

# Using the Convention on the Rights of the Child to Project the Rights of Transgender Children and Adolescents: the Context of Education and Transition

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## Abstract

Transgender children and youth suffer from discrimination and their rights to health and education are often not protected. Argentina and Malta are the only countries who have passed gender identity legislation taking into account the best interest of children, and these path breaking examples are analysed here. This article, however, argues that the legislation in these two countries does not go far enough, and that the provisions of the United Nations Convention on the Rights of the Child should be used to protect transgender children, and analyses how these provisions should be interpreted and enshrined in any future legislation. States should create gender identity laws and give children a voice in this matter.

## Keywords

Transgender Children – Transgender Adolescents – Gender Identity Legislation - Best Interest of the Child – Right to Education – Right to Health – Convention on the Rights of the Child – Argentina – Malta.

## 1. Introduction

This paper aims to raise awareness about the obligation of states to create legislation allowing children and adolescents to self-determine their gender identity and ensure, *inter alia*, that their rights under the Convention on the Rights of the Child (CRC) to education (Article 28), health (Article 24), identity (Article 8), protection against discrimination (Article 2), adequate standard of living and ultimately their right to life, survival and development (Article 6) are protected. The paper will focus on two chief concerns regarding the development of children and adolescents, namely, education and transition.<sup>1</sup> Accordingly, the paper will focus on Articles 2, 6, 8, 24 and 28 CRC to

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<sup>1</sup> Regarding definitions used in this paper: Transition refers in this paper to medical transition. According to article 1 of the Convention on the Rights of the Child 'a child means every human being below the

question how the best interests of the child, should be determined in deciding whether to allow children and adolescents to change gender identity. At the same time, this paper will address the age and maturity questions arising from Article 12 CRC, to assess when children and adolescents should be allowed to self-determine their gender identity without any restrictions. The Argentinian and Maltese legislation will serve as examples to illustrate how laws protecting the rights of transgender children and adolescents can be drafted to be in accordance with the rights enshrined in the CRC.

Recognising the fluidity of gender identity means acknowledging that every person has the right to choose their gender and consequently rely on documentation that permits them to identify with this choice. Most countries, however, lack legislation recognising the rights of transgender people and especially transgender children. This incongruence between reality and law may lead to inequality and discrimination against gender variant individuals, as well as to the impossibility of enforcing justice. To give only a few examples, in Chile, transgender children and adolescents receive little protection from the government. At the moment, there is no law allowing children to change their legal gender and no state programs to guarantee their human rights, including access to proper health care.<sup>2</sup> According to different studies, Chile has the highest rate of reported homophobic bullying targeting LGBTI students in Latin America<sup>3</sup> and is the second country, after South Korea, with the fastest growing rate of suicides among children.<sup>4</sup> Accordingly, more than 70% of the Chilean transgender population have not enrolled into higher education due to bullying, violence or social exclusion at school.<sup>5</sup> The Chilean government seems reluctant to change this as the current Anti-Discrimination Law allows exceptions from discrimination based on gender identity as long as these are justified by other rights, such as freedom of conscience and religion, and freedom of teaching and good morals.<sup>6</sup> In Lithuania the situation faced by transgender people is similar. Despite the fact that Lithuania lost the case of *L. v. Lithuania*<sup>7</sup> before the European Court of Human Rights (ECtHR), the

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age of eighteen years unless under the law applicable to the child, majority is attained earlier'. When discussing the different needs of transgender individuals under the age of eighteen (18) years old it is important to stress that 'children' in this paper refers to every prepubescent person aged between five (5) and twelve (12) years old. Individuals between twelve (12) and eighteen (18) years old are on the other hand referred to as adolescents. Both children and adolescents fall under the umbrella terminology of a 'minor'. This distinction is important not only because children have different needs than adolescents, but also because transgender minors might be subject to different legislation or medical treatments according to their age.

2 United Nations Convention on the Rights of the Child (CRC) 70th Session, 'Violations of the Rights of LGBT Children and Youth in Chile in response to The Combined Fourth and Fifth Periodic Reports of Chile to the UN Committee on the Rights of the Child', (2015) submitted by Fundación Iguales Santiago, Chile MADRE New York, New York The International Women's Human Rights (IWHR) Clinic at the City University of New York (CUNY) School of Law, 6.

3 *ibid.*

4 UNESCO, 'Good Policy and Practice in HIV and Health Education. Booklet 8: Education Sector, Responses to Homophobic Bullying' (2013) 20 <<http://unesdoc.unesco.org/images/0022/002229/222918S.pdf>> accessed 3 March 2017.

5 Pan American Health Organization (PAHO), et al, 'Blueprint for the Provision of Comprehensive Care for Trans Persons and their Communities in the Caribbean and Other Anglophone Countries (John Snow Inc. 2014) 19.

6 United Nations Convention on the Rights of the Child (CRC) 70th Session, (n 2) 6.

7 *L. v. Lithuania*, 46 EHRR 22 (2008); The case concerned an application brought by a Lithuanian transgender person, who was denied legal gender recognition. The applicant maintained that because of this he was unable to apply for a job, pay social security contributions, consult a doctor, communicate with the authorities, obtain a bank loan or cross the state border. The ECtHR found a

state is not hurrying to improve the rights of transgender people. At the moment transgender individuals can change their name only after they have undergone gender reassignment surgery.<sup>8</sup> Since as a fact there are no clinics in Lithuania providing such services and thus most people undergo surgery abroad, resulting in perilous travels back home with little to no post- surgery recovery time.<sup>9</sup>

More vulnerable than other minorities, transgender children and adolescents are faced with a myriad of challenges during the years of their youth and their rights should be on the legislative agenda of every country in the world. The gap in legislation protecting transgender people produces a chain reaction of human rights infringements, which are especially detrimental in the case of transgender minors since individuals are more vulnerable during their youth. Nonetheless, the obligation of states to protect transgender children is evident by looking at the rights enshrined in the CRC, at different legal cases discussing when a child is capable of forming and expressing his or her own views and at legislation already drafted ensuring and protecting the rights of transgender children and adolescents. A good legal example is set out by Argentina's Gender Identity Law<sup>10</sup> (GIL) and Malta's Gender Identity, Gender Expression and Sex Characteristics Act<sup>11</sup> (GIGESC), both countries implementing new gender identity legislation, which takes into account the evolving capacities and the best interest of the child as expressed in the CRC. The importance of legal recognition is also clearly advocated by various non-profit organisations as well as by the European Commission.<sup>12</sup>

## 2. Relevant CRC Provisions in the Context of Education and Transition for Transgender Minors

This paper has identified the following CRC Articles as particularly relevant in the context of education and transition for transgender minors: Articles 2, 3, 6, 12, 24 and 28. These rights are the most relevant in a minors' early development. Moreover the Committee on the Rights of the Child identifies Articles 2, 3, 6 and 12 as the four general principles of the CRC.<sup>13</sup> The following section will briefly interpret and analyse these Articles to give a better understanding of the scope of the CRC and demonstrate why the child's right to gender identity can be included in and protected under the CRC.

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violation of article 8 ECHR.

8 Emily Daina Šaras, 'A Problem, Not a Person - The Situation of Trans Youth in Lithuania', (2011) IGLYO on trans, 17, 18 <<http://www.iglyo.com/resources/iglyo-on-trans-2011/>> accessed 3 March 2017.

9 *ibid.*

10 Ley 26. 743 Identidad de Genero, promulgada Mayo 23 de 2012 translated in English as: Gender Identity Law, passed 23 May 2012 (GIL) <<http://tgeu.org/argentina-gender-identity-law/>> accessed 3 March 2017.

11 Gender Identity, Gender Expression and Sex Characteristics Act Cap. 540 14th April 2015, ACT XI of 2015, as amended by Act XX of 2015 (GIGESC Act) <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>> accessed 3 March 2017.

12 Commissioner for Human Rights, 'Human Rights and Gender Identity Issue Paper' (July 2009) 2, 3.2 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806da753>> accessed 3 March 2017.

13 Ton Liefwaard and Julia Sloth-Nielsen, *The United Nations Convention on the Rights of the Child – Taking Stock after 25 Years and Looking Ahead* (Brill 2017) 233.

