

OPINION 27

**Opinion regarding
gender diversity**

Published by the National Ethics Commission (C.N.E.)

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July 2017

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1. Introduction

To this day, the view on sex and gender is limited to « female » and « male ». This binary conception however, does not reflect the existing diversity and is based on normative stereotypes about « what is a woman or a man ». This leads us to question the omnipresence of the binary classifications of sex and gender.

Indeed, the differences between women and men are fluctuating, whether it is at the level of the body, the feelings, the behaviours or sexual desires and therefore make this categorization obsolete. Moreover, any difference in age, social status, environment or ethnic origin, which contributes, among other things, to the construction of a personal identity, lead to a conception of identity that is evolving throughout the entire life and is therefore in opposition with a rigid definition thereof.

Hence, « *transgender* » and « *intersex* » should not be considered as additional genders nor as a third or fourth gender.¹ Indeed, a non-binary approach of gender makes it possible to consider diversity as an entity. Just as « the » woman or « the » man does not exist, no person is completely transgender or intersex. It is quite possible to have more similarities between a woman called « *trans* » and a « *man* » than a « *trans* » women from a different cultural background or of a different age.

Moreover, a binary conception risks putting the so-called intersex or transgender people in particularly vulnerable situations and contributes to the violation of their fundamental rights. Violations of the rights of intersex persons can lead as far as the mutilation of their body through so-called “normalization” surgeries that are made without their consent, especially when such interventions are performed at an early age. These children are deprived of their physical integrity as well as of their right to develop their gender identity. Intersex children who have not undergone a process of « normalization » risk being confronted with social discriminations and administrative obstacles since, until now, there is no administrative and social space for them. As for transgender people, beyond multiple social and administrative discriminations, they frequently don't have access to the physical changes they would wish

¹ The expression intersex is privileged over the term intersexuality, which can be too easily associated with sexual orientation. This expression includes the variations of the development of the body in the course of life.

for. Any desire for a change or adaptation of gender, which can appear at any moment of life, until now appears to be more of an obstacle course.

2. Ethical considerations

In a first place, let's recall the principles of bioethics (*Principles of Biomedical Ethics*) initially determined in 1979 by Tom Beauchamp and James Childress, that appear to be appropriate to illustrate the ethical issues related to transgender and intersex people:

- respect of autonomy,
- non-maleficence,
- beneficence and
- justice.

Although there is no hierarchy among the principles of bioethics, autonomy is clearly the guiding principle and simultaneously the key value of bioethics.

Respecting the autonomy of a person presupposes that such person is in a position to be able to choose and act autonomously, without being subject to a moral judgment with regard to their choice or action. This choice lies with the individual and is expressed by such individual's informed consent. The autonomy to be able to express one's gender is paramount for the identity of a person and should be an essential value in our society.

In the case of transgender and intersex persons, respect of autonomy implies that adult individuals should have the freedom to decide about their gender and their gender identity.

In the case of minors (or legally incapable adults) important decisions are taken by their parents or legal representatives in compliance with the fundamental principle of the best interest of the child and ensuring that the child, depending on the child's age and maturity, has the possibility to take an active part in these decisions.

It is however necessary to take into account that the parent's autonomy and ability to take informed decisions may be compromised in conditions of stress or distress. Thus, even in the presence of a multidisciplinary team, there is a risk that under the effects of an overabundance of information, parents are led to make a hasty decision, for instance in case of a surgery (sexual assignment). On the other hand, the parent's decision for or against surgery or hormone treatment could also be influenced by their preference for a boy or a girl.

We are therefor in the presence of two types of autonomy expressing themselves at two different times: one at the time of birth, the other when the individual's autonomy is sufficiently developed and allows such individual to make an informed choice as to which gender they will decide to adopt.

However, the preferences of intersex children can only be acknowledged after crucial decisions have already been made and this even before such children develop their own autonomy. A posteriori, this choice may prove wrong and incompatible with the gender identity of the adult autonomous person and it is difficult to predict with certainty how the children will react when they begin to wonder about their gender.

The *principles of non-maleficence and beneficence* apply above all to doctors, paramedics etc. As traditional and universal principles, they figure among the basic principles of medical ethics with the aim to respect and protect the physical and mental integrity of people.

