Transgender matters and family law – comparative European approaches

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Part I: France and England and Wales

This article is the first part of a two-part series exploring how the family courts in four European jurisdictions approach transgender issues. Part I, explores the respective positions in France and England and Wales and Part II, published in the next edition, the positions in Italy and Spain.

By way of introduction and definition, a transgender person ('trans person') is a person whose gender does not align with the gender they were assigned at birth, based on their biological sex.

A distinction used to be made between transgender individuals (those adopting the appearance and lifestyle of a person of a different gender from that of their birth, without altering their sex), and transsexuals, being those persons altering their body by taking hormones or undergoing surgery to change their birth sex. However, in order to avoid violating the privacy of persons that have undergone the gender change surgery, both groups are now widely and commonly referred to as 'trans persons'.

Position in France

Trans persons were stigmatised in France until 2010. 'Transsexualism' qualified as a mental illness before 2010. The decree n°2010–125 dated 8 February 2010 removed 'transsexualism' from the list of mental illnesses codified by the French Public Health Code.

A law passed in 2016[1] extended the list of criminally sanctioned discrimination by adding in to the French Criminal code a category of discrimination related to gender identity. This was a milestone since it is the first and only protection for trans people against the various forms of discrimination they may suffer in their workplace and by the administration, and more specifically it figures at Art 225–1 of the French Criminal code.[2]

While French law has evolved on the framework of the social identity of trans persons, it remains very conservative on the issues of establishing filiation between trans persons and their biological children.

In order to understand the precarious stigmatisation of such a minority community, it is crucial to question the evolution of the rights granted to trans persons and more specifically the framework of their protection in France.

The physical transition of trans persons

Adults

Regarding the test for being prescribed medication such as puberty blockers and cross-sex hormones, the adult trans person must contact a doctor that is fit to provide a medical prescription for a hormonal treatment.

A psychiatric follow-up ensures such treatment is suitable for the trans individual and an endocrinologist is additionally consulted on whether or not to issue a counterindication for the hormonal treatment.

1 law dated 18th of November 2016, n° 2016–1547 relating to the modernisation of justice of the 21st century
2 https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000045391831

Then, blood tests and hormonal tests take place. Following the results of the health check-up, a prescription is issued for the hormonal treatment.

The most emblematic case law on the physical transition of trans persons comes from the French Supreme Court in 1992; a decision which was subsequently overturned in 2016. The 1992 case law set five conditions for a trans person to be recognised as such, by mirroring their physical transition:

> 'to present the syndrome of transsexualism, to have undergone medical-surgical treatment for therapeutic purposes, to no longer have all the characteristics of one's original sex, to have taken on a physical appearance close to the other sex and to have adopted the social behavior corresponding to the latter and finally the trans person must provide proof of the reality of the transsexual syndrome invoked and of the irreversible nature of the transformation of his or her appearance.'[3]

This case law was overturned in 2016, because the conditions regarding the transition of a trans person was so prescriptive that it violated a trans person's rights to the respect of their physical integrity as protected by Art 8 of the European Convention on Human Rights ('ECHR').

Minors

It is currently forbidden for a minor in France to undergo plastic surgery in order to physically change their gender.

However, puberty blockers and hormonal treatment can be prescribed to minors with the express approval of both parents.

Once the doctor has a formal written consent of both parents, he can prescribe a hormonal treatment to the minor, but the prescribed dose will be weaker than those regularly prescribed to an adult, so as to avoid an abrupt cessation of bone growth in the minor.

When the minor reaches puberty, puberty blockers are prescribed once the minor is in stage 'Tanner 2' meaning the beginning of the development of secondary sexual characteristics.

This is very rare in France due to the absence of a proper legal framework on the topic for minors.

The administrative alignment of the trans person with their social identity: the formal surname and gender change on administrative documents

Name change – adults

It was only in 2016, with a law dated 18 November 2016, n°2016–1547 relating to the modernisation of justice of the 21st century,[4] that the possibility of the change of name for a trans person was introduced. This was a significant milestone for the trans community as it meant that a trans person no longer has to go in front of a judge to obtain a change of name.

