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THE DEVELOPMENT OF TRANS RIGHTS AND THE RIGHT TO HEALTH CARE: A HISTORICAL PERSPECTIVE

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What is at stake in the history of trans rights?

- Sweden is often described as progressive and tolerant on issues of LGBTQ rights and trans rights in particular. In later years Sweden has come under serious critique from the WHO and the European Union for violating the human rights of its citizens on the matter of bodily integrity and right to private life.
- Two reports will be referenced today: **SOU 1968:28**, the preparatory report for the legislation of 1972, and **SOU 2014:91**, which was tasked with 'modernizing' the legislation.

What is at stake in the history of trans rights?

Three premises, that have withstood time, that are important for our understanding of the legislation:

1) Swedish civil registrations rely on gendered manifestations: juridical gender markers and gendered personal identification numbers. This put trans people in a particularly vulnerable position visavi the state due to the troubles of not fitting into administrative systems. Administrative systems distribute life chances and produce vulnerability so that those who are the most vulnerable in society also are the ones at the highest risk of such state violence (Spade 2011:13).

What is at stake in the history of trans rights?

2) The legislation on gender recognition and access to care, has been reliant on the discourse of the suffering trans person who is dependent on the aid of the state. Not unique to the Swedish context; it is and has been one of the hegemonic narratives internationally, expressed in clinical work, mainstream media and popular culture alike (see for example Gill-Peterson 2018, Raun 2016, Haritaworn et al. 2014, Serano 2013, Stryker 2008).

What is at stake in the history of trans rights?

3) The discourse of the state's responsibility for the suffering trans person has been the basis of the argument that gender recognition and gender-affirming care are exceptional, an exception to the rule. With the exceptionalization also comes a demand to measure up to the criteria set up by the state to count as eligible for the rule of exception.

Gender Recognition Act 1972:119

- In effect since 1972, applicable to two categories: trans and intersex.
- Regulates the right to have one's gender juridically recognized and the right to access to genital surgery as part of medical care.
- The preparatory report SOU 1968:28 consulted clinicians working with trans care seekers, psychiatrist Jan Wålinder and endocrinologist Rolf Luft.
- The legislation can be understood as a way to formalise already established procedures of alleviating bureaucratic problems and ensuring access to proper health care, turning what was an established medical practice into a formal civil right.

Arguments informing the legislation

- The argument was that gender variant people are marginalised due not only to the discrepancy between their gender identity and gender expression and official papers, but also due to the lack of understanding from society at large, and state representatives such as physicians in particular.

“The obstructed social adaptation is reinforced by an unsympathetic attitude from the general public and physicians.” (SOU 1968:28:27)

Arguments informing the legislation

- However still a demand for conformation to what was understood as the norm.
- An individual's sexed and gendered being is described as not only of importance to the individual but "to other individuals and to society" (SOU 1968:28:39).
- The report was explicit about the conflict at hand: administrative systems are reliant on binary sex and gender categorisations, so the state's responsibility to alleviate the pain caused by its administrative systems needs to be balanced against its desire to uphold those very same systems and, by extension, the order of society as we know it.

Criteria for gender recognition and access to care

- Legislators are open to changes in social attitudes and to changes in scientific knowledge production. Incorporated developments in the fields of sociology and medicine that put more emphasis on so-called “psychosexual elements”.
- The premise was that self-determination ought to be the basis of juridical gender recognition, but only if tested by medical expertise, and measured against diagnostic criteria. Medical experts (i.e. psychiatrists) were thought to be the only ones able to make decisions on gender-affirmative care on behalf of the state.
- In order to gain access trans people had to go through a psychiatric evaluation and send in an application to the National Board of Health and Welfare.

Criteria for gender recognition and access to care

- Three aspects were central: the stability, predictability and futurity of the gender identity. The dominant hypothesis was that one cannot change an established gender identity through external pressures.
- A manifest gender identity ought to be the grounds for the juridical gender. The key word here was manifest: “The individual’s apprehension of his or her sex influences the choice of clothes, pattern of movement, and further behavior” (SOU 1968:28:43).
- Trans people had to prove that their gender identities were stable and expressed through the so-called real-life test.