### A. Can a 'Right to Gender Identity' be Included in the CRC?

Under Article 2 CRC, states have the duty to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's '(...) race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'. Although gender identity is not specifically mentioned in Article 2 CRC, the states parties left the possible grounds for discrimination partially open-ended through the words 'and other status'.<sup>14</sup> Currently there is no binding international instrument specifically mentioning discrimination against individuals based on their gender identity.<sup>15</sup> The only document identifying gender identity as a ground for discrimination is the non-binding CRC Committee General Comment 15.<sup>16</sup> However, the interpretation of 'and other status' in the light of the *ejusdem generis* doctrine results in assuming that gender identity is included in the protection of Article 2 of the CRC, as it is of 'the same kind' as the other grounds mentioned in the Article. Gender identity can be defined as how a person identifies themselves, regardless whether masculine, feminine, neither or both, or a combination of all the other terms.<sup>17</sup> This interpretation coincides with the aim of the Convention to ensure that states fulfil their obligation of empowering and protecting children and ensuring their healthy development at all times and under all circumstances.<sup>18</sup> This is also supported by the Committee on Economic, Social and Cultural Rights' General Comment (GC20) underlining that the expression 'other status' in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights<sup>19</sup> (ICESCR) paves the way for adding further grounds of discrimination, such as disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation.<sup>20</sup>

Another way of incorporating gender identity in the CRC could be by interpreting Article 8 CRC as including a child's right to their gender identity.<sup>21</sup> Article 8(2) CRC requires that whenever a child is illegally deprived of elements of their identity, the state must provide protection and assistance to speedily re-establish that child's identity. Of course it could be argued that the scope of Article 8 CRC does not include the right to gender identity, because it was first introduced as a result of the horrifying

14 Bruce Abramson, *A Commentary on the United Nations Convention on the Rights of the Child, Article 2 The Right of Non-Discrimination* (Martinus Nijhoff 2008) 27, 28.

15 UNICEF, 'Eliminating Discrimination against Children and Parents based on Sexual Orientation and/or Gender Identity' (2014) Current Issues (9) 3.

16 UN CRC, 'General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' UN Doc CRC/C/GC/15 (17 April 2013) 4.

17 *ibid* 2.

18 Eugeen Verhellen, 'The Convention on the Rights of the Child: Reflections from a historical, social policy and educational perspective' in Wouter Vandenhoele, et al (eds) *Routledge International Handbook of Children's Rights* (Routledge 2015) 50.

19 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

20 UN CESCR, 'General comment No. 20 on Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/GC/20 (July 2009) 27.

21 Ombudsman for Children's Office, 'Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013' (October 2013) <<http://www.oco.ie/wp-content/uploads/2014/03/OCOAdviceonGenderRecognitionBill2013.pdf>> accessed 3 March 2017.

events in Argentina, where children were abducted from their families, being deprived of their true identity and family ties.<sup>22</sup> However, even if the delegations did not have in mind a right to gender identity at that time, including a non-exhaustive reference to the term identity and not underpinning any specific terminology like ‘family identity’ in the law<sup>23</sup> may allow a broader interpretation of the word. Furthermore, refusing to acknowledge gender identity as a ground for protection against any kind of discrimination or abuse may not be in line with the evolving character of today’s society and the purpose of the CRC.<sup>24</sup> The right of children and adolescents to identity does not only comprise the aspects of name, nationality and family origin. Identity is the human right condition of being identified as a separate and unique person. Essentially, identity comprises of the entire personal history of a person from birth until death or even after. As noted by the Inter-American Court of Human Rights:

personal identity is closely related to the person in his or her specific individuality and private life, both supported by a historical and biological experience, and also by the way in which the said individual relates to others, by developing social and family ties. This is why, although identity is not a right that is exclusive to children, it has special importance during childhood.<sup>25</sup>

A broad interpretation of Article 8 CRC not only coincides with the purpose of the CRC, but also with other international documents, which analyse the right to identity and non-discrimination in relation to legal recognition of gender and sexual orientation.<sup>26</sup>

### **B. Provisions of the CRC Particularly Relevant in the Context of Education and Transition for Transgender Minors**

Transgender children and adolescents struggle in everyday life with discrimination, bullying and a lack of legal protection safeguarding their rights. Like other vulnerable groups of people, transgender minors face difficulties especially during their education. Education is a process of continuous learning and formation, vital for the development of humankind. The right to education has been delineated as one of the most important human rights of a child, because it is both a human right itself and an indispensable means of realising other human rights.<sup>27</sup> Denying the right to education or contributing to the reasons behind a child’s decision to drop out of education can curtail significantly a child’s ability to develop their personality, talent and mental and

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22 Jaap Doek, *A Commentary on the United Nations Convention on the Rights of the Child, Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated from His or Her Parents* (Martinus Nijhoff 2006) 7.

23 *ibid* 8.

24 *ibid* 11, 12.

25 *Case of Forneron and daughter vs. Argentina (Merits Reparations and Costs)*, Inter-American Court of Human Rights Series C No 242 (27 April 2012) 123.

26 Organisation of American States, ‘Human Rights, Sexual Orientation and Gender Identity Expression’ (June 2013) AG/RES. 2807 (XLIII-O/13); UNHRC ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ (November 2011) A/HRC/19/41; UN HRC, ‘Human rights, sexual orientation and gender identity’ (July 2011) A/HRC/RES/17/19; Ombudsman for Children’s Office, (n 21) 5.

27 Jason M. Pobjoy, *The Child in International Law* (CUP 2017) 139.

physical abilities to their fullest potential.<sup>28</sup> Article 28 CRC, which ensures the child's right to education, is not the only right in the CRC pertaining to education. Given the holistic nature of the CRC, Article 28 should not only be read together with Article 29 CRC on the aims of education,<sup>29</sup> but also with other Articles of the Convention such as Articles 2, 3, 6, and 12. Article 28 CRC guarantees access to education on the basis of equal opportunity and taken together with Article 2 CRC, state parties are therefore obliged to ensure access to education to all children without any kind of discrimination. Since this paper has established that gender identity should be included under the grounds of non-discrimination in Article 2 CRC, states have an obligation to ensure that transgender children and adolescents receive access to education and do not drop out of school due to discrimination. Moreover, Article 3(1) CRC sets out that:

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.

The best interest principle is one of the most analysed and discussed CRC Articles in academic literature.<sup>30</sup> Determining what is in the best interest of the child is difficult in practice, especially when the subject concerns medical procedures, such as may be the case for transgender minors. However, the use of the word 'shall' in Article 3 CRC reflects the mandatory nature of the obligation, while the term 'consideration' makes clear that the child's interests must be taken into account. The decision maker must also undertake a careful, considerate and informed assessment of the child's best interest.<sup>31</sup> In General Comment 14, the Committee on the Rights of the Child reiterates that 'the best interest principle' as a dynamic threefold concept<sup>32</sup> that requires an assessment appropriate to the specific context and which ensures the holistic development of the child.

Taken together with Article 12 CRC, which in 12(1) recognises the right of children capable of forming views to express those views in all matters affecting them, and directs that due weight be accorded those views, depending on the age and maturity of the child as well as the matter at issue,<sup>33</sup> it is clear that the CRC brings

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<sup>28</sup> *ibid.*

<sup>29</sup> Article 29 CRC recognises that the content of education is as important as the access to education in a child's life.

<sup>30</sup> Mieke Verheyde, *A Commentary on the United Nations Convention on the Rights of the Child, Article 28: The Right to Education* (Martinus Nijhoff 2006) 38.

<sup>31</sup> Pobjoy (n 27) 225.

<sup>32</sup> The Committee underlines that the child's best interests is (1) a substantive right which takes the best interest of the child as primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and guarantees that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for states, is directly applicable and can be invoked before a court; (2) a fundamental, interpretative legal principle which means that when a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen; and (3) a rule of procedure that stipulates that the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. See UN CRC 'General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (May 2013) UN Doc CRC/C/GC/14, para 6.

<sup>33</sup> Article 12(2) provides for the right of the child to be heard directly or indirectly through a

together a procedural link between providing for a child's best interests and participation and progressing or securing other rights of the child set out in the CRC.<sup>34</sup> Thus, participation in decision making should be consistent with a child's best interests while at the same time children's participation in identifying and/or securing their best interests must be secured.<sup>35</sup> In order to assess the best interests of a child, those involved in decision making must fully consider the child's own view on the subject. Such consideration must be kept under constant review and take account of changing circumstances and evolving capacity of the child.

