

Trans reproduction: Continuity, cis-normativity, and trans inequality in law

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In recent years, increasing numbers of jurisdictions are abolishing sterilization requirements for legal gender recognition and are introducing self-declared change of legal gender. The abolition of this requirement leads to a change in the reproductive capacities of legal men and legal women, enabling legal men to become pregnant and to give birth, and legal women to beget children. The change in the reproductive capacities of the legal genders leads to biopolitical questions about how states do and should govern trans reproduction after decades of state-regulated sterilization. This article uses the situation in Norway to explore the regulation of trans reproduction and aims to explain why trans people's reproductive rights are lesser than those of cis people. It first investigates the Norwegian regulation of medically assisted reproduction and how it applies to people who have changed their legal gender. It shows that trans people are excluded from accessing medically assisted reproduction because their legal gender does not fit the conceptions of reproduction and gender under the Norwegian Biotechnology Act. Second, the article explores why trans people's reproductive rights are limited, and argues that the law is based on cis-normative assumptions about reproduction, pregnancy, and the desire to become pregnant. Such assumptions, it is argued, permeate the law and lead to discrimination against trans people. The Norwegian legislature has not given any reasons as to why trans people's reproductive rights are limited. The article demonstrates that although the sterilization requirement for legal gender recognition is abolished, the law continues to concentrate on cis realities and to restrict trans people's ability to form a family with children.

1. Introduction

Trans reproduction is not a new phenomenon: trans people have engaged in and formed families with children both before and after states began to introduce legal

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gender recognition based on self-declaration of gender.¹ However, as a result of more jurisdictions abolishing sterilization requirements for legal gender recognition, trans reproduction is gaining more public and scholarly attention.² Technological advances, including increased options for fertility preservation, and changes in the paradigm of gender-confirming treatment also facilitate trans reproduction.³ Across Europe, fears about legal men giving birth and the desire for “certainty in family law” have been dominant rationales for limiting trans reproduction, preconditioning change of legal gender on sterilization.⁴ This is being challenged, with states beginning to abandon medical requirements for legal gender recognition and, in particular, sterilization requirements. The abolition of this requirement leads to a change in the reproductive capacities of legal men and legal women, enabling legal men to become pregnant and to give birth, and legal women to beget children. Pregnant men, as Lara Karaian argues, “engender a critical re(conceive)ing of the idea that sex is biologically determined, that pregnancy is necessarily sexed as female, and that one’s sex, gender identity and identification as mother/father neatly align.”⁵ The legal genders that seek different forms of reproductive technologies are changing: among other things, the shift in the reproductive capacities of the legal genders challenges family systems to find ways to establish legal parenthood for people who “disturb” the original biological foundation of family law and the establishment of legal parenthood.⁶

Some people need reproductive technologies, such as donor insemination, to achieve parenthood. The change in the reproductive capacities of the legal genders leads to biopolitical questions about how states do govern and should govern trans reproduction after decades of state-regulated sterilization. Trans reproduction challenges what is often considered the “normal” or “ordinary” way to reproduce.⁷ Such assumptions may influence how trans reproduction is regulated and the right of trans people to a family life without discrimination, as guaranteed by the European Convention on Human Rights.⁸ This article focuses on the legal regulation of reproductive technology

¹ SUSAN STRYKER, *TRANS GENDER HISTORY: THE ROOTS OF TODAY’S REVOLUTION* (2008).

² See, for example, the media coverage of the pregnancies of Thomas Beatie: Nik M. Lampe, Shannon K. Carter, & J. E. Sumerau, *Continuity and Change in Gender Frames: The Case of Transgender Reproduction*, 33 *GENDER & SOC’Y* 865 (2019); Jenny Gunnarsson Payne & Theo Erbenius, *Conceptions of Transgender Parenthood in Fertility Care and Family Planning in Sweden: From Reproductive Rights to Concrete Practices*, 25 *ANTHROPOLOGY & MEDICINE* 329 (2018).

³ See, e.g., WORLD PROFESSIONAL ASS’N TRANS GENDER HEALTH, *STANDARDS OF CARE* (version 8, 2022), www.wpath.org/publications/soc.

⁴ Peter Dunne, *Transgender Sterilisation Requirements in Europe*, 25 *MEDICAL L. REV.* 554 (2017); Alice Margaria, *Trans Men Giving Birth and Reflections on Fatherhood: What to Expect?*, 34 *INT’L J. L. & FAMILY* 225 (2020).

⁵ Lara Karaian, *Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law*, 22 *SOC. & LEGAL STUD.* 211, 213 (2013).

⁶ Anniken Sørlie, *Governing (Trans)parenthood: The Tenacious Hold of Biological Connection and Heterosexuality*, in *QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS* 171 (Dianne Otto ed., 2018); Daniela Alaattinoğlu & Alice Margaria, *Trans Parents and the Gendered Law: Critical Reflections on the Swedish Regulation*, 21 *INT’L J. CONST. L.* 603 (2023).

⁷ Dunne, *supra* note 4; Lampe et al., *supra* note 2.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

and access to medically assisted reproduction for people who have changed their legal gender. It uses the term “trans” in a narrow and simplified way to refer to someone who has either changed or wants to change their legal gender and focuses on trans people who want to have children by using medically assisted reproduction. However, the umbrella term “trans” or “trans person” encompasses multiple identities whose needs and desires differ. It is often used to refer to people whose birth-assigned gender differs from their gender identity. Alternatively, the term can be seen as referring “to all identities or practices that cross over, cut across, move between, or otherwise queer socially constructed sex/gender boundaries.”⁹ While some trans people seek medical interventions and change of legal gender, others do not.

The article uses the situation in Norway to explore the regulation of trans reproduction and aims to explain why trans people’s reproductive rights are lesser than those of cis people. It will first investigate the Norwegian regulation of medically assisted reproduction and how it applies to people who have changed their legal gender. Included here will be a consideration of how the law regulating reproductive technologies is responding to the shift in the reproductive capacities of legal men and legal women. Second, the article explores why trans people’s reproductive rights are limited and argues that the law is based on cis-normative assumptions about reproduction, pregnancy, and the desire to become pregnant, which take for granted that this is exclusively for those identifying as women—and preferably ciswomen. Such assumptions, it is argued, permeate the law and lead to discrimination against trans people.

Norway and Norwegian law on change of legal gender and reproductive technology are used as an entry point to a broader discussion of trans reproduction and the legal governance of reproduction. Norway is often considered to be progressive as regards the development of LGBT rights,¹⁰ but until the 2020 amendments to the Norwegian Biotechnology Act,¹¹ the country was relatively restrictive, compared to neighboring jurisdictions, regarding the regulation of medically assisted reproduction.¹² Self-declared change of legal gender was adopted in Norway in 2016, but there has been a lack of legal research on the reproductive rights of people who have changed their legal gender.¹³ In 2021, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) addressed the uncertainty of the

⁹ Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, 1 GLQ: J. LESBIAN & GAY STUD. 237, 251 n.2 (1994).

¹⁰ Anniken Sørli & Anne Hellum, *Innledning Frihet, Likhhet og Mangfold: Fra Ideal til Realitet [Introduction: Freedom, Equality and Diversity: From Ideal to Reality]*, in *FRIHET, LIKHET OG MANGFOLD [FREEDOM, EQUALITY AND DIVERSITY]* 17 (Anne Hellum & Anniken Sørli eds., 2021).

¹¹ Lov om humanmedisinsk bruk av bioteknologi m.m. [Biotechnology Act] Dec. 5, 2003 nr. 100 (Nor.) [hereinafter *Biotechnology Act*].

¹² Ingvill Stuvøy et al., *Bioteknologiske Framtider: Refleksjoner over Endringene i Bioteknologiloven fra et Kjønnforskningperspektiv [Biotechnological Futures: Reflections from a Gender Studies Perspective on the Changes in the Norwegian Biotechnology Act]*, 45 TIDSSKRIFT FOR KJØNNFORSKNING 120 (2021).

¹³ Lov om endring av juridisk kjønn [Act on Change of Legal Gender] June 17, 2016 nr. 46, § 2 (Nor.) [hereinafter *Act on Change of Legal Gender*]. But see Anniken Sørli, *Lov om Endring av Juridisk Kjønn, Bioteknologiloven og Barneloven: Reproduksjon og Foreldreskap i Kontinuitet og Endring [Act on Change of Legal Gender, the Biotechnology Act and the Children’s Act: Continuity and Change in Reproduction and Parenthood]*, in *FRIHET, LIKHET OG MANGFOLD*, *supra* note 10, at 121.

reproductive rights of trans people in Norway but the issue has gained little international attention.¹⁴ Prior to the adoption of the Act on Change of Legal Gender, no thorough examination or assessment was made of the legal consequences of changing legal gender or of how other laws should apply to those who have changed their legal gender. Although a “swift” change to legal gender based on self-declaration was considered desirable at the time, the article demonstrates that rushed, cobbled together legal reforms may lead to inequality in other areas. Its findings may therefore also be relevant to legal reforms in other states. It shows that it is not enough to focus on sterilization and medical requirements reforms for legal gender recognition, while ignoring other areas, if the aim is to recognize the lives and desires of trans people, including their right to equality and reproductive health.

