



UPPSALA
UNIVERSITET

Children's Right to Health, including Medical Care

Jameson Garland, LL.D.

Uppsala University





European Court of Human Rights (ECtHR): Medical Consensus and Transgender Rights

Medical consensus in support of gender-affirming should receive more weight than a legal consensus in Europe as to how rights should be protected (due to resistance to act over many years). *Goodwin v. United Kingdom (2002)*

This is exceptional: generally the Court gives States a wide margin of appreciation on questions of involving medical science & ethics:

- *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12 (2013) (experimental drug access)
- *S.H. and Others v. Austria*, [GC], 57813/00 (2011) § 105 (gamete donation)
- *Evans v. United Kingdom*, no. 6339/05 (2007) § 74 (destruction of embryos after withdrawn consent)
- *Pretty v. the United Kingdom*, no. 2346/02 (2002) § 73-74 (assisted suicide)



European Court of Human Rights: “Trans-supportive” decisions

- Medical requirements

- Medical consensus supports a person both to be registered and marry according national law to in a medically affirmed gender. *Goodwin v. United Kingdom (2002)*
- Contracting States must provide medical facilities and legal mechanisms for gender-affirming procedures *L. v. Lithuania (2003)*.
- Categorical waiting periods for surgery not based on patients’ significant needs are not proportional. *Schlumpf v. Switzerland (2009)*.
- Sterilisation for gender recognition is no justified under Art. 8. *Y:Y. v Turkey (2015) / A.P., Garçon and Nicot v. France (2017)*



European Court of Human Rights: Problematic Decisions in Gender Recognition

- **Medical Preconditions:** Desire to change gendered registration is *not arbitrary* based on “*the numerous and painful interventions involved* in such surgery and ... *commitment and conviction required to achieve a change in social gender role*”
 - Gender registration and right to marry. *Goodwin v. United Kingdom* (2002)
 - Reimbursement for surgery. *Van Kück v. Germany* (2003)
 - Name change. *S.V. v. Italy*, 55216/08 (2018)
- **Divorce Requirements / Discrimination:**
 - “Transsexuals” are *not similarly situated* with “cissexuals” in the right to gender recognition & registration and can be required to divorce. *Hämäläinen v. Finland*, [GC] no. 37359/09 (2014)



European Court of Human Rights: Special Protections for Children

Söderman v Sverige [GC], no. 5786/08 (2013)

- Sweden has “a positive obligation” to prevent violations of private life, with **a narrow margin of appreciation whenever the “most intimate” aspects of life are harmed and “identity is at stake”** (¶¶ 78-79).
- For “children, who are particularly vulnerable” Sweden has **an obligation to “prevent ill-treatment” known to them**, including physical and psychological harm. (¶¶ 81-85).
- There must be **a legal framework to provide meaningful protection to the child, ensuring human dignity and best interests of the child.** (¶¶ 80-81).

OBS: Identoba v. Georgia, app no. 73235/12 (2015) Contracting States have obligations to investigate & stop violence based on gender identity.





UPPSALA
UNIVERSITET

The UN Human Rights Framework

**International
Covenant on
Civil & Political
Rights
(ICCPR)**

**International
Covenant on
Economic, Social
& Cultural Rights
(ICESCR)**



**Convention on the Rights of the Child
(CRC)**



UPPSALA
UNIVERSITET

Right to Health: Discrimination & Identity



UPPSALA
UNIVERSITET

The Right to Health & Gender Identity Discrimination

General comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2 of the International Covenant on Economic, Social and Cultural Rights) (2009)

§ 20. [T]he notion of the prohibited ground **“sex”** has evolved considerably to cover not only physiological characteristics but also **the social construction of gender stereotypes, prejudices and expected roles.**

§ 32. “Other status” as recognized in article 2, paragraph 2, includes sexual orientation.... In addition, **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**” should be protected.

See also: General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)



UPPSALA
UNIVERSITET

The Right to Health & Gender Identity Discrimination

General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), § 8.

In order **to fully realize the right to health for all children, States parties have an obligation to ensure that children's health is not undermined as a result of discrimination**, which is a significant factor contributing to vulnerability. A number of grounds on which discrimination is proscribed are outlined in article 2... These also include **sexual orientation, gender identity and health status**, for example HIV status and mental health. Attention should also be given **to any other forms of discrimination that might undermine children's health**, and the implications of multiple forms of discrimination should also be addressed.



