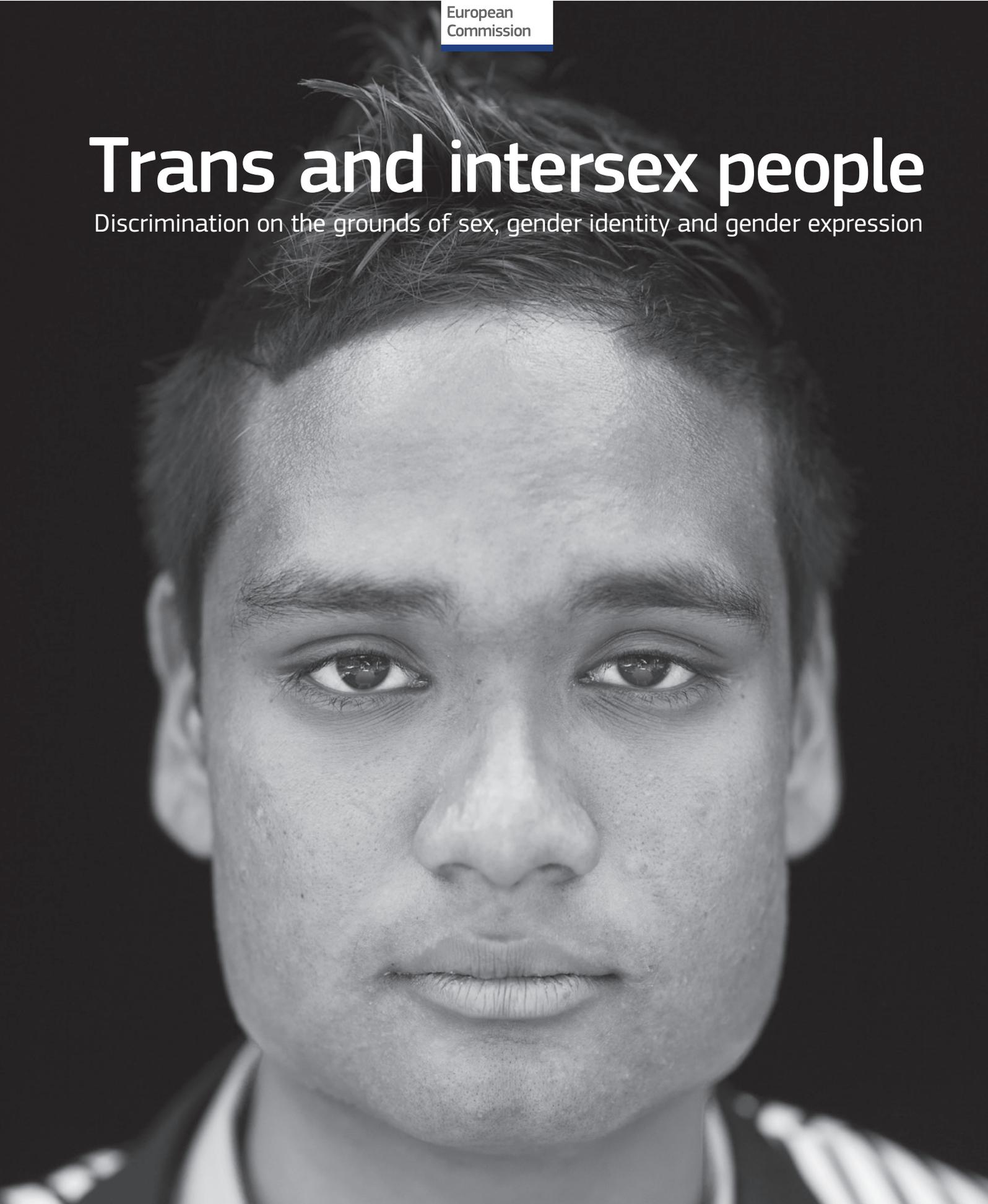




# Trans and intersex people

Discrimination on the grounds of sex, gender identity and gender expression



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Luxembourg: Office for Official Publications of the European Union 2012

ISBN 978-92-79-22964-0

doi:10.2838/56269

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Printed in Luxembourg

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# Trans and intersex people

## Discrimination on the grounds of sex, gender identity and gender expression

European Network of Legal Experts in the non-discrimination field

Written by Silvan Agius & Christa Tobler

Supervised by Migration Policy Group

**European Commission**  
Directorate-General for Justice

Manuscript completed in June 2011

This report was financed by and prepared for the use of the European Commission, Directorate-General for Justice. It does not necessarily represent the Commission's official position.