The right to life, development and survival is a fundamental human right and should be regarded as a precondition to the other rights in the Convention, since without life, there cannot exist any meaning. This fact is reinforced by the use of the word 'inherent' in article 6 (1) CRC, which states in 6(1) that 'States Parties recognize that every child has the inherent right to life.' Hence, state parties are obliged not only to respect the life of children, but also to ensure this right with positive measures.<sup>36</sup> The child's inherent right to life is strengthened and amplified through the obligation of states to safeguard the development and survival of the child in CRC Article 6(2).<sup>37</sup> Child's rights are therefore not only concerned with the duty of states not to arbitrarily interfere with the right to life, but also with ensuring societal conditions by which all children can develop to their fullest potential.

Lastly, Article 24 CRC does not ask state parties to ensure the right to health, but the highest attainable standard of health.<sup>38</sup> In this context, health is more than not having an illness; it is the best possible mental or physical condition a person can have. According to the Declaration of Alma-Ata 1978, health is a state of 'complete physical, mental and social wellbeing' that should permit individuals to lead socially and economically productive lives.<sup>39</sup> Many groups of children are overlooked in the development of health-care programmes. One of these groups is transgender children and adolescents. According to the Council of Europe transgender children face obstacles when they try to access trans-specific health-care and support services before they reach the age of majority.<sup>40</sup> Nonetheless, when a state party is

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representative in any administrative or judicial proceeding affecting the child. See UN CRC 'General Comment No. 12 (2009) The right of the child to be heard' (July 2009) UN Doc CRC/C/GC/12, para 5.

34 Jean Zermatten, *The Best Interests of the Child Literal Analysis, Function and Implementation Working Report*, (Institute International des Droits de L'enfant 2010) 2, 7.

35 *ibid.*

36 Manfred Nowak, *A Commentary on the United Nations Convention on the Rights of the Child, Article 6 The Right to Life, Survival and Development* (Martinus Nijhoff 2005) 18.

37 A. Glenn Mower, Jr., *The Convention on the Rights of the Child – International Law Support for Children* (Greenwood Press 1997) 31.

38 In article 24 the CRC recognises 'the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health' and establishes that 'States parties shall strive to ensure that no child is deprived of his or her right of access to such health care services'. The article lists some of the measures to be taken by states parties to ensure the full implementation of the right to health such as measures aimed at: diminishing infant and child mortality; combating disease and malnutrition; ensuring appropriate prenatal and post-natal health care for mothers; developing preventive health care; abolishing traditional practices prejudicial to the health of children; and promoting international cooperation with a view to progressively achieving the full realisation of the right to health. See Asbjørn Eide and Wenche Barth Eide, *A Commentary on the United Nations Convention on the Rights of the Child Article 24 The Right to Health* (Martinus Nijhoff 2006) 15.

39 Declaration of Alma-Ata International Conference on Primary Health Care, Alma-Ata, USSR, (September 1978), I; V.

40 Commissioner for Human Rights of the Council of Europe, 'LGBT children have the right to safety

implementing Article 24 CRC, the state party has to make sure that the four principles of the Convention (non-discrimination, the best interests of the child, the child's right to life, survival and development and the right of the child to express his or her views freely in those matters affecting the child) are also respected.

### 3. Discrimination against Transgender Minors in Education and Consequent Human Rights Abuses

Transgender children and adolescents face severe discrimination in education and are confronted with a series of difficult questions throughout their adolescence. This part of the article asserts that transgender children and adolescents are faced with significant psychological trauma due to the bullying and discrimination they are confronted with in education that in turn can lead to other detrimental repercussions to their mental health. It further argues that international legal principles prohibit this discrimination, and can be used to better protect them during the course of their education.

#### A. *Can CRC Provisions be Protective of Transgender Minors in the Context of Education?*

Under Article 28(e) CRC state parties must take positive measures to encourage regular attendance of children in schools and reduce dropout rates.<sup>41</sup> This applies especially in cases where children drop out of school, because other children or educational staff are discriminating against them.<sup>42</sup> Transgender minors are more likely to drop out of school because of bullying, verbal or physical assaults and discrimination or harassment during their education than other children.<sup>43</sup> Sometimes teachers engage in discriminatory behaviour and neither stop nor prevent abuse against transgender children.<sup>44</sup> As a result, transgender minors and adults may suffer from poor mental and physical health.

In addition to the abuse transgender children and adolescents experience during their education because of bullying, there are also many families who do not accept transgender identities and believe that children should not be allowed to cross-dress or change identities, as this is immoral and/or is inconsistent with their religious views.<sup>45</sup> The question that arises in this case is how does the state balance the rights

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and equality', Human Rights Comment (October 2014) <[http://www.coe.int/hu/web/commissioner/blog/-/asset\\_publisher/xZ32OPEoxOkq/content/lgbti-children-have-the-right-to-safety-and-equality?\\_101\\_INSTANCE\\_xZ32OPEoxOkq\\_languageId=en\\_GB](http://www.coe.int/hu/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/lgbti-children-have-the-right-to-safety-and-equality?_101_INSTANCE_xZ32OPEoxOkq_languageId=en_GB)> accessed 3 March 2017.

41 Verheyde (n 30) 38.

42 *ibid.*

43 WHO, (Technical Brief) 'HIV and Young Transgender People' (2015) WHO/HIV/2015.9, 8; Open Society Foundation, 'License to Be Yourself: Trans Children and Youth' (Open Society Foundation 2015) 3.

44 Council of Europe, 'Combating Discrimination on Grounds of Sexual Orientation or Gender Identity' (June 2011) 53.

45 One example are the catholic families in Malta, who strongly disagree with the GIGESC Act, stating that the law is a 'direct assault on the foundational Christian cultural tenets of Maltese society'. See Hilary White, 'Malta's 'gender identity' bill could see Catholic parents fined, critic warns' LIFESITE (3rd December 2014) <<https://www.lifesitenews.com/news/maltas-gender-identity-bill-could-see->



of transgender children with the rights of parents to educate their children accordingly to their moral beliefs? Traditionally, the right to education was seen through the prism of the parents' right to choose the education of their children.<sup>46</sup> Children did not have a say in what kind of education they preferred and the state had to balance the implementation of legislation in this field with the rights of parents to have their children educated in conformity with their religious and moral convictions.<sup>47</sup> However, this approach changed after the judgment in *Kjeldsen, Busk and Pedersen v. Denmark*,<sup>48</sup> when the ECtHR concluded that the state had the competence to create school education programs even when parents did not agree with them, as long as the information was objective, critical and pluralistic.<sup>49</sup> With this case came also the question of whether children have a right to be educated according to their convictions. The right of children to be educated in accordance with their convictions is linked with the right to freedom of conscience and the combination of the two concepts falls under the umbrella of the right to education.<sup>50</sup> Looking at the scope of the CRC, it is clear that although Article 26(3) CRC gives parents a right to choose the education of their children, Article 12(1) together with Article 28(1) CRC provides children with the right to participate in decisions regarding their education and therefore ensures that the education they receive is in conformity with their moral convictions.<sup>51</sup> This is highly important, because there is a gap in protection for children that grow up in families that do not support their transgender identity. In cases where the parents or legal representatives fail to protect children from human rights abuses, the state and state institutions have a duty to step in and ensure children's fundamental rights are being respected. Without this, transgender children may drop out of school, become victims of prostitution or child labour, be socially excluded, homeless and at a higher risk of developing mental and physical health problems or commit suicide.<sup>52</sup> In General Comment No. 12, the Committee on the rights of the Child urges:

States parties to pay special attention to the right of the girl child to be heard, to receive support, if needed, to voice her view and her view be given due weight, as gender stereotypes and patriarchal values undermine and place severe limitations on girls in the enjoyment of the right set forth in article 12.<sup>53</sup>

If gender stereotypes and patriarchal values undermine the rights of girls, it would be logical that the same reasoning would extend to transgender children as well, because the same gender stereotypes and heteronormative values place 'severe limitations' on their rights as well. Furthermore, although the Convention recognises the role of the family in the education of their children, it also aims at ensuring the well-

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catholic-parents-fined-critic-warns> accessed 10 April 2016; Life Network Endorsing Value to Every Life, 'Submission for the Gender Identity (GIGESC) Consultation by Life Network and Gift of Life Foundation Malta' (28th November 2014) <<http://lifenetwork.eu/index.php/submission-gigesc-consultation-life-network-gift-life-foundation-malta/>> accessed 3 March 2017.

