

Result report: 222656 - Gender identity and sexual orientation in international and national (Norwegian) law
By Anne Hellum

Background, aims and objectives

Gender identity and sexual orientation are in the throw of social and legal change. The plural and shifting forms of gender that exist in society challenge existing legal orders that assume a homogenous and binary system of sex and gender. The research project, which started out in 2014, was prompted by the lack of systematic analysis of the complex legal situations the life situation of lesbian, gay, bisexual, transgender and intersex persons (LGBTI) give raise to in international and national law. A key concern was how Norwegian law's binary understanding of "sex" and "gender" created a situation where a wide range of gender identities were not being recognized by the law. As a consequence, transpersons either had to go through genital surgery and sterilization or be left without adequate health care enabling them to live in accordance with their gender identity

The *primary objective* of the project was, according to the project description, to analyse the relationship between gender identity, sexual orientation and the law from the perspective of persons who do not fit into the traditional binary system of sex and gender, neither biologically nor in terms of gender identity. *The secondary objective* was to contribute to greater legal recognition and better protection against discrimination of persons from these groups through dynamic interpretation of existing laws and suggestions for law reform.

Research results (analytical)

The research project has, in line with *its first primary objective*, contributed to the development of an international human rights jurisprudence that addresses LGBTI persons' right to gender identity, self-determination and equality and non-discrimination.¹ Human rights discourses on sexual orientation and gender identity often depart from adult persons' life experiences. By taking a life cycle perspective, that puts the experiences of children and teenagers centre stage, the project adds new knowledge to this field of study. The research project is in the forefront of developing a human rights discourse that addresses the complex legal issues that intersex and transgender children and parents encounter at birth, during childhood and adolescence.² It has also prompted research that addresses tensions between different understanding of gender within the human rights system itself, particularly between gender as plural and fluid and gender as binary and static. The project has set the scene for a discussion of how international conventions, like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) through a step-by-step approach may

¹ The project's human rights research is compiled in the book *Human Rights, Sexual Orientation and Gender Identity*, Anne Hellum (ed.) Routledge, 2017.

²« The Rights of LGBTI children under the Convention on the Rights of the Child», Kirsten Sandberg, in Anne Hellum (ed.) 2017; "Legal Gender Meets reality: A Socio-Legal Children's Rights Perspective". Anniken Sørli. In Anne Hellum (ed.) 2017.

enhance its potential to address gender stereotypes that create, uphold and reproduce the binary gender orthodoxy.³

The project has, in line with its *second and third primary objectives*, interpreted and assessed Norwegian law in selected areas from the perspective of LGBTI persons in combination with sources of international and European human rights law. A key question, when the project started, was whether the Norwegian rules, where sterilization was a condition for gender change, was in consonance with the right to gender identity under the European Human Rights Convention.⁴ An overall research question today is what impact the two acts, which incorporate Norway's human rights obligations regarding LGBTI rights, has had on existing regulations of LGBTI persons right to health, education and family life. These are the Norwegian Gender Recognition Act from 2016 and the Equality and Anti-Discrimination Act's prohibition against discrimination on the grounds of sexual orientation and gender identity, which entered into force in 2013. The project's case studies show how laws, principles and practices, moulded on the binary male-female model, in many situations overrule the right to gender identity and equality and non-discrimination. As elaborated by Lars Arnesen, the Norwegian Gender Recognition Act's limitation to change from male to female or from male to female, does not sit well with the Yogyakarta principles and the Norwegian Equality and Anti-Discrimination Law's prohibition against discrimination on the ground of gender identity.⁵ Andrea Gustafson's study of LGBT related prosecution shows how asylum seekers, to appear as credible and genuine, have to fit into heterosexual ideals of romantic love and marriage.

Anniken Sørli's PhD thesis "The Right to Gender Identity. A grounded Life Cycle Perspective" is a systematic analysis of the encounter between the right to gender identity and equality and laws that based on conventional gender values. The thesis, which takes a life cycle perspective, juxtaposes empirical knowledge about transpersons' social life with analysis of Norwegian law in four areas. These are: trans-children's right to change gender, trans-children's and adolescents' right to toilets and changing rooms without discrimination, the health rights of trans-persons within different age groups and trans-person's parenthood rights. The thesis shows how rights and principles moulded on a binary male-female gender model takes precedence when they come in to conflict with the right to gender identity and equality.

The project has, in line with its *secondary objective*, contributed to legal change through a combination of reinterpretation of Norwegian law, and elaboration of alternative models for legal change. National legislation is, to respect, protect and fulfil LGBTI children, adolescent

³ «Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination against Women», Rikki Holtmaat and Paul Post, in Anne Hellum (ed.) 2017; "Queering gender in International Law", Dianne Otto, in Anne Hellum (ed.) 2017.