Criteria for gender recognition and access to care

- An implicit demand for genital surgery: someone who was reluctant to have surgery did not fulfil the criteria for the diagnosis and was thus not eligible for gender recognition or gender-affirming healthcare.
- The state has an obligation to protect its citizens from making decisions they would later regret: there was no formal demand for genital surgeries.
- Genital surgery is only lawful when performed to align the body with the juridical gender. Otherwise the surgeries are “meaningless mutilation[s]” (SOU 1968:28:62).

Criteria for gender recognition and access to care

- Reproductive abilities as the most significant indicators of sex and gender. For trans people this meant that reproductive capacity needed to be eliminated for the gender identity to take precedence.
- Heterosexual orientation and a low sex drive were key tools in the differential diagnosis. Homosexual experiences were listed as a contra-indication for gender recognition in a 1978 evaluative report, and until the 1990s the ability to prove a heterosexual preference was decisive for the application for gender recognition to be approved (in the logic of the heterosexual matrix, Butler 1990).

What has changed since 1972?

- **2012**: elimination of the demand that a trans applicant needs to be unmarried and a Swedish citizen. **2013**: elimination of the sterilization demand.
- Citizens have fought the state to be able to register their first name of choice (litigation won in 2003), to gain access to gender-affirming care without sterilization (litigation won in 2013), and to be able to be registered as their children's parents under the correct juridical gender (litigation won in 2015).
- Two governmental commissions with the task to 'modernize' the legislation: the second one, SOU 2014:91, is still in the legislative process.

'Modernizing' the Gender Recognition Act

- SOU 2014:91 was to focus on the administration of juridical gender recognition and the stipulated age limits.
 - A separation of the juridical and medical aspects of gender affirmation in order to facilitate access to juridical gender recognition without medical evaluation.
 - Children as young as 12 should to be able to have their gender recognized, children as young as 15 should to be able to access genital surgeries, if in accordance with scientific evidence and proven experience. The existing legislation carries an age limit of 18.
 - It acknowledges that there is a spectrum of experiences within the trans community, and that society hence needs to provide different types of support and not stress the one fits all medical care model.

'Modernizing' the Gender Recognition Act

- The preparatory report was indeed a break with the existing legislation, based on human rights arguments, but there is also historical continuity:
- Concluded that most aspects of gender-affirming care are regulated by the *Health and Medical Services Act* 1982:763, but insisted that genital surgeries and the removal of gonads ought to be regulated by a specific act with an application process governed by the National Board of Health and Welfare.
- Described genital surgery as “a life changing act” (SOU 2014:91:276) and stated that such procedures “require rigorous medical examinations and evaluations” (SOU 2014:91:292).
- A prerequisite for genital surgery is a diagnosis, either within the spectrum of gender dysphoria or intersex.

Where are we at?

- Moved away from a model where the state interest took precedence, but trust is still placed in clinical evidence and scientific knowledge production, not in the lived experience of the care seekers.
- Need an open discussion about trans health, that focuses not only on access to gender-affirming care, but to overall care and good health, departing from self-determination. This could be facilitated through work that:
 - centres community knowledge and self-determination already in school settings
 - secures financing for trans led organizations working with self-care and community development

References

Butler, Judith. 1990. *Gender trouble*. London: Routledge.

Gill-Peterson, Julian. 2018. *Histories of the transgender child*. Minneapolis: University of Minnesota Press.

Haritaworn et al. 2014 Haritaworn, Jin, Adi Kuntsman, and Siliva Posocco. 2014. *Queer necropolitics*. London: Routledge.

Raun, Tobias. 2016. *Out online*. London: Routledge.

Serano 2013, Serano, Julia. 2013. *Excluded*. Berkeley: Seal Press.

SOU 1968:28. 1968. *Intersexuellas könstillhörighet*. Stockholm: Esselte.

SOU 2014:91. 2014. *Juridiskt kön och medicinsk könskorrigering*. Stockholm: Elanders.

Spade, Dean. 2011. *Normal life*. South End Press.

Stryker, Susan. 2008. *Transgender history*. Berkeley: Seal Press.