46 Geraldine Van Bueren, *The International Rights of The Child* (Martinus Nijhoff Publishers 1995) 240.

47 *ibid.*

48 *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 para 53.

49 *ibid.*

50 Van Bueren (n 46) 240.

51 *ibid* 243.

52 FRA, 'Being Trans in the European Union Comparative analysis of EU LGBT survey data' (Publication Office of the EU 2014) 21.

53 UN CRC (n 33) para 77.

being and development of the child. Therefore, the state is required to ensure that families act in the best interest of the child and allow the child to exercise its rights, in a manner consistent with the child's evolving capacities.<sup>54</sup>

Consequently, in order for states to protect transgender children and fulfil their legal obligations, these should ensure a holistic approach within the education system, whereby discrimination and physical or verbal abuse against transgender children could be prevented. This approach may include training staff on transgender issues, developing gender-free facilities and promoting gender identity. Sensitising the community to transgender issues should be included in the education curriculum and schools should monitor any form of discrimination against transgender children and adolescents. Some may argue that protecting children entails not revealing information about LGBTI issues in the classroom. Nonetheless, the UN Special Rapporteur on the right to education has underlined in its report that children have a right to comprehensive sexual education without discrimination on grounds of sexual orientation and gender identity and that it is necessary to question stereotypes about gender and sexuality in schools.<sup>55</sup>

In addition, the right of children to receive information concerning sexuality is specifically protected under Article 13 CRC, on the right to freedom of expression.<sup>56</sup> Concerning these aspects, Malta is the only European country that has launched an education policy (in June of 2015) that focuses on gender variant and intersex children.<sup>57</sup> Creating such policies is one of the positive results, which lead to a higher protection for transgender children and adolescents, since Malta passed the Gender Identity, Gender Expression and Sex Characteristics Act (GIGESG)<sup>58</sup>. Some of the main points addressed by the government included confidentiality, adequate facilities, support, inclusive policies and the possibility to amend documentation and access to information.<sup>59</sup> All provisions are meant to be implemented uniformly in all schools, while highlighting the fundamental obligation placed on schools to provide all students with a safe and inclusive educational environment.<sup>60</sup>

Article 28(1) CRC further recognises the right of the child to education on the basis of equal opportunity.<sup>61</sup> UNESCO defines discrimination in education as:

any distinction, exclusion, limitation or preference which being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: (...) of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.<sup>62</sup>

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54 Marta Santos Pais, 'A Human Rights Conceptual Framework' Innocenti essays No.9' (UNICEF 1999) 13.

55 UNGA, 'Report of the United Nations Special Rapporteur on the right to education' (July 2010) UN Doc A/65/162 para 23.

56 See Van Bueren (n 46) 140.

57 ILGA Europe, 'Malta launches inspiring education policy for trans, gender variant and intersex children' (June 2015) <<http://www.ilga-europe.org/resources/news/latest-news/malta-education-policy-june2015>> accessed 3 March 2017.

58 See (n 12).

59 *ibid.*

60 *ibid.*

61 Verheyde (n 30) 38.

62 UNESCO 'Convention against Discrimination in Education' (Paris 14 December 1960), Article 1 (d).

In order to eliminate and prevent discrimination within the meaning provided by this Convention, states undertake to 'abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education (...)'.<sup>63</sup> The Convention against Discrimination in Education was ratified by, among others, Chile, Argentina and Malta (notification of succession).<sup>64</sup> On this basis it may be argued that states should allow transgender children to act in accordance with the gender they identify with. This means allowing children to legally change their gender, to make sure schools accept and identify their needs, to stop discrimination based on gender identity and create bathroom facilities either for both genders or for no gender at all. These regulations will not conflict with other rights in the CRC, because there is no proof that allowing children to change gender identity violates the fundamental rights of others. On the contrary, transgender children who are not allowed to live their true self often face violence and discrimination in schools.

Article 19(1) CRC further amplifies the obligations of state parties to protect children from all sorts of violence, even when the child is in the care of a person other than their parents, including therefore the time the child is at school.<sup>65</sup> Under Article 29(1)(a) CRC state parties agree that the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential. In order for transgender children to develop to their fullest potential, states need to ensure that transgender children are supported in schools and helped through the process of transition, in case they wish to undergo any treatment. This period of time is especially stressful and needs to be properly supervised by caretakers who should be sensitised to transgender issues.

Transgender children fear discrimination and bullying which does not only infringe upon receiving education free from discrimination, but also leads them to avoid any type of services, including health services, based on the anticipation of negative attitudes by health-care providers.<sup>66</sup> Even more concerning is the fact that a high percentage of transgender minors has been diagnosed with HIV.<sup>67</sup> Of all LGBTI people, the transgender subgroup seems more vulnerable, especially children and adolescents. Cases of suicide are not isolated and may be attributed to the neglect and insecurity felt by transgender minors during their education and years of upbringing.<sup>68</sup> Out of all LGBTI children, the highest number of suicides occurs among transgender children and adolescents.<sup>69</sup> According to Marta Santos Pais,<sup>70</sup> child development should be considered a holistic concept that links the child's physical wellbeing with its 'spiritual, moral and social development'. In other words, promoting the right to life, development and survival to its fullest potential should be 'compatible with the dignity of the human person'. In this context, providing legal recognition of

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63 *ibid* Article 3.

64 UNESCO.org, 'Convention against Discrimination in Education. Paris, 14 December 1960' <<http://www.unesco.org/eri/la/convention.asp?KO=12949&language=E&order=alpha>> accessed 3 March 2017.

65 Van Bueren (n 46) 242.

66 FRA, 'Survey data explorer – LGBT Survey 2012' (transgender specific questions interactive map) <<http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-lgbt-survey-2012>> accessed 3 March 2017.

67 World Health Organization, 'Technical Brief HIV and Young Transgender People' (2015) 8.

68 *ibid*.

69 FRA (n 52) 21, 77.

70 Santos Pais (n 54) 11.

gender may assist in creating conditions helpful to the optimal development of young peoples' mental health and therefore to preventing further suicides from occurring.

Taking into consideration the grievous harms transgender children can experience because of bullying and discrimination in education and the fact that many of them either commit suicide or may attempt to do so, states may also be in breach of Article 6 CRC because they are not ensuring to the maximum extent possible the survival and development of the child. In this context, the Committee on the Rights of the Child has urged states to provide information on the measures adopted to prevent children's suicide.<sup>71</sup>

In conclusion, the benefit of recognising gender identity legally will be the effect of reducing the stigmatisation felt by transgender children not only throughout their education but also throughout their mental and physical development.<sup>72</sup>

#### **4. Rights to and in the Context of Medical Transition, and the Right to Health**

It is clear that due to the fact transgender children face severe discrimination, legal gender recognition may facilitate access to several fundamental rights and should not be dependent on whether the person has undergone any hormonal or surgical treatment prior to the application for a gender identity change. In addition, medical research also plays an essential part in deciding at what age children should be allowed to change gender and undergo medical treatment. However, it may be helpful to keep in mind that legal gender recognition should be separated from the actual medical transition period. Legal recognition allows transgender individuals to change their gender identity and may therefore help prevent stigmatisation and discrimination against transgender individuals within society.<sup>73</sup> This step may also benefit the psychological stability of individuals and ensure they have access to proper education, health care and other similar services.<sup>74</sup>

The subsequent question to be addressed is how registry officials and/or courts determine at what age a child is mature enough to self-determine its gender identity and at what age it has the ability to give informed consent regarding hormonal treatment and gender reassignment surgery. Salient to this is the question of whether legislation should be allowed to differentiate between adults and children and youths and impose restrictions on the right of children to self-determine their gender identity, based solely on the presumption that children are still vulnerable and unable to be fully recognised as mature rights-holders. At what age legal recognition may be granted should depend on the evolving capacities of the child and their wish to change their gender identity, recognising that this does not necessarily need to overlap with the starting age for hormonal treatment or gender reassignment surgery.