The text of this report was drafted by Silvan Agius and Christa Tobler and supervised by Migration Policy Group on the authority of the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), managed by:

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This publication is supported for under the European Community Programme for Employment and Social Solidarity – PROGRESS (2007-2013). This programme is managed by the Directorate-General for Justice, of the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment and social affairs area, as set out in the Social Agenda, and thereby contribute to the achievement of the Lisbon Strategy goals in these fields.

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Christina | 1988

## Executive summary

Within the broader context of discrimination, discrimination on the grounds of gender identity and gender expression, as well as discrimination on grounds of sex vis-à-vis intersex people, are particularly complex issues. This is due to the fact that the legal recognition and rights afforded to this community are often intertwined with specific medical and psychological obligatory requirements. Whilst most of the report deals with discrimination on the grounds of gender identity and gender expression, a brief part focuses on the specific discrimination that intersex people face.

The report begins by describing discrimination on the grounds of gender identity and gender expression, including in particular the challenges faced by trans people in their lives and the demands of the trans community. This part also clarifies the definitions used in the context of trans discrimination, and the terms used by the community to represent the diversity within it. Linked to this part of the report is an annex that contains a glossary of the most important terms. The report shows that negative attitudes towards trans and intersex people are often directly correlated to the importance that a determinate society places on the binary gender model, as well as the levels of gender stereotypes, sexism and gender inequalities that exist within it.

In Europe and in other parts of the world this is reflected in various legal requirements that trans and intersex people must meet in order to fit into one of the two possible genders / sexes. The report explores in detail the medicalisation and pathologisation of trans identities and intersex bodies. It gives an overview of the current situation and information about the dissonance between the rigid requirements established in law and the demands of trans and intersex people with regard to healthcare and their ability to choose the extent of treatments that they undergo (if any). The report then gives a brief overview of the discrimination that trans people face in access to employment and other spheres of life, as well as the levels of harassment, violence and bias-motivated crime that they are victims of both in the domestic and the public sphere.

In a brief part on international human rights law, the report looks into the legal treatment of trans discrimination outside EU law, in particular under United Nations law and under the Council of Europe's European Convention on Human Rights and Fundamental Freedoms and the case-law related to it. The report shows that while there are few direct references to gender identity in international law, there is an increasing body of resolutions and recommendations that suggests increasing institutional awareness of the seriousness of gender identity discrimination.

The main part of the report deals with EU law on trans discrimination. EU non-discrimination law does not at present contain an explicit prohibition of discrimination on the grounds of a person's gender identity and gender expression. Indeed, Art. 19 TFEU, which is the most general legal provision on non-discrimination in the EU Treaty, entitles the EU to take action to combat "discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" only, without mentioning trans issues. Neither does a prohibition on discrimination against trans people appear in the EU Charter of Fundamental Rights.

However, this does not mean that at present there is no applicable EU law in this context. According to the case-law of the Court of Justice of the European Union, discrimination against trans people may amount to discrimination on the grounds of sex in so far as people who intend to undergo, are undergoing and have undergone gender reassignment are concerned. The report describes and analyses this case-law as well as its application in the EU Member States. It also discusses the difficulties presented by CJEU case-law.

From a legal conceptual point of view the main difficulty lies in the Court's reasoning and, more specifically, in the comparison on which the Court bases its discrimination analysis, i.e. in the choice of the comparator used to arrive at

a finding of sex discrimination. Initially, the Court appeared to compare the post gender-reassignment transsexual person who complained about discrimination with a person of the opposite sex who had not undergone gender reassignment (in fact, it would appear that the concrete comparator was the complainant herself, before gender reassignment). However, later the Court moved in a direction that makes it difficult to understand why discrimination on grounds of gender reassignment should be covered by law on sex discrimination. The Court now compared the treatment of heterosexual couples where neither partner's identity is the result of gender reassignment surgery with the treatment of couples where the identity of one partner has led to gender reassignment being intended, underway or already undergone. Finally, in yet another case, the Court stated that cases involving discrimination against transsexual people on grounds of the gender reassignment that they have undergone must be analysed based on a comparison not between men and women, but rather between the post-operative transsexual (e.g. a female-to-male transsexual) and a person of the same sex (i.e. a woman) whose sex is not the result of gender reassignment surgery. In all of these cases, confusion also lies around what constitutes gender reassignment, and none of them refer to the surgical status of the applicants or in the case of K.B., the partner of the applicant.