The article is divided into five parts. Section 2 deals with sterilization as a requirement for change of legal gender and the dominant rationales behind it. It then explores the reproductive human rights of trans people. Section 3 examines the Norwegian Act on Change of Legal Gender and the Norwegian Biotechnology Act, to see how rules on reproduction apply to those who have changed their legal gender. It demonstrates that trans people’s reproductive rights are limited. Section 4 looks at the reasons underlying the legislative choice to limit trans reproduction. These being unclear, potential reasons are suggested, including unspoken rationales. Among these are prejudice, uninformed assumptions about trans people’s desire for children, and cultural notions about pregnancy and reproductive capacities. It is argued that the acts reproduce cis-normative conceptions of pregnancy and reproductive capacity. Section 5 discusses alternative ways to regulate access to medically assisted reproduction. It recommends that states should act to safeguard the rights of trans people to reproductive health, and make amendments to natal and neonatal care to cater for trans-inclusive care. Regardless of whether trans people have access to medically assisted reproduction, the abolition of the requirement for sterilization means there will be pregnant legal men and legal women who beget children. Section 6 provides some concluding remarks.

2. Trans reproduction after the era of sterilization

2.1. Legal and cultural aversion to trans reproduction

The struggle of trans people to affirm and develop their rights has had social, political, and legal consequences. In 2002, for example, in the case of *Christine Goodwin v. the United Kingdom*, the European Court of Human Rights (ECtHR) ruled that member states have a positive obligation under article 8 of the European Convention on Human Rights (ECHR) to ensure legal gender recognition for people who have

¹⁴ ILGA-EUROPE, ANNUAL REVIEW OF THE HUMAN RIGHTS SITUATION OF LESBIAN, GAY, BISEXUAL, TRANS, AND INTERSEX PEOPLE IN EUROPE AND CENTRAL ASIA COVERING THE PERIOD OF JANUARY TO DECEMBER 2020 (2021), www.ilga-europe.org/report/annual-review-2021/ (last visited Apr. 25, 2023).

undergone gender confirmation treatment.¹⁵ However, legal gender recognition is not available in all jurisdictions. In 2021, according to Transgender Europe and ILGA-Europe, thirty-nine of the fifty-four European and Central Asian countries surveyed had legal or administrative measures that make change of legal or registered gender available to trans people. Conditions governing the change of legal gender vary between states.¹⁶ In 2017, the ECtHR ruled that requiring sterilization for legal gender recognition violated the right to respect for private life under article 8 of the ECHR.¹⁷ According to the ECtHR, people wanting to change their registered gender were faced with an “impossible dilemma”:¹⁸ either to undergo medical treatment, against their will and in violation of their right to physical integrity, to obtain legal gender recognition, or to abstain from changing their legal gender and sacrifice their right to gender identity—both of which are guaranteed in article 8 ECHR.¹⁹ Many countries still impose medical and social requirements limiting the self-determination of trans people, but there is a slow movement towards states introducing self-declared change of legal gender.²⁰ This enables more trans people to become parents after changing their legal gender, through the use of their eggs or semen to reproduce sexually or with medical assistance.

ECtHR case law confirming that the sterilization requirement is a violation of human rights constitutes a positive development for trans people’s legal status. At the same time, according to Peter Dunne, the rulings may be criticized for being superficial and failing to question or critically analyze the rationales behind this requirement.²¹ Such analysis may be necessary to avoid (re)producing them in other areas, such as access to medically assisted reproduction for people who have changed their legal gender. Dunne says: “[i]ndeed, statements from the ECtHR, as well as the highest courts in Germany and Sweden, reveal a general assumption that, irrespective of disproportionality, transgender sterilisation requirements do pursue valid aims.”²² Dunne identifies three justifications for requiring sterilization for the change of legal gender: legal certainty, child welfare, and natural reproduction.²³ The opposition to male pregnancy, Dunne argues, appears to be based more on notions about proper reproduction that are

¹⁵ Christine Goodwin v. United Kingdom, App. No. 28957/95 (GC), July 11, 2002, <https://hudoc.echr.coe.int/eng?i=001-60596>.

¹⁶ Transgender Europe (TGEU), *Trans Rights Index: Europe and Central Asia 2021*, <https://tgeu.org/wp-content/uploads/2021/05/tgeu-trans-rights-map-2021-index-en.pdf> (last visited Apr. 13, 2023) [hereinafter *Trans Rights Index 2021*].

¹⁷ A.P., Garçon & Nicot v. France, App. Nos. 79885/12, 52471/13, & 52596/13 (Apr. 16, 2017), <https://hudoc.echr.coe.int/eng?i=001-172913>.

¹⁸ See also X. & Y. v. Romania, App. Nos. 2145/16 & 20607/16 (Jan. 19, 2021), <https://hudoc.echr.coe.int/eng?i=001-207364>. For a critique of the case X. and Y. v. Romania, see Sarah Schoentjes & Pieter Cannoot, *X and Y v. Romania: The “Impossible Dilemma” Reasoning Applied to Gender Affirming Surgery as a Requirement for Gender Recognition*, STRASBOURG OBSERVERS (Feb. 25, 2021), <https://strasbourgoobservers.com/2021/02/25/x-and-y-v-romania-the-impossible-dilemma-reasoning-applied-to-gender-affirming-surgery-as-a-requirement-for-gender-recognition/>.

¹⁹ A.P., Garçon & Nicot v. France, App. Nos. 79885/12, 52471/13, & 52596/13, Apr. 16, 2017, ¶ 132.

²⁰ ILGA-Europe, *Rainbow Europe 2021* (May 17, 2021), www.ilga-europe.org/rainboweurope/2021; *Trans Rights Index 2021*, *supra* note 16.

²¹ Dunne, *supra* note 4, at 556.

²² *Id.* at 556.

²³ *Id.* at 560–2.

connected with societal attitudes rather than with what is considered natural reproduction.²⁴ Opponents of legal men giving birth and legal women begetting children have argued that such things threaten legal certainty.²⁵ In Sweden, for example, the reason for introducing the sterilization requirement in 1972 was to “completely eliminate the risk of confusion in family relations that would arise if a transsexual person who has changed registered gender should have their own children.”²⁶ It was also to avoid legal men becoming mothers and legal women becoming fathers.²⁷ The traditional biological principles on which the legal family system is based do not fit with allowing parenthood to people who “deviate” from the reproductive norm of (legal) men and (legal) women.²⁸ It has also been argued that trans people are unfit to be parents and that the children of such parents will suffer from discrimination. As regards natural reproduction, opponents of trans reproduction argue that it goes against reproductive norms as well as the normative consideration of the sexes/genders.²⁹ According to Jemina Repo, in Finland, sterilization was used to govern trans kinship relations by trying to make them impossible, thereby maintaining normative kinship relations—but this attempt failed: permanent infertility was not required and trans people were not prohibited from using their own sperm or eggs, with the aid of reproductive technologies, after they had changed their legal gender.³⁰ In 1972, questions were also raised in Sweden as to whether there was any actual risk that “a person who officially has a male gender becomes a mother and a person who officially has a female gender becomes a father.”³¹ It was, the statement argued, practically out of the question that a person would change their legal gender and then enter into a relationship with a person of the same registered gender. The risk of pregnancy or fatherhood was, therefore, considered to be insignificant, even if sterilization was not carried out.³²

Nonetheless, because of the abolition of sterilization requirements, advances in reproductive technologies, and increased self-determination in gender confirmation treatment, trans people now have significantly more reproductive options and capacities, which many wish to take advantage of. Research shows that a majority of trans people wish to have children.³³ However, many of them face cis-normative

²⁴ *Id.* at 577.

²⁵ A.P. Garçon and Nicot v. France, App. Nos. 79885/12, 52471/13 & 52596/13, Apr. 16, 2017, ¶ 105.

²⁶ Proposition [Prop.] 1972:6, at 50 [government bill] (Swed.).

²⁷ *Id.* at 49.

²⁸ Anniken Sørli, *Rettighetssubjekter i Endring: Den Fødende Mannen [The Birth-Giving Man]*, in RETTIGHETER I VELFERDSSTATEN: BEGREPER, TRENDER, TEORIER [RIGHTS IN THE WELFARE STATE: CONCEPTS, TRENDS, THEORIES] 227 (Ingunn Ik Dahl & Vibeke Blaker Strand eds., 2016); Sørli, *supra* note 6.

²⁹ Dunne, *supra* note 4.

³⁰ Jemina Repo, *Governing Juridical Sex: Gender Recognition and the Biopolitics of Trans Sterilization in Finland*, 15 POL. & GENDER 83, 101–3 (2019).

³¹ Proposition [Prop.] 1972:6, at 49 [government bill] (Swed.).

³² *Id.* at 49–50.

