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## **Introduction: Queer and Trans Reproduction with Assisted Reproductive Technologies (ART), in Europe**

By Doris Leibetseder<sup>1</sup> and Gabriele Griffin<sup>2</sup>

In October 2018 a Polish lesbian couple living in Britain and wanting to have the British birth certificate of their 4-year old son, conceived with the help of Assisted Reproductive Technologies (ART), transcribed into Polish, were awarded that right by the Polish Supreme Administrative Court (SAC). This court decided that the refusal of the transcription of the birth certificate would restrict the child's rights and freedoms and render the boy an 'illegal person'. The court's main argument centred on the best interests and rights of the child. Its decision means that the boy will be entered in the Polish register, both mothers will be indicated as parents, and after obtaining the Polish birth certificate, the parents can apply for a Polish passport, ID card and social security number for their son (Mazurczak, 2018, n.p.). How was this possible, given that in Poland queer and trans people are denied access to ART, have no right to enter into an official partnership or marriage, cannot adopt or officially co-parent?

At the start of the proceedings, the Polish Commissioner for Human Rights and Helsinki Foundation for Human Rights asked for the referral of the case to the Court of Justice of the European Union (CJEU) for a preliminary ruling related to a potential limitation of freedom of movement of a minor Polish citizen. SAC's view was that there was no need to refer the case to the CJEU because same-sex marriages need to be recognized in EU member states according to the CJEU for the freedom of movement in the EU to be possible. However, according to the European Court of Human Rights (ECHR) Poland has no obligation to recognize these partnership regulations, but it has an obligation to register the birth certificate of a child of same-sex parents. Contrary to a similar case in 2014 which ruled against the plaintiffs, the turning point this time was a new Polish administrative legislation (existing since March 2015). This requires that the transcription of a foreign civil status act is obligatory if a Polish citizen applies for it. The SAC also indicated greater acceptance of same-sex families in its written justification of the 2018 ruling. In 2014 the SAC used quotation marks around 'family when referring to same-sex families, whereas this time no quotation marks were used (Mazurczak, 2018, n.p.).

This case illustrates some of the issues queer and trans people in European countries face when trying to reproduce using ART. These include:

- Having legal access to ART (sometimes only possible when one is in a form of legal partnership).
- If legal access to ART is not possible in their home country, 'fertility travel' is used, but this results in the challenge of how to get the legal documentation (birth certificate, citizenship, parenthood recognition) necessary in the home country.

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Only queer and trans people with enough money and flexible time can afford to do this.

- The issue of obtaining legal parenthood as such for same-sex couples and trans people (often combined with a legal partnership recognition or otherwise through adoption or co-parent recognition).
- Having appropriate terminology on birth certificates (are two mothers/fathers possible; for trans people: is a birth father possible; for single queer and trans people: is just one parent possible?).
- And: what is the relative status of national legislative bodies relative to trans-European ones such as the European Court of Human Rights in setting agendas, directives, and establishing legislative measures that are socially inclusive, not least of queer and trans people?

These are the concerns of this special issue on ‘Queer and Trans Reproduction with ART in Europe’. Before we draw out some of its core themes, a word on terminology: we use queer and trans to denote non-heteronormative and non-cisgendered<sup>3</sup> identities and lifestyles. However, the individual contributors to this issue use their own preferred expressions, ranging from LGBTQI+ to queer and other similar terms. This represents the range of phrases currently in use in transnational and local queer and trans communities. It also reflects the fact that language is dynamic and changing. Our editorial policy here was not to prescribe particular words to delineate queer and trans people, since self-definition is crucial in queer and trans politics. However, we are also well aware, and want to emphasize here, that many more and different ways of designating oneself are available to queer and trans people, and we do not wish to impose any particular kind of description of their identities or lifestyles. Hence queer and trans in this Introduction functions to some extent as a shorthand for a range of identities and lifestyles as well as practices, behaviours and dispositions.

Regarding the definition of ART, we the editors, want to keep it as broad as possible because which kinds of technico-medical procedures count as ART vary across different contexts. According to the International Committee for Monitoring Assisted Reproductive Technology and the World Health Organization, ART ‘includes the in vitro handling of both human oocytes and sperm, or embryos for the purpose of establishing pregnancy’ (Zegers-Hochschild et al., 2009, p. 2685). Their definition explicitly does not include assisted insemination (AI) with sperm from a partner or donor. In this special issue, however, ART includes AI.