Whilst from a conceptual point of view it may be difficult to see why such cases should be sex discrimination cases, including them into the category of sex discrimination is at present the only pragmatic way to provide legal protection against discrimination on grounds of gender reassignment under EU law. Even so, the fact remains that so far CJEU case-law on trans issues deals exclusively with discriminatory consequences of gender reassignment, which is only one aspect of the broad spectrum of trans discrimination. This report therefore advocates that the Court interprets existing discrimination grounds in a purposive manner, giving them the broadest possible meaning in order to live up to the Union's commitment to respect for human dignity and human rights, including the rights of persons belonging to minorities (Art. 2 TEU).

Following the description and analysis of the present CJEU case-law on gender reassignment, the report discusses various challenges to the legal analysis of trans discrimination cases against the background of the relevance of legal concepts of EU law. As general background, it should be remembered that EU law includes not only explicit non-discrimination provisions but also general principles of equality and non-discrimination, which may also play a role in discrimination cases against trans people. In a concrete case that involves alleged discrimination, the facts must first be analysed in order to determine the relevant discrimination ground. The report shows that sometimes this is less obvious than might be assumed. Further, there is the question of whether the concept of discrimination by association may be relevant in the context of some cases of discrimination against trans people. The report argues that the concept should indeed be seen as an additional tool that may strengthen the position of claimants in trans discrimination cases.

Next, the different forms of discrimination recognised in modern EU non-discrimination law – i.e. direct and indirect discrimination, harassment and instruction to discriminate – are also relevant in the context of trans discrimination cases. The cases so far decided by the Court of Justice must be seen as direct discrimination cases. On the other two concepts (harassment and instruction to discriminate) there is no case-law concerning discrimination against trans people yet. Further legal concepts that may play an important role in trans discrimination cases but on which there is not yet any specific CJEU case-law concern justification, positive action, the burden of proof and remedies and sanctions. Finally, as in other contexts, cases of multiple discrimination may pose particular difficulties.

A specific part of the report provides case studies of national legislation and case-law on gender identity and gender expression discrimination. In this context, it is important to realise that EU non-discrimination law is merely a minimum regime which does not prevent the Member States from providing protection against discrimination on additional grounds and better protection more generally of victims of discrimination. As the discussion of best practice in this report shows, there are promising approaches in the laws of some Member States which can and should serve as models for others to follow.

Finally, a specific part of the report deals with discrimination against intersex people. Intersex discrimination is a particularly complex form of sex discrimination. Notably, surgery on intersex people is not the same as gender reassignment. It often takes place early in life before the person concerned can participate in the decision-making process. For this reason, the key stakeholder groups often consist of the parents of intersex children, who do not wish to have their children associated in any way with sex ambiguity. However, many intersex adults are angry that surgery was performed upon them as young children without their consent. At the same time, they do not necessarily desire genital reconstruction, because of the severe impact it can have on sexual pleasure. This part follows the structure of the sections related to gender identity and gender expression and looks into current legal coverage of intersex people at EU and Member States level, relevant case-law, and the recent discussion that has started in some Member States as to how to best respect the human rights of intersex people.

Lizzie | 1993

# Introduction

European societies are based on norms derived from the simplistic idea of a dichotomy of two mutually exclusive and biologically defined sexes to whom different roles and behaviour are traditionally ascribed (the binary gender model). People who do not easily fit these norms, such as trans and intersex people, encounter numerous difficulties, both at the practical level of everyday life and at the legal level. Obviously, this is not acceptable in a legal union such as the European Union whose founding Treaty, according to Art. 2 TEU, is founded on respect for human dignity and human rights, including the rights of persons belonging to minorities.

On the level of the EU institutions, 1 September 2010 saw the first conference held in the building of the European Parliament in Brussels on the situation of transgender people in the European Union. The “(Trans)Gender Equality?” conference followed an internal note on transgender rights in the EU produced by the European Parliament services<sup>1</sup> as well as a parliamentary report<sup>2</sup> calling for more explicit measures to combat discrimination based on gender identity. In fact, the European Parliament had already in 1989 adopted a resolution on discrimination against transsexuals.<sup>3</sup> This shows that within the European Union the European Parliament has long been a vocal actor in relation to trans issues, notably through its Intergroup on Lesbian, Gay, Bisexual, Trans (LGBT) Rights. Important collection of information on homophobia and transphobia has also been carried out by the European Union’s Fundamental Rights Agency (FRA).<sup>4</sup>

With the present report, the European Commission’s Network of Legal Experts in the Non-discrimination Field wishes to contribute to the European Union’s efforts to combat the disadvantage suffered by trans and intersex people. The report examines the legal treatment of discrimination against trans and intersex people on the grounds of sex, gender identity and gender expression, in particular in EU law, against the background of the difficult position of trans and intersex people in our societies. The starting point for reflections on this issue is – to take up a point made by Advocate-General Elmer – the need for EU non-discrimination law to adjust to society,<sup>5</sup> in such a way as to render the principle of discrimination appropriate for dealing with the cases that come before the courts in present-day society.<sup>6</sup> Where appropriate, the report builds on previous work done in the trans field, notably by the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe),<sup>7</sup> Transgender Europe (TGEU) and the already-mentioned EU Fundamental Rights Agency (FRA).

