

(Trans)Gender Identity Fraud And Human Rights Law:

Is human rights law able to protect transgender persons from domestic 'gender identity fraud' prosecution and conviction?

Elise Kolen

PUBLIC NOTE

The issue of consent is of key importance in criminal law sexual offence cases. In some countries, sexual consent can be vitiated by 'sexual fraud'. In these cases, the victim was deceived by their sexual partner to have sex, as they did not know or were lied to about a fact that was relevant for them before consenting to the sexual intercourse.

One specific form of 'sex by fraud' is 'gender identity fraud'. In the cases that I have studied, the (female) victim has had sexual intercourse with the defendant but later retracted their consent to sex after finding out that their partner was a female to male transgender (FMT). Transgender people have been convicted for sexual offences in the UK, Israel and the USA. This paper researches whether the current human rights framework is able to protect transgender persons from gender identity fraud conviction in domestic courts.

Evidence for practice

- Conviction on the basis of 'gender identity fraud' appears immoral and contrary to existing transgender protection laws;
- Transgender persons who are prosecuted and/or convicted for sexual offences on the bases of gender identity fraud, should be protected by higher human rights courts as the HRC or the ECtHR;
- Countries should put the conviction of transgender persons for gender identity fraud higher on the agenda and condemn these convictions more openly.

Keywords: human rights law, gender, identity fraud

Introduction

In multiple countries around the world, transgender persons have been convicted for so-called 'gender identity fraud'.

Imagine, Covid-19 is already a far memory in our past and everyone can go to bars again and dance and drink with strangers. One night you meet this great looking guy named Matt at the dancefloor and you immediately hit it off. During the night you share multiple kisses, and you fool around a bit in the backstreet ally of the bar as well. At the end of the night, you go home happy and full of good memories of the night and the cute

guy you just met that evening.

The next day, you are desperate to find Matt back on social media and after some searching, you're lucky: you found him! Then, the confusion starts. When you look through his tagged pictures you find multiple pictures from years ago. And on those pictures your Matt does not look like a cute man, but more like a cute girl....

You have probably never thought about it, but how would you react if you found out you had a sexual encounter or even relationship with a transgender person without your knowing? Maybe you would be surprised, or maybe you couldn't care less. However, you might also feel betrayed, ashamed or even downright furious that you slept with a transgender person without knowing so. You might feel so bad that you report Matt to the police for sexual assault.

In multiple countries around the world, transgender persons have been convicted for so-called 'gender identity fraud'. In these cases, the (female) victim has had sexual intercourse with the defendant but later retracted their consent to sex after finding out that their partner was an FMT. So far, only FMT persons were convicted, which is why this paper focusses on FMT persons and not male to female transgender (MFT) persons. Gender identity fraud is a specific form of 'sex by fraud' where, in some countries, people could be convicted if they deceived their partner to have sex, as they lied or omitted to tell about a fact that was relevant for their partner before they would consent to the sexual intercourse. Transgender people have been convicted for this type of sexual offences in the UK, Israel and the USA (*McNally, Alkobi, Wheatley*). In the case of *Wheatley* for example, the defendant was convicted for more than 2 years in prison (Gross, 2009, p. 178).

Conviction on the basis of gender identity fraud appears immoral and contrary to existing transgender protection laws. Even though transgender people form a minority group in our society, there are still millions of transgender persons worldwide who might be prosecuted (and convicted) for this specific 'crime' (Baker, 2017, p. 1801).

This article will provide the reader with the relevant human rights framework and case law, and an examination whether human rights law could be relied upon as a reason for non-prosecution of transgender persons in these specific circumstances.

1. Transgender protection by human rights law

To the best of my knowledge, at the present time, no international court has had to decide upon a case of 'gender identity fraud'. It is therefore unclear which treaty(articles) would be applicable and whether the relevant human rights court would accept the complaint of a transgender person battling the legal bases of a 'gender identity fraud' conviction. If a case would come in front of the HRC / ECtHR, however, my prediction will be that one of the following arguments will be used for non-prosecution.

1.1. Privacy.

The right to privacy (or: right to private life) is a fundamental right that should be respected by state and non-state actors everywhere (Çinar, 2019, p. 1). This right is protected by human rights law through article 17 of the ICCPR, article 8 of the ECHR and other human rights treaties. However, the definition of the right to privacy is difficult to define. The ECtHR discussed the definition of article 8 in *Niemietz v. Germany* and stated that 'it is not possible or necessary to attempt an exhaustive definition of the notion of "private life"' (*Niemietz v. Germany*, 1992, para. 29). Over the years it has become clear however that gender identity does fall under the right to private life (See a.o. *B v. France*, 1992). The HRC also reiterated that the right to privacy under article 17 ICCPR covers gender identity (*G v. Australia*, 2017, para. 7.2)

To pinpoint the right to privacy more specifically to 'gender identity fraud' cases, the Yogyakarta Principles could be helpful. The Yogyakarta Principles (Plus 10) set down principles on the application of international

human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics. The principles provide a universal guide to affirm binding international legal standards but are in itself not binding. Principle 6 of the Yogyakarta Principles states amongst others that ‘the right to privacy [...] includes the choice to disclose or not to disclose information relating to one’s sexual orientation or gender identity’. It is not certain yet how far this right to non-disclosure goes, but, in my opinion, this could include non-disclosure to your sexual partner. Obligatory revelation of your sex to your sexual partner as in ‘gender identity fraud’ cases could be contrary to the right to choose whether or not to disclose private information regarding your gender identity.

