhler, Alecs Recher, Karina Theurer

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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:

- Discrimination: Young persons are more likely to be discriminated against for being trans.² However, they often cannot access justice, such as non-discrimination laws, as their adult peers.
- Violence: A significant increase in reported murders of trans children and young trans people in recent years has been found by TGEUs global research. 20% of victims where the age was known were under 20 years, out of which those younger than 18 years made up 36,6%.³
- Legal recognition: Only a handful of states in Europe allow minors to have their gender identity officially recognized without a minimum age barrier.
- Education: 29% of trans students felt discriminated against in their school in 12 months before the survey.⁴
- Healthcare: Legal age barriers, but also ignorant service providers and reluctant parents can become major obstacles for trans youth to access trans-specific medical services.

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 Transgender Europe 2015

⁴ FRA 2014: 9

- Suicidality: Multiple studies found that younger transgender people were more likely to seriously consider and/or attempt suicide than older transgender people.⁵ Trans men seem to be at particular risk.

Many trans people, though not all, realize their gender identity before leaving primary school.⁶ The majority hides their gender identity from schoolmates, parents and other people in their lives. They might feel different without having words for it.⁷ At the same time, an “increasing numbers of adolescents have already started living in their desired gender role upon entering high school”⁸ highlighting the large number of trans adolescents showing gender identity continuity throughout adulthood.

Children who are visibly transgressing gender norms are often discriminated against, bullied and harassed at school, in their leisure time, in other social as well as medical contexts, even in the family and in specific situations where it becomes visible that the gender assigned at birth varies with the gender expressed. Trans children in Europe mostly are excluded from having their gender identity also officially recognized (legal gender recognition).

However, every child has rights under the Convention ratified by all European states.⁹

⁵ Sebastian Barr 2015

⁶ Kennedy Hellen 2010: 28

⁷ Ibid.

⁸ World Professional Association for Trans Healthcare, Standards of Care Version 7, 2011

⁹ 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

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 discriminatory structures and politics.

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 2 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 subjects of rights¹⁰. The core principle of the CRC is the human dignity of every child and its equal and inalienable rights.¹¹ All European states and nearly all states worldwide have ratified the CRC.¹² By the act of ratification member states express their will to be bound by the convention and thus are responsible internationally from that moment on for any violation of their

¹⁰ Schmahl 2013: 29, para. 2

¹¹ CRC/GC/2001/1 para. 1

¹² 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/>

obligations (if these are not excluded explicitly by valid reservations¹³). In accordance to Art. 51 of the Convention member states have transmitted texts of reservations,¹⁴ 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 jurisdiction¹⁵.

The CRC is amended by three optional protocols. The first optional protocol focuses on the involvement of children in armed conflicts and entered into force in 2002. The second optional protocol which also entered into force in 2002 deals with the sale of children, child prostitution and child pornography. The third optional protocol implements an individual communications procedure and entered into force in 2014. 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 as 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

¹³ 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

¹⁴ 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

¹⁵ CRC/GC/2003/5 para 1

texts of reservations, see:
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en

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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”

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 the CRC also includes youth so in the following we will only use the term child or children but include youth. The CRC is applicable to all children but allows states to define an earlier majority for example in regard to marriage.¹⁷

According to Art. 1 it is not possible to reduce majority exclusively for special groups of children, such as foreigners or refugees.¹⁸ The Committee on the Rights of the Child (the Committee) stresses that all children in a member state’s jurisdiction have to be

¹⁶ Excerpt from OHCHR as of 20 June 2016

¹⁷ Schmahl 2013: 46

¹⁸ Schmahl 2013: 49; Alston 1992: 5

granted the same rights in a non-discriminatory manner.¹⁹ 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 requires States to actively identify individual children and groups of children who might require special measures to have their rights recognized and realized. States have thus the obligation to actively take special measures "in order to diminish or eliminate conditions that cause of discrimination". These measures might include for instance data collection, changes in legislation, administration and resource allocation as well as educational measures to change attitudes.²⁰

As children in Europe live in very different situations we cannot go into detail on specific intersections of trans children living for example in alternative care settings or 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