³³ Katrien Wierckx et al., *Reproductive Wish in Transsexual Men*, 27 HUM. REPRODUCTION 483 (2012); Felicitas Falck, Louise Frisén, Cecilia Dhejne, & Gabriela Armuand, *Undergoing Pregnancy and Childbirth as Trans Masculine in Sweden: Experiencing and Dealing with Structural Discrimination, Gender Norms and Microaggressions in Antenatal Care, Delivery and Gender Clinics*, 22 INT'L J. TRANSGENDER HEALTH 42 (2021); Justine Defreyne, Judith Van Schuylenbergh, Joz Motmans, Kelly Tillean, & Guy T'Sjoen, *Parental Desire and Fertility Preservation in Assigned Male at Birth Transgender People Living in Belgium*, 21 INT'L J. TRANSGENDER HEALTH 45 (2020).

practices, procedures, and norms, as well as ignorance, when they seek reproductive health care services.³⁴ The law, the media, and political discourse all play a part in producing and reproducing conceptions of motherhood, fatherhood, and “proper reproduction,” which in turn may negatively affect trans people’s access to reproductive technologies and their experiences when seeking reproductive health care. An analysis of media coverage of trans reproduction in the United States shows that the media present reproduction as the ultimate ideal, but see trans reproduction “as an exception to cisnormative, biologically based reproduction,” and present it as a new phenomenon.³⁵ Framing something as a new phenomenon, according to Nik M. Lampe, Shannon K. Carter, and J. E. Sumerau, erases history, in this case that of trans people, and frames a group or practice as “abnormal or unexpected.”³⁶ Framing trans reproduction as something new signals that reproduction is a cisgender phenomenon.³⁷ A literature review conducted by Margaret Besse, Nik M. Lampe, and Emily S. Mann shows that many transgender men have difficulties achieving pregnancy and during pregnancy and childbirth, difficulties which derive from cis-normative medical norms and practices. For example, the othering of trans experience of pregnancy in health care settings and portrayal of trans pregnancy as different was a recurrent problem.³⁸

2.2. Reproductive human rights

According to the Rainbow Europe Map of 2021, in fourteen of the forty-nine European countries included in the assessment carried out by ILGA Europe, medically assisted insemination for couples regardless of sexual orientation and/or gender identity is available without any legal barriers. Medically assisted insemination for single persons is legally possible in twenty-six countries.³⁹ Norway is one of these but, according to a 2021 ILGA Europe report, it is unclear whether legal men can access medically assisted insemination.⁴⁰ The Norwegian Biotechnology Act gives *women* access to reproductive technology to become pregnant.⁴¹

The availability of access to reproductive technology raises questions about the extent of the rights to family life, reproductive health, and protection against discrimination, and whether there are factors that may justify limiting trans people’s rights. Norway is bound, *inter alia*, by the ECHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴² The conventions have the force of

³⁴ Falck et al., *supra* note 33; Margaret Besse, Nik M. Lampe, & Emily S. Mann, *Experiences with Achieving Pregnancy and Giving Birth among Transgender Men: A Narrative Literature Review*, 93 *YALE J. BIOLOGY & MEDICINE* 517 (2020).

³⁵ Lampe et al., *supra* note 2, at 872.

³⁶ *Id.* at 873.

³⁷ *Id.* at 874.

³⁸ Besse, Lampe, & Mann, *supra* note 35. See also Gunnarsson Payne & Erbenius, *supra* note 2; Theo Erbenius & Jenny Gunnarsson Payne, *Unlearning Cisnormativity in the Clinic: Enacting Transgender Reproductive Rights in Everyday Patient Encounters*, 20 *J. INT’L WOMEN’S STUD.* 27 (2018); Lampe et al., *supra* note 2 (on media coverage of trans reproduction).

³⁹ See ILGA-Europe, *Rainbow Map*, www.rainbow-europe.org/#0/8682/0 (last visited Apr. 13, 2023).

⁴⁰ ILGA-EUROPE, *supra* note 14.

⁴¹ Biotechnology Act, *supra* note 11, § 2-2.

⁴² Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

Norwegian law and have precedence over other Norwegian laws.⁴³ Article 8 of the ECHR guarantees everyone a right to respect for family life and in conjunction with article 14 protects against discrimination, including discrimination connected with gender identity.⁴⁴ The Norwegian Constitution also enshrines the right of everyone to family life,⁴⁵ and both the Constitution and the Norwegian Equality and Anti-Discrimination Act prohibit discrimination on the basis of a person's gender identity.⁴⁶ Protection against discrimination under Norwegian domestic law must be interpreted in the light of international and European human rights laws, by which Norway is bound, such as the ICESCR and the ECHR.⁴⁷

So far, the ECtHR has not considered whether states have an obligation to ensure access to medically assisted reproduction for people who have changed their legal gender, but it has ruled on questions of access to reproductive technology for heterosexual (cisgender) couples. The ECtHR has found that the ECHR does not confer a right to medically assisted reproduction as such, but that the matter falls within the general scope of the right to family life under article 8 ECHR.⁴⁸ In the case *S.H. and Others v. Austria*, the ECtHR stated that “the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8, as such a choice is an expression of private and family life.”⁴⁹ Article 14 of the ECHR complements article 8 in relation to the enjoyment of the right to family life. The application of article 14 does not presuppose a breach of article 8 or any other provision under the ECHR. It comes into effect if the matter falls within the ambit of the right to family life, and also applies to additional rights that states have voluntarily established. Accordingly, when states go beyond their obligations under article 8 and create a right to medically assisted reproduction, limiting this to certain groups may be discriminatory and in breach of article 14 in conjunction with article 8.⁵⁰ Sandra Fredman summarizes this development in the ECtHR case law as follows: “While not establishing socio-economic rights as such, it has the effect of extending existing social provisions in social democratic European States

⁴³ Lov om styrking av menneskerettighetenes stilling i norsk rett [Human Rights Act] May, 21, 1999 nr. 30, § 3 (Nor.).

⁴⁴ *Identoba & Ors. v. Georgia*, App. No. 73235/12, ¶ 96 (May 12, 2015), <https://hudoc.echr.coe.int/eng?i=001-154400>.

⁴⁵ KONGERIKET NORGES GRUNNLOV [CONST.] 1814, article 102 (Nor.).

⁴⁶ Lov om likestilling og forbud mot diskriminering [Equality and Anti-Discrimination Act], June 15, 2017 nr. 51, § 6 (Nor.) [hereinafter Equality and Anti-Discrimination Act]; KONGERIKET NORGES GRUNNLOV [CONST.] § 98 (Nor.).

⁴⁷ ANNE HELLUM & VIBEKE BLAKER STRAND, LIKESTILLINGS- OG DISKRIMINERINGSRETT 80–8 (2022).

⁴⁸ *S.H. & Ors. v. Austria*, App. No. 57813/00, Nov. 3, 2011, <https://hudoc.echr.coe.int/eng?i=001-107325>; *Mennesson & Ors. v. France*, App. Nos. 65192/11, 65941/11, June 26, 2014, <https://hudoc.echr.coe.int/eng?i=001-145389>; *Wagner & JMWL v. Luxembourg*, App. No. 76240/01, June 28, 2007, <https://hudoc.echr.coe.int/eng?i=001-81328>.

⁴⁹ *S.H. & Ors. v. Austria*, App. No. 57813/00, Nov. 3, 2011, ¶ 82. See also *Dickson v. United Kingdom*, App. No. 44362/04, Dec. 4, 2007, <https://hudoc.echr.coe.int/eng?i=001-83788>.

⁵⁰ See a similar statement by the ECtHR in a case about adoption for a single lesbian woman: *E.B. v. France*, App. No. 43546/02, Jan. 22, 2008, ¶ 49, <https://hudoc.echr.coe.int/eng?i=001-84571>.

to excluded groups.”⁵¹ Thus, member states have positive obligations to ensure all people equal access to any health care services they provide unless the differential treatment is justified as reasonable, objective, and proportionate. Additionally, member states have an obligation to refrain from discriminating against people based on their gender identity.

Under the ICESCR, trans people have a right to equal access to reproductive technologies, without discrimination based on their gender identity.⁵² Under article 12 ICESCR, member states—including Norway—are obliged to respect, protect, and fulfill the right of everyone to the highest attainable standard of health, including reproductive health. This means that member states must stop denying certain groups access to reproductive health facilities and services that are accessible to other people, if the differential treatment cannot be justified as objective and reasonable. All groups must be able to exercise their right to reproductive health without unlawful discrimination.⁵³ The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity clarify state obligations as regards sexual orientation and gender identity and trans people’s corresponding rights.⁵⁴ It is a soft law declaration, based on an interpretation of existing legally binding human rights norms. Principle 17(f) states that countries must ensure that reproductive services are equally available, without discrimination. Principle 24(a) requires states to “take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity.” In 2018, the Council of Europe Parliamentary Assembly called on member states to protect the rights of rainbow families without discrimination because of their sexual orientation or gender identity, and “where single women are granted access to medically assisted procreation, ensure that such access is granted without discrimination on the grounds of sexual orientation or gender identity.”⁵⁵ In 2021, the European Parliament also called on member states to ensure access to fertility treatment without discrimination because of a person’s gender identity.⁵⁶

⁵¹ Sandra Fredman, *Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights*, 16 HUM. RTS. L. REV. 273, 276 (2016). See also Oddný Mjöll Arnardóttir, *Discrimination as a Magnifying Lens: Scope and Ambit under Article 14 and Protocol No. 12*, in SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS 330 (Eva Brems & Janneke Gerards eds., 2014).

⁵² See ICESCR, *supra* note 42, art. 12 in conjunction with art. 2. See Comm. on Econ. Soc. & Cultural Rts., Gen. Cmt. No. 20, ¶ 32, Doc. No. E/C.12/GC/20 (July 2, 2009).

⁵³ Comm. on Econ. Soc. & Cultural Rts., Gen. Cmt. No. 14., ¶ 12, Doc. No. E/C.12/2000/4 (Aug. 11, 2000); Comm. on Econ. Soc. & Cultural Rts., Gen. Cmt. No. 22, ¶ 22 (2016).

⁵⁴ Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Mar. 26, 2007, http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf [hereinafter Yogyakarta Principles].

⁵⁵ Council of Europe, Parl. Assembly Res. 2239, *Private and Family Life: Achieving Equality Regardless of Sexual Orientation*, ¶ 4.5.4 (Oct. 10, 2018).