UPPSALA
UNIVERSITET

The Right to Health & Gender Identity Discrimination

Committee on the Rights of the Child, General Comment no. 14 (2013) on the right of the child to have his or her best interests taken as primary consideration, § 55.

Children are not a homogeneous group and therefore diversity must be taken into account when assessing their best interests. The identity of the child includes characteristics such as **sex, sexual orientation**, national origin, religion and beliefs, **cultural identity, personality....The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8)** and must be respected and taken into consideration in the assessment of the child's best interests.

Recommendations for gender neutral registration or options: SOGI Rapporteur and Independent Expert (2018); Parliamentary Assembly for the Council of Europe (2017, 2015); Yogyakarta Principles (Principle 31) (end registration in identity documents)



Discrimination & Swedish Law

5 § I denna lag avses med

1. *kön*: att någon är kvinna eller man,

2. *könsöverskridande identitet eller uttryck*: att någon *inte identifierar sig som kvinna eller man* eller *genom sin klädsel eller på annat sätt ger uttryck för att tillhöra ett annat kön ...*

Även den som avser att ändra eller har ändrat sin könstillhörighet omfattas av diskrimineringsgrunden kön.

OBS: Applies in (1) employment, (2) education, businesses, (3) organizations, (4) sales of goods, services, & housing, (5) health and social services, (6) insurance, (7) military & civil services, m.m. (*Diskrimineringslag 2 kap.*)



UPPSALA
UNIVERSITET

Discrimination in Comparative Law



Law of Malta, Ch. 456 (employment and education)

Prohibits discrimination on the basis of “*gender identity, gender expression and sex characteristics*”



Finland's The Act on Equality between Women and Men (609/1986), §§ 3, 6 7 (employment and education)

This Act's provisions on discrimination based *on gender identity or gender expression apply correspondingly to discrimination based on the fact that an individual's physical gender-defining characteristics are not unambiguously female or male.*



UPPSALA
UNIVERSITET

Registered Identity & Swedish Law

Folkbokföringslag (1991:481)

18 § Födelsetiden anges med sex siffror, två för året, två för månaden och två för dagen i nu nämnd ordning. Födelsennumret består av tre siffror och är *udda för män och jämnt för kvinnor*.

24 § ...*Föds barnet på ett sjukhus* eller enskilt sjukhem ska inrättningen göra anmälan. Om en barnmorska hjälper till vid födelsen i annat fall, ska hon göra födelseanmälan. Anmälan ska göras så snart som möjligt. I andra fall ska barnets vårdnadshavare göra anmälan inom en månad från födelsen.

Reasons to maintain gender registration: (1) statistics and research, and (2) to keep track of sex equality. *SOU 2008:60, Personnummer och samordningsnummer*, s. 73.



Registered Identity & Swedish Law

Lag (1972:119) om fastställande av könstillhörighet i vissa fall

- Gender identity can only be determined in consult with individuals to assess how they relate to one gender or another (*SOU 1968:28, s. 39*).
- Male-female classification (if biological) is not a proxy for identity (because of variations of sex characteristics and transgender identities) (*SOU 1968:28, s. 39*).
- A “small group” of people are affected by gender registration and could be medically made to fit the categories supported by the values of the majority of people. (*Prop. 1972:6 p. 18.*)
- The definitions of “male” / “man” and “female” / “woman” should be kept **“vague”**. (*Prop. 1972:6, p. 18.*)



UPPSALA
UNIVERSITET

Registered Identity & Swedish Law

“kön”



67xxxx – 603x



UPPSALA
UNIVERSITET

Registered Identity & Swedish Law

67xxxx – 603x



“födelselän”



UPPSALA
UNIVERSITET

Lag (2001:182) om behandling av personuppgifter i Skatteverkets folkbokföringsverksamhet, 2 kap. 3 §

För de ändamål som anges i 1 kap. 4 § får följande uppgifter behandlas i databasen:

1. person- eller samordningsnummer,
2. namn,
3. födelseid,
4. födelsehemort,
5. födelseort,
6. adress,
7. folkbokföringsfastighet, lägenhetsnummer, folkbokföringsort, distrikt och folkbokföring under särskild rubrik
12. inflyttning från utlandet ...



