

AMNESTY INTERNATIONAL

SUBMISSION TO THE
FRENCH GOVERNMENT ON
VIOLENCE AND
DISCRIMINATION ON THE
GROUND OF GENDER
IDENTITY

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INTRODUCTION

Amnesty International welcomes the consultation process initiated by the Ministry of Women's Rights upon request of the First Minister and aimed at developing a governmental action plan aimed at combating violence and discrimination experienced by lesbian, gay, bisexual, transgender and intersex (LGBTI) people in France.

This contribution focuses specifically on some of the issues falling within the remit of working group number 6. In particular, Amnesty International remains concerned about a number of issues bearing a negative impact on the lives of transgender and intersex people and resulting in the violation of their human rights; they include the lack of comprehensive protection against discrimination on the ground of gender identity, the mandatory requirements for the legal recognition of the gender change and the barriers in accessing health care.

The French authorities should ensure that any action undertaken in these areas should comply with relevant international human rights legal obligations and standards and recommendations from human rights treaty bodies and inter-governmental institutions such as the Council of Europe.¹

Governmental initiatives in these areas should take into account the complexity of issues pertaining to gender identity. Such a complexity should be reflected by the terminology used to refer to transgender and intersex people. Research undertaken on these issues has shown that the gender identity of transgender people should not be narrowly construed as to choices made relating to gender reassignment surgery. Some transgender people perceive themselves somewhere in a continuum between male and female and do not necessarily seek to undergo genital reassignment surgery.² Gender identity of intersex people is complex; research has shown that some intersex people do not identify themselves as belonging to the gender assigned at birth and thus seek gender reassignment when adults.³

1 In particular articles 17 (right to privacy) and 26 (right to be equal before the law) in conjunction with article 2 (non-discrimination) of the International Covenant on Civil and Political Rights, articles 12 (right to the highest attainable standard of health) in conjunction with article 2 f of the International Covenant on Economic, Social and Cultural Rights, article 8 (right to private and family life) in conjunction with article 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, General Comment 20 on discrimination in Economic, Social and Cultural Rights of the United Nations Committee on Economic, Social and Cultural Rights that explicitly acknowledges gender identity as a ground of discrimination (par. 32), the Council of Europe Committee of Ministers' recommendation (2010)5 on measures to combat discrimination on grounds of sexual orientation and gender identity, the Council of Europe Commissioner for Human Rights Issue Paper (2009) 2 on discrimination on the ground of gender identity and the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.

2 For instance, only around 68 per cent of the transgender women who were surveyed in the context of a research in Belgium felt either fully or mainly female. More than 23 per cent of them felt both male and female. The research concluded that a third of transgender people do not feel comfortable with the binary male/female identities. See : Joz Motmans, "Being transgender in Belgium. Mapping the social and legal situation of transgender people", Institut for the Equality between women and men, 2010.

3 See for instance Anne Fausto-Sterling, "Sexing the body. Gender Politics and the construction of sexuality", Basic Books, 2000.

Amnesty International refers to **transgender, or trans, people** as individuals whose gender expression and/or gender identity differs from conventional expectations based on the physical sex they were assigned at birth. Trans is a political umbrella term that is used to describe a wide range of identities, experiences, and people whose appearance seem to conflict with the binary gender norms of society, including transsexuals, transgender, travesti, gender queers, cross dressers, drag queens, drag kings, and many more.⁴ **Intersex** individuals possess genital, chromosomal or hormonal characteristics which do not correspond to the given standard for 'male' or 'female' categories as for sexual or reproductive anatomy. Intersexuality may take different forms and cover a wide range of conditions.⁵ Amnesty International refers to **gender identity** as each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, or with the way they are made to express their gender, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.¹ An individual's gender identity may be male, female, or a gender which is neither male nor female; it may also be more than one gender, or no gender.⁶

1. LEGAL GAPS IN FRENCH LAW TO COMBAT DISCRIMINATION ON THE GROUND OF GENDER IDENTITY

Amnesty International calls on states to adopt comprehensive anti-discrimination legislation in line with anti-discrimination provisions enshrined by international and regional human rights treaties including the International Covenant on Civil and Political Rights (articles 2 and 26), the International Covenant on Economic, Social and Cultural Rights (article 2) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 14 and Protocol 12). Domestic anti-discrimination legislation should protect transgender and intersex people from discrimination on the ground of gender identity. The United Nations Committee on Economic, Social and Cultural Rights pointed out in its comment 20 (par. 32) that "gender identity is recognized as among the prohibited ground of discrimination".