A formal change of name is, therefore, no longer a cumbersome process since this is now done in front of the registrar or the city hall and is a mere administrative process. This is in comparison to the period prior to 2016, where it had to be undertaken before a judge, who could demand a psychiatric certificate and sometimes even a prior sterilisation, before a trans person could undergo a name change.[5]

Hence, this law represents a crucial breakthrough because the conditions that

3 Rulings 91–11900 and 91–12373, Bulletin 1992, AP n. 13 and n. 123 and 124, Bulletin 2012, AP. n. 1 in Ibid, § 58 p. 17.

4 https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000033418904

5 French Supreme court, 1st civil chamber, 7th June 2012, n° 10–26.947 and French Supreme court, 1st civil chamber, 13th February 2013, n° 11–14515 on the conditions required prior to 2016 for the French state to recognise the transition of a trans person

used to be required to modify gender on the civil status were so strict that they constituted a significant breach of the rights of a trans person, making them particularly vulnerable.

Regarding the proof of the lawful interest to proceed to the name change, being transgender constitutes itself a legitimate reason to request a surname change. The applicant can add some elements of proof demonstrating that the requested name is their usual name in their daily life by providing bills, letters addressed in their new name, affidavits from friends and family, loyalty cards etc.[6]

Name change – minors

In a decision dated 28 September 2022, the French Conseil d'état authorised trans teenagers to use their preferred name in school.

Regarding the formal name change for a trans minor in their civil status, the procedure in the city hall must be done with the approval and presence of both parents.

Gender change – adults

Some major legislative developments in France regarding the status of trans persons are worth mentioning in this section.

In a decision dated 6 April 2017, the ECHR condemned France because it held that the refusal of French authorities to change the civil status regarding the gender, on the grounds that the applicants had not provided proof of the irreversible character of the change of the physical appearance violated principles of Arts 3 and 8 of the ECHR.[7] The ECHR defined gender identity as 'one of the most basic essentials of self-determination'.

Following this decision, Art 61–1 of the French civil code was reformed to include a mention which states that 'the absence of medical treatment, surgery or sterilisation, cannot motivate the refusal to grant the request [to modify the mention of his / her gender in his civil status records]'. Therefore, it is now possible for trans individuals to obtain a birth certificate recording their new gender status, by lodging a request to the Court and the former original sex will no longer appear.[8]

However, there is still some progress to make to fully protect the rights of the trans community, as identified in two recent decisions of the EHCR. The current legal framework of a trans person's rights still leaves some level of vulnerability, which must necessarily and crucially evolve.

Moreover, in another recent case of the ECHR, dated 31 January 2023, the court held that the refusal of French authorities to replace the mention of 'male gender' with 'neutral gender' or 'intersex' on the birth certificate of a trans person does not breach their right to the respect of their private life according to Art 8 of the ECHR.[9] However, this case shows that the issue of gender change for 'intersex' individuals is far from being resolved under French law.

Gender change – minors

Recently, in a case dated 25 January 2022, the Court of Appeal of Chambéry recognised that a non-emancipated minor, with the consent of both parents, can change their gender in their civil status, following a proportionality test performed by the trial judges.[10] The proportionality test was counterbalanced with the right to the respect of the private life of Art 8 ECHR.

This is a first in France since current French legislation does actually not provide

6 Conseil d'état, 28th September 2022, req n°458403
7 ECHR, 6th April 2017, A.P Garçon and Nicot v France, n°79885/12, 52471/13, 52596/13, paragraph 135
8 The position of French legislation on trans on the topic of gender change is here far more liberal than what the ECHR prescribes to state members. In a decision dated 17th of February 2022 involving Poland, the ECHR held that the refusal to delete any mention relating to the gender of origin on the birth certificate of a trans person does not violate the European Convention of Human Rights.
9 ECHR, 31st January 2023, n°76888, Y v/ France
10 Court of Appeals of Chambéry, 25th January 2022, n°21/01282

non-emancipated minors (ie those aged 16 and 17) with a legal mechanism to change their gender on their birth certificate.

Trans persons and legal parenthood – the status of French case law

Access of trans persons to medically assisted procreation

The French Constitutional Council recently held that refusing access to a trans person, and more specifically to a trans man that has preserved his gestational capacity, to medically assisted procreation techniques is not unconstitutional.[11]

French conservatism prevails in that medically assisted procreation is not currently open to same sex couples. This means that if a heterosexual person is in a relationship with a trans person, they will not be able to access such techniques to have children.