<sup>1</sup> European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (2010), *Transgender Persons’ Rights in the EU Member States*, Brussels: European Parliament.

<sup>2</sup> European Parliament Resolution of 17 June 2010 on assessment of the results of the 2006-2010 Roadmap for Equality between women and men, and forward-looking recommendations, P7\_TA(2010)0232.

<sup>3</sup> Resolution on discrimination against transsexuals, OJ 1989 C 256/33.

<sup>4</sup> European Union Agency for Fundamental Rights (2008), *Homophobia and Discrimination on the grounds of Sexual Orientation in the EU Member States: Part 1 - Legal Analysis*, Luxembourg: Publications Office of the European Union; (2009), *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation*, at 123-138; (2010), *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - 2010 Update: Comparative Legal Analysis*.

<sup>5</sup> CJEU, Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143, para. 9 in the AG’s opinion (in the context of gender reassignment).

<sup>6</sup> CJEU, Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd.* [1998] ECR I-621, para. 15 in the AG’s opinion (in the context of sexual orientation).

<sup>7</sup> Stephen Whittle, Lewis Turner, Ryan Combs & Stephenne Rhodes (2008), *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care*, Brussels: ILGA-Europe; Stefano Fabeni & Silvan Agius (2009), *Transgender People and the Gender Recast Directive: Implementation Guidelines*, Brussels: ILGA-Europe; Declaration of the Trans Rights Conference (28 October 2009), available at [http://www.ilga-europe.org/home/issues/transgender/declaration\\_of\\_the\\_trans\\_rights\\_conference](http://www.ilga-europe.org/home/issues/transgender/declaration_of_the_trans_rights_conference).

Christopher | 1985

# Part I

## Trans and intersex people and discrimination: Definitions and factual perspectives

## 1. Definitions

The term *trans* includes those people who have a gender identity and/or a gender expression that is different from the sex they were assigned at birth. Indeed the term *trans* is an umbrella term that includes, but is not limited to, men and women with transsexual pasts and people who identify as transsexual, transgender, transvestite/cross-dressing, androgyne, polygender, genderqueer, agender, gender variant or with any other gender identity and gender expression which is not standard male or female, and who express their gender through their choice of clothes, presentation or body modifications, including the undergoing of multiple surgical procedures.

*Transsexual people* identify with the gender role opposite to the sex assigned to them at birth and seek to live permanently in the preferred gender role. This is often accompanied by strong rejection of their physical primary and secondary sex characteristics and a wish to align their body with their preferred gender. Transsexual people might intend to undergo, be undergoing or have undergone gender reassignment treatment (which may or may not involve hormone therapy or surgery). *Men and women with a transsexual past* fully identify with their acquired gender and seek to be recognised in it without any references to their previous sex and/or the transition process that they undertook to align their sex with their gender.

*Transgender<sup>8</sup> people* live permanently in their preferred gender. Unlike transsexuals, however, they may not necessarily wish to or need to undergo any medical interventions.

*Transvestite/Cross dressing people* enjoy wearing the clothing of another gender for certain periods of time. Their sense of identification with another gender can range from being very strong and indeed it being their primary gender, to being a less critical part of their identity. Some transvestite or cross-dressing people may seek medical assistance to transition and live permanently in their preferred gender at some point in their lives. Others are happy to continue cross dressing part-time for the rest of their lives.

The terms *androgyne, polygender and genderqueer* are very similar in their definition and refer to those people who, having a combination of masculine and feminine characteristics, are 'gender fluid' and move between genders, and have blurred lines between their gender identity, gender expression and sexual orientation.

*Agender people* do not have a gender identity and refuse to be classified as male or female or in any other way.

*Gender variant* refers to anyone whose gender varies from normative gender identity and the roles of the gender assigned at birth.

*Intersex people* differ from *trans* people as their status is not gender related but instead relates to their biological makeup (genetic, hormonal and physical features) which is neither exclusively male nor exclusively female, but is typical of both at once or not clearly defined as either. These features can manifest themselves in secondary sexual characteristics such as muscle mass, hair distribution, breasts and stature; primary sexual characteristics such as reproductive organs and genitalia; and/or in chromosomal structures and hormones. The term *intersex* has replaced the term 'hermaphrodite' which was used extensively by medical practitioners during the eighteenth and nineteenth centuries.