Furthermore, Amnesty International maintains that states should comply with the human

4 An activist's guide to the Yogyakarta Principle, pag. 24, http://www.ypinaction.org/files/02/85/Activists_Guide_English_nov_14_2010.pdf

5 Discrimination on grounds of sexual orientation and gender identity in Europe, Council of Europe, June 2011, p.131. Definition of 'intersex' from World Health Organization, "Genetic components of Sex and Gender". See also Federal Anti-Discrimination Agency, Benachteiligung von Trans Personen, insbesondere im Arbeitsleben, Berlin, 2010, p. 11.

6 http://www.yogyakartaprinciples.org/principles_en.htm.

rights standards developed by the relevant European Court of Human Rights' case-law⁷ to provide effective protection against hate crime, as well as with the commitments made as part of the Organization for Security and Cooperation in Europe (OSCE)⁸. Crimes perpetrated on the real or perceived gender identity of the victims are a serious form of discrimination and states have to effectively address them. States should therefore introduce criminal legislation acknowledging that hate crime can be perpetrated on the ground of gender identity. Any alleged transphobic motive should always be registered by law enforcement agents and be the object of a thorough and impartial investigation⁹.

France has recently amended its legislation on sexual harassment (law 2012-954 of 6 August 2012) by introducing the ground of "sexual identity" (*identité sexuelle*) in both its Criminal and Labour Codes. These amendments included into French Criminal law the notion of hate crime perpetrated on the ground of "sexual identity".¹⁰ Furthermore, it enshrined the prohibition of any discrimination on the ground of "sexual identity" in the area of employment (article 1132-1 of the French Labour Code).

Amnesty International remains concerned as regards whether the notion of "sexual identity" will be construed as covering "gender identity", which is a prohibited ground of discrimination under international law.¹¹

Moreover, law 2012-954 does not amend law 2008-496 of 28 May 2008 concerning several dispositions aimed at aligning French civil law on discrimination to EU law. This law provides protection against discrimination in many other areas of life than employment and including social protection, health, education and access to goods and services. Amnesty International highlights that transgender and intersex people should be protected against discrimination on the ground of gender identity in all areas of life including those covered by the material scope of law 2008-496.

7 The European Court of Human Rights (ECHR) has found that states have the duty to take all necessary steps to unmask any alleged racist hate bias on which a crime may be perpetrated (*Nachova and others v. Bulgaria*). It also found that crimes perpetrated with a racist bias cannot be treated as common crimes because they are particularly destructive of fundamental rights (*Šečić v. Croatia*). The General Policy Recommendation No. 11 of the European Committee against Racism and Intolerance (ECRI) calls on states to ensure that the police thoroughly investigate racist offences by duly taking into account the racist motivation of ordinary offences, to establish a monitoring system for recording and monitoring racist incidents and to encourage victims and witnesses to report such incidents.

8 The OSCE defines hate crimes as criminal offences, including offences against persons or property, where the victim, premises, or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support or membership of a group

9 Amnesty International, *Inadequate Protection. Homophobic and transphobic hate crimes in Croatia*. Index: EUR 64/001/2012, Amnesty International. *Changing Laws. Changing Minds. Challenging homophobic and transphobic hate crimes in Bulgaria*. Index: EUR/15/001/2012

10 Loi 2012-954 du 6 août 2012 relative à l'harcèlement sexuel
<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte=&categorieLien=id>

11 The United Nations Committee on Economic, Social and Cultural Rights has indeed clarified that "gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace. CESCR comment 20: Non-discrimination in Economic, Social and Cultural Rights, par. 32.
<http://www2.ohchr.org/english/bodies/cescr/comments.htm>

Article 2.1 of law 2008-496 prohibits discrimination on the ground of sex. As pointed out by the former High Authority to Combat Discrimination and to Promote Equality (HALDE), the prohibition of discrimination on the ground of sex should be construed as protecting “transsexual persons” who are, have been or will be undertaking gender reassignment surgery.¹² Although such deliberations are in line with the case-law of the European Court of Justice¹³, Amnesty International maintains that such a protection is a partial one as gender identity should not be narrowly construed as exclusively referring to gender reassignment surgery.