¹⁹ See General Comment No. 5 (2003)

²⁰ CRC/GC/2003/5 para. 12

The best interests of the child in Art. 3 CRC is one of the core principles and fundamental values in the Convention.²¹ 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.²²

The Committee describes the core principle of the best interests of the child as a dynamic concept with three dimensions: First of all, 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.²³ Secondly it is a fundamental, interpretative *legal principle*, which should be used for the interpretation of legal provisions.²⁴ Thirdly, the best interests of the child is seen as a *rule of procedure*. It applies 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 in consideration of the best interests of a child or a group of children.²⁵

The 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

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

²² General Comment No. 5 (2003) CRC/GC/2003/5 para. 12.

²³ CRC/C/GC/14 para. 6a.

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

²⁵ General Comment No. 14 (2013) CRC/GC/2013/14 para. 6c.

in different national / local contexts.²⁶ 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".²⁷

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 heard²⁸. 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".²⁹ 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 children³⁰. 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*

²⁶ CRC/C/GC/14 para 2.

²⁷ CRC/C/GC/2011/13 para. 61

²⁸ CRC/C/GC/2009/12 para. 2

²⁹ General Comment No. 12 (2009) CRC/C/GC/2009/12 para. 4

³⁰ CRC/C/GC/2009/12 para. 13, 14

children and their inclusion in all matters affecting the child, including the assessment of his or her best interests. Article 3, paragraph 1, reinforces the functionality of article 12, by facilitating the essential role of children in all decisions affecting their lives.”³¹ Additionally, children who are in a vulnerable situation, due to for example a disability, migrant background or belonging to a minority group, should be supported to ensure they can fully participate in determining their best interests.³²

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.³³

II. Who are Trans Children?

This publication uses the umbrella term **trans** 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 youth 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.³⁴

³¹ CRC/C/GC/14 para. 43, CRC/C/GC/2009/12 para. 70-74.

³² CRC/C/GC/14 para. 54

³³ Köhler / Recher / Ehrt 2013: 9

³⁴ See definition in Open Society Foundation 2015

Trans children might thus also include children who later in life would 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 differing from standard expectations.

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.³⁵ However, they have less access 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 but also teachers thrive with negative effects on the physical and mental health of the child, as well as school performance. 29% of trans students said they felt personally discriminated against by school or

³⁵ Irish Ombud on the Rights of the Child 2013 p. 21

university personnel in the 12 months preceding the EU Fundamental Rights Agency's survey.³⁶

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 any legal interest in this.³⁷

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.

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

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 pro-

³⁶ FRA 2014

³⁷ Kontra 2011

³⁸ OSF 2014: 3

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

cedures, 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 respect⁴¹. 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 countries young trans people do not have the right to change their name or gender marker.

⁴⁰ FRA 2014

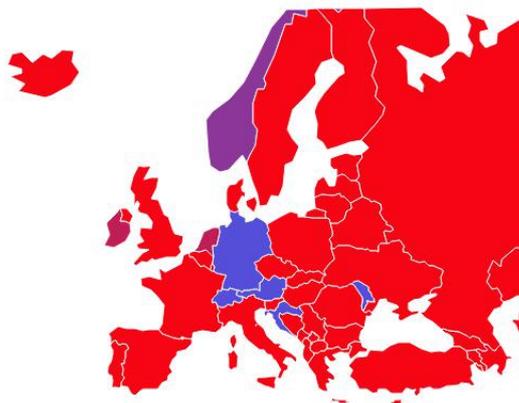
⁴¹ see: Köhler / Recher / Ehart 2013: 6

⁴² Amnesty International 2014: 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)

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. A 16-

year old trans girl in Barcelona, who had been using a female name since age four, was refused to her official 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 mislead about her sex.⁴⁴

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.⁴⁵

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. Contra-

⁴⁴ Fundación Daniela, 2016

⁴⁵ German Constitutional Court: 1 BvR 938/81; 1 BvL 38/92, 40/92 and 43/92

dicting 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. A school social worker refused to change a trans girl's name on the class roll, telling the mother: "The child's father was more than clear on this topic and I would like to keep my job".⁴⁶

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. The Norwegian law 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.⁴⁷ Maltese child protection services are ready to take action against parents who are obstructing the free development of their child's gender identity.