In this paper a clear distinction applies with regard to the terms *sex and gender*. *Sex* refers to biological makeup such as primary and secondary sexual characteristics, genes, and hormones, while *gender* refers to people's internal perception and experience of maleness and femaleness, and the social construction that allocates certain

<sup>8</sup> Until recently, this term was also the primary umbrella term referring to all *trans* people, but this use is now losing favour to the term 'trans' which is perceived to be more inclusive of all *trans* communities.

behaviours to male and female roles which vary across history, societies, cultures and classes. Gender is hence strongly linked to society's expectations and is not exclusively a biological matter. This distinction is blurred when discussing the legal meaning of the grounds of sex, primarily because sex has been interpreted broadly to cover aspects of gender. Notably, "[t]he Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex" (Directive 2006/54/EC, Recital 3).

*Gender identity* refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modifications of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism.<sup>9</sup>

*Gender expression* refers to peoples' manifestation of their gender identity, and the one that is perceived by others. Typically, people seek to make their gender expression or presentation match their gender identity/identities, irrespective of the sex that they were assigned at birth.

## 2. Difficulties presented by the binary gender model and gender stereotypes

Negative attitudes towards trans and intersex people are directly correlated to the importance that a determinate society places on the binary gender model and the level of gender stereotypes, sexism and gender inequalities that exist within it. The binary gender model classifies both sex and gender into two distinct and exclusive forms of masculine and feminine identities. This system is maintained through a cisnormativity<sup>10</sup> system which legitimises and privileges those who are comfortable in the gender belonging to the sex assigned to them at birth through various practices and institutions. Additionally, this norm systematically disadvantages and marginalises all persons whose sex, gender identity and gender expression do not meet social expectations. This happens through the enforcement of wide boundaries between the two sexes (and their corresponding genders) to discourage people from crossing them or establishing alternative third sexes or third genders. Gender stereotypes also play a significant role in othering and marginalising trans and intersex people. In fact, gender stereotypes that favour a particular form of 'masculinity' in relation to men and a particular form of 'femininity' in relation to women expose many trans and intersex people to institutionalised discrimination.

In addition to the disadvantage emanating out of the binary gender model, trans and intersex people are subjected to transphobia and interphobia which consist of cultural and personal beliefs, opinions, attitudes and behaviours based on prejudice, disgust, fear and/or hatred of trans and intersex people or against variations of sex, gender identity and gender expression. Institutional transphobia and interphobia manifest themselves through legal sanctions and the legal entrenchment of the binary gender system; pathologisation of trans identities and intersex bodies and inexistent/inadequate mechanisms to counter violence and discrimination. Social transphobia and interphobia manifest themselves in the forms of physical and other forms of violence, hate speech, discrimination, threats, marginalisation, social exclusion, exoticisation, ridicule and insults.

<sup>9</sup> As defined in *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2006), (Yogyakarta Principles, for short).

<sup>10</sup> The gender identity and gender expression of cisgender people match the sex they were assigned at birth and the social expectations related to their gender. Cisgender people are considered to constitute the norm within society.



Bert | 1925

### 3. Medicalisation of trans identities and intersex bodies

#### 3.1 Gender reassignment

A primary concern of many trans people revolves around their access to appropriate gender reassignment services, including psychological, endocrinological and surgical expertise. Not all trans people need all aspects of these services, and some may not require any of them. However, as a result of the binary gender model detailed above, both trans identities and intersex bodies are medicalised and pathologised because they do not neatly fit the norm established by the binary model. Trans and intersex people are rendered as patients with little say over their own identities and bodies, and the treatments that are made available to them are often not based on their personal needs or wishes but on social and institutional expectations. The treatments that are offered are often intertwined with legal requirements under which certain social entitlements can only be accessed after the person undergoes a set of legally established procedures. This manifests itself most clearly in the enforcement of certain unnecessary yet obligatory medical treatments and procedures (e.g. sterilisation and the requirement of a 'full' gender reassignment; and the removal of certain physical and sexual features perceived to belong to the other sex in the case of intersex people) in order for them to be able to access certain rewards that are freely available to the vast majority of people in society (e.g. change of name and issuance of identification documents in the appropriate gender for trans people; and participation in society as a person belonging to one of the two socially accepted sexes for intersex people).