Transition for transgender individuals can be both a social as well as medical process. Social transition happens when transgender children and adolescents are allowed to live their 'True Self' and are accepted for who they are within society. The second part of this article will deal with the question of medical transition for transgender children and youth, and the right to health without discrimination on

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71 UN CRC, 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child' (November 2010) CRC/C/58/ Rev 2, para 26.

72 Ombudsman for Children's Office (n 21) 5.

73 Commissioner for Human Rights (n 12).

74 *ibid.*

grounds of gender identity.

Medical transition is a complicated topic which raises several questions due to the invasive character of the procedures involved. Besides the various treatments that exist for prepubescent transgender individuals, and different impacts of these treatments on the health of minors, questions arise also regarding the legal capacity of a child to consent to medical treatment when it is not certain that they fully comprehend all implications on their health. Finally, taking as a starting point the gender identity legislation already enforced in Malta and Argentina this paper will try and establish how the best interest of the child should be determined in deciding when to allow children to change gender through medical transition.

#### **A. States have an Obligation to Ensure the Right to Health without Discrimination on Grounds of Gender Identity**

The main questions in the medical field surrounding the topic of transgender children and adolescents are firstly, whether transgender children should benefit from an early treatment (for example with hormones) or not<sup>75</sup> and whether feelings of gender nonconformity last from an early age through adulthood.<sup>76</sup> The link between these questions is important, because what is best for a child's development cannot be determined if medical research is not in line with the effects various treatments may have on children's health.

Regarding the treatment of gender variant people there are three main stages available. In stage one treatment, children receive puberty blocking medication, and in stage two cross-sex hormone treatment. Stage three involves the actual gender-reassignment surgery. Stage one treatment is considered reversible and is mostly given to children starting from the age of 10 until 14 or 16.<sup>77</sup> Stage two is irreversible, meaning that the bodily intrusion is more intense and the medical treatment should be applied with sufficient precaution.<sup>78</sup> The third stage is the most intrusive, is dependent on the fulfilment of at least one of the hormonal treatments and requires that the person is given enough information to make an informed choice.<sup>79</sup> Taking into account the fluidity of gender it is practically not sound and there are significant health risks if children are allowed to undergo surgical or hormonal irreversible treatment from an early age without medical guidance and judicial supervision. As medication is only given to minors once they start puberty, medical treatment concerns adolescents between the ages of approximately 12 and 18. It should be noted that individual medical supervision is important in these cases, because every person may react differently to certain treatments.

There is a continuing controversy in the medical world regarding different treatments for gender nonconformity and gender dysphoria in children and

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75 Lieke Josephina Jeanne Johanna Vrouenraets, et al 'Early Medical Treatment of Children and Adolescents With Gender Dysphoria: An Empirical Ethical Study' (2015) 57 (4) Journal of Adolescent Health, 367, 369; Cecilia Dhejne et al 'Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden' (2011) 6 (2) Public Library of Science One.

76 Thomas D. Steensma et al 'Desisting and persisting gender dysphoria after childhood: A qualitative follow-up study' (2010) 16 (4) Clinical Child Psychology and Psychiatry, 499.

77 See *ibid* 125.

78 *ibid* 132.

79 *ibid*.

adolescents.<sup>80</sup> Most of the research about transgender people comes from the United States of America, although the number of studies relating to this field is increasing in Europe as well.<sup>81</sup> There are two opinions about the most suitable treatment for transgender children and adolescents. While some believe the best way to treat gender nonconformity is by suppressing puberty with the help of puberty blockers;<sup>82</sup> others have serious doubts about the effects such a treatment may have on the health of children and adolescents, arguing that it may increase the risk of various health problems, including polycystic ovary syndrome in girls, or have possible side effects on bone mineral density for all transgender individuals.<sup>83</sup> There are however, also those physicians who believe that cross-sex hormonal treatment may be given to children from an early age, without the need to block puberty.<sup>84</sup> Several concerns have been raised about cross-hormonal treatments, including the possibility of negative effects these may have on the health of children, the impact on future fertility and the question of whether a child is capable of balancing the risks and benefits of treatment, and of all probable side effects at such an early stage.<sup>85</sup> Usually, the most common treatment used by medical authorities is the prescription of puberty blockers, which may, after some time, be taken along with or replaced by cross-sex hormones.<sup>86</sup> Different studies have analysed the possibility of puberty suppression in gender variant adolescents.<sup>87</sup> In the Netherlands, puberty suppression is part of the treatment protocol.<sup>88</sup> Every child over the age of 12 can benefit from hormonal suppression in case they still identify as gender variant the moment they enter puberty. In some cases, children under 12 years of age may receive this kind of treatment, because of faster puberty development.<sup>89</sup> The aim of puberty suppression is to alleviate suffering caused by the change in appearance of adolescents and to provide time to make an objective decision regarding the actual gender reassignment procedure.<sup>90</sup>

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80 Vrouenraets et al (n 75) 367; Louis Gooren and Henriette Delamarre-van de Waal, 'The Feasibility of Endocrine Interventions in Juvenile Transsexuals' (1996) 8 (4) *Journal of Psychology & Human Sexuality*, 69.

81 Annelou L.C. de Vries et al, 'Young adult psychological outcome after puberty suppression and gender reassignment' (2014) 134 (4) *Pediatrics*, 696; Jack Drescher, Peggy Cohen-Kettenis and Sam Winter, 'Minding the body: Situating gender identity diagnoses in the ICD-11' (2012) 24 (6) *International Review of Psychiatry*, 568 (However, in Europe a high majority of transgender individuals are not getting state funding for hormones and primary gender reassignment surgeries); Henriette A Delemarre-van de Waal and Peggy T. Cohen-Kettenis, 'Clinical management of gender identity disorder in adolescents: a protocol on psychological and pediatric endocrinology aspects' (2006) 155 *European Journal of Endocrinology*, 131.

82 Delemarre- van de Waal and Cohen-Kettenis (n 81) 131.

83 Valentina Chiavaroli, et al, 'GNRH analog therapy in girls with early puberty is associated with the achievement of predicted final height but also with increased risk of polycystic ovary syndrome' (2010) 163 *European Journal of Endocrinology*, 55; Daniel Klink et al., 'Bone mass in young adulthood following gonadotropin-releasing hormone analog treatment and cross-sex hormone treatment in adolescents with gender dysphoria' (2015) 100 (2) *The Journal of Clinical Endocrinology & Metabolism*, E270.

84 Information available on the website of the center of excellence for Transgender health, Youth: Special Considerations, <<http://transhealth.ucsf.edu/trans?page=protocol-youth>> accessed 3 March 2017.

85 *ibid.*

86 de Vries, et al, (n 81) 696; Vrouenraets et al, (n 75) 367.

87 Vrouenraets et al, (n 75) 367; Annelou L. C. de Vries, Peggy T. Cohen-Kettenis, 'Clinical management of gender dysphoria in children and adolescents: The Dutch approach' (2012) 59 (3) *Journal of Homosexuality*, 301.