The challenge in recognising filiation to trans persons becoming parents

Regarding the recognition of legal parenthood for trans persons, several criteria must be considered because there are some barriers to legally recognising filiation for trans parents in France:

- If the person giving birth to the child has a female marker,[12] they will be recognised as the mother of the child.
- If the mother is married, the partner will automatically be recognised as the father of the child. Indeed, there is a presumption that they are the father if they are married to the person giving birth to the child.
- If the mother is not married to her partner and the partner has a male marker in his civil status, he can be legally recognised as the parent to the child before or after birth.
- If the partner of the mother does not have a male marker in their genes, they have the possibility to adopt the child, whether they are the biological parent or not. Adoption is a viable solution when establishing filiation (the biological link between the child and the parent) is not otherwise possible.

For a trans woman, there is no doctrine at the moment and the case law is expected to evolve. The question concerns trans women (male by birth) giving birth to a child after the formal change of gender in their civil status. In a decision dated 9 February 2022,[13] the Court of Appeal of Toulouse recognised the right of a trans woman to be designated as a mother on the birth certificate of her biological daughter. However, this decision was rendered unlawful after a decision from the French Supreme Court, which had reversed and quashed this decision. However, the Toulouse Court of Appeals decided to maintain its position on this issue. There is no doubt that this incompatible position between the two Courts will result in a new decision from the Supreme Court in the near future.

Conclusion

The comparison of the French law status compared to other European jurisdictions shows that in some aspects France has a more liberal vision towards trans persons, particularly in respect of establishing filiation on the birth certificate when the trans person is the person who gave birth to the biological child.

However, there is still much room for an evolution of the French legislation on other issues related to trans rights and legal parenthood.

Position in England and Wales

Transgender rights in England and Wales have attracted significant legal and political attention recently, particularly for adolescents in light of the imminent closure

11 Conseil Constitutionnel, 8 juillet 2022, n°2022–1003, QPC
12 Female marker means that the trans person was of female gender by birth, as the biological gender assigned to them
13 Court of Appeals of Toulouse, 9th February 2022, n° 20/03128.

of the NHS Gender Identity clinic at the Tavistock and Portman NHS Foundation Trust, London.

The Tavistock clinic, named the Gender and Identity Development Service ('GIDS'), opened over thirty years ago to support young people aged under 18 struggling with gender dysphoria; a condition which involves a strong desire to be and to be treated as being of the gender other than their natal sex at birth. However, the treatment has been controversial, raising legal, medical, political and ethical issues. Decisions made by the Tavistock clinic were heavily criticised, legal actions ensued and the clinic was forced to prepare for closure following an independent review[14] by Dr Cass (it will be replaced by two new centres).

So what is the legal position now in respect of gender affirming or gender re-assignment treatment for those under 18 years old?

Medical treatment for under 18s: Consent

The entitlement of a young person to obtain medical treatment is governed by both statute and common law: Section 8(1) of the Family Law Reform Act 1969[15] sets out the statutory presumption that young persons aged 16 and 17 may consent to medical treatment, including surgery.

Consent of adolescents under 16 – Gillick competence

A child, under the age of 16, may be competent to consent to medical treatment if they are deemed to be '*Gillick*' competent. In the landmark House of Lords case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112[16], Lord Scarman, at 188H- 189A, stated:

> 'I would hold as a matter of law that the parental right to determine whether or not their minor child below the age of 16 will have medical treatment, terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed . . . until the child achieves the capacity to consent, the parental right to make decisions continues . . . '

Thus, it was determined, in all but the most exceptional circumstances, that physicians, not judges, should determine the capacity of a child under 16 to consent to treatment. From that moment forth, the term '*Gillick* competence' was coined.[17]

Bell v Tavistock – who determines the validity of consent?

A young person's ability to consent to gender treatment was brought into sharp relief in the matter of *Bell v Tavistock and Others* [2020] EWHC 3274 (Admin). The claimant, Quincy Bell (aka Kiera), was administered puberty blockers aged 16, progressed to cross-sex hormones and began surgical intervention as an adult to transition from female to male. She terminated her treatment having changed her mind and regrets having embarked upon the transition, being left with a masculine voice and facial hair. Quincy Bell argued that the clinic should have challenged her desire to transition as a young person more robustly.

