

Equality of Gender Recognition and Balance between Sex and Gender

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ABSTRACT

Since the twentieth century, the rights of the individual have continued to be given legal attention, with gender identity becoming increasingly recognised and accepted towards the end of the twentieth century. The protection of the equal rights of transgender people has also entered the realm of legislation. This paper summarises and compares the development of transgender identity recognition and its limitations in the laws of various countries, using examples from different countries. The process of affirmative action is uneven across the globe, but is generally moving in the direction of optimisation. It also draws out the difficulties in obtaining social recognition for transgender people and the controversial nature of new bills, such as the Equality Act of 2019 in the United States, and analyses the conflict of rights and protections between biological sex and gender identity, and finally discusses how the balance between the two might be improved.

Keywords: *transgender, gender and sex, Equality Act, gender recognition, gender identity*

1. INTRODUCTION

The term “gender identity” was originally coined by Robert Jesse Stoller in 1964. This term refers to a person's personal conception of their own gender, which may or may not correspond to their winning gender [1]. Although a person may exhibit actions, appearances, and attitudes that correspond to gender roles in a particular traditional sense, this does not represent their gender identity. Gender identity can be masculine, feminine or non-binary and is not necessarily based on or consistent with biological sex characteristics. With socialisation and civilisation, the idea of human rights has been further promoted and developed, and the equal rights of individuals are increasingly valued, and the rights of social minorities should be respected and protected by law, including the right of an individual to determine one's own gender identity. The antidiscrimination laws are started to be considered in the legislation global-widely. One of the part that receives the most debate and attention is the gender recognition which offers legal status for the non-cisgender populations. Attitudes to gender identity vary greatly between legal jurisdictions, as does the degree of legal recognition of gender reassignment for transgender people. It is a process of continuous change and reform to maximise the protection

of the equal rights of transgender groups and reduce the hidden discrimination of minorities in society in the future. However, many controversies have arisen during this process, the most important of which is whether the less restrictive gender recognition process will affect equality on the basis of biological sex.

This paper will use several examples associated with gender recognition in different national jurisdictions, compare and contrast the commonalities and differences between them, analyze why some of them are controversial, and anticipate the future direction and to discuss how may the law to be modified to reduce the controversial part.

2. COMPARATIVE ANALYSIS OF THE LEGAL GENDER RECOGNITION

This paper will divide the recognition in two main aspect, the change of legal gender on the identification documents such as birth certificate, passport etc. and the using or participating of public accommodations or activities which are separated based on biological sex. The degree of the changing of legal gender in various jurisdictions can be categorized in five stages.

2.1. Stage1: Complete Prohibition

First, some countries are completely prohibit the change made on the legal status of an individual based on one's gender identity. According to the Trans Legal Mapping Report which released by IGLA World, by 2020, only 96 countries have the process in legislation allowing the change of legal gender. This indicates at least in 47 UN member states, transgender people cannot use their gender identity as their legal status. Furthermore, there are 13 countries criminalize transgender people [2]. Malaysia is an example. The state religion of Malaysia is Islam, therefore Islamic attitudes towards transgenderism have a strong influence on the population, as well as having an almost decisive role in the legislations. Both the Malaysian civil law and Sharia law do not provide protection for the transgender community from discrimination and still do not recognize the legal position of the transgender people. The legal gender is forbidden to change unless mistakes are made based on Section 27 Malaysia Births and Deaths Registration Act and Section 6(2)(o) National Registration Act [3]. Practices of transgender was stated illegal as a lifestyle in the 126th session of Malaysian council of the rulers in 1989 and then The National Fatwa Committee declared in 2008 that transgenderism is prohibit and is among the major sins in the religion of Islam based on the prophetic and Quranic evidences. The forbidden for "anti cross-dressing" is still existed in the legislation of Malaysia and individuals who violated it can be facing charges and penalty.