88 Vrouenraets et al, (n 75) 367, 368.

89 *ibid.*

90 *ibid.*

In the countries where gender reassignment therapy is available, the minimum age for undergoing this treatment is usually 18.<sup>91</sup> In addition, for many transgender people, access to gender reassignment surgery means having to prove that they are in fact transgender by having to undergo genital examinations by psychiatrists or having to stereotype themselves in their preferred gender to fit eligibility criteria.<sup>92</sup> When treatment is not available in the home state, the treatment transgender individuals receive may sometimes even result in bodily harm as a result of having to undergo surgery abroad.<sup>93</sup> This may be in violation of Article 24(2) CRC, which requires the state to undertake all appropriate legislative, administrative and other measures for the implementation of the rights set out in article 24(1) CRC. This includes preventive measures as well.<sup>94</sup> Some of these measures are outlined in the CRC Committee's General Comment No. 3 and No. 4.<sup>95</sup> Specific attention must be given to vulnerable groups, such as transgender children and adolescents. Finally, new research published in the US indicates that transgender children who receive support from their community and family are less likely to develop mental anguish, as this mental anguish is solely the result of social factors like discrimination, rejection, and harassment and not the process of transition itself.<sup>96</sup>

That being so, states should take measures to ensure that the highest attainable standard of health can be enjoyed by everyone without discrimination on grounds of gender identity. A way to achieve this is by including the needs of transgender children in the development of national health-care plans. States should take further appropriate measures to ensure that transgender minors have effective access to appropriate gender reassignment services, provided that the public health insurance covers all expenses.<sup>97</sup>

Nevertheless, it is important to distinguish between the age of consent for the change of gender identity and the actual starting point of medical treatment, which is divided into hormonal medication and/ or reassignment surgery. Some transgender children may be completely happy only to change gender legally, without pursuing any medical treatment. Authorities should keep in mind that children are free to determine if they want to undergo any treatment or not and that they may not want to categorise themselves as either male or female, but transgender and still wish to be legally recognised as such. Most medical studies do not approach this matter, many of them still using phrases like: '[h]e had adjusted easily to the male role and expressed no doubts on the adequacy of his masculine behaviour'.<sup>98</sup> This heteronormative approach of treating transgender individuals by only allowing them to transition in either the female or male gender seems inadequate and paradoxical due to the fact that they continue to be confined to binary logics. Encouragingly, the World Medical Association issued a statement in October 2015 underlining that everyone has the right to determine their own gender, that gender incongruence is not in itself a mental disorder

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91 Commissioner for Human Rights of the Council of Europe, (n 12) 25.

92 *ibid* 28.

93 *ibid*.

94 Eide and Barth Eide (n 38) 15.

95 UN CRC, 'General Comment No. 3: HIV/ AIDS and the Rights of the Children' (March 2003) UN Doc CRC/ GC/ 2003/ 3; UN CRC, 'General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (July 2003) UN Doc CRC/GC/2003/4.

96 Kristina R. Olson et al, 'Mental Health of Transgender Children Who Are Supported in Their Identities' (2016) 137 (3) *Pediatrics*.

97 Eide and Barth Eide (n 38) 27, 28.

98 Peggy T. Cohen-Kettenis et al, 'Puberty Suppression in a Gender-Dysphoric Adolescent: A 22-Year Follow-Up' (2011) 40 (4) *Archives of Sexual Behavior*, 843, 844.

and therefore condemning the requirement of sterilisation as part of legal gender recognition procedures.<sup>99</sup> Hence, this is why it is correct not to impose the requirement of medical treatment prior to legal gender recognition.

The legal capacity of a child to consent to medical treatment is especially complicated in the case of transgender children, because there are a number of possible side-effects that children may not fully take into account, even if they comprehend what these mean. Furthermore, the scarce research in the area and the fact that there is no harmonised guideline for the treatment of gender variant people creates further impediments on assessing when it is best for transgender minors to undergo hormonal treatment or surgery. One of the negative aspects of undergoing gender reassignment treatment is the high risk of becoming infertile.<sup>100</sup> Even if minors may assume they would rather prefer to change their biological features than be able to have a child at a later stage in their lives, their point of view may change once they grow older. Nonetheless, according to some scientists, it is technically possible (or will soon be possible) for transsexual people to procreate.<sup>101</sup> Due to the complexity of this issue and the impact on the health of children and adolescents, it may be a sound option for legislators to ask for the intervention of judicial and specialised medical authority in coming to a decision on this matter. Informed consent for children is key to providing them access to proper and legal health-care.<sup>102</sup> Unauthorised medical intervention may amount to torture in certain cases, especially where there is no emergency and the child has not been given the opportunity to consent.<sup>103</sup> For transgender children, treatment is a viable option, because it allows them to assume the characteristics of their perceived gender identity. It remains important, however, that transgender children and youth are provided with proper information and support to enable them to come to an appropriate decision.

Turning to Argentina and Malta, two countries which have created gender identity legislation, might serve as a good example for states which aim to draft similar legislation in the future. According to the Argentinian GIL all persons older than 18 will be able to access total and partial surgical interventions and/or comprehensive hormonal treatments to adjust their bodies. The only requirement will be, in both cases, that the individual concerned gives informed consent. In the case of minors, the informed consent will be obtained following the principles and requirements established in Article 5 of the GIL and the agreement of a competent judicial authority.<sup>104</sup> In Malta, the GIGESC Act states that it shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/ or surgical intervention on a minor until the person to be treated can provide informed consent through the person exercising parental authority or the tutor of the minor.<sup>105</sup> Only in exceptional circumstances, treatment may be effected once agreement is reached between the interdisciplinary team and the persons exercising parental

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99 WMA Statement on Transgender People adopted by the 66th WMA General Assembly, Moscow, Russia (October 2015) <<http://www.wma.net/en/30publications/10policies/t13/index.html>> accessed 3 March 2017.

100 Paul De Sutter, 'Gender reassignment and assisted reproduction - Present and future reproductive options for transsexual people' (2016) 16 (1) Human Reproduction, 612.

101 *ibid* 614.

102 Melinda Jones, 'Adolescent Gender Identity and the Courts' Michael Freeman (ed), *Children's Health and Children's Rights* (Martinus Nijhoff 2006) 129.

103 *ibid*.

104 GIL, Article 5.

105 GIGESC ACT, Article 14 (1).



authority or tutor of the minor who is still unable to provide consent.<sup>106</sup> Both pieces of legislation ask for the informed consent of the minor, but do not provide any guidelines for establishing at what age children are able to give their informed consent in this matter. Furthermore, the wording of the GIGESC Act is again less fortunate, as it does not place the view of the minor at the heart of the legislation, but rather grants children their right to consent through their legal guardians.

If one considers that forcing children to live in circumstances where they have clearly decided they do not wish to do so (for example by forcing cancer treatments on children) is cruel and inhuman, then not allowing transgender children and adolescents to undergo gender reassignment treatment to live the life they wish to, is also inhuman and should be regarded as mental torture, in breach of international human rights law.<sup>107</sup> If not providing treatment for gender variant adults is regarded as unacceptable, then minors should also be allowed access to treatment if they wish, and if medical staff agree it is in their best interest. Children who are not able to undergo such treatment may feel even more mentally distressed once they reach puberty and experience body modifications which are unconformable to them.

Defining the ability of children to consent to medical treatment has raised a contentious debate among scholars.<sup>108</sup> In England and Wales, children aged 16 and over are deemed by law to be competent to consent to any medical or surgical treatment.<sup>109</sup> For children aged under 16, the standard approach of determining when their control over their own body begins is by looking at the case of *Gillick v West Norfolk and Wisbech Area Health Authority*, in which it was held that competence to consent is for children task- and not age-specific.<sup>110</sup> According to the *Gillick* competence test once children under 16 years of age have 'sufficient understanding and intelligence' to enable them to understand fully the nature and consequences of the proposed treatment, then the decision to undergo treatment should lie within their power and not that of their parents.<sup>111</sup> The *Gillick* test has been adopted internationally as the standard by which children can be determined competent to consent to their own medical treatment. The standard adopted fits with the evolving character of the CRC.<sup>112</sup>

It may be useful to look at several cases decided by the Australian courts with regards to gender reassignment treatment for minors. Treatment of children with gender dysphoria is given in two stages. Until recently, courts did not differentiate between the stages of treatment and regarded them as a special medical procedure, which can only be lawfully performed with court approval.

In *Re Lucy*<sup>113</sup> and *Re Sam and Terry*<sup>114</sup>, the Family Court of Australia held that parents are lawfully permitted to consent to gender reassignment stage one treatment, because it is reversible and does not impose any significant risk to the health of the

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106 *ibid* Article 14 (2).

107 UN HRC, 'CCPR General Comment No. 20 Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment' (September 1992) §2. See further the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

108 See in this matter Van Bueren (n 46), Melinda Jones, (n 102) 129, 132.

109 Family Law Reform Act, 1969 s 8(1).

110 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 para 189.

111 *ibid* paras 188, 189.

112 Jones (n 102) 130.

113 *Re Lucy* [2013] FamCA 518.

114 *Re Sam and Terry* [2013] FamCA 563.

child.<sup>115</sup> However, in both decisions it was held that stage two treatments require court authorisation, because of their irreversible effects and the significant risk of making a wrong decision about the best treatment for a child.<sup>116</sup> In *Re Jamie*<sup>117</sup> in 2013, a decision of the Full Court of the Family Court, the Court affirmed the position previously adopted in both decisions.