At first instance, the Divisional Court, made a declaration as to the 'relevant' information that a child under 16 would have to understand in order to have competence to consent to the administration of puberty blocking drugs. Part of their guidance stated that clinicians 'may well consider' that it is not appropriate to move to treatment for 14–15-year-olds without the involvement of the court and that, for 16–17-year-olds, an application to the court would be

14 https://www.theguardian.com/society/2022/jul/28/nhs-closing-down-london-gender-identity-clinic-for-children
15 https://www.legislation.gov.uk/ukpga/1969/46/section/8
16 https://www.casemine.com/judgement/uk/5a8ff8c960d03e7f57ecd66a
17 Oxford Reference: https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095852606;jsessionid=64E1886BB6077A65264F9FCA18376DCA

appropriate if there were any doubt about the long-term interests of the patient. The respondent ,Tavistock clinic, was granted permission to appeal.

The Court of Appeal determined that it was for physicians, not judges, to exercise their judgment; knowing how important it was for the patient's consent to be obtained properly according to the particular individual circumstances of the patient. Furthermore, the Court of Appeal recognised that clinicians would be alive to the possibility of regulatory or civil action and this action would allow the issue of whether consent was properly obtained to be tested in individual cases.

The consent of the parents to gender changing treatment – what weight is attached to parental consent?

The case of *AB v CD and others* [2021] EWHC 741 confirms the entitlement of the parents of a trans-adolescent to consent to complex medical interventions for their child in certain circumstances.

In this matter, Lieven J confirmed that:

(i) Parents cannot override the decision of a 15-year-old child who is *Gillick* competent to consent to medical treatment.

(ii) However, where a child is not *Gillick* competent, or the child cannot make the decision (for example, because they find the situation overwhelming), the parents' right to provide consent continues, being in the child's best interests. This approach ensured the parents' rights (Art 5, United Nations Convention on the Rights of the Child and Art 8, ECHR) are balanced against the child's right to assert their own decisions, when competent to do so; and

(iii) puberty blocking treatment does not fall into a special category of medical treatment for children which requires court approval and for which the parents are unable to give lawful consent. However, in certain circumstances, for example, if parents feel pressured by their child to consent to puberty blockers, or the child's clinicians disagree how to proceed, the case should be referred to court.

Can a local authority invoke the inherent jurisdiction of the High Court to prevent a trans-adolescent undergoing gender affirming/re-assigning treatment abroad?

In *Re S (Inherent Jurisdiction: Transgender Surgery Abroad)* [2023] EWHC 347 (Fam),[18] the President of the Family Division, Sir Andrew MacFarlane, was concerned with an adolescent, S, who was assigned female at birth, but who identified and had lived as male for some years. S, with the consent of both parents, sought to travel abroad to undergo a double mastectomy (this procedure is not permitted in England and Wales to under 18s).

The local authority made an application to invoke the inherent jurisdiction of the High Court thereby preventing S from leaving the jurisdiction for surgery. The mother was threatened with imprisonment if she left the jurisdiction with S for this procedure.

However, on the first day of the final hearing the local authority made an application to withdraw the application having concluded that it could not discharge the burden to establish its case on (i) the legality of the procedure abroad and (ii) the validity of S's consent. After granting permission for the local authority to withdraw, McFarlane P provided vital commentary regarding the appropriate engagement of the inherent jurisdiction. In doing so, he reminded the local authority of the ongoing need to consider the 'twin lode-stars' of 'significant harm' and 'welfare' throughout such cases. The local authority was penalised for its conduct with a punitive cost award made against it.

18 https://caselaw.nationalarchives.gov.uk/ewhc/fam/2023/347

National reform on the issue of medical treatment for trans-adolescents

Presently, Dr Hilary Cass is Chairing a national Independent Review of Gender Identity Services for Children and Young People[19]. The Review focusses on how best to provide consistent and appropriate support and treatment for children and adolescents with gender incongruence or dysphoria. The review has now entered its final phase with plans to submit a final report to NHS England towards the end of 2023.

Adults: legal recognition of a change of gender

The Gender Recognition Act 2004 ('GRA 2004')[20] allows a person over the age of 18 to apply to the Gender Recognition Panel for a Gender Recognition Certificate ('GRC'). This certificate provides legal recognition of the acquired gender and enables the applicant to record a change of their gender on official documents (s 1(1), GRA 2004). The criteria for eligibility is that the individual must have:

(i) lived in the other gender; or

(ii) changed gender under the law of a country or territory outside the UK.