Many trans people undergo a process called *gender reassignment* through which they re-define the gender in which they live in order to better express their gender identity. It is a process that may involve medical assistance including hormone therapies and surgical procedures that trans people undergo to align their body with their gender. Along with this medical process, however, trans people also have to undergo social and legal adjustments which would not be necessary in a society that was not based on the binary gender model. These include coming out to family, friends and colleagues; dressing and acting according to one's gender during a period known as a 'real life test' prior to being officially recognised as belonging to one's gender; and meeting other legal or judicial procedures depending on national law. Changing one's name and/or sex on legal documents is often only possible after the transition is irreversible and 'complete'. Moreover, the length of the transition process varies significantly from country to country, depending on the gender reassignment treatment available and the legal/administrative procedures and requirements that regulate it.

The *Transgender EuroStudy*<sup>11</sup> showed that even those states that provide for gender reassignment treatment fail to provide the treatment to all trans people in an accessible way. Seventy-nine per cent of all respondents reported that they were denied state funding for their hormonal therapy. Eighty-two per cent reported, that they were denied funding for the minimal surgery needed to live in the preferred gender; while fifty-one per cent decided to pay for the surgery itself even though several of them earned wages below their national average. Coverage of costs is, however, not the only problem. One out of four trans people reported refusal of treatment because their medical practitioner did not approve of their gender reassignment. The consequences for many trans people are severe, as lack of access to gender reassignment treatment results in social stigmatisation, low self-esteem and a higher risk of suicide.

Many intersex people do not need or wish to undergo medical treatment. However, intersex infants and children are customarily subjected to cosmetic surgery intended to ensure that their genital appearance and internal gonads conform to what is usually expected for their assigned gender. This also tends to entail hormone treatments aimed at making them conform to those associated with being 'male' or 'female'.

<sup>11</sup> Whittle, Turner, Combs & Rhodes (2008).

### 3.2 Pathologisation of trans identities as mental and behavioural disorders

The World Health Organization's (WHO) International Classification of Diseases (ICD) is called the *International Statistical Classification of Diseases and Related Health Problems 10th Revision – Version for 2007* (ICD-10).<sup>12</sup> The WHO listed homosexuality as a mental disease in ICD-9 for the first time in 1977 but eventually removed it in 1990 when it adopted the ICD-10 following a body of research that showed that sexual orientation was not a disease. However, the focus seems to have shifted to trans identities as psychological and behavioural disorders and new classifications were introduced in the ICD.<sup>13</sup>

The relevant ICD-10 references to trans identities are found in *Disorders of adult personality and behaviour within Chapter V: Mental and behavioural disorders*. The relevant diagnoses fall within two subsections:

- i. F64 Gender identity disorders  
(F64.0 Transsexualism; F64.1 Dual-role transvestism; F64.2 Gender identity disorder of childhood; F64.8 Other gender identity disorders; and F64.9 Gender identity disorder, unspecified)
- ii. F65 Disorders of sexual preference  
(F65.0 Fetishism; F65.1 Fetishistic transvestism; F65.6 Multiple disorders of sexual preference)

Similar to the call to declassify homosexuality in 1990, a growing global call for the depathologisation of trans identities has emerged while the debates surrounding the upcoming new version of the ICD (ICD-11) are taking place.<sup>14</sup> In 2010, the Board of Directors of the World Professional Association for Transgender Health, Inc. (WPATH) “strongly urge[d] the de-psychopathologisation of gender variance worldwide” since “psychopathologisation of gender characteristics and identities reinforces or can prompt stigma, making prejudice and discrimination more likely, rendering transgender and transsexual people more vulnerable to social and legal marginalisation and exclusion, and increasing risks to mental and physical well-being.”<sup>15</sup> ILGA-Europe and TGEU in their joint *Declaration of the Trans Rights Conference (2009)* call on the WHO “to safeguard the human rights of trans people” by removing gender identity disorder (and similar pathologies) and introducing “an alternative non-pathologising category in the ICD-11, which establishes quality standards for medical treatments ample enough to support the gender expression of trans people.”<sup>16</sup>

The American Psychological Association (APA) is currently revising its *Diagnostic and Statistical Manual of Mental Disorders (DSM)* and is considering a reclassification of the pathologies that refer to trans identities in the forthcoming DSM-V. So far it appears that the APA is not intending to remove trans identities from the list of diseases, even though the association is well aware of the discrimination against trans people and has published policy guidelines on the treatment of trans people in society.<sup>17</sup>

### 3.3 Pathologisation of intersex bodies as suffering from sex development disorders

*Disorders of sex development* (DSD) is a medical term that has recently replaced the term intersex within medical spheres, and refers to congenital conditions in which development of chromosomal, gonadal, or anatomical sex are

<sup>12</sup> The classification is available online at <http://apps.who.int/classifications/apps/icd/icd10online/>.

<sup>13</sup> ICD-9 code 302.85.