Furthermore, effective mechanisms of redress should be made available to those transgender and intersex people who are victims of discrimination on the ground of their gender identity. In this respect, equality bodies at the national level should include this form of discrimination in their remit, collect individual complaints and assist victims to seek redress. As a consequence, the Defender of Rights should tackle discrimination on the ground of gender identity against transgender and intersex people including those who do not seek to undergo any gender reassignment surgery.

2. LEGAL GENDER RECOGNITION

Transgender and intersex people should be able to change their name and the other gender markers on official documents issued by the state, including birth certificates, and on documents provided by other institutions, such as education certificates, through a quick, accessible and transparent procedure on the basis of the individual’s self identification. Gender legal recognition should not be submitted to mandatory requirements that violate human rights. Making such recognition dependent upon criteria such as the incapacity to reproduce (implying sterilization), gender reassignment surgeries, mental disorder diagnosis and single status (implying divorce if married) violate the right to be free from inhuman and degrading treatment, the right to the highest attainable standards of health, the right to private and family life and the right to equality before the law.

In 1992 the European Court of Human Rights found that the French state’s refusal to legally recognize the gender change of a “transsexual” person amounted to a violation of her right to private and family life.¹⁴ The French Court of Cassation consequently established that the gender change should be legally recognized. However, the Court set out some criteria for such recognition including psychiatrist diagnosis and changes affecting the physical

¹² See deliberation 2008-28 and 2008-29 <http://archive.equal-jus.eu/82/>

¹³ P v S and Cornwall County Council 1996, K.B. v National Health Service Pensions Agency and Secretary of State for Health 2004, Sarah Margaret Richards Richards v Secretary of State for Work and Pensions, 2006

¹⁴ B. v France, application 13343/87, judgment 25 March 1992

appearance of the applicant.¹⁵

Following up on this judgment, and in a situation where the criteria for the legal recognition of the gender change are not established by law, French Courts have applied different criteria and procedures in instances where transgender people have sought legal recognition of their gender. In general, transgender people have usually been denied the possibility to legally change their gender unless they were officially diagnosed with a mental disorder, they underwent gender reassignment surgeries including genital surgeries entailing sterilization and they were single. Furthermore, some Courts have required additional judicial expertise, often undertaken by a psychiatrist, a gynaecologist and an endocrinologist, aimed at assessing the irreversibility of the gender change.¹⁶

A circular issued by the Ministry of Justice in 2010¹⁷ highlighted that the gender change could be legally recognized in instances where although a person has not undertaken a genital reassignment surgery, other medical treatments including hormonal treatment or other surgeries have irreversibly change the gender. This circular remains problematic, in particular the link between legal recognition of the gender change and compulsory medical treatments imposed on transgender people.

The draft law introduced by MP Michèle Delauney on 22 December 2011 to the National Assembly¹⁸ would contribute to tackling some of the issues mentioned earlier. It would indeed introduce a relatively simple procedure to achieve legal recognition of the gender change without imposing some of the mandatory requirements which result in human rights violations. However, the draft law still foresees the dissolution of marriage should the applicant be married on the day of the introduction of the request to change the legal gender which bears negative consequences on the right to private and family life of transgender people. The Council of Europe Commissioner for Human Rights has welcomed the approach followed by the Austrian and German Constitutional Courts¹⁹ in this respect which recognized that “protecting all individuals without exception from state-forced divorce has to be considered of higher importance than the very few instances in which this leads to same-sex

15 “Attendu que lorsque, à la suite d'un traitement médico-chirurgical, subi dans un but thérapeutique, une personne présentant le syndrome du transsexualisme ne possède plus tous les caractères de son sexe d'origine et a pris une apparence physique la rapprochant de l'autre sexe, auquel correspond son comportement social, le principe du respect dû à la vie privée justifie que son état civil indique désormais le sexe dont elle a l'apparence; que le principe de l'indisponibilité de l'état des personnes ne fait pas obstacle à une telle modification ». Cour de Cassation, changement de l'état civil, B c France, arrêt 361 p

16 The Court of Cassation has recently refused the request to legally change the gender of a person who underwent genital reassignment surgery in Thailand because she refused to undertake an additional expertise. The applicant had provided the Court with a certificate issued by the surgeon who undertook the surgery.(arrêt n. 757 du 7 juin 2012).