Non-maleficence, « primum non nocere » implies to not cause pain in the present and in the future. For parents this means that they will have to try and prevent that the decisions they make will harm the child in the immediate or distant future.

Beneficence implies that any action, such as the surgery for sexual assignment, is beneficial while ensuring that the best result is achieved given the benefit-risk ratio. However, it could be better for the child to refrain from an intervention, as it would allow the child to eventually choose their identity. Thus, the principle of beneficence may, under certain conditions, be in conflict with the principle of autonomy of the person.

Finally, the principle of justice analyses who is entitled to have a specific treatment and how to provide care in an equitable way, taking into account limited medical and financial resources. Regarding transgender and intersex persons, the principle of justice relates more particularly to covering the costs of hormone / surgical treatment and the (non)-reimbursement of specific treatments by social security systems. This issue has to be discussed in light of the individual (harassment, discrimination, suicide etc.) and social price (since the individual is part of society) in connection with purely financial costs.

3. Considerations from prenatal stage to adult age

3.1. Prenatal and neonatal diagnosis

Intersex diagnosis is often made at the time of birth especially because of the ambiguous appearance of the external genitalia although recently prenatal screening has allowed for a more detailed examination of the genital organs in utero by means of an ultrasound examination and a karyotype (sex chromosome screening).

But intersex diagnosis may also occur only during puberty or even at a later stage in life.

Long time called disorder of sex development, these terms are increasingly replaced by the less controversial expression of differences of sex development (DSD) to avoid, to the extent possible, any negative connotation since the majority of intersex people are not considering their condition as abnormal and pathological.

However, many organizations including the World Health Organization (WHO), the International Classification of Diseases (ICD), the American Psychologists Association (APA) and the Diagnostic and Statistical Manual of Mental Disorders (DSM) continue to classify intersex among pathologies.

Prevalence of intersex cases varies considerably according to sources and the classification of the different variations. According to some authors, one newborn out of 4500 is likely to present a genital « anomaly » (Hughes et al. 2006). Others estimate the incidence to range between 1:3000 and 1:5000 (Bosinski 2005).

One of the most well known causes of DSD is congenital adrenal hyperplasia (or adrenal-genital syndrome, AGS). Treatment from birth supplies the missing hormones and slows down the production of those hormones that are produced in excess. Other etiologists include hypoandrogenism and gonadal dysgenesis.

In Luxembourg routine screening for congenital adrenal hyperplasia with the newborn is performed since 2011.

3.1.1. Parental and social expectations

Most often the birth of a child is a very hopeful event for parents. They have frequently imagined what their child will be like and have developed a preference for a girl or a boy, which is also generally the first question asked by their surrounding. This clearly shows the predominance of binary classification in our society.

The revelation following a prenatal or neonatal diagnosis that the newborn will not correspond to the expectations of the parents is most often felt as a shock, likely to plunge them in the greatest dismay. After having idealized their future relationship with the child, confrontation with the reality of an ambiguous or atypical gender of their child may exceed their ability to imagine their future as well as that of the child, which implies that parents may be easily tempted to yield under social pressure and accept gender assignment surgery in the hope of improving the future psychological well-being of the child. Most of the time, « atypical » gender has no consequences from a medical point of view and the surgical procedure is only based on social adaptation. Furthermore, any intervention on the newborn is made without the consent of the main party involved and is in fact a mutilation of the child's body with often dramatic consequences as in some cases permanent exclusion or, even worse, suicide.

However some interventions may be necessary from a medical point of view because of life-threatening circumstances (as for instance the risk of developing tumours or adrenal insufficiency).

3.2. Childhood

Social construction of gender starts at birth. For the newborn, the gender assigned at birth becomes a judicial and social fact accompanying the individual throughout their entire life.

During childhood development through adolescence and into adulthood, society referring to the established binary model, tends to expect from the individual « normal » behaviours for the gender assigned to them. As a result, all individuals not entering into this pre-established binary standard have to face important difficulties in order to assert their fundamental rights.

Transgender/intersex people can be subject to medical and surgical treatment since their

young age. These practices, documented since the 1920s, have since been widely questioned. Despite this, surgical procedures remain a common practice.