⁵⁶ Eur. Parl. Res. of 24 June 2021 on the Situation of Sexual and Reproductive Health and Rights in the EU, in the Frame of Women’s Health, ¶ 39, Doc. No. 2020/2215(INI), 2022 O.J. (C 81) 43.

So far, access to reproductive technology has been addressed only to a limited extent. However, the right to protection from discrimination because of one's gender identity limits the ability of states to limit access to the reproductive technologies they provide. The protection against discrimination shall ensure that no one is denied their rights because of, for example, their gender identity. A distinction must therefore be made between states that have created a right to donor insemination, in vitro fertilization (IVF), and partner egg donation, and those that do not allow the use of such reproductive technologies. In states that do not, not allowing them to trans people will not amount to differential treatment. In states that permit medically assisted reproduction, by contrast, excluding trans people from this reproductive technology constitutes differential treatment that amounts to discrimination, if the differential treatment cannot be justified as objective, reasonable, and proportionate. Such treatment limits trans people's ability to form a family, and puts them in a less favorable situation compared to cis-people.

3. Norway: Legal gender recognition and medically assisted reproduction

3.1. The Norwegian Act on Change of Legal Gender

The Norwegian Act on Change of Legal Gender was adopted with a sizeable parliamentary majority and entered into force on July 1, 2016.⁵⁷ Previously, a precondition for gender recognition was sterilization through the surgical removal of the reproductive organs. This precondition was rooted in administrative practice established in the early 1970s and was not governed by legislation: the Norwegian requirement for sterilization was not something that had been carefully considered before being introduced and little is known about the thinking behind it. It was the approach developed at the only healthcare institution that provided gender confirmation treatment to “transsexual” people living in Norway. Thus, it was closely linked to medical views about “transsexuals” at the time.⁵⁸

In 2013, the Norwegian Ministry of Health and Care Services appointed an expert group to make recommendations on the requirements for change of legal gender. In its 2015 report, the group says that it had not found any medical explanation for making the surgical removal of the reproductive organs a condition for the change of

⁵⁷ Act on Change of Legal Gender, *supra* note 13.

⁵⁸ Anniken Sørli, *Legal Gender Meets Reality: A Socio-Legal Children's Perspective*, 33 *NORDIC J. HUM. RTS.* 353 (2015); Anniken Sørli, *Retten til Kjønsidentitet som Menneskerettighet: Kan Norsk Forvaltningspraksis' Krav om Irreversibel Sterilisering ved Endring av Fødselsnummer Forsvares? [The Right to Gender Identity as a Human Right]* (Kvinnerettslig skriftserie Universitetet i Oslo, Paper No. 90/2013, Feb. 19, 2013), www.jus.uio.no/ior/forskning/omrader/kvinnerett/publikasjoner/skriftserien/90-sorlie.html; Helsedirektoratet [Directorate of Health], *Rett til Rett Kjønn—Helse til Alle Kjønn: Utredning av Vilkår for Endring av Juridisk Kjønn og Organisering av Helsetjenester for Personer som Opplever Kjønnssinkongruens og Kjønsdysfori [The Right to Right Gender—Health for All Genders: Investigation of the Conditions for Changing Legal Gender and Organising Health Services for People who Experience Gender Incongruence and Gender Dysphoria]* (Apr. 2015), www.regjeringen.no/contentassets/d3a092a312624f8e88e63120bf886e1a/rapport_juridisk_kjonn_100415.pdf (Nor.).

legal gender.⁵⁹ This chimes with the statement made by the Norwegian Equality and Anti-Discrimination Ombud in 2014, who found that making medical intervention a precondition for legal gender recognition amounted to unlawful discrimination.⁶⁰ The expert group, however, pointed out that Per Anchersen, a head psychiatrist working with “transsexuals” in Norway, had given the following explanation for recommending “castration” for the change of legal gender in 1979:

Concerning women, I have recommended castration on the grounds that without castration it would at least in theory be a possibility of someone being converted into a menstruating man. And by only carrying out a simple sterilization (that could go wrong), in the worst case this could be a man who could be a mother. Such a (barely imaginable) calamity would lead to unsolvable legal complications and bring discredit upon the whole treatment procedure.⁶¹

According to the expert group, there is reason to believe that the Norwegian requirement for irreversible sterilization before the change of legal gender was based on similar considerations.⁶² It suggests that sterilization was introduced to govern and limit trans reproduction, and to uphold a cis-normative conception of motherhood. Not carrying out sterilizations would disrupt the repronormative order: only women can be mothers. Motherhood and pregnancy were regarded as part of female identity and the relationship between them was considered inseparable. Moreover, without sterilization, the credibility of gender confirmation treatment would be reduced, and it would lead to insoluble legal complications, by disturbing legal certainty in family relations. This view correlates with the arguments for an infertility requirement put forward in the *travaux préparatoires* to the 1972 Swedish Gender Recognition Act, which allude to the risk of confusion in kinship relationships if the possibility of legal men becoming pregnant was not ruled out.⁶³ The aims of upholding cis-normative kinship relations and protecting the relationship between pregnancy, motherhood, and (legal) women appears to be a major feature of justifications for the requirement for sterilization.

The 2016 Act on Change of Legal Gender defines legal gender as the gender a person is registered with in the National Population Registry.⁶⁴ For it to be changed, the Act requires the applicant to be regarded as a resident of Norway and to self-identify as “the other gender,” i.e., other than the one he or she is registered with in the Norwegian Population Registry.⁶⁵ Thus, change of legal gender is based solely on self-identification (within the two-sex model): it does not need to be evaluated by medical experts and does not depend on medical treatment. People who change their

⁵⁹ Helsedirektoratet, *supra* note 58, para. 7.21.

⁶⁰ Likestillings- og diskrimineringsombudet [Equality and Anti-Discrimination Ombud], case no. 14/840 (Sept. 9, 2014).

⁶¹ Brev fra Per Anchersen til Kirke- og undervisningsdepartementet [Letter from Per Anchersen to the Ministry of Church Affairs and Education] (Nor.) cited in Helsedirektoratet, *supra* note 58, para. 7.2.1.

⁶² Helsedirektoratet, *supra* note 58, para. 7.2.1.

⁶³ Proposition [Prop.] 1972:6, at 50 [government bill] (Swed.).

⁶⁴ See Act on Change of Legal Gender, *supra* note 13, § 1.

⁶⁵ See *id.* § 2. Norwegian citizens living abroad also have a right to change their legal gender. See Regulation No. 1565 om endring av juridisk kjønn for norske statsborgere bosatt i utlandet [On Change of Legal Gender for Norwegian Citizens Living Abroad] § 1 (Dec. 12, 2016) (Nor.).

legal gender can thus generally reproduce either sexually or with the help of fertility treatment.

The right to change legal gender applies to those who have reached the age of sixteen,⁶⁶ children between the ages of six and sixteen (with parental consent), and intersex children regardless of age.⁶⁷ The Act does not set any limit on subsequent changes of legal gender.⁶⁸ The Act's main focus was the abolition of the sterilization requirement and the introduction of change of legal gender for minors.⁶⁹ Only a few consultative bodies addressed the issue of applying the Biotechnology Act and other legal consequences of changing legal gender.⁷⁰

The legal consequences of changing legal gender and the issue of how gender-specific laws and regulations are to be applied were poorly explored in the *travaux préparatoires*⁷¹ to the Act and during the reform process. However, as a general rule, when other statutes and regulations are enforced, the legal gender applies. An exception is made in the case of the establishment of legal parenthood, if this cannot be established without referring to the birth-assigned gender of the parent.⁷² For example, according to the Children's Act, the woman who gave birth to it is the child's mother.⁷³ Thus, to establish legal parenthood for the person who gave birth, birth-assigned gender needs to be used. None of the other provisions under the Act are applicable. The objective is to ensure children have two legal parents—even when the parent(s) has/have changed their legal gender.⁷⁴

3.2. The Norwegian Biotechnology Act

Rules governing parenthood and medically assisted reproduction, including fertility preservation, indicate what forms of reproduction, pregnancy, and parenthood are regarded as legitimate or illegitimate. They thus produce and reproduce norms for reproduction, pregnancy, and parenthood. Under the Biotechnology Act, “medically assisted reproduction” means insemination and IVE. “Insemination” means the introduction of sperm into a woman's body by means other than sexual intercourse.

⁶⁶ Act on Change of Legal Gender, *supra* note 13, § 4

⁶⁷ See Act on Change of Legal Gender, *supra* note 13, §§ 4.2, 4.3.

⁶⁸ Proposition [Prop.] 74 L (2015–16): Lov om endring av juridisk kjønn [Act on Change of Legal Gender], para. 8.4.4 (Nor.).

⁶⁹ See, e.g., Aksjon: Norge: La John Jeanette Få Endre Juridisk Kjønn! [Norway: Let John Jeanette Change their Legal Gender!], AMNESTY INT'L (June 16, 14), <https://amnesty.no/aksjon/norge-la-john-jeanette-fa-endre-juridisk-kjonn>; Landsforeningen for Lesbiske, Homofile, Bifile og Transpersoner (LLH), *Stans tvungen sterilisering og kastrasjon av transpersoner* [Stop Forced Sterilization and Castration of Transgender People], UNDERSKRIFT (May 15, 2012), www.underskrift.no/vis/4005.

⁷⁰ See, e.g., Helse- og omsorgsdepartementet [Ministry of Health and Care Services]. Høring: Forslag til Lov om Endring av Juridisk Kjønn: Høringssvar [Hearing: Proposal for an Act on Change of Legal Gender: Consultative Comment], REGJERINGEN (June 25, 2015), www.regjeringen.no/no/dokumenter/horing---forslag-til-lov-om-endring-av-juridisk-kjonn/id2423028/?expand=horingssvar.