UPPSALA
UNIVERSITET

Right to Health: Medical Care



ICESCR: Standards of health care

- Health care must not only be “*scientifically and medically appropriate and of good quality*” but must be carried out by “skilled medical personnel” with, for example, the use of “*scientifically approved*” medicines. (ICESCR committee)
- Article 15 & 20 (UNESCO – to enjoy the benefits of science requires protection from scientific risk).
- Scientifically questionable interventions on vulnerable groups can constitute degrading treatment – long history of treatment of LGBTI persons proven harmful that was not science-based (UN Special Rapporteur on Torture 2013)



Standards for Health Care: Committee on the Rights of the Child (Art. 24)

Health care must be “*scientifically and medically appropriate and of good quality*”:

- (a) treatments, interventions, and medicines are based on the best available evidence,
- (b) medical personnel are skilled and provided with adequate training on maternal and children’s health, and the principles and provisions of the Convention,
- (c) hospital equipment is *scientifically approved and appropriate for children*,
- (d) drugs are *scientifically approved*, are *child-specific* (when necessary) and are *monitored for adverse reactions*; and
- (e) that regular quality of care assessments of health institutions are conducted”.

OBS: children must have *judicial remedies* for harms to their health & rights in healthcare



Sweden's Standards of Care

Hälso- och sjukvårdslagen (2017:30)

2 kap. 1 ■ Health and medical care is referred to in this Act includes (1) measures to *medically prevent, investigate and treat diseases and injuries* (2) transport of the sick, and (3) care of the deceased.

Patientsäkerhetslag (2010:659)

1 kap. 5-6 §§ The act aims to protect against medical injury refers to suffering, physical or mental injury or illness, and death that could have been avoided if adequate measures had been taken in the patient's contact with health care.

6 kap. 1 §: Health care personnel shall perform their work in accordance with *science and carefully tested experience*. A patient shall be given expert and diligent health care in fulfillment of these requirements. The care shall as far as possible be designed and implemented in consultation with the patient. The patient should be shown consideration and respect.



Goal of Swedish Health Care Legislation

Health care personnel must work in accordance with *vetenskap* (“science”) and *beprövad erfarenhet* (“carefully tested” or “well-tested” experience”) to provide care that will:

- (1) prevent, diagnose, and treat illness and injury (“effective”) (*PSL 1 kap. 2 & 4 § § and HSL, 2 kap. 1 §*)
- (2) protect patients from net harms and injury (“safety”) (*PSL 1 kap. 6 §*)

Science and carefully tested experience must validate care as *safe* and *effective* for treating illness or injury.



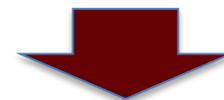
Vetenskap och beprövad erfarenhet alternatives

**“Health care status” & “Science and
carefully tested experience”
questioned**



Special legislation

- Könstillhörighetslag (1972:119)
- Steriliseringslag (1975:580)
- Lag (2006:351) om genetisk integritet



Clinical Research

Lag (2003:460) om etikprövning
av forskning som avser människor



Human rights & experimental treatment

ICCPR Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

ICESCR / CRC

All health care must follow from informed consent & children must be heard and have rights to independent counseling relative their maturity,

Committee on Economic, Social and Cultural Rights, The right to the highest attainable standard of health, General Comment no. 14 (2000). General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)



Patientlag (2014:821)

3 kap., 1 § The patient shall be informed about

1. the patient's medical condition,
2. the methods available for examination, care, and treatment ...
6. significant risks of complications and side effects...

4 kap. 3 § When the patient is a child, the child's attitude to the current care or treatment shall as far as the clarification. The child's attitude should be given importance in relation to his or her age and maturity.

*ECHR requires **all foreseeable risks** to be disclosed under Article 8. Any such risk not clearly disclosed must be actionable in national courts. Ioniță v. Romania, app. no. 81270/12 (2017), § 84; Konovalova v. Russia, no. 37873/04 (2014); Trocellier v. France (dec.), no 75725/01 (2006) → **Skadeståndslag (1972:207) 3 kap. 4 § .***



Conclusions?

- Swedish law is not consistent with human rights recommendations for discrimination protection and gender registration for transgender minors. Sweden has obligations under international law to act on these matters.
- From a human rights perspective, medical consensus is likely to play a substantial role in determining whether there is a right to specific interventions for transgender minors.
- Sweden as a State Party to the CRC and other treaties is in accordance with human rights standards in requiring care to be based on science and carefully tested experience. If care does not meet that standard, the legal pressure however increases for specific legal authorization of the treatment, clinical research, and ensuring consent and special legislation.