These invasive treatments, most often without medical necessity, are performed to match the physical appearance with the gender assigned at birth. They are often carried out during infancy obviously in the absence of the prior and fully informed consent of the directly involved individual, the best interest of the child being subordinated to social expectations. Often easy to be influenced and scarcely informed parents tend to follow the advice of the attending physician without necessarily thinking about the consequences of such interventions on the child's well-being. People who have undergone such interventions often feel mutilated. Psychological distress due to the negative consequences of a surgery should not be underestimated and can lead to self-harming and suicidal behaviours.

The United Nations Inter-Agency Declaration on Sterilization² adopted in 2014 refers to violations of the physical integrity of transgender/intersex persons and as such constitutes a fundamental step towards approaches combining medicine and human rights.

Juan E. Méndez, the UN special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment condemned these interventions performed on intersex persons, which he assimilates to a form of torture³.

Gender assignments also take place through verbal and non-verbal interactions with parents, siblings, friends, neighbours, medical professionals, counselling workers as well as gender specific toys and picture books.

There is no space in society for children who are not considered (or do not want to be considered) either as girls or as boys. This also applies to children who are not identifying with the gender assigned to them at birth.

For children the first contact with society in the broader sense takes place through childcare structures or other socio-educational structures as for instance nurseries. Care and

² Eliminating forced coercive and otherwise involuntary sterilization: an interagency statement, 2014.

³ Report of the special rapporteur on torture and other cruel, inhuman or degrading punishments or treatments, articles 77 and 78, United Nations, General Assembly, Human Rights Council, 2013.

supervision practices of children are impregnated by the binary conception. Games and teaching material are most often based on traditional gender stereotypes confining boys and girls to different roles.

Educational staff is not necessarily equipped to adopt best practices with regard to diversity. During their training, future teachers are hardly familiarized with the subject of gender diversity. Educational concepts and programs give little importance to the reality of this diversity. Frequently also, parents lack science-based information about gender diversity and are often clueless if their child does not identify with the assigned gender.

People working in the psycho-socio-educational sector but also lawyers, doctors and health professionals as well as political decision makers have no knowledge or training on gender diversity.

3.3. Adolescence

The development of sexual maturity is a particular element of adolescence. Again, regarding transgender/intersex children, different types of interventions take place without necessarily their consent. This ranges from hormone treatments to more invasive procedures to have the person fit into the mould of the gender assigned at birth. For transgender children, problems are related to discriminations imposed by society. If they decide to show different traits from those considered « normal » and attributed to their assigned gender, they are often victims of physical and psychological harassment. If on the contrary, they decide to « hide », they are condemned to live in silence and will find it difficult to fully develop their identity.

Questions about the appropriateness of hormone treatment of the adolescent preventing the development of the sexual characteristics of the rejected gender (breasts, pilosities, voice) or the administration of hormones to build the desired sexual characteristics must be solved.

As of what moment should hormone treatment and/or gender assignment surgery be authorized or recommended in order to respect the right of the adolescent to decide on their morphological gender re-assignment while taking into account the interest and the discernment abilities of the adolescent?

3.4. Adult age

The complexity of gender assignment persists throughout adulthood.

Indeed, the lack of recognition of diversity in terms of gender identity is particularly apparent when allocating a civil status and in relation with social coverage in the workplace to mention only these examples.

The right to privacy is a fundamental right protecting individuals from any interference in their private life, which should enable those people to not be forced to disclose their gender identity.

The fact that society does not allow intersex and transgender people to claim a gender identity different from the one assigned to them at birth nor to adapt their civil status to the gender identity of their choice, is in contradiction with their right to self-determination and personal development.

This opposition of law texts prevents the use of a series of other civil and social rights, such as the right to identity, the right to education, the right to work, the right to physical, mental, sexual and reproductive health (Citizen's right) etc. Indeed, a certain number of international standards determine the principle of non-discrimination based on gender but there is no specific binding provision to warrant the protection of intersex and transgender persons. Finally, transgender or intersex persons, for fear of being stigmatized or excluded by society, are likely to live in a state of withdrawal, thus de facto restricting their social and cultural life.