<sup>14</sup> Brought together under a global campaign called Stop Trans Pathologization 2012.

<sup>15</sup> See <http://www.wpath.org/documents/de-psychopathologisation%205-26-10%20on%20letterhead.pdf>.

<sup>16</sup> Available at <http://web.hku.hk/~sjwinter/TransgenderASIA/maltadeclaration.pdf>.

<sup>17</sup> APA Policy Statement: Transgender, Gender Identity, & Gender Expression Non-Discrimination (adopted in 2008), available online at <http://www.apa.org/about/governance/council/policy/transgender.aspx>.

considered atypical. The term was adopted in 2005 at the International Consensus Conference on Intersex. In 2006, the *Consensus Statement on Management of Intersex Disorders*<sup>18</sup> proposed a new medical classification system on the premise that it removed labelling and defined the situation of intersex people more clearly for patients, family members and medical practitioners alike. The new classification is summarised in the table below:<sup>19</sup>

<b>Previous</b>	<b>Proposed</b>
Intersex	DSD
Male pseudohermaphrodite, undervirilization of an XY male, and undermasculinization of an XY male	46,XY DSD
Female pseudohermaphrodite, overvirilization of an XX female, and masculinization of an XX female	46,XX DSD
True hermaphrodite	Ovotesticular DSD
XX male or XX sex reversal	XX testicular DSD
XY sex reversal	46,XY complete gonadal dysgenesis

The *Consensus Statement* and the *Clinical Guidelines for the Management of Disorders of Sex Development in Childhood*<sup>20</sup> were intended to introduce the best standards of care for people affected by DSD. However, this was met with strong criticism as it provided additional decision-making powers to medical practitioners and parents over the bodies of intersex infants. Organisation Intersex International (OII) and other activists objected to the use of DSD in general, stating that “the DSD guidelines are primarily about gender and assuring parents and doctors that the right gender can be chosen without consultation with the child. We resoundingly reject this.”<sup>21</sup>

A thorough human rights assessment of current medical practices and legal requirements is thus needed to ensure that intersex people have access to the best standards of care without infringement of their right to bodily integrity.

#### 4. The gender marker and laws entrenching the binary gender model

For many trans people, having the right name and gender marker<sup>22</sup> on identification documents is of paramount importance for social, practical and personal reasons. In daily life, incongruence between one’s gender presentation and gender marker on identification documents<sup>23</sup> causes several problems including inability to marry or enter into a registered partnership with one’s partner, difficulties in accessing or staying in employment, and difficulties in accessing goods and services e.g. difficulty in proving one’s identity when picking up a parcel at the post office, purchasing insurance or boarding an aeroplane. While the vast majority of Member States provide for gender

<sup>18</sup> Pediatrics, Vol. 118 No. 2 August 1, 2006, at e488-e500, available online at <http://pediatrics.aappublications.org/content/118/2/e488.full.pdf+html>.  
<sup>19</sup> Ibid., at e489.  
<sup>20</sup> Consortium on the Management of Disorders of Sex Development, (2006) Rohnert Park: Intersex Society of North.  
<sup>21</sup> Curtis E. Hinkle (not dated), Why is OII not using the term DSD or “Disorders of Sex Development”? available online at [http://www.intersexualite.org/Response\\_to\\_Intersex\\_Initiative.html#anchor\\_42](http://www.intersexualite.org/Response_to_Intersex_Initiative.html#anchor_42).  
<sup>22</sup> *Gender marker* is a gendered designator on official documents. The most obvious gender markers are designations such as male/female or Mr/Mrs/Ms/Miss. They are often embedded in identity cards, driver’s licences, birth certificates, diplomas, civil status documents and tax forms. Less obvious gender markers can be coded numbers such as social security numbers and tax numbers.  
<sup>23</sup> Regarding the recognition of such documents in other countries, see e.g. Sheila Swatschek (2005), *Transsexuality and International Private Law*, Brussels: ILGA-Europe.

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recognition,<sup>24</sup> the list of requirements attached to such recognition tends to be long, invasive and pathological.<sup>25</sup> Such laws may require that the trans persons: (i) have the intention to live permanently in the opposite gender; (ii) meet the real-life test requirements; (iii) obtain multidisciplinary opinions indicating that they suffer from gender identity disorder; (iv) undergo irreversible genital surgery; (v) be sterilised; and/or (vi) be single or obtain a divorce from their spouse. Such requirements are usually either entrenched in legislation regulating the recognition of trans people or belong to an established practice that regulates it.