Pursuant to s 2 of the GRA[21], the Gender Recognition Panel, must be satisfied that the applicant has or has had gender dysphoria, has lived in the acquired gender throughout the period of two years ending with the date on which the application is made and intends to continue to live in the acquired gender until death. This application must be supported by two medical reports, which include the details of the gender dysphoria.[22]

Being in possession of a Gender Recognition Certificate permits the holder to:

(i) update their birth or adoption certificate (if registered in the UK);

(ii) get married or form a civil partnership in their affirmed gender;

(iii) update their marriage certificate or civil partnership certificate (if registered in the UK);

(iv) show their affirmed gender on their death certificate.

Official change of name

An individual cannot update their name on the Gender Recognition Certificate once issued, thus any name change must occur before an application for the GRC.

16–18 years olds can change their own name by:

(i) Making a simple legal statement in the form of an 'unenrolled' deed poll,[23] or

(ii) Applying for an 'enrolled' deed poll (which is registered officially at the Royal Courts of Justice), thereby placing their new name on public record. However, to do so they will need require the agreement of those with parental responsibility over them or a court order to this effect.

Over 18s can apply for an 'enrolled' deed poll, which is a straightforward administrative process.

Adults: gender recognition and parental responsibility

Acquiring gender does not affect parental status (s 12, GRA)[24].

The case of Mr Freddy McConnell tested the remit of parental status and gender. In this case, McConnell, born female, suffered gender dysphoria and underwent testosterone treatment in 2013, followed by

19 https://cass.independent-review.uk/
20 https://www.legislation.gov.uk/ukpga/2004/7/contents
21 https://www.legislation.gov.uk/ukpga/2004/7/section/2
22 Note the legal position in Scotland: https://www.parliament.scot/bills-and-laws/bills/gender-recognition-reform-scotland-bill
23 https://www.gov.uk/change-name-deed-poll/change-a-childs-name
24 https://www.legislation.gov.uk/ukpga/2004/7/section/12

a double mastectomy. However, he retained his female reproductive system. After carrying and giving birth to a son ('YY'), he sought to be named as a 'father', 'parent' or 'gestational parent' on the child's birth certificate (as he was considered male in law and had a Gender Recognition Certificate to prove it).

The Registrar General for England and Wales decided that Mr McConnell should be registered on the birth certificate of his son, as his 'mother'. Mr McConnell applied for a judicial review of that decision.

His primary claim was that, as a matter of domestic law (by virtue of the GRA 2004), he should be regarded, and therefore have the right to be registered, as YY's 'father', or otherwise as 'parent' or 'gestational parent'. His secondary and alternative claim, given that domestic law required his registration as 'mother', he sought a declaration of incompatibility under s 4 of the Human Rights Act 1998 on the ground that the domestic regime is incompatible with his and/or YY's rights under Arts 8 and 14 of the ECHR.

On 9 November 2020, on an application for permission to appeal, the Supreme Court determined that permission to appeal be refused because the applications did not raise an arguable point of law which ought to be considered at this time bearing in mind that the cases were the subject of judicial decision and reviewed on appeal.

His appeal was dismissed. In the Court of Appeal, Lord Burnett, came down in favour of the right of a child born to a transgender parent to know the biological reality of their birth rather that the parent's right to be recognised on the birth certificate in their legal gender. The legislative scheme of the GRA required Mr McConnell to be registered as the 'mother' of YY. There was no incompatibility between the GRA and the Convention.

Registration of marriage and civil partnerships

The Gender Recognition (Marriage and Civil Partnership) Regulations 2015 provides for the continuity of a protected marriage or civil partnership registered under the law of England and Wales. This is not affected by the issuing of a full Gender Recognition Certificate to one or both parties to the marriage or civil partnership.[25]

Trans-rights: anti-discrimination

Section 7(1) of the Equality Act 2010[26] offers trans persons protection against discrimination:

> 'A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.'

Summary

After a period of flux, there is now a degree of certainty and consistency with regard to the approach of the family Courts to trans matters in England and Wales. It is hoped that this will be further cemented with the findings of the Cass Review of Gender Identity Services for Children and Young People, due at the end of 2023.

25 https://www.legislation.gov.uk/ukpga/2013/30/notes/division/2/10/1?view=plain
26 https://www.legislation.gov.uk/ukpga/2010/15/section/7