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

Now we will examine whether the direct or indirect age-restrictions and thus the restriction of access of trans children to legal gender recognition 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 "*States 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 in-*

⁴⁶ Trakine

⁴⁷ See legal reasoning and § 4 *Amending the legal gender of children* in the Maltese Legal Gender Amendment Act (2016)

interference." The listing of aspects of the identity stays open for other aspects, especially cultural, religious and gender identity⁴⁸. Arguing that children under a certain age are in general too young to be aware of their gender identity is an argumentation, 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 studies⁴⁹ have shown that trans children are as aware of their gender identity as cis children⁵⁰. As already described the best-interest-principle and the child's right to be heard whenever their rights can be affected are core principles and fundamental values of the CRC that 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."⁵¹ 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 being heard and taken into account can amount to a violation of Art. 8 para 1 CRC in connection with the afore mentioned core principles. State parties have to assure that trans children's identity is respected and enable their access to legal gender recognition.

⁴⁸ Schmahl 2013: 99

⁴⁹ See: Olson / Key / Eaton 2015

⁵⁰ Olson / Key / Eaton 2015: 6

⁵¹ CRC/C/GC/14, para 44.

2. Right to Health (Art. 24 CRC)

In its general comment no. 15 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."⁵²

Bullying, harassment and violence faced by trans children often lead to health problems. In order to ensure the childrens' 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 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.⁵³ 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 grounds of discrimination according to Art. 2 CRC include sexual orientation and gender identity.⁵⁴

⁵² CRC/C/GC/15, para 2.

⁵³ CRC/C/GC/15, para 4 and 7.

⁵⁴ CRC/C/GC/15, para 8.

Trans children who are supported in their gender identity and who can live and express themselves accordingly, are not more depressed, and only slightly more likely to be anxious than their cis-gender peers. Moreover, socially transitioned trans children have notably lower rates of internalizing psychopathology in comparison to trans children who do not live in accordance with their gender identity.⁵⁵

3. Conclusion

Excluding children from being taken into account and being heard by 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 self-determination.

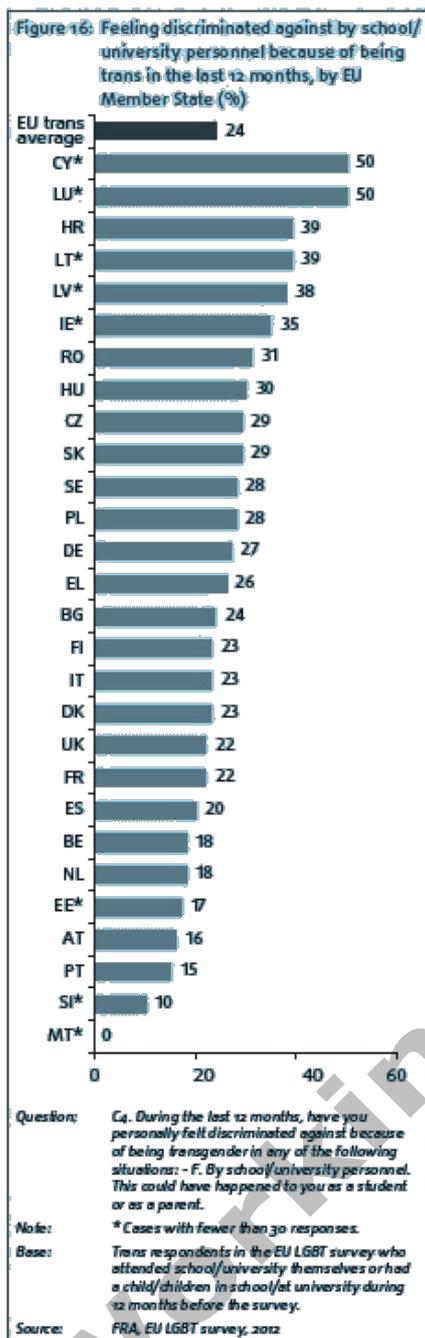
Trans children must be recognised as a vulnerable group that is potentially affected by all actions of a state regarding legal gender recognition. In this context, provisions are mandatory that ensure children are heard and decision-making takes into account impacts on a child's best interests.