### **Context for this Special Issue**

This special issue was seeded in a Riksbanken-Jubileumsfond-funded workshop on ‘Queer and Transgender Reproduction with ART: Legal, Cultural and Socioeconomic Challenges’, that we ran in May 2018.<sup>4</sup> The workshop brought together legal, gender and social science experts from a variety of European countries including Austria, Czechia, Finland, Hungary, Spain, Sweden, and

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<sup>3</sup> Cis (or cisgendered) designates staying within the parameters for normative gendered behaviour (Enke, 2012, p. 61). It functions in binary opposition to a term such as trans (or transgendered). A cis person ostensibly stays in line with prevailing norms instead of crossing that line.

<sup>4</sup> We would like to acknowledge Riksbankens-Jubileumsfond’s generous grant (no. F17-1394:1) which enabled us to run this workshop. This workshop was applied for under the umbrella of a larger 2-year Marie Skłodowska-Curie Action Fellowship, held by Doris Leibetseder (no. 749218).

the UK. One thing that was noticeable was that quite a few of the participants were educational, professional, possibly political or ideological migrants, living and working in one European country whilst having been born in another. This testifies to the mobilities within Europe of those who can afford it or are able to find a workplace in another EU-country that characterize contemporary European cultures. Mobility is also a striking trait of contemporary debates in queer and trans studies.

At the same time, this mobility also highlights ways in which European nation states, despite their European umbrella, operate quite differently at policy levels when it comes to regulating queer and trans people's lives, reproductive and otherwise. This itself, has been a major source of queer and trans mobility as the case of the Polish lesbian couple living in Britain cited at the beginning of this Introduction highlights. This is also discussed in greater detail in Doris Leibetseder's contribution to this special issue which considers the relative restrictiveness or permissiveness of three different European countries' legislations regarding queer and trans parenthood. Thus whilst freedom of mobility in the EU provides an arena where people can, at least theoretically, move without restriction, Europe is still made up of countries with very different national legislations that position queer and trans people's reproductive and parenting possibilities in quite different ways, ranging from the very restrictive to the quite permissive. And here we arrive at the issue of intra-European differences which structure both this special issue and its individual contributions.

### **Intra-European Differences Regarding ART Regulation**

Changes in the legal access to ART for queer and transgender people in different countries have created both challenges and possibilities for reproduction for LGBTQI+-people. Some queer and transgender people circumvent restrictive laws (not only concerning LGBTQI+ access to ART, but also limiting access by age, relationship status, and class) in their own country and make use of fertility border crossing. Nonetheless, in many cases those either travelling or using local ARTs experience legal and administrative problems with birth and parental certificates.

The number of queer and transgender people wanting to use or using ART is rising as Leibetseder's contribution indicates. However, diversity in the regulation of access to particular ART procedures in different EU-states encourages fertility tourism. Successful reproduction itself is also not sufficient for making a family: challenges still lie ahead regarding the acquisition of appropriate birth and parenting documents. Hence, the first purpose of this themed issue is to compare the different legal situations regarding ART for queer and transgender people in several European countries.

Secondly, in order to understand how queer and transgender reproduction with ART is carried out, the experiences of LGBTQI+-people with medical and administrative procedures during the ART treatment process are important. These are addressed in all the contributions to this volume in different ways. Theo Erbenius and Jenny Gunnarsson Payne's article, for example, deals with medical staff's attempts to adapt to a new client group, trans people, in their fertility clinic. Thirdly, we have a special focus on transgender legal challenges and experiences with ART. This is crucial because in transgender cases gender identity is the core issue in reproduction and not sexual orientation, as in other queer contexts.

Gender identity as well as sexual orientation play a key role in state-of-the-art ART research that centres on the emerging understanding that a multiplicity of relationships, kinship and family structures, as well as diverse genders and sexualities, are increasingly possible through

ART and recognized as such formally (Thompson, 2015, p. 415; Dahl, 2014). To date, however, queer and transgender reproduction and ART use are mainly researched in the UK and Anglophone countries (Franklin, 1997; Carsten, 2004; Strathern, 1992), particularly around lesbian family making and sperm use (Dunne, 2000; Mamo, 2007, 2013). Queer and transgender reproduction is much less researched in central (Kalender, 2012) and Eastern Europe (Nebalkova, 2011; Nahman, 2012), where investigations on this topic are only just starting. The particular European comparative stance which informs this special issue is a relatively new dimension of ART research (but see Jasanoff, 2005 and 2011).

Actual numbers of queer and transgender people using ARTs nationally or transnationally vary significantly across countries. A 2010 study (Shenfield et al., 2010) of cross-border reproductive care in 6 EU countries including Belgium, Czech Republic, Denmark, Sweden, Spain and Switzerland states that 90% of the people using ART in these states are heterosexual, so the calculation is that at least 10% are queer. Looking closer at individual countries of origin, the same study shows even higher numbers, i.e. 20% of the clients from Norway and 39.2% from France were lesbians.