17 Circulaire n. CIV07/10 du 14 mai 2010

18 <http://www.assemblee-nationale.fr/13/propositions/pion4127.asp>

19 Constitutional Court of Austria (Verfassungsgerichtshof), V 4/06, 8 June 2006, Constitutional Court , B 1973/08-13, 17.02.2010. German Constitutional Court (Bundesverfassungsgericht), judgement 1 BvR 3295/07 of 11 January 2011, German Constitutional Court, judgment 1 BvL 10/05 of 27 May 2008

marriages”.²⁰

3. ACCESS TO HEALTHCARE AND THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

Amnesty International supports the removal of the classification of gender identities as mental disorders in the International Classification of Diseases (ICD) and the Statistical Manual of Mental Disorders (DSM) of the American Association of Psychiatrists. The French Decree 2010-125 of 8 February 2010²¹ removes “early gender identity troubles” from the list of long-term mental illnesses established at the national level. Amnesty International considers this as a positive reform. It is however important to reiterate that the relevant aspect of transgender health care should be reclassified in a non-stigmatizing manner to facilitate access to health care and to ensure that specific transgender health care, such as hormonal treatment and gender reassignment surgeries, should be included in public insurance schemes consistently with the recommendations of the World Professional Organisation for Transgender Health (WPATH).²²

Transgender people should be able to access medical treatments, including surgeries and hormonal treatment, on the basis of an informed consent and without being subject to a long and humiliating diagnostic period. While access to other medical treatments is usually made dependent upon the informed consent²³ given by the person seeking them, transgender people have to wait months if not years before accessing treatments. The diagnostic phase can indeed last from six to nine months.²⁴ During this phase the psychiatrist in charge of the diagnosis can request to hear parents or other “witnesses” to assess whether the person in question is transsexual, which can be at odds with the respect of the right to privacy.

20 Issue Paper CommDH/IssuePaper(2009)2, “Human Rights and Gender Identity”, Thomas Hammarberg, Council of Europe Commissioner for Human Rights.

Article 23 of the International Covenant on Civil and Political Rights (ICCPR) sets out the right to marry and found a family, and Article 2 of the ICCPR says that this must be applied without discrimination, including on the ground of sexual orientation or gender identity. The Human Rights Committee in the case of *Toonen v Australia* held that the reference to ‘sex’ in Article 2 includes discrimination on the ground of sexual orientation (Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92 (1992).

21 <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021801916&dateTexte=&categorieLien=id>

22 “The WPATH Board of Directors urges state healthcare providers and insurers throughout the world to eliminate transgender or trans-sex exclusions and to provide coverage for transgender patients including the medically prescribed sex reassignment services necessary for their treatment and well-being, and to ensure that their ongoing healthcare (both routine and specialized) is readily accessible” www.wpath.org/medical_necessity_statement.cfm

23 Article 16-3 of the French Civil Code and article L1111-4 of the French Code of Public Health

24 Haute Autorité de Santé, “Situation actuelle et perspectives d’évaluation de la prise en charge médicale du transsexualisme en France”, 2009 http://www.has-sante.fr/portail/jcms/c_894315/situation-actuelle-et-perspectives-devolution-de-la-prise-en-charge-medicale-du-transsexualisme-en-france

The report compiled by the General Inspection of Social Affairs (Inspection Général des Affaires Sociales -IGAS) acknowledges several problems relating to the modalities according to which the diagnostic phase is carried out. The diagnosis functions as a gatekeeper to specific transgender health care as transgender people cannot access it unless they agree to follow the diagnostic pattern. Furthermore, the diagnostic phase is usually followed by a real life experience of one year which serves as a monitoring phase where the transgender person has to live in the preferred gender without being able to access irreversible hormonal treatment or gender reassignment surgery or to legally change the gender. In this period transgender people can be exposed to many situations where their physical appearance is not in line with the gender and the gender markers on official documents that may entail the violations of several rights such as the right to private life, the right to be equal before the law and the right to be free from discrimination.

Furthermore, the IGAS report highlights that psychiatrists within specialized hospital teams dealing with transgender-specific health care, including reassignment surgeries, sometimes do not recognize the diagnosis made by other psychiatrists. This represents yet another barrier to access trans-specific health care. The report acknowledges that one of the reasons why transgender people seek medical treatment abroad is their reluctance to undergo the diagnostic phase. Barriers to specific transgender-health care result also in transgender people accessing hormonal treatment on the black market and without medical supervision.

Amnesty International is calling on the French government to ensure that transgender people can access health care, including transgender specific health care, without any undue burden and delays and on the basis of the informed consent. Specific medical treatments, including hormonal treatment and reassignment surgeries, should not be imposed on transgender people as a condition to the legal recognition of their gender.

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