2.2. Stage2&3: Relatively Conservative with Requirements

The second stage of advanced equal recognition is that people can change their legal gender but with the requirements to take the gender reassignment surgery or treatments. China's law which associated with the gender recognition can be considered as an example. Chinese law provides that citizens have the freedom to "change their names in accordance with regulations", but does not provide for transgender people to change their legal gender. Documents from the Ministry of Public Security stipulate that undergoing genital sex reassignment surgery is a prerequisite for changing the gender of one's identity documents, and require a sex identification certificate issued by a tertiary hospital and a notary certificate issued by a notary or a judicial appraisal department.[4] These requirements raised some argues as gender reassignment surgery is not covered by medical insurance in China and transgender people are required to pay for the entire procedure from their own pocket. The high cost makes it unaffordable for many transgender minorities, who already face more pressure and discrimination in society, and undoubtedly makes their path to gender recognition even more difficult. The third stage is more easier to access to the legal status change

for transgender people as the recognition process does not required any gender reassignment surgery or treatment but a doctor certifies that prove a person suffers from gender dysphoria. This is taken place in the United Kingdom. In the UK, people who wish to change their legal gender must apply for a Gender Recognition Certificate, which does not require gender reassignment surgery, but they must have lived with their acquired gender for two years and be diagnosed with gender dysphoria. However, many transgender people do not apply because they find the process too lengthy, intrusive and degrading to their private lives. The similar phenomenon can be founded in many countries, but raised more arguments as the phrasing can be slightly changed. In Japan, according to the Act on special cases in handing gender for people with gender identity disorder which an act approved by the National Diet of Japan in 2003 associating with the gender recognition. In this case, if once the person gains the certificate, the government would the government will cover 30% of the cost if the person required for a gender reassignment treatment. But many people pointed out that it is a direct discrimination as the law classified transgenderism as a mental illness.

2.3. Stage 4&5: Totally Free Choice without Requirements

The forth stage where several countries are discussing to move forward into is the changing process of legal gender without any requirements. Some country are already allowed the individuals to freely change decide their legal gender on their documents only based on self-declaration such as Argentina and Portugal. Argentina is the first jurisdiction to adopt a gender recognition policy based entirely on individual autonomy, without requiring third party diagnosis, surgery or any type of barrier as the Gender Law passed by the Congress of Argentina in 2012 which are provide the change on the national ID of transgender people who are over 18 with only their written declaration. This has made many transgender gained more equal right as to be recognized in the society with their own identity but at the same time also raises debates as how to regulate the recognition in order to prevent thre equality based on biological sex.

In the five stage, the legislation does not only limit the legal gender recognition in the range of the binary genders-men or women. It provide a third gender option on the official documents for non-binary and intersex community. Few countries such as Germany and Australia have already implemented this legal recognition. Previously, in the vast majority of legal systems, the gender on official documents could only be divided into male and female, which had a significant impact on the rights of non-binary groups, whose civil rights were limited by the normative confines of sex and gender [5]. This is a great development on the equality

for gender identity as some individuals do not need to force themselves to fit in the two traditional gender male and female based on the sex as they born with. Individual right of choice is maximised and respected equally.

3. HOW THE LEGAL GENDER RECOGNITION BECOME CONTENTIOUS

3.1. Questions Raised On the Social Recognition of Transgender

As the gender identity of transgender people gains more legal recognition and equal rights, controversy ensues. In most countries there is a general trend towards a reduction in the restrictions and requirements for legal gender change evidences can be seen such as in 2017, the British government set out a consultation on the reform on the Equality Act 2010 removing the requirements for legal recognition for transgender people. The recognition with gender identity is presence in a positive tendency in a global-wide view, it is an effective advanced element for the anti-discrimination of the trans population. The reform and limitless of the created a easier access to equal rights for the trans community in the society, but discuss are raising in the aspect of the protection of right based on the biological sex. Mainly, when the problems come in the trans people's using of the sex-separate public accommodations and participation in the sex-divide activities. Recently, the American's Equality Act that reintroduced on the 117th congress in February 2021 received numerous arguments. The Act was passed by the House on the 25th of February with the vote of 224 to 206 and moved in to the senate for consideration. Its purpose is to provide legal protection for each individuals especially the minorities from discrimination based on sex, race, sex-orientation and gender identity in the public accommodations. But the part about the equal rights for transgender people in the access of separate-sex facilities becomes controversial as the act states that people can access these single sex areas according to their chosen gender identity. The opponents of the act argue that this can affect the rights of the women who already have been considered more vulnerable under the society that still maintain some aspects of patriarchy. Some opponents and feminist groups such as the women's human rights campaign USA point out that this may offer more opportunity for several offenders with nefarious motives who can claimed themselves as trans women to enter women-only areas like refugees and rape centre, also sex-divided space like bathroom and changing room and prison. How to determine that people whose official document gender is male, who has never undergone gender reassignment surgery or hormone therapy, and who does not conform to the traditional sense of "femininity" in terms of visual appearance, can enter female-only public facilities solely when they claimed their gender identity are women. This may create a legal loophole for some law-offenders with bad intentions.