4. Legal situation (laws, bills of law, proposals, administrative and legislative procedures)

4.1. General comments

Courts have to deal with the difficulties of transgender/intersex people when they are applying for the rectification of a civil status record, which application can be submitted by these peoples.

Thus the District Court of and in Luxembourg has ruled that « transsexualism is characterized by the firm believe of a person of a well-determined gender to belong to the opposite gender, the psychological component being in total contradiction with the other components of physical type used for assigning the gender at birth. »

Jurisprudence must therefore « be creative » given the absence of specific law texts and even if « transsexualism is a phenomenon recognized by Luxembourg jurisprudence », in lack of specific legal provisions on transgender and intersex, Luxembourg courts must rely on the general principles of civil law and the law of Luxembourg citizens, frequently drawing inspiration from Belgian and French case law and doctrine to solve these issues.

Hence, to be able to rectify the gender in the civil state record, jurisprudence requires medical and psychological treatment from transgender people. For the changes of first name(s) in the civil state records transgender people must follow the usual judicial procedure provided for any name change.

Currently intersex situations are not addressed at all by Luxembourg jurisprudence unlike in France, where on August 20, 2015 the Tribunal de Grande Instance of Tours took a decision ruling that failing to « assign in the present case the person to one or the other gender and acknowledge that the indication on their birth certificate is simply erroneous », it is appropriate to order « the replacement in their birth certificate of the indication "male" with the indication "neutral", which may be defined as belonging to neither the male nor the female gender and is preferable to "intersex" which leads to a categorization that should be avoided (as the issue is not to recognize a new gender) and which appears to be more stigmatizing ».

4.2. Legal framework

Currently no law text specifically provides for transgender/intersex persons but the texts embody the binary principle, both at the level of the Constitution and at the level of the other legal provisions.

Thus the principle of equality of everyone before the law, of individual freedom, of gender equality is guaranteed but the requirement of gender assignment at birth leads to the absolute consecration of the binary system.

If the Civil Code provides for the rectification of the civil status by way of a judicial decision, it is only possible to record either a male or female gender. Also marriage is only possible between two people of the same or of a different gender.

A rectification of the civil status by the State prosecutor is only possible in case of material errors or omission.

Labour law provides for « the prohibition of treating women less favourably than men or vice versa », hence, for gender equality and the prohibition of any form of discrimination.

Discriminations based on non-discrimination criteria are referred to as direct discriminations and are defined as « situations where one person is treated in a less favourable way than another person is, was or would be treated in a comparable situation on the basis of one of the criteria set out below. »

This non-discrimination criteria include the one of « gender ».

« Any distinction based on the fact that an individual is a man or a woman and wants to change gender is therefore prohibited. » « The prohibition to discriminate a person because of their gender is based on the principle of equality between women and men. » This prohibition also includes « the prohibition to discriminate a person because of a change of gender. » Thus, the employer is obliged, for instance, to respect the choice of the transgender person to change their civil status.

Therefore the principle of non-discrimination does not only apply between men and women but also to « any transition from one state to the other » and « gender equality implies the non-discrimination because of a change of gender. » This was confirmed already in 1996 by a EU case law.

4.3. Change of gender and/or name

1. Change of first name

Any adult person of Luxembourg nationality who wishes to change their name or first name may submit, either in person or through a lawyer, a written and motivated request to the Minister of Justice enclosing a certified copy of their birth certificate. This request must provide for relevant and sufficiently serious reasons justifying the request to change their name or first name.

In the case of a minor, the person must also have Luxembourg nationality and the parents have to submit a request signed by them to the Ministry of Justice together with a certified copy of the child's birth certificate. If one of the parents has custody of the child, the other parent's opinion must also be submitted together with the request.

Within the frame of an application to change the first name because of a change of gender, the applicant must submit their request to the Minister of Justice together with a certified copy of the birth certificate, with the indication of the change of gender recorded in the margin thereof. Prior to the decision the Ministry of Justice must seek the opinion of the Prosecutor's offices and the opinion of the State Council.

If the name change is authorized, a copy of the Grand-Ducal decree is issued to the applicant against the payment of a registration fee. The decision will be published in the Official Journal (Mémorial) and the authorization to change name enters into force after a period of 3 months as of the date of the publication in the Official Journal provided no objection was filed with the Ministry.