⁴ Anniken Sørli, «Tvungen identitet - en vurdering av norsk forvaltningspraksis' krav om irreversibel sterilisering ved endring av juridisk kjønn», Tidsskrift for familierett, arverett og barnevernrettslige spørsmål 04/2014.

⁵ Anne Hellum «Vern mot diskriminering på grunnlag av seksuell orientering, kjønnsidentitet og kjønnsuttrykk. Noen utviklingslinjer i internasjonal og norsk rett, Reidun Førde; Morten Kjelland & Ulf Stridbeck (red.), *Cand.mag., cand.med., cand.jur., cand.alt., Festskrift til Aslak Syse*. Gyldendal, 2016; Lars Arnesen «Bør retten anerkjenne mer enn to kjønn?», Hefte for *Kritisk Juss* nr.2, 2017

and adult social and economic rights like health and education without discrimination, reinterpreted in the light of international legal sources. As a contribution to full recognition and real equality between the plurality of sexualities and gender identities that exist in society the research project has initiated a discussion of the strengths and weaknesses of two different models. Legal recognition of a third gender is one possibility. Abolition of legal gender followed up by a gender-neutral conception of legal personhood is another alternative.

Project implementation and use of resources

The project funding has been allocated in accordance with the research plan.

Scholarships. The projects main resources were one PhD scholarship and three master scholarships. Anniken Sørli defended her PhD thesis *The “Right to Gender Identity. A grounded Life Cycle Perspective”* at the Faculty of Law in Oslo in June 2018. The thesis consisted of three articles published in peer reviewed international journals at level 2 and one book article with an international level 2 publisher. Three master dissertations (60 study points) were completed and rewarded with A. They are published in *Kvinnerettslig skriftserie*, an open access publication channel. Through writing scholarships and supervision, two of the master students produced articles published in peer reviewed national and international journals at level 1.

Travel grants and translation. The PhD, master students and senior researchers were awarded funding for research stays abroad (three months at Zentrum für transdisziplinäre Geschlechterstudien ved Humboldt Universitetet in Berlin for the PhD student) and presentation of papers in international conferences. The researchers have received funding for translation and language review of articles published in international journals and books (7 articles and book chapters by PhD student and 2 articles and 1 report by the master students).

Grant to project leader. The project leader, professor Anne Hellum, was awarded a small grant (frikjøp) to relieve her of teaching duties, in order to carry out research, supervise PhD and master students, organise conferences and edit special journal issues and books. Project funding was allocated to production of one international anthology at an international level 2 publisher (Routledge) and one Norwegian anthology at a national level 1 publisher (Gyldendal).

International guest professor. Professor Dianne Otto from Melbourne University, who is one of the lead scholars in the field of “queering international law”, has contributed to the project through several visits. This includes a three weeks stay at the Faculty of Law in Oslo where she gave guest lectures and conducted workshops with PhD and master students. This set the scene for mutual research collaboration. It prompted Anniken Sørli’s visit to Melbourne University where she contributed with a chapter in Dianne Otto’s most recent book.⁶

⁶ Anniken Sørli «Governing (trans) parenthood – The tenacious hold of biological connection and heterosexuality», Dianne Otto (ed) *Queering International Law: Possibilities, Alliances, Complicitis, Risks*, Routledge 2017.

Project conferences. The project started out with an international conference “Sexual Freedom, Equality and the Right to Gender Identity as a Site of Legal and Political Struggles” which took place at the Literature House in Oslo, 11-12 December 2014.⁷ The conference brought international and national scholars, practitioners and activists together. The best articles were published in a special issue of the Nordic Human Rights Journal in 2016. The project’s closing conference «Kjønn og rett i endring: seksualitet, kjønnsidentitet og kjønnsuttrykk» was attended by Norwegian scholars in law, medicine, psychology and gender studies. In order to disseminate the research results to a Norwegian audience the best contributions will be published in an anthology appearing at Gyldendal in 2019/20.

Internationalization

The project has made a significant contribution to international cooperation with key scholars and universities in the field of LGBTI rights. The international opening conference brought together lead scholars from Melbourne University in Australia, University of Leiden in the Netherlands, Keele University in the UK, The Irish Center of Human Rights at the National University of Ireland, the University of Bremen in Germany, The University of Stellenbosch in South Africa and the University of Copenhagen. It included human rights practitioners from Sweden, Malta and Kenya and members of the UN CRC Committee and the UN CEDAW Committee. The conference, which resulted in a high level international publication laid a foundation for closer cooperation with lead scholars from Australian, German, Dutch and English universities.