However, the Court also established that a Gillick-competent minor is able to provide consent to stage 2 treatment. This important decision enabling children deemed competent by the court to consent to stage 2 treatment is in line with the aims of the Convention by promoting the idea that children are autonomous beings with the potential to engage in their own decision-making processes.

Puberty blockers are the least intrusive treatment that can be applied with regard to gender variant children. Another argument in favour of puberty blocker treatments, is the fact that researchers have found that less prepubescent children will persist and manifest their gender nonconformity after reaching adolescence or adulthood.<sup>118</sup> Although an increasing number of gender clinics have adopted this form of treatment, many others remain critical about the negative impacts such a treatment may have on children and adolescents.<sup>119</sup> Those advocating in favour of puberty suppression, on the other hand, emphasise the importance of puberty suppression for the adolescents' mental health, because it makes it possible for children to develop a physical appearance in line with their desired gender.<sup>120</sup> Due to its reversible nature, it could be argued that future legislation should follow the law in Argentina that allows children to undergo stage one treatment without the decision of the court. However, in cases where the legal guardians do not agree with this treatment, children should have the possibility to resort to summary proceedings. As hormonal treatment could have more negative effects on a child's health, it may be in the interest of the child to ask for the decision of the court in this matter. However, even in this case it should be possible to resort to court proceedings without the consent of the parents. For gender reassignment surgery, as it is an irreversible and highly invasive medical procedure, the involvement of the court should be absolutely necessary. Even if the court agrees it is in the best interest of the young adult to undergo surgery, it should take into account that the family and child will need both ongoing medical and financial support.<sup>121</sup>

In conclusion, although the age of consent may raise some difficulties regarding gender reassignment treatments due to effect on the mind and body of minors, it cannot be said it does the same in case children choose to change their gender identity legally without undergoing any medical treatment. The child's best interest can be respected only if children are given the opportunity to express their autonomy. However, in regards to irreversible medical treatment, this autonomy may be restricted due to the invasive nature of the procedure. This restriction is recognised as having a protective function under the CRC, through the principle of the best interests of the child.

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115 *Re Lucy* (n 113) 518.

116 *Ibid*; *Re Sam and Terry* (n 118) 563;

117 *Re Jamie* [2013] FamCAFC 110.

118 Thomas D. Steensma et al, 'Desisting and persisting gender dysphoria after childhood: A qualitative follow-up study' (2010) 16 (4) *Clinical Child Psychology and Psychiatry* 499, 503 et seq.

119 Elli Coleman, et al, 'Standards of care for the health of transsexual, transgender, and gender-nonconforming people' (2012) 13 *International Journal of Transgenderism*, 165.

120 Vrouenraets et al (n 75) 367, 368.

121 *Jones* (n 102) 141.

**B. A Closer Look at how the Best Interests of the Child should be Determined in Deciding whether to Allow Children to Change Gender**

Having established that there is a gap in protection in the field of transgender children's rights, every state should create suitable gender identity legislation in order to protect the rights of transgender children. Consequently, the question remains how should legislation protecting the rights and best interests of children be drafted? Currently, the GIL and GIGESC Act in Argentina and Malta may be used as a guideline by states when drafting a law with the aim of ensuring adequate protection to transgender persons. The Argentinian GIL contains 15 Articles. According to Article 4 of the GIL all persons requesting that their recorded sex be amended and their first name and images changed must prove that they have reached the minimum age of 18 years, submit a request stating that they fall under the protection of the current law and provide the new first name with which they want to be registered. For minors, under the age of 18 the request for the procedure detailed in Article 4 must be made through their legal representatives and with explicit agreement by the minor, taking into account the evolving capacities and best interests of the child as expressed in the CRC and in Argentinian Law 26061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents. Likewise, the minor must be assisted by a children's lawyer as prescribed by Article 27 of Law 26061.<sup>122</sup> In case the consent of any of the minor's legal representatives is denied or impossible to obtain, it will be possible to resort to summary proceedings.<sup>123</sup>

While the ability to change gender identity is possible for every person in Argentina, Malta takes a less favourable approach by limiting the recognition to citizens and habitual residents (individuals who have lived in Malta for some time and intend to continue living in Malta for a long period of time<sup>124</sup>). This decision puts citizens of the EU in an unclear legal situation and may be discriminatory against other nationals. The legislators did not consider that there might be children living in Malta with a different citizenship<sup>125</sup> and with no possibility of acquiring a dual citizenship due to legal restrictions in other states. Further, it may be very hard for a child to prove intent of living in Malta for a long period of time and therefore fulfil the requirements of habitual residency. In any case, this requirement would most probably further delay the actual change of gender identity.

Another relevant difference in the two states is the fact that minors in Argentina can change gender without judicial authorisation (except in cases where parental consent is missing). In Malta, however, the application for the change of gender identity has to be filed in the registry of the Civil Court (Voluntary Jurisdiction Section).<sup>126</sup> When the application is made on behalf of a minor, the best interests and

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122 GIL, Article 5.

123 *ibid* Article 5 (2).

124 EU Commission Employment, Social Affairs & Inclusion, 'Malta - Habitual Residence' <<http://ec.europa.eu/social/main.jsp?catId=1121&langId=en&intPageId=2769>> accessed 10 April 2016.

125 In Malta it is allowed for individuals to hold dual citizenship, see Department of Citizenship and Expatriate Affairs, 'Acquisition of Maltese Citizenship by Registration' (CEA/L/2 2014) 4 <<https://identitymalta.com/acquisition-of-maltese-citizenship-by-birth/>> accessed 3 March 2017.

126 GIGESC Act, Art 7.

maturity of the child is the paramount consideration for the court's assessment.<sup>127</sup> In comparison with the GIL, gender change is solely authorised through the court and does not require the explicit agreement of the child or the involvement of a children's lawyer. The process however, is more complicated than in Argentina as it requires the involvement of the court in all decisions regarding minors, regardless of the parent's approval, which further delays the application and may therefore have a significant impact on the child's wellbeing. Moreover, without appointing a children's lawyer or another appropriate representative during court proceedings, children may face several procedural disadvantages. In most countries in the world and especially in common law countries, a representative does not only state the wishes of the child, but helps with the collection of evidence relating to the best interest of the child.<sup>128</sup> There is a high risk that without a representative, an independent and objective view of what is in the best interest of the child may not be presented before the court.<sup>129</sup> This would result in the possible breach of Articles 3 and 12(2) CRC.

Most scholarship analysing Malta's GIGESC Act has praised its progressive character, because it acknowledges a right to gender identity both for adults and children.<sup>130</sup> Taking into account that this law was the first of its kind in Europe, it is in some ways progressive. However, states contemplating a legislative path forward should consider more suitable legislation for the protection of transgender children, especially in the area of children's right to self-determination and the assessment of children's evolving capacities and best interest. For children without parental consent, the courts in Argentina must come to a decision only after taking in consideration the best interest of the child and its maturity. Malta uses a less favourable approach regarding gender variant children. The requirement of judicial decision and parental authority when children wish to change their identity on their documentation may undermine therefore their right to self-determination and complicate or prolong the procedure. In comparison with the Argentinian law, Malta has decided to replace 'taking into account' with 'giving due weight' to the child's views. Neither formulation makes children's views the primary consideration.

Ideally, the child has a clear opinion about his gender identity and the parents are supportive of transition. However, in cases where parental consent is missing, children should still be able to petition for a change of gender identity. The first difficulty that arises for minors under the GIGESC Act is the fact that minors are not allowed to change gender in cases where the consent of parents or legal representatives is missing. In this respect it may be useful to look at several cases from the ECtHR. In the case of *Van Kück v. Germany*, the ECtHR stated that 'gender identity was one of the most intimate areas of a person's private life'.<sup>131</sup> The Court also found that the right to gender identity and personal development constitutes a fundamental aspect of the right to respect for private life and that, in the present case, the freedom to define oneself as a female was one of the most basic essentials of self-determination.<sup>132</sup>

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127 *ibid* Art. 7 (2).

128 Jones (n 102) 129, 130.

129 *ibid* 130.