This type of incident can be seen in the Karen White Case. In 2018, in the UK, Karen White, a biological male imprisoned on a charge of sexual assault against a woman, was granted permission under the policy to stay in a women's prison, citing his gender identity as female. White assaulted at least two female inmates during his time in a women's prison, and although White has since been convicted, the bad publicity caused has become indisputable [7].

3.2. Controversial Arguments on the Balance between Legal Protection on Sex and Gender

The problem also arises in the field of sport, where the biological sex of men and women is different, for example, men are naturally contain more percentage of muscle than women, and if physical competition is divided according to mental gender identity, transgender athletes who are physically male and mentally female obviously have a clear advantage over female athletes who are physically female, thus leading to unfair results. This vague definition and ambiguous restriction has led to this act becoming lacking in precision and rigour and is exposed to a significant risk fold making it much less viable. Despite its laudable objectives, the Equality Act is flawed in its form [6]. The Act prioritises gender identity over biological sex, which leads to the destruction of women's rights on the basis of their biological sex in the event of a conflict between the two, instead upsetting the balance and contradicting the Act's original intention of "equality". The ambiguity and unreasonableness of the Act further squeezes the already narrow space for women of the biological sex in society and diminishes women's hard-earned rights [8]. Alyse Sherrick hold an distinct view with Callie H. Burt. Alyse stated the social gender recognition without requirements is not the root of the expecting increasing crimes, Alyse promotes that instead of separate the transgender women from the cisgender women, people with sexual assault offence should be prohibit from entering. Alyse stated the cause of the problem should focus on the individuals experience rather than the gender identity [8]. The aim to focus on individual situation is commendable but the existence of physical differences also needs to be recognised. The potential risks need to be recognised and taken into account and a more eclectic approach to reform will maximise the balance of rights between the various groups.

4. HOW TO ADVANCE THE RIGHTS OF GENDER RECOGNITION WITHOUT OFFENDING OTHER GROUPS' EQUALITY

In modern society in general, biological sex and gender identity have become two separate concepts, and official documents may consider recording both in order to accurately uphold respect for the individual's legal

gender recognition. or non-binary gender could also be included. Such an innovation would allow non-binary gender groups to be legally identified in society without having to force themselves into a specific male or female. In gender-specific public facilities, restrictions should be placed on people who simply claim to be transgender without being legally certified or undergoing a gender reassignment process, and while individual circumstances may deviate, for example, if one cannot afford the cost of a gender reassignment process but already has a chosen gender that persists in all aspects of one's social life, the risk of exploiting loopholes for the unscrupulous due to the vague absence of restrictions is still necessary. But at the same time the law could provide for a gender-neutral space to be created alongside the two single-sex spaces, which could be a space that anyone could use to enter. The existence of such a space would not only alleviate the problem of trans people not wanting to remain classified as their own gender of origin, but would also maximise the protection of the rights of non-binary gender people to be recognised. The UK and Italy have had policies to establish transgender prisons [6], but the separate labelling of transgender people from males and females seems to be inaccurate and subtly discriminatory, an implicit non-recognition of the gender identity of transgender people. Anti-discrimination protections are necessary in view of the immense stress and fear of harassment that some transgender people face when going to toilets that do not correspond to their gender identity. In the 2015 American Transgender Survey, more than half (59%) of respondents avoided using public restrooms in the past year because they were afraid of being harassed or assaulted [9]. Therefore, a gender neutral space seems to be the best solution. People who are not legally or medically recognized but who do not want to share a space with the opposite sex can have a "gender-free" option, which also caters for non-binary genders and intersex people, for example. There is no way to say that this is absolutely fair, but in certain situations, personal safety comes first and the risks need to be assessed, especially in environments where women need more privacy and security, such as women's shelters.