⁷¹ In Norway, *travaux préparatoires* are an important source in the interpretation of laws.

⁷² See Act on Change of Legal Gender, *supra* note 13, § 6.

⁷³ Lov om barn og foreldre [Act Relating to Children and Parents] Apr. 8, 1981 nr. 7, § 2 (Nor.) [hereinafter Children's Act].

⁷⁴ Prop. 74 L (2015–16), *supra* note 68, para. 8.5.3.

“In vitro fertilization” is defined as fertilization of oocytes outside a woman’s body.⁷⁵ Permission to use medically assisted reproduction can be given if the woman is married, living in a stable relationship resembling marriage, or is single (living alone).⁷⁶ Medically assisted reproduction is thus available from public and private health care services in Norway to lesbian and heterosexual couples—and to women living alone. For heterosexual couples, a precondition for insemination is the medical need for assisted reproduction.⁷⁷ Insemination may also take place when two women are married or living in a stable relationship resembling marriage, or when a woman is single.⁷⁸ Medical need is required for in vitro fertilization.⁷⁹ In 2020, the Biotechnology Act was amended to permit egg donation, but surrogacy is not allowed. Egg and semen donations are not permitted at the same time, nor is the donation of a fertilized egg.⁸⁰ An exception is made for lesbian couples: partner donation of an egg and the use of donor semen is permitted.⁸¹ This legal amendment entered into force in 2021.⁸² There have been two main justifications for egg donation: the equal treatment of men and women when infertile and the low risk involved in the procedure.⁸³ Medically assisted reproduction requires the written consent of the would-be parents, and the woman cannot be older than forty-six.⁸⁴ The decision on whether to provide medically assisted reproduction must be made by a doctor and be based on a medical and psychosocial assessment of the woman and her spouse or cohabitant. In making the decision, weight must be given on her/their caring ability and the best interests of the child.⁸⁵

This short introduction to the main rules on medically assisted reproduction under the Biotechnology Act shows that their wording is gender-specific. Terms such as “woman” or “man” are used to describe the requirements for medically assisted reproduction, and are therefore also used here. These gender-specific terms are not defined under the Act or in the *travaux préparatoires* to the Act. Prior to the 2016 Act on Change of Legal Gender, the strong medico-legal link that characterized legal gender recognition⁸⁶ did not create uncertainty. Legal men could not conceive and legal women were not able to beget children. However, Norwegian law’s conception of gender has changed, which creates a need to clarify concepts that at the time of the adoption of the Biotechnology Act were considered self-evident.

⁷⁵ Biotechnology Act, *supra* note 11, § 2-1.

⁷⁶ *Id.* § 2-2.

⁷⁷ Further detailed *id.* § 2-3.

⁷⁸ *Id.* § 2-3.

⁷⁹ *See id.* § 2-4.

⁸⁰ *Id.* § 2-15, subsec. 3.

⁸¹ *Id.* § 2-15, subsec. 4.

⁸² Lov om endring i bioteknologiloven (sikre kvinner i likekjønnet par mulighet til å velge hvem av kvinnene som skal gå gravid med parets barn) [Act Amending the Biotechnology Act (Ensuring Women in Same-Sex Couples the Opportunity to Choose which of the Women Will Become Pregnant with the Couple’s Child)] June 4, 2021, nr. 53 (Nor.).

⁸³ Recommendation [Innst.] 273 S, at 11 (2017–18); Innstilling til Stortinget fra helse- og omsorgskomiteen [Recommendation to Parliament from the Health and Care Committee] (Nor.); Recommendation [Innst.] 296 L, at 21 (2019–20); Innstilling til Stortinget fra helse- og omsorgskomiteen [Recommendation to Parliament from the Health and Care Committee] (Nor.).

⁸⁴ *See* Biotechnology Act, *supra* note 11, §§ 2-5, 2-3a.

⁸⁵ *See id.* § 2-6.

⁸⁶ *See* Sørlie, *supra* note 6.

3.3. Medically assisted reproduction for people who have changed their legal gender

The gender-specific wording of the Biotechnology Act creates uncertainties and barriers for trans people seeking medically assisted reproduction and fertility preservation. Trans people in Norway report that they face barriers because of their legal gender when, for example, seeking fertility preservation for egg donation to a future partner.⁸⁷ Their reproductive capacities and legal gender do not match the understanding of gender and reproduction on which the provisions on medically assisted reproduction are based. Unlike the Children's Act, the specific application of the Biotechnology Act is not mentioned under the Act on Change of Legal Gender. Thus, the general rule applies, i.e., the legal gender is applicable in the interpretation of the Biotechnology Act.⁸⁸ “Woman” means “legal woman” and “man” means “legal man.” This being so, the gender-specific wording of the Biotechnology Act does not fit the situation of legal men seeking medically assisted reproduction to bear children. Insemination and IVF, including partner egg donation, are only accessible to legal women. A legal man is not a (legal) woman and therefore cannot access medically assisted reproduction to conceive a child. To conceive children is regarded as a female activity and capacity, excluding legal men from accessing medically assisted reproduction—regardless of their reproductive capacities and the repeal of the sterilization requirement. It appears that the capacity to conceive as a (legal) man is considered less desirable. This restrictive interpretation of the Biotechnology Act fails to consider that reproductive capacity and function are not determined by legal gender.

In the 2015 consultation note to the Act on Change of Legal Gender, the Ministry of Health and Care Services suggested that the notion of “bodily gender,” as opposed to “legal gender,” should be applied in certain situations. The Ministry said that, as a general rule, legal gender should determine interpretation of the Biotechnology Act. However, when a person who has changed their legal gender can be enabled to become a parent through assisted reproduction, the law should accommodate this. The Ministry took as an example cases where legal men seek medically assisted reproduction to bear children. According to the Ministry, “the bodily gender” can be applied when the wording of the Biotechnology Act otherwise bars a person from accessing medically assisted reproduction. The Ministry also suggested the gender-specific wording of the Biotechnology Act should be replaced with gender-neutral terms when such wording is unnecessary, such as when requiring consent for assisted reproduction.⁸⁹ If the legislature had accepted this suggestion, medically assisted reproduction, including partner egg donation, would have been accessible to everyone

⁸⁷ Caroline Ugelstad Elnæs, *Levi ble nektet å fryse ned egg* [Levi Was Denied the Possibility of Freezing His Eggs], Blikk (Oct. 4, 2021), <https://blikk.no/eggdonasjon-ikke-binaer-levi-sorum/levi-ble-nektet-a-fryse-ned-egg/207462>; ILGA-EUROPE, *supra* note 14.

⁸⁸ Act on Change of Legal Gender, *supra* note 13, § 6.

⁸⁹ Helse- og omsorgsdepartementet [Ministry of Health and Care Services], Høring: Forslag til Lov om Endring av Juridisk Kjønn [Hearing: Proposal for an Act on Change of Legal Gender], REGJERINGEN, para. 10.3 (June 25, 2015), www.regjeringen.no/contentassets/6a6a1ba1395f48a3ba5aa3c1f2536582/horingsnotat_forslag_til_ny_lov_om_endring_av_juridisk_kjonn.pdf.

with the reproductive capacity to donate eggs to their partner, for example, or to become pregnant.

However, the Ministry's suggestions in the consultation note were not adopted and thus have no legal weight. During the consultation process, very few consultative bodies addressed the issue of access to medically assisted reproduction.⁹⁰ In the Government Bill passing the Act on Change of Legal Gender, the Ministry said: “[F]or the time being, the legal gender shall also be applied when interpreting the rules under the Biotechnology Act concerning assisted reproduction. The Ministry will, however, when evaluating the Biotechnology Act go back to the question of assisted reproduction for people who have changed their legal gender.”⁹¹ No explanation was provided. An evaluation of the Biotechnology Act formed part of the 2013 political manifesto of the Solberg Government.⁹² However, in 2017, in the white paper on the evaluation of the Biotechnology Act, the Government did not propose any amendments to the Biotechnology Act concerning access to medically assisted reproduction for trans people.⁹³ In 2018, the Parliament endorsed the view of the Government. In 2020, when the amendments to the Biotechnology Act were presented, the bill did not include changes as regards access to medically assisted reproduction for trans people.⁹⁴ In the white paper, the Ministry noted that there were arguments for and against giving trans people access to assisted reproduction on the basis of birth-assigned gender—but did not specify them. Without thoroughly considering the matter or its possibly discriminatory effects, the Ministry concluded that, in the view of the Government, no changes should be made.⁹⁵ This was in line with the majority view in the Standing Committee on Health and Care Services that legal gender rather than birth-assigned gender should be applicable. Only the committee member from the Socialist Left Party (SV) thought that “everyone should have the same opportunities to make use of their reproductive organs to get children—regardless of legal gender.”⁹⁶ It is therefore the legislature's view that the general rule laid down by the Act on Change of Legal

⁹⁰ See, e.g., Helsedirektoratet [Directorate of Health], Høringssvar: Forslag til Lov om Endring av Juridisk Kjønn og Anbefalinger fra Ekspertgruppe om Helsetilbudet for Personer som Opplever Kjønnssdysfori [Consultative Comment: Proposal for an Act on Change of Legal Gender and Recommendations from the Expert Group on the Health Services for People who Experience Gender Dysphoria] (Nov. 12, 2015), www.regjeringen.no/contentassets/30840fd8995949ada8305a28376d8987/mars_hdir_kjoen.pdf; Bioteknologirådet [Biotechnology Advisory Board], Høringssvar: Forslag til Lov om Endring av Juridisk Kjønn [Consultative Comment: Proposal for an Act on Change of Legal Gender] (Nov. 2, 2015), www.regjeringen.no/no/dokumenter/horing---forslag-til-lov-om-endring-av-juridisk-kjoenn/id2423028/?uid=c6c8ca5d-805a-4569-8fb1-a0cde9ee7e63.