1.2. Non-discrimination.

The HRC describes discrimination as ‘any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, [...] or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms’ (UN Human Rights Committee, 1989). The phrase ‘other status’ also includes gender identity as the aforementioned list is non-exhaustive (UN Human Rights Committee, 1989).

The HRC and the OHCHR have repeatedly urged States to tackle (in)direct discrimination against LGBTQ+ people (United Nations Office of the High Commissioner for Human Rights, 2015, p. 12). This includes an obligation to ensure that laws and policies of the member States do not discriminate against a person’s gender identity (United Nations Office of the High Commissioner for Human Rights, 2015, p. 12). More specifically, states should legally recognise a transgender persons’ preferred gender (United Nations Office of the High Commissioner for Human Rights, 2015, p. 6). Even though a number of states still have requirements in place before legally recognising the preferred gender of a transgender person, UN mechanisms have called upon States to make this recognition irrespectively of mandatory sterilisation, medical treatment or divorce (*A.P. Garçon and Nicot v. France*, 2017, p. 3).

The courts in ‘gender identity fraud’ cases have denied the defendants’ preferred gender during the trial and concluded in their judgments that the defendant was impersonating someone else. The defendants in these cases did not have any reconstructive surgery yet but dressed like a man, represented themselves as a man and spoke in the masculine form (see f.e.: Gross, 2009, p. 178). The ECtHR already confirmed that the recognition of a transgender person’s sexual identity should not be conditional on undergoing an operation or sterilising treatment (*A.P. Garçon and Nicot v. France*, 2017, p. 3). It is therefore possible that the national courts conclusion that a transgender person was fraudulently posing like someone from the other sex, does not comply with the human rights principle of non-discrimination.

Conclusion

Fundamental human rights as the right to privacy and non-discrimination would form the building blocks of the argument against gender identity fraud conviction. These rights have proven to be successfully used in LGBTQ+ related cases and the ECtHR especially seems to have been quite progressive in its judgments with regards to transgender rights. We will not know for sure however what the outcome would be until an actual case of ‘gender identity fraud’ would come before the human rights courts.

Until that time, what about cases like Matt’s? Should they avoid any intimate contact with someone before sitting down with that person and telling them that they were born with a different biological sex? This is not only a grave intrusion on their privacy, but could also be quite dangerous, as we have seen that declaring oneself to be transgender can involve a high risk that the transgender person in question will be exposed to emotional and physical violence (Sharpe, 2017, p. 178).

Raising awareness of Matt’s case and others in a similar situation is very important. That way, more people can engage in the public debate on the protection of sexual minorities in their country. Fighting for the rights of the LGBTQ+ community should not only be done by Matt himself, but by *all* people.

References

Articles

Aeyal Gross, 'Gender Outlaws Before the Law: The Courts of the Borderland', (2009) 32 Harv. J.L. & Gender 165-231.

Alex Sharpe, 'The ethicality of the Demand for (Trans)parency in Sexual Relations' (2017) 43(2) Aus. Fem. Law J. 161-183.

Kellan E. Baker, 'The Future of Transgender Coverage' (2017) 376(19) N. Engl. J. Med. 1801-1803.

Özgür H. Çınar, 'The Right to Privacy in International Human Rights Law' (2019) 13(1) J. Manag. Inf. Syst. 1-11.

Jurisprudence:

A.P. Garçon and Nicot v. France (App no 79885/12) ECHR 6 April 2017.

CrimC (Hi) 389/02, The State of Israel v. Alkobi (Sept. 7, 2003) (Isr.) (unpublished).

B v. France (App No 13343/87) (1992) Series A no 232-C.

McNally [2013] EWCA Crim 1051 (United Kingdom).

Niemietz v. Germany (A/251-B) (1993) 16 E.H.R.R. 97 (16 December 1992).

State v. Wheatley, No. 97-1-50056-6 (Wash. Superior Ct. May 13, 1997) (United States of America).

Legislation

European Convention on Human Rights article 8.

International Covenant on Civil and Political Rights article 2(1), 17, 26.

Sources from the United Nations:

G v. Australia (2017) Human Rights Committee.

UN Human Rights Committee, 'CCPR General Comment No. 18: Non-discrimination' (10 November 1989).
- UN Office of the High Commissioner for Human Rights 'Discrimination and violence against individuals based on their sexual orientation and gender identity: report of the Office of the United Nations High Commissioner for Human Rights (4 May 2015) A/HRC/29/23.



A note from the author

My name is Elise Kolen and I'm currently undertaking the LLM European Law at Utrecht University. I first came across the topic of my article while I was following a criminal law course at Cambridge University during my Erasmus+ programme. It sounded very unfair to me that transgender persons should be afraid of being convicted for this type of sexual offence. That's why I wrote my bachelor thesis on this topic and eventually this article!