In sports, physiological conditions are important to the fairness of the game as athletes are competing for physical skills, stamina, explosive power, etc. Transgender athletes may need to undergo some assessment to determine whether they have an advantage or disadvantage in terms of physical ability compared to the gender they choose to compete in, and the range needs to be set to ensure that this does not affect equality based on biological sex.

5. CONCLUSION

The right of individuals to choose their own gender identity should be valued worldwide and should not be restricted. Legal identity is a vital step towards equality.

Although attitudes towards transgender people in different jurisdictions around the world and the process of legislating gender change have been uneven due to cultural and historical, religious backgrounds, etc., overall there has been a positive development. This is due to increased acceptance by society at large and the growing importance of individual rights. However, in the process of development, various controversies have arisen, most notably the distinction between biological sex and gender identity, and how to balance the interests and rights of both. In addition, the rights of non-binary gender groups, beyond the initial distinction between male and female based on biological characteristics, are beginning to be socially accepted, valued and protected in legislation.

The protection of transgender people from discrimination is essential, but at the same time, other socially marginalised groups need to be taken into account when there is a conflict with rights based on biological sex, and decisions need to be made with trade-offs and caution where necessary, such as the above-mentioned non-medically and legally recognised single-sex spaces for cisgender women who are exploited by men on the basis of their biological sex. The question of whether transgender groups, which are not medically or legally recognised, are free to access the single-sex spaces of cisgender women. I conclude the essay by discussing the need for third gender to be included in legal gender recognition, the already gender-free space created and the distinction between gender and sex at the legal level, on official documents.

AUTHORS' CONTRIBUTIONS

This paper is independently completed by Jiayi Lin.

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REFERENCES

- [1] Deana F. Morrow and Lori Messinger, *Sexual Orientation and Gender Expression in Social Work Practice* (2006, ISBN 0231501862)[M] Columbia University Press, 2006, pp.8.
- [2] Jamie Wareham, *Forbes*, New Report Shows Where It's Illegal To Be Transgender In 2020[N] Sep 30, 2020.
<https://www.forbes.com/sites/jamiewareham/2020/09/30/this-is-where-its-illegal-to-be-transgender-in-2020/?sh=7cd835d55748>

- [3] Wan Amir Azlan Wan Haniff, Siti Mariam Atan, Rahmawati Mohd Yusoff, Rosnani Mohd Salleh, Zulhazmi Yusof, Transgender Rights In Accordance with civil&Sharia Law: Malaysia and Asean Perspectives [D] 26 Mar 2021, pp.5-6.
- [4] UNDP, APTN, Legal Recognition of Gender Identity of Transgender People - An Assessment Report on Relevant Laws and Policies in China [J] 2008, pp.50-51.
- [5] Kriva Maria, Umea University, Faculty of Social Sciences, Umea Centre of Gender Study, The recognition of the non-binary gender: A social-legal analysis of the third gender legislation in Malta and Germany [D] 4 Sep, 2019.
- [6] Caille H. Burt, Scrutinizing the US Equality Act 2019: A Feminist Examination of Definitional Changes and Sociolegal Ramification [J] 1 June 2020, pp.3-4, 13.
- [7] Belknap J., The Invisible Woman, Gender, Crime and Justice (3rd ed.) [M] 2007.
- [8] Alyse Sherrick, Gender Identity and Trans Equality: A Comment on Burt [J] 1 Apr, 2021, pp.3-4.
- [9] Brain S. Barnett, MD, Ariana E. Nesbit, MD, and Renee M. Sorrentino, MD, The Transgender Bathroom Debate at the Intersection of Politic, Law, ethnic and, Science [D] June 2018, pp.4.