⁹¹ Prop. 74 L (2015–16), *supra* note 68, para. 8.5.3.

⁹² *Politisk plattform for en regjering utgått av Høyre og Fremskrittspartiet* [Political Platform for a Government Formed by the Conservative Party and the Progress Party] 46 (Oct. 7, 2013), www.regjeringen.no/no/dokumentarkiv/regjeringen-solberg/andre-dokumenter/smk/2013/politisk-plattform/id743014/.

⁹³ White Paper [Meld.] St. 39 (2016–17): Evaluering av bioteknologiloven [Evaluation of the Biotechnology Act], www.regjeringen.no/no/dokumenter/meld.-st.-39-20162017/id2557037/.

⁹⁴ Proposition [Prop.] 34 L (2019–20): Endringer i bioteknologiloven mv [Amendments to the Biotechnology Act, etc.], <https://lovdata.no/static/INNST/innst-201819-273.pdf> (Nor.).

⁹⁵ Meld. St. 39, *supra* note 93, para. 4.14.2.

⁹⁶ Innst. 273 S, *supra* note 83, at 20–1.

Gender holds good for the application of other laws,⁹⁷ which means that legal gender will determine trans people's access to assisted reproductive technology. In 2022, the Norwegian Directorate of Health confirmed that medically assisted reproduction can only be provided to a legal (and biological) woman.⁹⁸ Consequently, legal men cannot access (donor) insemination or in vitro fertilization when they need medically assisted reproduction to bear children, and legal men cannot legally donate their own eggs to their partner. This stands in contrast to the options available to cis people.

There are, nevertheless, ways to access such reproductive technologies. The Act on Change of Legal Gender does not restrict the number of times a person can change their legal gender. Consequently, if a legal man, for example, wants to bear a child, a way to access medically assisted reproduction is to change their gender to legal woman for a time to satisfy the gender-specific wording of the Norwegian Biotechnology Act. The Socialist Left Party member of the committee in fact pointed this out, saying that “to deprive people of the right to assisted reproduction because of their legal gender is both wrong and probably ineffective.”⁹⁹ Changing legal gender to fulfill the gender requirement of the Biotechnology Act may, however, have practical consequences and impose a psychological burden on the individual whose legal gender does not match their gender identity. Moreover, access to assisted reproduction via public or private health care services is dependent on the person or couple being approved by the doctors who assess them. It cannot be guaranteed that this assessment will be free from stereotypical assumptions about trans people, the best interests of the child, and cis-normative conceptions about reproduction and gender. The doctor's psychosocial assessment of the intended parent(s) may be influenced by the boundaries of trans reproduction under the Biotechnology Act, which by way of excluding many trans people from medically assisted reproduction and making trans reproduction invisible in law, presents trans reproduction as less desirable and illegitimate. A trans-inclusive Biotechnology Act, on the other hand, would signal that such assumptions are illegitimate.

A textual and restrictive interpretation of the Act on Change of Legal Gender and of the Biotechnology Act supported by statements in the *travaux préparatoires* to the Acts reduces the fertility options for those who have changed their legal gender.

4. Reasons for limiting trans reproduction

In Norway, medically assisted reproduction, including (donor) insemination, (partner) egg donation, and IVF, is permitted and must therefore be accessible without discrimination. A restrictive textual interpretation of Norwegian law does not provide for such equality of access. People who have changed their legal gender are denied access to

⁹⁷ Act on Change of Legal Gender, *supra* note 13, § 6.

⁹⁸ E-post fra Helsedirektoratet til Bioteknologirådet [Email from the Directorate of Health to the Biotechnology Advisory Board], Doc. No. 22/111-2 (Jan. 3, 2022) (Nor.).

⁹⁹ Innst. 273 S, *supra* note 83, at 21. See also Humanist Etisk forbund [Humanist Ass'n] Høringsuttalelse: Forslag til Lov om Endring av Juridisk Kjønn [Consultative Comment: Proposal for an Act on Change of Legal Gender] (Nov. 15, 2015), www.regjeringen.no/no/dokumenter/horing--forslag-til-lov-om-endring-av-juridisk-kjonn/id2423028/?uid=d52a8678-40fa-47ea-bb9d-942e957f915a.

medically assisted reproduction if their legal gender does not, in the view of the legislature, match their normative reproductive capacity. They are thus being placed in a worse position than others (cis people) because of their gender identity. Being unable to use the assisted reproductive technology means that some of them will not be able to become parents and form a family with children—unlike cis people who—if they fulfill other requirements—can access medically assisted reproduction. This may be a heavy blow to people that want a family with children. Under Norwegian antidiscrimination law and international human rights law, to which Norway is bound, differential treatment on the basis of gender identity amounts to discrimination and is unlawful, unless the differential treatment has an objective purpose, is necessary to achieve that purpose, and its negative effects are not disproportionate to the aim sought to be achieved.¹⁰⁰ The Norwegian legislature did not assess whether the use of legal gender as the basis for the rules laid down by the Biotechnology Act has discriminatory effects, nor did it ask what justified applying the Act in this way. Such an assessment would have laid bare the reasons for the legislative choice. The reasons for limiting trans reproduction are therefore unclear. It may well be that the underlying reasons were consistency in law and repronormative and cis-normative conceptions about reproduction, pregnancy, and the societal gender order.

It is reasonable to ask whether the underlying reason is that trans reproduction, in the view of the legislature, too gravely breaks with cultural conceptions of gender, parenthood, and reproduction for medically assisted reproduction to be offered. If so, the previous rationales for preconditioning legal gender recognition on sterilization are reintroduced. Trans reproduction disturbs what was considered to be “natural reproduction,” proper reproduction, and motherhood. As regards the sterilization requirement, Dunne notes that “there is a sense that opposition to male pregnancy is less about ‘nature’ and more about societal attitudes towards proper reproduction.”¹⁰¹ Trans reproduction destabilizes and challenges cultural imaginations of motherhood and fatherhood, and the relationship between gender, reproductive capacities, and parenthood.¹⁰² The exclusion of trans people from access to medically assisted reproduction signals that the state persists in its unwillingness to break with cultural conceptions of reproduction and pregnancy and to ensure equality.¹⁰³ Perhaps the image of a pregnant man, in the view of the legislature, too gravely violates the cultural conceptions of pregnancy, motherhood, and what it means to be a man—and hence the reproductive roles of (legal) genders—for medical assistance to be offered.

According to Lampe, media coverage of trans reproduction perpetuates assumptions about there being one universal and normal pregnancy and way of conceiving that is biological and cis-normative.¹⁰⁴ The law, and in this case the Norwegian Biotechnology Act, does so too. By using the term “woman” and conflating it with the capacity to conceive,

¹⁰⁰ Equality and Anti-Discrimination Act, *supra* note 46, § 9.

¹⁰¹ Dunne, *supra* note 4, at 24; Helsedirektoratet, *supra* note 58, para 7.2.1; Proposition [Prop.] 1972:6 [government bill] (Swed.).

¹⁰² Sørli, *supra* note 6; Sørli, *supra* note 13; Payne & Erbenius, *supra* note 2; Margaria, *supra* note 4.

¹⁰³ Sørli, *supra* note 6.

¹⁰⁴ Lampe, Carter, & Sumerau, *supra* note 2, at 875.

the Act excludes from the law legal men's capacity to conceive children and produce eggs. Legal men's reproductive capacities are made invisible, and their exclusion from assisted reproduction means pregnant men are regarded as illegitimate and undesirable. The Act assumes that all women can produce eggs and conceive, ignoring legal men and ciswomen, who, for different reasons, cannot get pregnant. The Act thus confirms and normalizes pregnancy and motherhood as female. Cis realities are used and continue to be used as the starting point and norm for reproduction. Cis reproduction and cisgender pregnancy is reinforced as universal and preferable. Such marginalization of trans reproductive experiences undermines the needs, lives, and desires of trans people.

The Biotechnology Act seems to be based on the assumption that the desire to carry a child equates to being a woman and is linked to *motherhood*, thus being incompatible with identifying as a man or with fatherhood. Combining capacities considered to be female with being a (legal) man seems to subvert gender norms so alarmingly that the legislature prefers not to explicitly promote such pregnancies by permitting medically assisted reproduction regardless of legal gender. This, however, makes manifest an inconsistency in the law. Daniela Alaattinoğlu and Alice Margaria show in their article that, by making possible legal parenthood for people who have changed their legal gender, many countries, including Norway, create “legally male mothers and female fathers”—and, by so doing, blur the gender binaries. This happens because of an unwillingness to bring legal parenthood into line with the realities of self-declared change of legal gender and the mixture of the reproductive capacities of legal women and legal men.¹⁰⁵ As regards medically assisted reproduction, on the other hand, there appears to be a desire not to dismantle the relationship between motherhood/pregnancy and (legal) women, and between (legal) men and fatherhood/sperm production. The Biotechnology Act fails to recognize the plurality of the reproductive capacities of the legal genders, and thus moves away from the reproductive reality otherwise created by the Act on Change of Legal Gender. This is similar to the previous aim of promoting certainty in family law by requiring sterilization, thereby upholding normative kinship relations, while making trans kinship relations impossible.¹⁰⁶ Since not all legal men are in need of reproductive technology to become pregnant, and legal women may use their own sperm, trans people will beget and give birth to children irrespective of national regulations limiting access to reproductive technologies.