Significance of the research results- past, present and future

The research project has made a significant contribution to new knowledge in the field of sexual orientation, gender identity and the law. It is in the forefront of developing a human rights discourse that addresses the complex legal issues that intersex and transgender children and parents encounter at birth, during childhood and adolescence.⁸ The research fills a gap in Norwegian legal science. It integrates new knowledge on the right of LGBTI persons in legal disciplines like women’s law, child law, family law, refugee law, health law and education law.

The research has facilitated inclusion of LGBTI rights in courses on national and international equality and anti-discrimination law at the Faculty of Law in Oslo and in Copenhagen.⁹ It has also made its mark on courses in family law, health law and social insurance law.

⁷ <https://www.jus.uio.no/ior/english/research/projects/transgender/events/conferences/2014/gender-identity-conference/>

⁸ «The Rights of LGBTI children under the Convention on the Rights of the Child», Kirsten Sandberg, in Anne Hellum (ed.) 2017; “Legal Gender Meets reality: A Socio-Legal Children’s Rights Perspective”. Anniken Sørli. In Anne Hellum (ed.) 2017. Anniken Sørli “Transgender Children’s Right to Education without Discrimination: the Case of Changing Room Facilities”, in *The international Journal of Children’s Rights*.

⁹ Women’s law and human rights <https://www.uio.no/studier/emner/jus/jus/JUS5910/index.html>, Diskriminerings- og likestillingsrett <https://www.uio.no/studier/emner/jus/jus/JUS5590/index.html>

The research has been used by LGBTI rights organisations, human rights organisations, decision-makers and law makers. It made a significant impact on the Norwegian Gender Recognition Act, which was enacted in 2016. A key contribution in this regard was the project's conclusion that the Norwegian rules concerning gender change, which required sterilization, was in conflict with the right to gender identity under the European Human Rights Convention.

The researchers in the project have been recruited to work in human rights institutions and research and teaching institutions. The PhD student Anniken Sørli was first employed by the National Human Rights Institution (NIMI) and later hired as associate professor at Høgskolen i Østfold. The master student Andrea Gustafsson was granted a PhD scholarship on LGBTI rights and refugee law at the University of Bergen in 2018. The master student Lars Arnesen and Anniken Sørli are writing a commentary to the Norwegian Gender Recognition Act for the Norwegian University Press. Anne Hellum is integrating LGBTI issues in a new book on Norwegian Equality and Anti-discrimination law (co-authored with Vibeke Blaker Strand,) at Gyldendal Forlag.

Dissemination of research results to the wider public

The research results were disseminated through the project's international opening conference in December 2014 and through its closing conference in November 2018. Both conferences were attended by LGBTI organisations, researchers in the field of law, medicine, psychology and gender studies, public administrators, decision makers and law-makers.

The project's webpage provides access to key legal sources in the field of LGBTI rights.

The project researcher arranged workshops on LGBTI rights at Oslo Pride in 2014, 2015, 2016 and 2017. Talks have been given at seminars arranged by administrative agencies like BUFDIR, the Gender Equality Ombud, the Child Ombud, Utlendingsdirektoratet (UDI) and the Center for Gender Research at the University of Oslo. The researchers have written a number of newspaper articles. They have also conducted interviews in newspapers, journals and web sites such as Forskning.no, Kilden and radio programs like Verdi Børsen. Most importantly, the project has provided expert inputs (høringsuttalelser) to the proposed gender Recognition Act.

Publications and results that are expected after 2019

The research results, with the exception of three articles, were published in the period 2016-2019. These articles are accepted for publication:

- Grønningsæter, Andrea: «Establishing a sexual identity: The Norwegian Immigration Authorities 'Practice in Sexuality-Based Asylum Cases». *Nordic Journal of Migration Research* (2019).
- Grønningsæter, Andrea and Lars Arnesen: Recognition of the civil status of transgender people in Norwegian Law, i *The Recognition of the civil status of trans persons: a comparative view*. Editor: Professor Isabel Cristina Jaramillo Sierra. Springer (2020).

- Sørli, A: 'The Insufficiency of Gender Recognition Acts: The Example of Trans Schooldays i Eva Brems, Toon Moonen and Pieter Cannoot (red.), *Protecting Trans* Rights in the Age of Gender Self-determination* (Intersentia, 2019/2020).

Furthermore, the contributions from the project's closing conference, will appear in a book edited by Anne Hellum og Anniken Sørli (red) *LHBTI personers rett til anerkjennelse, selvbestemmelse og likhet*, Gyldendal, 2020. The book will include researchers in the field of law, psychology, political science, medicine and gender research. Through this book, the research will include new developments in the field. The target audience for the book is teachers and students at universities and university colleges in different parts of Norway, law and policy makers, decision-makers, social workers and activists.