



**MMS Bulletin #173**

*Droits humains sous pression : garantir le droit à la santé*

***An overview and problematisation of the attacks on transgender health care from a human rights perspective***

**The right to health in an anti-LGBTQIA+-climate**

De Amélie Strebel

*The political climate is increasingly transphobic. This results among others in legislation, banning gender affirming care. Gender affirming care is essential for especially transgender and nonbinary people. Not getting access to it can infringe on their right to health. This is a worrying development from a human rights perspective, especially considering the aim to progressively fully realise the rights.*



## **Attacks on Transgender Health Care**

Transgender health care is increasingly threatened in today's political climate. Looking at the US for example, over the last few years there has been an increase in anti-trans legislation, including legislation restricting access to gender affirming care.[1] According to the Human Rights Campaign, gender affirming care is medically necessary and age-appropriate health care and restricting gender affirming care through legislation prevents 'transgender, non-binary and gender expansive youth from accessing medically necessary, safe healthcare'.[2] Gender affirming care has been linked to lower rates of various mental health issues such as suicidality in transgender and nonbinary individuals (Tordoff et. al. (2022, p. 7). To set this issue into perspective, the US is not the only country with increasing anti-trans laws. This is part of an ongoing global trend which targets the LGBTQIA+ community.[3]

*"Restricting access to gender affirming healthcare treats the affected groups discriminatorily, as this medically necessary care is withheld from the affected group of people."*

— Amélie Strebel

## **The Right to Health and Gender Affirming Care**

The right to health is a human right. According to article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), everyone has the right to 'the highest attainable standard of physical and mental health'. The right to health is a broad right, encompassing many different aspects relating to health care such as accessibility, availability and quality (CESCR General Comment No. 14 para 12). Important is that it is not to be understood as the right to be healthy. On the one hand, it includes different freedoms such as the right to control one's health and body. On the other hand, it includes entitlements such as the right to a system which provides equality of opportunity to attain the highest possible standard of health (CESCR General Comment No. 14 para 8 8).

The right to health encompasses gender affirming care, as gender affirming care is essential for the mental, physical and social wellbeing of transgender people.[4] However, here it is important to highlight that the right to health is not limited to only essential care. It is the right to the highest attainable standard of physical and mental health (Article 12(1) ICESCR). This takes factors regarding the individual rightsholder and regarding the State's resources into account (CESCR General Comment No. 14 para 9).

This means that care that improves physical or mental health can fall within the scope of the right to health within the boundaries of the State's reasonable feasibility. Furthermore, the right to health must be guaranteed free of discrimination of any kind as per Article 2(2) ICESCR.

Next to explicitly named categories of grounds for discrimination, Article 2(2) ICESCR forbids discrimination based on 'other status', which includes gender identity (CESCR General Comment No. 20, para 32). As previously mentioned, gender affirming healthcare is medically necessary health care for i.e. transgender individuals. Restricting access to it therefore treats the affected groups discriminatorily, as this medically necessary care is withheld from the affected group of people.



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## ***Progressive realisation and retrogressive measures***

ICESCR is an interesting human rights treaty, as the state obligations are somewhat different to other human rights treaties. Article 2(1) ICESCR defines the states' obligation to progressively take steps to the full realisation of the rights recognised in the Covenant. This concept is known as 'progressive realisation' and offers necessary flexibility in the realisation of the rights, as it accounts for real world disparities between the States.[5] Nonetheless, States have an obligation to undertake steps to the maximum of resources possible to eventually achieve the full realisation of the rights by using all appropriate means.[6] Furthermore, there are obligations which are of immediate effect. One particularly important one regarding the topic of transgender health care is the obligation of non-discrimination.[7]

Out of the obligation of progressive realisation follows the restriction of retrogressive measures.[8] In the General Comment No. 3 the Committee on Social, Economic and Cultural Rights stated that any deliberate retrogressive measures are only permitted as exceptions. They must be considered carefully and fully justified by considering all the rights in the Convention and in light of the maximum use of available resources.[9] This means that



retrogressive measures, in other words are a step backwards from the full realisation of rights, can be permissible if justified. Purely ideological reasoning, which is often employed when States cut back on gender affirming care, does not meet the high standard set for the justification of retrogressive measures.

## ***Anti-trans Legislation as an Attack on Human Rights***

The right to health is no exception to the restriction on retrogressive measures, which means that deliberately taken retrogressive measures must be proven to have been taken after thorough consideration of all alternative measures and that they can be justified by the reference to the totality of the rights of the ICESCR.[11] Gender affirming care, as established above, is health care. Restricting access to it therefore affects the right to health. Legislation restricting previously allowed access to gender affirming care is a step backwards with regard to the full realisation of the right to health, as a State is directly taking away access to necessary health care. Therefore, these anti-trans laws depict a retrogressive measure. Violating the principle of non-retrogression hinders the progressive realisation of the right and therefore goes against the objective of ICESCR, which is the full realisation of the rights defined in it. Furthermore, because of the medical necessity of gender affirming care, banning the access to it clearly infringes on the right to health. Lastly, as mentioned before, it is a violation of the right to non-discrimination.

## ***Concluding remarks***

These restrictions on access to gender affirming care affect the right to health of transgender people. They are unjustified retrogressive measures, which are prohibited under ICESCR. Especially considering the immediate obligation to non-discrimination, this attack on human rights is grave and deeply concerning. However, several court cases, for example *Moe v. Yost* (2025) in Ohio where a right to health care freedom in relation to gender affirming care was acknowledged, as well as the work of Civil Society Groups drawing attention to this issue, give hope for improvement of the situation.

It is important to highlight that this is not an ideological debate, even though it is often framed as one. This is an issue concerning the health of individuals and their basic human rights.



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