It is very difficult to find specific statistics on how many transgender people have had ART treatments. The Human Fertilisation and Embryology Authority (UK), for example, could not provide numbers on this, because ‘the Authority collects information on the gender of patients at the time of treatment, and not whether they have changed gender during their life’ (HFEA, 2013). ART clinics too document only the actual gender at the point of treatment. Even if there was the possibility of registering transgender patients as such, they often choose not to disclose their transgender status, if they can, in order to avoid having difficulties with the documentation or having confrontations with the ART service providers, or being refused treatment. This is one of the outcomes of a pioneering, and the one and only, study to date on transgender people’s experiences of using ARTs in Canada (James-Abra et al., 2015).

The same study states that the absence of research on this ‘is a significant research gap, considering both the unique reproductive needs of trans people and existing research identifying barriers to care for trans people more broadly’. This is in spite of the recommendations of the World Professional Association for Transgender Health (WPATH, 2011) and of the Ethics Committee for the American Society for Reproductive Medicine that physicians should discuss fertility options (including ART and gamete storage) with transgender patients prior to starting medical transition (hormones or surgery), that the denial of access to fertility services is not justified (Ethics Committee, 2015), and despite existing studies indicating the strong reproductive wish of transwomen (around 40% of them) and transmen (54%) (de Sutter et al., 2002). To date no research study has been published about transgender people’s experiences with ART clinics in Europe. The few existing studies on access to ART for LGBTIQI+ people all state that more research is needed in this field. Current evidence is based on small numbers and limited geographically, in contradistinction to the rising numbers of queer and transgender requests for ART.

### **Structure and Contributions to this Special Issue**

This issue consists of three contributions from northern and western European countries and two from post-socialist, former eastern European ones. Together they reveal much about the range of issues, experiences, legislations and practices queer and trans people wanting to reproduce with ART face in Europe. The contributions have determined the order in which the articles appear

in this volume. Leibetseder's contribution deals with an overview of different ART-regulations in 3 EU-states on 'Queer and Trans Access to Assisted Reproductive Technologies: A Comparison of Three EU-States, Poland, Spain and Sweden'. As this gives us an insight into existing differences across Europe regarding queer and trans reproductive challenges, this article opens the special issue. The next article by Theo Erbenius and Jenny Gunnarsson Payne, 'Unlearning Cisnormativity in the Clinic: Enacting Transgender Reproductive Rights in Everyday Patient Encounters', has Sweden as the site of investigation. It thus follows on from Leibetseder's piece which also deals with Sweden as one of the EU countries it discusses. One might think of Julian Honsakalo's article 'Unfit for Parenthood? Compulsory Sterilization and Transgender Reproductive Justice in Finland' as a bridging piece between those articles covering the north west of Europe and those focussing on the east since it shows that certain dilemmas are faced in both contexts, in particular in this instance the demand for sterilization on transgender people who want to acquire a different juridical gender from the one they were born with. Hana Hašková and Zdeněk Sloboda's article looks at 'Negotiating Access to Assisted Reproduction Technologies in a Post-Socialist Heteronormative Context' in Czechia or the Czech Republic, a country that is much more restrictive in the parenting opportunities it affords to its queer and trans inhabitants than Sweden, for example, is. Finally, Judit Takács' text on 'Limiting Queer Reproduction in Hungary' situates Hungarian regulations of and attitudes towards ART and LGBTQI+-people within a wider European perspective. Hence this article rounds off our special issue.

The contributions in this issue analyze how the impact of intra-European differences is affecting queer and trans people's reproductive possibilities when using ART. Leibetseder's contribution provides comparative insights into the intra-European legal differences across a post-socialist, eastern, a south-western, and a northern EU-state: Poland, Spain and Sweden. Here Leibetseder draws on and elaborates uses Isabell Engeli and Christine Rothmayr Allison's (2017) comparative model of classifying countries according to their permissive or restrictive regulations regarding ART access. She argues that this model is somewhat heteronormative model and adapts its criteria to include queer and trans ART-access and legal parenthood possibilities in a more overt manner. Leibetseder's comparison shows that the south-western and northern countries in her sample have more permissive regulations despite operating in quite different socio-political climates. Where economic restrictions due to fiscal austerity programs can limit queer and trans people's access to ART and parenthood in Spain, in Sweden it may be the long waiting times for ART-treatment that may lead to fertility travels. In a restrictive country such as Poland, vague, poorly implemented, or prohibitive laws are very challenging for queer and trans people and force them into fertility border crossing, but this can leave their parenthood status in a legal limbo.