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 schools – by teachers as well as by

⁵⁵ Olson / Durwood / DeMeules 2016



their classmates.⁵⁶ A third (29 %) of trans respondents attending school felt discriminated against by school personnel in the 12 months preceding the EU-wide survey.⁵⁷ Teachers themselves are often little informed on gender identity. Kindergartens and schools often refuse to respect the child's identity and deny access to (gendered) facilities that would match their gender identity and allow participation at single sex/gender-activities only on the basis of the legally registered gender. Education authorities might refuse to issue diplomas on the socially used name. A mismatch between school leaving certificate and how a child or young person presents themselves can negatively impact further education and employment opportunities. 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). As a consequence, many reduce their liquidity intake, or "hold it in" to avoid going to the bath-

⁵⁶ Schneider 2013: 19

⁵⁷ FRA 2014: 4

room in school. This can have severe effects on their physical health, but also on their ability to concentrate and focus on their education.

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.⁵⁸

"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%. Decision given by a court. 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)⁵⁹*

There is a lack of making a mention about gender identity and gender expression in the curricula and in the classrooms. If children receive information trans identities are often presented as deficient, a norm deviation in the binary gender-system. For example, when Polish Max was in the second grade junior high school in 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

⁵⁸ Trakine 2016

⁵⁹ Trakine 2016

discuss the theme for nearly 45 minutes until he could not stand it any longer and cried out.⁶⁰

As a result of direct and indirect discrimination there are high rates of absenteeism and drop-outs in schools⁶¹ 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

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 including educational institutions and informal educational contexts.⁶² Reading Art. 28 para. 1 CRC with the

⁶⁰ Raczyńska 2015

⁶¹ Schneider 2013: 20

⁶² 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>

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 [...]”⁶³. 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”⁶⁴.

Violence in schools, exclusion and stigmatization keep trans children off schools. 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*”.⁶⁵ 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, changes in schoolbook and other teaching material contents and in school curricula, resource re-allocations and a broad variety of complementary inclusive educational measures.

[URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html](http://www.unesco.org/eri/la/convention.asp?KO=12949&language=E&order=alpha); For status of ratification see: <http://www.unesco.org/eri/la/convention.asp?KO=12949&language=E&order=alpha>.

⁶³ Verheyde 2006: 39

⁶⁴ HRC/GC/1989/18 paras. 26-27; paras. 7-8, 13

⁶⁵ Art. 28 para. 1 lit. e

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

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

Article 28 para 2 and Article 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 mental violence like bullying and harassment⁶⁶. CRC-state-parties have to take repressing and preventing measures to protect children from violence in schools by classmates as well as by other students⁶⁷. There is a glaring protection gap for trans children from violence in schools. 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 skills⁶⁸ as well as the broader development of the personality⁶⁹. 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

⁶⁶ CRC/C/111, 2001 para. 679b

⁶⁷ Schmahl 2013: 238

⁶⁸ 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).

⁶⁹ Ibid.

and mental and physical abilities to 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 identity⁷⁰ and specifically demands “facilitating the 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.⁷¹

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 great need of 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 clear instructions that respect for the gender identity of a student and prevention of transphobic violence is part of their duty. These tasks require adequate policies supported by resources for comprehensive and extensive training of teachers as well as administrators.

⁷⁰ Committee of Ministers 2010 para 31

⁷¹ See Explanatory Memorandum to Rec Com 2010(5), p. 18

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 enabling trans children to learn in a safe and respectful environment. They also have to actively end any further discrimination by state actions or omission.

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 the 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 for a potential conflict with the best interest 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 schools, administration and professionals 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. Amendment of educational documents, certificates, diplomas etc. reflecting a child's gender identity irrespective of medical diagnosis or legal gender recognition status, also retroactively;
6. Non-discrimination frameworks 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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