Subsequently the applicant must request the competent civil state officer, submitting the non-opposition certificate and a copy of the Grand Ducal decree, to record the new name in the

margin of the birth certificate. In case of refusal, a copy of the Grand-Ducal decree is sent to the applicant who may lodge an appeal through a lawyer before the Administrative Court within 3 months after the notification.

A request to change the first name submitted to the administrative authority could in principle be based on the applicant's conviction to belong to the opposite gender, a feeling that could constitute a legitimate interest within the meaning of the law of 11 and 21 Germinal, Year XI on first names, as amended by the law of 18 March 1982, but so far no such request has been successful in the courts. Based on available information several applications were accepted by the Ministry if the change of name related to a neutral first name.

2. Change of gender

In order to be able to authorize the change of gender in the civil state record, judges must rule that the specific case submitted to them, is an actual case of « transsexualism ».

For this « transsexualism » to be considered as actual, jurisprudence traditionally holds that it is necessary among others « that the mutation appearing in the individual results from a determinism that is beyond such individual's free will, so that the latter can no longer, personally and socially, accept their physiological gender » and that « the request of the actual transgender person aims at the recognition of this discrepancy and its legal consideration ».

In practice the judge therefore requires that the diagnosis of « transsexualism » be formally confirmed by medical experts. This diagnosis must relate to the physical transformation based on hormone treatments, sterilization and surgical procedures (bilateral mastectomy, total hysterectomy) and on the psychology of the relevant person, which is generally documented by a psychiatrist. If all these elements are met, the courts rule that it is an « actual case of transsexualism » and that the « request is admitted. »

A recent case law seems to mark a turnaround in this matter. The District Court of Luxembourg held on June 1, 2016 that « in view of international developments encouraging the States to abolish sterilization and the principles laid down in article 8 of the European Convention on Human Rights, the court considers that the principle of irreversibility of

gender transformation through an gender re-assignment surgery leading to sterilization cannot be maintained» and that « irreversibility therefore may only relate to the transformation of the appearance of the person (...) ». (T.A. n°173/2016)

4.4. Foreign jurisprudences

4.4.1. Decision of the French Cour de cassation

On May 4, 2017 the French Cour de cassation refused the indication « neutral gender » as the civil status of an intersex person. In 2015 the applicant had requested a family judge to replace the reference « male » with « neutral ». The request was admitted and then rejected on appeal for the first time in 2016.

The Cour de cassation stated that « the duality of gender indications in civil state records pursues a legitimate aim in that it is necessary for social and legal organization of which it constitutes a founding element » and that « the recognition by the judge of a « neutral gender » would have important repercussions on the rules of French law and would imply numerous coordinating legislative changes ». The applicant announced to go before the European Court of Human Rights.

4.4.2. Decision of the European Court of Human Rights (ECHR)

The European Court of Human Rights sentenced France in April 2017 for forcing transgender people to undergo sterilizing surgery in order to be allowed to change their gender in the civil state records. The ECHR was seized by three applicants of French nationality whose applications had been joined.

The ECHR held more specifically that « subjecting the recognition of the gender identity of transgender persons to the performance of a sterilizing surgery or treatment – or very likely to have this type of result – that such persons do not want to undergo, results in subjecting the full exercise of their rights with regard to the respect of their privacy as provided under article 8 of the Convention to waiving the full exercise of the rights with regard to the respect of their physical integrity, guaranteed not only by this provision but also by article 3 of the Convention».