Erbenius and Gunnarsson Payne's contribution deals with how health professionals working in ART-units unlearn cisnormativity in Sweden. Their qualitative in-depth interviews show that medical staff had to relearn how to approach, communicate and provide materials for their new patient cohorts after 2013, when the legal sterilization requirement for transitioning was abolished in Sweden. Erbenius and Gunnarsson Payne found that clinics worked hard to make improvements in the ART-treatment of trans people, with some success, and that many of the remaining issues could be solved by increasing funding for the clinic's budget, given that it now treats additional patients.

Honsakalo's article indicates that Finland did not emulate Sweden regarding the abolition of the sterilization requirement for transgender people, thus creating difficulties for their future procreative and parenting opportunities. Urgent needs to reform the Trans Act are hampered by Finland's rising conservative political climate, questions concerning the meaning of 'voluntary'

sterilization (see by some as the inevitable effect of wanting to transition with medical assistance) and the actual level of parenting desire among trans people.

Hana Hašková and Zdeněk Sloboda's article highlights how heteronormativity creates barriers for LGBT people's access to ART in Czechia. They employ framing analysis to discuss relevant legislation and media debates. They diagnose that an assimilation to patriarchal heteronormativity and cisnormativity is required if Czechian lesbians, gays and trans-people want to use ART. This leads to an invisibility of LGBT reproduction in medical institutions. The increase of LGBT people's visibility in media and public discourse is not matched by what is going on in the actual clinics. However, even the media and public discussions of LGBT parenthood and access to ART affirm reproduction and the reproduction of gender stereotypes as something that should be maintained. The recent somewhat greater acceptance of homoparental families in public discourses offers hope that more permissive legislations concerning LGBT parenthood, ART access and marriage may follow.

Against such hope Judit Takács' article analyses the limitations of queer reproduction in Hungary and how distorting media representations, legislative frameworks and social inequalities contribute to this. Queer couples may be able to resist those limitations, mainly through fertility travels, but this leaves economically disadvantaged queer people in a difficult position. Utilizing two quantitative comparative European studies Takács analyses how the social acceptance of ART and of gays and lesbians in Hungary compares to that in other EU states. Hungarian LGBT studies have found that rainbow families are on the rise. As the year 2018 was declared the 'year of the families' by the Hungarian government in order to combat the country's low birth-rate and as the current xenophobic government does not want to rely on migration to solve its population problem, this might increase the chances for reproduction for more privileged Hungarian queer couples.

### **Concluding Remarks**

These uncertain times in Europe with their destabilization of socio-political regimes, rising populism, conservatism, nationalism, and the retrenchment of welfare provision are paradoxically coupled with the greater visibility of queer and trans people and their rainbow families. Until now Europe has played a decisive role in promoting more inclusive societies within its borders, especially through the European Court of Human Rights and the European Court of Justice. These European institutions have positively impacted on the opportunities in various aspects of life, ranging from pension provision to equality at work and reproductive rights, for marginalized groups including queer and trans people. But it is unclear to what extent this will remain the case. Brexit and its attendant problematics may weaken Europe as a politico-legal entity that has fostered inclusiveness. Similar retrenchments from transnational institutions and organizations are under discussion and evident in the US's withdrawal from the Kyoto Agreement, in current discussions about the World Trade Organization, and, more specifically in Europe, in Italy's resistance to the EU's rejection of its proposed budget. What the history of Europe has shown to date is that nation state policies and politics have frequently not favoured minorities; transnational institutions have been much stronger in supporting them.

At the same time we see ART technologies advancing and changing significantly to enable biotechnological opportunities for reproduction that match the European inclusiveness *dispositif* which has enabled queer and trans people and rainbow families to live more visibly in many but not all European cultures. However, as already indicated, Brexit, and the current rise of (extreme) far right-wing parties, some of which are already in the government (e.g. Austria, Hungary, Italy,

Poland), may endanger the LGBTIQ+-people and rainbow family rights which are never granted to last forever, and which can never be taken for granted. In the current Brexit context (November 2018) the outcomes of which are still uncertain, queer and trans people in the UK will benefit from the UK staying in the Council of Europe (European Convention of Human Rights) and hence being subject to its European Court of Human Rights post-Brexit (General Secretariat of the Council, p. 4.). However, appeals to EU-regulated human rights against UK human rights violations will have only limited force (Boyle, 2016). The upcoming election of the European Parliament in 2019 will show where Europe is heading politically in the near to medium term future. This will also serve as an index of what we continue to need to be vigilant about in our quest for greater legal, socio-cultural and economic inclusion of LGBTIQ+ people's lives and family formations.



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