Any justification by the Norwegian legislators for applying legal gender and excluding legal men from accessing (donor) insemination and in vitro fertilization seems hard to find—or at best is vague and weak. If the underlying aims are to promote legal certainty and to uphold cis-normative conceptions of reproduction, pregnancy, and the societal gender order, the differential treatment can hardly be regarded as justified. The “universal notion of human reproduction” is already “destabilized” by pregnant men and begetting women.¹⁰⁷ Family laws already need to be amended because of the

¹⁰⁵ Alaattinoğlu & Margaria, *supra* note 6.

¹⁰⁶ See Dunne, *supra* note 4; Repo, *supra* note 30.

¹⁰⁷ Dunne, *supra* note 4, at 21.

introduction of self-declared change of legal gender. Making medically assisted reproduction accessible to people who have changed their legal gender would not create a new situation of legal uncertainty. Additionally, such rationales can be challenged by looking at, for example, the consequences of limiting reproduction for the lives of trans people. Trans people are barred from establishing families with children by the use of medically assisted reproduction. Other people, on the other hand, may have their conceptions of reproduction, pregnancy, and gender order challenged. This balancing of interests should tilt in favor of trans people.

Another possible underlying reason for limiting trans reproduction is simply prejudice and negative attitudes toward trans people, and the assumption that they are not fit for parenting. To this author's knowledge, no research has found that trans people are not fit for parenthood.¹⁰⁸ Unsubstantiated claims that people with a certain group characteristic are unfit for parenting clearly stems from prejudice and the stigmatization of trans people. Arguments for differential treatment, based on prejudice and negative attitudes, cannot be regarded as legitimate.¹⁰⁹ As regards the legitimization of the requirement for sterilization, Dunne says that “[a]nti-trans attitudes are not a legitimate justification for compromising trans fertility. Any other conclusion would mean that, every time lawmakers (or a section of society) wish to curb minority freedoms, they could simply whip up discriminatory sentiments against that group.”¹¹⁰ Limiting the access of trans people to reproductive technologies would produce and reproduce stereotypes about them, including the assumptions that trans people do not desire children, are unfit for parenting, and are not “really” men or women. Such stereotypes and prejudices could negatively affect the children of trans people who adopt, conceive, or beget a child through sexual reproduction, or transition after forming a family with children. To (re)produce stereotypes and prejudice through law does not serve the best interests of the child.

The rights of trans people to reproduce, and to have access to assisted reproduction, are negotiated against the background of a national and international anti-trans discourse, which may seek to maintain legal barriers to trans reproduction. In Norway, the public debate includes claims that trans people do not really exist, that the right of trans people to change legal gender discriminates against (cis) women, and that change of gender is a legal fantasy.¹¹¹ Public statements—such as: “No matter what gender the ox feels like, it is the cow that calves,” “Gender, biology is what’s fundamental in this regard,” “People too can feel what they like, but we can’t get away from

¹⁰⁸ See also Shannon Price Minter, *Transgender Family Law*, 56 FAMILY CT. REV. 410 (2018) (with further references).

¹⁰⁹ Proposition [Prop.] 81 L (2016–17): Lov om likestilling og forbud mot diskriminering [Law on Equality and Non-Discrimination], para 12.2.1 (Nor.).

¹¹⁰ Dunne, *supra* note 4, at 17.

¹¹¹ Peter Risholm & Christina Ellingsen, “Schrödingers Kjønn” Holder Ikke i en Rettsstat, [“Schrödinger’s Gender”: Does not Hold in a State under the Rule of Law], SUBJEKT (Jan. 12, 2022), <https://subjekt.no/2022/01/12/schrodingers-kjonn-holder-ikke-i-en-rettsstat/>; *Debatten: Hun, Han, Hen og Hva Mer?* [The Debate: She, Him, They and What Else?], NRK (Jan. 27, 2022), <https://tv.nrk.no/serie/debatten/202201/NNEA51012722> (featuring a discussion with Christina Ellingsen).

the fact that the female body gives birth”¹¹²—have been hotly debated and gained both support and criticism.¹¹³ The polarized debate, which is violent and heated, on the rights of trans people and their lives in Norway, has also led to formal complaints about alleged hate speech against trans people—and to conviction for hate speech.¹¹⁴ However, antagonism to trans people’s human rights, including hate speech, violence, and hate crime against them, is found throughout Europe.¹¹⁵ In 2022, the Council of Europe Parliamentary Assembly condemned

the highly prejudicial anti-gender, gender-critical and anti-trans narratives which reduce the struggle for the equality of LGBTI people to what these movements deliberately mischaracterise as “gender ideology” or “LGBTI ideology.” Such narratives deny the very existence of LGBTI people, dehumanise them and often falsely portray their rights as being in conflict with women’s and children’s rights, or societal and family values in general. All of these are deeply damaging to LGBTI people, while also harming women’s and children’s rights and social cohesion.¹¹⁶

In a thematic report in 2022, the Council of Europe Steering Committee on Anti-Discrimination, Diversity and Inclusion, also addressed the anti-trans discourse and the growth of opposition to the human rights of trans people, describing it as a pan-European problem.¹¹⁷ Anti-trans narratives may influence government representatives and political figures, as well as trans people themselves and their ability to take part in public and social life—and as such, the possibility of introducing trans friendly laws.

The differential treatment of people who have changed legal gender lacks an objective purpose and is disproportionate. The Norwegian legislature has not clarified the reasons for limiting trans reproduction. They seem to be grounded in cultural assumptions about what a man or woman “is,” and cisnormative ideas about reproduction and pregnancy. Other potential rationales borrowed from the former discourse on the requirement for sterilization are equally unable to justify differential treatment, which effectively bars trans people from accessing medically assisted reproduction and from establishing families with children because of their gender identity—for no good reason. The practice of applying legal gender and the impact of this on people who have changed legal gender conflicts with the purpose of the Norwegian Equality and Anti-Discrimination Act, which is to promote equality and prevent discrimination on

¹¹² For a statement by a Centre Party politician during a debate broadcast on NRK, the largest TV Channel in Norway, see *Debatten: Hun, Han, hHn og hvH Mer?*, *supra* note 111.

¹¹³ See *contra*, e.g., Anna Blix, *Om kyr og kjønn* [About Cows and Gender], KLASSEKAMPEN (Feb. 11, 2022), <https://klassekampen.no/utgave/2022-02-11/om-kyr-og-kjonn/iicv>;

¹¹⁴ Editorial, *Smakløse og svært usaklige ytringer fra Christina Ellingsen* [Christina Ellingsen’s Tasteless and Highly Inappropriate Remarks], SUBJEKT (July 7, 2022), <https://subjekt.no/2022/07/17/smaklose-og-svaert-usaklige-ytringer-fra-christina-ellingsen/>; Høyesterett [Supreme Court], Case No. HR-2022-1843-A, Sept. 30, 2022 (Nor.). Since 2020, hate speech directed at gender identity and gender expression has been prohibited under the Norwegian Penal Code, see *Lov om straff* [Penal Code], May 20, 2005 nr. 28, § 185 (Nor.).

¹¹⁵ Council of Europe, Parl. Assembly, Res. 2417, *Combating Rising Hate against LGBTI People in Europe* (Jan. 25, 2022).

¹¹⁶ *Id.* ¶ 5.

¹¹⁷ *Id.* ¶ 14.

the ground of gender identity.¹¹⁸ Norwegian law discriminates against trans people, and the Norwegian legislature should therefore change it to ensure equal access to reproductive technologies for all people, regardless of their legal gender or gender identity.

5. Alternatives to applying legal gender

Limiting trans people's access to medically assisted reproduction goes against the human rights the Act on Change of Legal Gender seeks to uphold: the right to private life and non-discrimination.¹¹⁹ An interpretation of the Biotechnology Act and the Act on Change of Legal Gender that limits the reproductive rights of trans people does not match the shift in the reproductive capacities of the legal genders otherwise being facilitated by the Act on Change of Legal Gender. It shows the lives of trans people are being regulated in a negative way, and that the aim of trans-inclusiveness that was behind the use of legal gender as a guiding principle for legal interpretation is thwarted when it comes to access to medically assisted reproduction. Instead of recognizing trans people and ensuring trans equality, it excludes from reproduction trans people that do not fit the cis-normative wording of the Biotechnology Act.

The protection against discrimination given by international law, to which Norway is bound, and by the Norwegian Constitution, operates alongside other regulations and has effects in all areas. It takes precedence if it conflicts with other Norwegian law. It works as a principle of interpretation, implying that other regulations shall be interpreted so as not to discriminate, as well as a legal barrier to adopting discriminatory laws and regulations.¹²⁰ As regards the Biotechnology Act, it is the provisions on access to medically assisted reproduction that discriminate against people who have changed their legal gender. The Act leads to discrimination on an individual level and to structural discrimination. States are, however, obliged to respect, protect, and fulfill the human rights of trans people. This includes taking steps to eliminate underlying prejudice, stereotypes, and discriminatory structures to help achieve substantive equality, and to make necessary legislative amendments.