5. Recommendations

Based on the above observations, the C.N.E. has developed the following recommendations:

- A. The C.N.E. recommends to the legislator to abolish gender identification markers in civil state records and identity documents. Law texts should be adapted accordingly and binary restrictions should be deleted.
- B. Gender diversity needs to be included in the Constitution : All genders are equal before the law. Gender diversity must be considered as normal independently of their social representation.
- C. The legislator must ensure that invasive surgical procedures, performed without the informed consent of the interested person, are banned and are considered as an attack on the physical and mental integrity of such persons.
- D. All legislative initiatives must be guided, in a transversal manner, by the absolute respect of the principles of equality of everyone before the law and of non-discrimination. Therefore, the legislator must identify and anticipate the various possibilities of discriminatory treatments of transgender/intersex people throughout their respective live cycles.
- E. Every pedagogical initiative and training of socio-educational, medical, administrative, legal, legislative and executive staff must aim at the acceptance of gender diversity. These measures must promote the fight against taboos regarding people and groups of people that were until now marginalized. Protected environments allowing them to freely express themselves must be created as transitional solution.
- F. The C.N.E. recommends creating places in day-cares, nurseries, kindergartens etc. that meet the requirements of gender diversity (restrooms, cloakrooms...) as well as diversifying pedagogical offers and tools. The C.N.E. recommends creating consulting offices to answer questions of minors and adults as well as of their friends and families.
- G. Socio-cultural as well as sports, leisure and professional structures must be able to integrate minors and adults in all their diversity.
- H. The C.N.E. recommends promoting research on transgender and intersex issues with an interdisciplinary approach in various fields such as medicine, law, economics,

statistics, health, education, philosophy, equal opportunities, human rights.

- I. The bill of law N° 7146 on the modification of the gender indication and first name(s) at the level of the civil status amending the Civil code that was filed is an important element providing a solution to specific situations in a binary system. The gender diversity supported by the present opinion should be taken into account.

6. Appendices

6.1. The Luxembourg Constitution

Art. 10bis. (1) All Luxembourg citizens are equal before the law.

...

Art. 11. (Revision of 29 March 2007)

«(1) The State guarantees the natural rights of the human person and of the family.»

(Revision of 13 July 2006)

«(2) Women and men are equal in rights and duties. The State sees to actively promote the elimination of impediments, which may exist in matters of equality between women and men.» (Revision of 29 March 2007)

«(3) The State guarantees the protection of private life, save the exceptions established by the law.

(4) The law guarantees the right to work and the States sees that each citizen is assured to exercise this right. The law guarantees union freedom and organizes the right to strike.

(5) The law governs social security as to its principles as well as the protection of health, the rights of workers, the fight against poverty and social integration of citizens suffering from a handicap.

...

Art. 12. Individual freedom is guaranteed. – No one may be prosecuted except in the cases specified by law and in the forms prescribed by law. – No one may be arrested or detained except in the cases specified by law and in the forms prescribed by law. – Except in cases of flagrante delicto no one may be arrested if not on the basis of a motivated order of the judge, which must be served at the moment of the arrest or at the latest within twenty-four hours. – Every person must be informed immediately of the means of legal recourse at their disposal to regain their freedom. »

The Luxembourg Constitution is thus clearly based on a binary system distinguishing between women and men.

Article 11 (2) of the Luxembourg Constitution states the principle of gender equality. This principle of equality is a fundamental principle guaranteed by numerous national, European and international texts.

6.2. The Luxembourg Civil code

Art. 57. (L. 4 July 2014) The birth certificate provides the day, time and place of birth, the gender of the child, the name and first name given to the child, the first name, name, gender and domicile of the parents as well as their place and date of birth if it is known. (L. 4 July 2014). The parents choose the first names of the child. The civil state officer may not record first names in the birth certificate that could harm the interest of the child or of third parties.

...

Art. 76. (L. 4 July 2014) Are provided in the marriage certificate: Ministry of Justice of the Grand Duchy of Luxembourg 1) the first name, name, gender, place and date of birth and domicile of the spouses; 2) the first name, name, gender and domicile of the parents; 3) the consent of the parents, that of the family council, that of the ad hoc guardian and, if applicable, that of the guardianship judge in the cases were required; 4) the first name and name of the previous spouse of each of the spouses; 5) the publications at the various domiciles; 6) the declaration of the spouses to take each other as spouse and the declaration of their union by the public officer.

Art. 99. (L. 16 May 1975) When the rectification of the civil state record is requested, it will be ruled, except appeal, by the competent court and upon conclusions of the State prosecutor. If necessary the interested parties will be summoned before court. The State prosecutor may proceed to the rectification of purely material errors and omissions in civil state records. For this purpose the State prosecutor shall provide the necessary instructions directly to the registries.