130 See for example Peter Dunne, 'Rethinking legal gender recognition: recent reforms in Argentina, Denmark and the Netherlands' (2015) 1 *International Family Law Journal* 41, 44; Alessia Valenza, 'Historic moment for trans and intersex people as Malta passes the Gender Identity, Gender Expression and Sex Characteristics bill Act' ILGA (2 April 2015) <<http://ilga.org/malta-gigesc/>> accessed 3 March 2017.

131 *Van Kück v Germany*, 37 EHRR 51 (2003) para 56.

132 *ibid* paras 73-75, 78.

Finally, the Court established the applicant's right to sexual self-determination, which is protected by the right to private life.<sup>133</sup> In the case of *Goodwin v The UK* the Court linked the applicant's right to personal development and physical and moral security to the values of 'human dignity and human freedom' and the notion of 'personal autonomy' and included them in the scope of Article 8 of the ECHR.<sup>134</sup> However, the case of *Goodwin* speaks only in terms of 'post-operative transsexuals'<sup>135</sup> and it may be difficult to apply it in the case of minors that have not undergone gender reassignment surgery. Nonetheless, from these judgments it is clear that in the view of the European Court the right to gender identity is linked with the right to self-determination and constitutes a fundamental human right. It would be unfortunate if the right to sexual self-determination did not apply to all gender variant individuals, including pre-operative transgender persons and gender variant children. Especially in the case of children, the right to self-determination should be protected, even when parents do not give their consent for the transition. The requirement of parental authority in this process leads to various problems, especially when family members do not agree with the change of gender identity by the child. Not allowing children without parental authority to access legal procedures breaches rights protected by the CRC, especially Articles 3, 8, 12 and 16.

However, even if states take the example of the GIL, this approach still raises various questions, apart from the lengthy procedure of having gender identity claims assessed by a court. In cases where parents disagree with the wishes of the child, the family environment may become unstable. Consequently, children may experience significantly more psychological pressure and anxiety. In these cases, it is highly questionable whether children will take the step to change gender, as long as family members wish to reject them afterwards, or threaten to exclude them from the family or not support them financially anymore. Another issue appears when one parent does not share the same views with the other parent on this matter, creating family tensions, which may lead to the destabilisation of the familial environment.

Transgender children already face significant psychological pressure in understanding and accepting their own identity, so in this case the impact on the psychological wellbeing of the child may be even more drastic. Children may experience a sense of guilt or shame, because they may consider that they are the main cause of disagreements in the family. In some cases, this may lead to children developing mental-health problems. Therefore, in deciding the best interests of a gender-variant child, it is important for courts to carefully balance several of the aspects mentioned above. Given the possible disagreements in the family caused by the wish of children to change gender identity, courts might assume that family stability is more important for the best interest of the child than the transition itself. In fact, such decisions could be more harmful than allowing the child to transition, although a clear-cut answer to this question may only be achieved after considering each case individually. However, the court should be careful not to presume harm without clear evidence and to balance all probable outcomes with regard to the child's best interest.

Discrimination and in some cases sentiments of poor self-esteem, depression and suicidal thoughts are exacerbated as the child grows up and are mostly correlated in research with the impediment of changing gender identity.<sup>136</sup> This is why, if

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133 *ibid.*

134 *Goodwin v. The UK* (2002) 35 EHRR 18 para 90.

135 *ibid.*

136 FRA (n 53) 21.

legislators are prepared to accept the fluidity of gender and to put aside out-dated theories about gender and morality, then laws protecting gender variant children should enable them to self-determine their identity.

In contrast to the approach taken in the legislation in Argentina and Malta, one could also argue that the solution to these problems would simply be to leave out the requirement of gender markers on documents. The implication would be that children would not need to change gender legally, and go through this exhausting and lengthy legal process at all. The issue that names remain to be gendered in most of the cases is problematic owing to the fact that children would still need to change their names legally to avoid discrimination. However, changing name should be considerably easier, without the need of the courts approval. However, this does not address the problem of medical transition.

Malta has made a first step in recognising equal treatment for individuals who are in possession of documentation without female or male gender markers. According to Article 9(2) of the GIGESC Act a gender marker other than male or female, or the absence thereof, recognised by a competent foreign court or responsible authority acting in accordance with the law of that country is recognised in Malta. Other countries, such as Australia, New Zealand, Denmark and Nepal have introduced the possibility to list an "X" in place of the traditional "M" and "F" gender markers on passports.<sup>137</sup> The focal concern regarding introducing a third gender in documentation may be the visibility transgender people acquire through this approach, which may increase the risk of further stigmatisation within society.<sup>138</sup> For this reason, legislators should aim at renouncing the requirement of gender markers on documentation. For those arguing against this proposal by invoking the issue of public safety, governments could choose to introduce a separate document with details about gender, which could be handed in only when it is a particular necessity to do so and not used in daily life activities, such as registration in schools or universities. The Australian Human Rights Commission underlines that there could be some documents that require the symbol about sex or gender for security reasons or in order to ensure that a person can access appropriate benefits in healthcare institutions.<sup>139</sup> Another example could be to facilitate the gathering of data in order to monitor progress in achieving gender equality.<sup>140</sup> However, in many other cases, recording sex or gender is not necessary according to the Commission.<sup>141</sup> In any case, if governments are reluctant to put aside the requirement of gender-markers on identity documents, then new legislation should make it possible for transgender minors to choose not to have any gender written on their documents, as some transgender individuals do not identify with any gender at all. This approach is also in line with the requirement of non-discrimination and the right to privacy under the CRC.

#### 4. Conclusion

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137 Aron Macarow, 'These Eleven Countries are Way Ahead of the US on Trans Issues' ATTN: (9th February 2015) <<http://www.attn.com/stories/868/transgender-passport-status>> accessed 10 April 2016.

138 Jack Byrne, 'Licence to be Yourself' (The Open Society Foundation 2014) 21.

139 Australian Human Rights Commission, 'The Sex and Gender Diversity Project Concluding Paper' (Human Rights and Equal Opportunity Commission March 2009) 34.

140 *ibid.*

141 *ibid.*

This article develops the debate about the necessity of ensuring protection for transgender children and adolescents and raises awareness about the obligation of states to protect transgender children and adolescents through appropriate legislation. When states fail to enact legislation permitting individuals to change gender identity, they are not only failing the community as a whole, but also breaching their obligations under the CRC.

In order for states to protect transgender children and fulfil their legal obligations, they should ensure a holistic approach within the education system, so that discrimination and physical or verbal abuse against transgender children and adolescents can be prevented. Although the legislation introduced in Argentina and Malta provides a helpful starting points, states should improve future legislation by allowing more freedoms to children and adolescents to change gender identity and undergo medical treatment. Nonetheless, a better solution regarding legal gender recognition may actually be to renounce the requirement of gender on identity documentation. Moreover, states should not only implement legislation, but also ensure that schools and health-care facilities have enough training in transgender issues and that discrimination based on sexual orientation or gender identity is prohibited under national legislation. Furthermore, transgender children should have free access to psychological and legal counselling as well as other health-care facilities. If gender markers are still perceived as a necessity by governments, future legislation should allow children to change gender without the need of judicial authorisation. Most importantly, the law should prohibit and punish the use of so-called 'conversion therapies'.<sup>142</sup> However, prior to introducing legislation allowing transgender children to undergo gender reassignment procedures, governments should allocate more funding for medical research in this field in order to prevent any negative outcomes for individuals who wish to transition. Besides this, judicial bodies should analyse medical research thoroughly and keep in mind that gender is not binary, but can take many other forms as well. The issues raised in this paper are important, especially with regard to children, because in many countries legal gender recognition is available only for adult transgender individuals that have undergone hormonal treatment and gender reassignment procedures.<sup>143</sup>

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142 Conversion therapies are practices that falsely claim to change a person's sexual orientation or gender identity. Such practices have been rejected by medical staff, but due to the way society understands gender, some practitioners continue to conduct conversion therapy. Minors are especially vulnerable, and conversion therapy can lead to mental and physical abuse, see Human Rights Campaign, 'The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity' <<http://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy>> accessed 10 April 2016.

143 Amnesty International, 'The State decides who I am- Lack of legal gender recognition for transgender people in Europe' (Amnesty International February 2014) 7.