In that regard, a key question is what legal amendments would ensure access to medically assisted reproduction for people who have changed legal gender, reduce the cis-normativity and repro-normativity of Norwegian law, and modify stereotypes about trans people. In 2013, when the requirement for infertility was abolished in Sweden, an interpretation by analogy was chosen to ensure access to reproductive technology for people who have changed their legal gender.¹²¹ This made medically assisted reproduction accessible regardless of legal gender and placed trans and cis

¹¹⁸ Equality and Anti-Discrimination Act, *supra* note 46, § 1.

¹¹⁹ Prop. 74 L, *supra* note 68.

¹²⁰ Vibeke Blaker Strand, *Håndheving av Diskrimineringsvernet i Møte med Andre Lover i Velferdsstaten [Enforcement of the Protection against Discrimination Encountering Other Acts in the Welfare State]*, in RETTIGHETER I VELFERDSSTATEN: BEGREPER, TRENDER, TEORIER, *supra* note 28, at 135, 136.

¹²¹ Proposition [Prop.] 2012/2013:107, ch. 5 [government bill] (Swed.); Statens Offentliga Utredningar [SOU] 2016:11, ¶ 16.8: Olika vägar till föräldraskap [Different Routes to Parenthood] [government report series] (Swed.).

people in apparently similar situations. As such, an interpretation by analogy could serve the equality principle. To interpret the Norwegian Biotechnology Act by analogy may enable access to medically assisted reproduction for trans people in Norway—at least in theory. In the Swedish Health Care Services, the Swedish regulation led to uncertainties about whether people who have changed their legal gender can access medically assisted reproduction. The invisibility of trans reproduction in the Biotechnology Act may also affect the expectations and assessments made by gate-keeping medical professionals. Thus, it may lead to inequality in practice, creating a barrier to trans reproduction and therefore, it may be a less desirable option. Moreover, law works to govern what are considered “normal” and preferable ways of forming families with children. Unamended, the Act would continue to normalize cis reproduction and cisgender families with children and to present trans reproduction and trans families as the other and less desirable. It would risk (re)producing prejudice and stereotypes about trans people and their families.

In 2021, the current Norwegian Minister of Health and Care Services, Bent Høie, received a written question from a Socialist Left Party politician, asking what legal amendments were needed to make partner egg donation accessible regardless of legal gender. The Minister replied that the Norwegian Equality and Anti-Discrimination Act prohibits discrimination on the basis of gender, gender identity, or gender expression. If Parliament is of the view that partner egg donation should be accessible regardless of legal gender in order to avoid breaching the Equality and Anti-Discrimination Act, then, the Minister said, the Biotechnology Act should be amended. In the Minister’s view, it should be considered whether the rules on assisted reproduction laid down by the Biotechnology Act should be made applicable regardless of legal gender. The Minister suggested adding provisions to the Biotechnology Act and the Act on Change of Legal Gender specifying that birth-assigned gender should apply when interpreting the rules on medically assisted reproduction, if the person so wishes.¹²² This would ensure access to medically assisted reproduction for people who have changed their legal gender on the same terms as for cis people. The rules would also better reflect the reality and make trans reproduction and trans pregnancy visible in the law. This may affect trans people’s experiences and shape the expectations of society. At the same time, it means introducing a special provision applicable to people who have changed their legal gender: an exception to the general—and preferable—rule. Trans reproduction would be presented as different. Provisions that specify the use of birth-assigned gender indicate that—regardless of their legal gender—they are not “really” men or women. Because of their reproductive capacity they will never be freed from their birth-assigned gender, and the biology of the law would continue to dominate.

Regulation of access to medically assisted reproduction could be based on reproductive capacities rather than legal or birth-assigned gender. As argued elsewhere

¹²² Skriftlig Spørsmål fra Nicholas Wilkinson (SV) til Helse- og Omsorgsministeren (Bent Høie) [Written Question from Nicholas Wilkinson (Socialist Left Party) to the Minister of Health and Care Services (Bent Høie)], Doc. No. 15:2882 (2020–21) (sent Aug. 27, 2021, answered Sep. 9, 2021), www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=85743.

with respect to the establishment of legal parenthood for people who have changed their legal gender, gendered terms could be replaced “with language that relates to the function or substance that the law is governing: such as pregnancy, cash benefits for the birth-giving parent or caring parent, . . . access to abortion and parental leave.”¹²³ Further, “[t]his would include all parents no matter what their gender identity or sexual orientation, and contribute to ending reliance on gender and sexuality hierarchies based on biologic.”¹²⁴ Speaking of language and the power of language, Dean Spade suggests to use a more direct language and to not assign certain body parts or reproductive capacities to a gender. Rather, one could speak about “people with ovaries” or “people who are pregnant.”¹²⁵ Following Spade, provisions on access to medically assisted reproduction could, for example, speak about people with ovaries, people who produce sperm or eggs. Focusing on reproductive capacities or body parts correlates well with how the protection against discrimination based on pregnancy is understood under the Norwegian Equality and Anti-Discrimination Act:¹²⁶ pregnancy is a separate ground of discrimination and is not attached to the gender of the pregnant person. Trans people too are protected from discrimination based on pregnancy. The protection is attached to the situation that creates vulnerability—i.e., that the person is pregnant.¹²⁷ Lara Karaian argues that to unsex the protection against pregnancy discrimination, “presents an opportunity to further dismantle the normative and socially constructed sexed and gendered roles that govern us.”¹²⁸ De-gendering reproduction under the Biotechnology Act harmonizes well with the understanding of pregnancy as a ground of discrimination that focusses on the situation that creates vulnerability. To replace gender-specific terms with a language that relates to reproductive function or capacity might have structural impact. It would contribute to safeguarding access to medically assisted reproduction for trans people, reduce the cis normative power of law, and may also contribute to reducing prejudice against and stereotypes about trans people. The Act would also reflect the differences in reproductive capacities and contribute to stop favoring cis-normative ways to reproduce. To use reproductive capacities—rather than legal gender—as a starting point would imply that the law takes the relevant differences between trans and cis people into consideration and contributes to dismantling the link between reproduction and gender. Before making such amendments in law, steps need to be taken to ensure that the legal amendments will not create inequalities and barriers in other areas.

Regardless of the accessibility of medically assisted reproduction, self-declared change of legal gender means that, across Europe, legal men will get pregnant and give birth and legal women will beget children. Research shows that further improvements are needed in countries that have introduced self-declared change of legal gender.¹²⁹

¹²³ Sorlie, *supra* note 6, at 189.

¹²⁴ *Id.* at 189.

¹²⁵ Dean Spade, *About Purportedly Gendered Body Parts*, DEAN SPADE (Feb. 3, 2011), www.deanspade.net/wp-content/uploads/2011/02/Purportedly-Gendered-Body-Parts.pdf.

¹²⁶ Equality and Anti-Discrimination Act, *supra* note 46, § 6.

¹²⁷ HELLUM & STRAND, *supra* note 47, at 107.

¹²⁸ Karaian, *supra* note 5, at 224.

¹²⁹ Falck et al., *supra* note 33.

Pregnancy care, natal, and neonatal care need to be adjusted to include the diversity of identities and pregnancies among parents and parents-to-be in a non-cisnormative way. According to the European Parliament, pregnant men and non-binary people should “benefit from measures for pregnancy and birth-related care without discrimination on the basis of their gender identity.”¹³⁰ Importantly, also trans people are protected against discrimination on the basis of pregnancy. Trans people may also be vulnerable to intersecting forms of discrimination because of gender identity and pregnancy, for example in employment. A thorough examination of practices in public health centers and hospitals is needed for institutions to be able to include, and provide care to, different sorts of parents and for different forms of reproduction. Cooperation between LGBT organizations and trans and reproductive health units can be a way to establish new trans-inclusive hospital practices and training for hospital staff to include the “new” patient group of trans patients seeking fertility treatment.¹³¹ There is, for example, a need for “individualized, inclusive, respectful and knowledgeable healthcare that does not treat a masculine identity and pregnancy as mutually exclusive.”¹³²

6. Concluding remarks

Examining the Norwegian Biotechnology Act and the Act on Change of Legal Gender has shown that, although sterilization requirements have been abolished, the law continues to concentrate on cis realities and to restrict trans people’s ability to form a family with children. The use of legal gender as a guiding principle for the interpretation of other laws and regulations was meant to recognize trans people’s gender identity, thereby affirming the rights of trans people. As regards reproductive rights, however, it had the opposite effect. It reintroduced an obstacle to trans people’s ability to form a family with children and led to misrecognition of trans people. The legislature’s choice thus perpetuated differential legal treatment of cis people and trans people. It also continued the practice of limiting trans reproduction and framing it as illegitimate and undesirable. Although the abolition of the requirement for sterilization was an affirmation of trans human rights, the limited attention paid to trans reproduction (re)produced inequality for a vulnerable group. It demonstrates that law did not completely dismantle the biological link between reproduction and gender, and that it does not facilitate the blurring of reproductive capacities and gender by way of providing medically assisted reproduction to people who have changed their legal gender. It is argued that measures should be taken to ensure access to medically assisted reproduction for people who have changed their legal gender. Laws that exclude trans people and make trans reproduction invisible need to be amended to safeguard the reproductive health and rights of all people.

¹³⁰ Eur. Parl. Res. of 24 June 2021, *supra* note 56, at 9.

¹³¹ Gunnarsson Payne & Erbenius, *supra* note 2. See also Erbenius & Gunnarsson Payne, *supra* note 38.

¹³² Falck et al., *supra* note 33.