Art. 100. The rectification judgment may not, at any time, be subject to opposition by the interested parties who have not requested it or were not summoned.

Art. 101. (L. 16 May 1975) The ruling of the rectification judgments will be recorded in the registries by the civil state officer immediately after reception and shall be mentioned in the margin of the amended record.

The ruling of the rectification judgments is transmitted immediately by the State prosecutor to the civil state officer of the place where the amended record is kept; the decision is mentioned in the margin of the birth certificate and if applicable in the margin of the marriage certificate of the interested party and in the civil state records of their legitimate minor descendants. Copies of the record may only be issued with the ordered amendment, subject to a fine as provided by article 50 of the Criminal code and any claims for damages against the registries.

...

Art. 143. (L. 4 July 2014) Two persons of the same gender or different gender may contract marriage. In case of marriage of two people of the same gender, article 312 shall not apply.

The Luxembourg Civil code also provides for a binary system, requiring the declaration of gender at birth and in the marriage certificate. Marriage is possible for two persons of different or of the same gender, reflecting the binary system man - woman.

Only article 99 of the Civil code provides for the change of the civil status upon a request lodged with the competent court, as the State prosecutor is only competent for rectifying purely material errors or omissions.

6.3. The Labour code

Neither the Luxembourg Labour code nor Luxembourg jurisprudence include the general principle of equality.

Indeed, any distinction made by the employer that is felt as unfair by the employee, is not automatically considered as discrimination.

According to Luxembourg law « employers remain free to base their choices and decisions on own criteria with the exception of the non-discrimination criteria. Employees who are adversely affected by these choices have no means to act ».

« However the rules of non-discrimination bind the employer in the exercise of all the employer's prerogatives. »

If the employer resorts to one of the « non-discrimination criteria » that are listed exhaustively by the law in articles L. 241-1 (2) and L. 251-1 (2), the unfavourable treatment must be directly or indirectly linked to these criteria for there to be discrimination.

6.4. Jurisprudence

In a first judgment of February 19, 1979 the District Court of Luxembourg, in order to reject the request for the change of gender of an alleged transgender person ruled that K. did not provide proof that since his birth he had physical characteristics of a woman or even transgender tendencies and that, therefore the indication of his gender in his birth certificate resulted from a mistake. On the other hand, the same court, by a later judgment of May 25, 1988 involving the same applicant, admitted his request after a medical expertise ordered in this case, ruling that as of the present sentence, K. should be declared as of “female gender”

and that, hence in his birth certificate the word « male » will be replaced by the word « female ».

In 2009⁴, the District Court of and in Luxembourg ruled that « *the mutation appearing in the individual results from a determinism that is beyond such individual's free will, so that the latter can no longer, personally and socially, accept their physiological gender* » and that « *the request of the actual transgender person aims at the recognition of this discrepancy and its legal consideration.* »

Due to hormone treatment followed over several years and the mastectomy performed in 2009, Mrs T. no longer has the characteristics of her original gender and has taken on a physical appearance similar to the male gender to which also corresponds her social behaviour. According to her doctors, the applicant is determined to undergo surgical procedures irreversibly changing her morphological gender identity.

It appears from the medical reports and certificates submitted in this case that since several years now the physical appearance, the mental state and the behaviour of Mrs T. are no longer those of a person of female gender but correspond to the male gender she is requesting. The doctors recommend, after the hormone treatment and the mastectomy performed in March 2009, to proceed with the surgical procedure at the level of the genitals (phalloplasty). The fact that Mrs T. is presenting the transsexual syndrome and does no longer have the appearance of the female gender but has taken a physical appearance closer to the male gender, to which correspond her social behaviour, her determination to change gender and her psychological suffering linked to the discrepancy between her appearance, her social and intellectual behaviour and her civil status, justify that the civil status of the applicant will as of now mention the male gender. In the light of all these considerations, the request of Mrs T. shall be admitted and the modification of the indication of her gender in her birth certificate shall be ordered. »⁵

⁴ TA Lux 3009/2009 n°188/2009 (rectification of a civil state record)

⁵ Discrimination au travail, Jean-Luc PUTZ, Guide Pratique, Editions Promoculture 2010, page 155.

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