All European countries that have gender recognition laws require a diagnosis of Gender Identity Disorder (GID) prior to recognition in another gender, and therefore all trans people in those countries need to seek medical and psychological assistance. A refusal of certification of GID by a medical practitioner may mean that the trans person cannot undergo gender reassignment treatments, with the consequence that the person is also unable to change the gender marker on civil status documents. Those trans people who do not intend to or cannot undergo gender reassignment, and thereby meet all the requirements outlined in national law, often find themselves unable to change their legal gender marker even if they live in the gender they identify with full time.

As explained above, the intertwining of legal gender recognition with requirements for medical certification and irreversible interventions is problematic. The sterilisation and the divorce requirement represent society's primary interest to enforce the binary gender system. The trans person's wellbeing comes second. Sterilisation is required to ensure that the biological role of the sexes is not challenged while divorce is required so as to prevent an existing different-sex marriage becoming one of the same-sex. A similar interest applies in the obligation to undergo 'full' gender reassignment treatment. In view of the human rights breaches that these requirements represent, the Council of Europe Commissioner for Human Rights calls on Member States to "[a]bolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in laws regulating the process for name and sex change."<sup>26</sup> The Board of WPATH followed suit and called for the removal of sterilisation and surgical requirements from the list of requirements for gender recognition:

"No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person's lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures."<sup>27</sup>

## 5. Discrimination in access to employment and other spheres of life

Research on the employment rates of trans people and the positions that they occupy show high percentages of unemployment and underemployment. "The Engendered Penalties study shows that only 31% of the respondents are in full-time employment. The exact figure for transgender women is 40% and for transgender men 36%, while among the non-transgender population these figures are 57% for women and 72% for men. Spanish research into unemployment amongst transgender people showed that 54% of the respondents were unemployed."<sup>28</sup> A study that used the pre- and post-transition experiences of transgender workers as a way to explore the factors that contribute to the persistence of gendered workplace disparities estimated that:

<sup>24</sup> The principle has been established by the decision of the European Court of Human Rights (ECtHR) in *B v France* (1992) and confirmed in later decisions (see II.2.2.1).

<sup>25</sup> The ECtHR has left it to national legislation to define criteria for legal gender recognition.

<sup>26</sup> Commissioner for Human Rights (2009), Human Rights and Gender Identity, Strasbourg: Council of Europe Identity, at 44.

<sup>27</sup> See <http://www.wpath.org/documents/Identity%20Recognition%20Statement%2006-6-10%20on%20letterhead.pdf>.

<sup>28</sup> Commissioner for Human Rights (2009), at 30.

“average earnings for female-to-male transgender workers increase slightly following their gender transitions, while average earnings for male-to-female transgender workers fall by nearly 1/3. This finding is consistent with qualitative evidence that for many male-to-female workers, becoming a woman often brings a loss of authority, harassment, and termination, but that for many female-to-male workers, becoming a man often brings an increase in respect and authority.”<sup>29</sup>

Moreover, transsexual people are particularly vulnerable to losing their jobs during the period of transition. For many trans people, a gender marker and name on identification documents and academic certificates that does not match their gender presentation can lead to extensive discrimination in job interviews. When in employment, the workplace’s rules on use of gendered toilet facilities or obligatory gendered uniforms have been reported to cause problems. Trans people may indeed continue to be referred to according to their previous gender role and hence to use the facilities and present themselves in dissonance with their acquired gender.

Discrimination in other spheres of life, such as access to general healthcare, education or any other goods and services, is equally rampant and follows a similar pattern. This is often connected with requirements to present official identification documents that contain a gender marker (e.g. in the cases of enrolment in an educational institution or gym, and opening a bank account or other services), or due to gender facilities (e.g. changing rooms and toilet facilities).

## 6. Harassment, violence and bias-motivated crime

Trans people are subjected to recurrent harassment in the public sphere and “a high degree of discrimination, intolerance and outright violence.”<sup>30</sup> Acknowledging the hardship, the Council of Europe Commissioner for Human Rights recommends that Member States “Enact hate crime legislation which affords specific protection for transgender persons against transphobic crimes and incidents.”<sup>31</sup>

The study entitled *Transphobic Hate Crimes in the European Union*<sup>32</sup> is the first to provide quantitative evidence of trans people’s experiences of hate crime in European Union Member States and is based on responses that were received from 2669 trans persons from across Europe. The study reveals that:

- i. 79% of respondents had experienced some form of harassment in public ranging from transphobic comments to physical or sexual abuse;
- ii. The most common forms of harassment were (unsolicited) comments (44%) and verbal abuse (27%). 15% of respondents had experienced threatening behaviour and 7% physical abuse;
- iii. Drawing upon evidence from an earlier online survey from the UK, the researchers found that trans women may be more likely to experience harassment than trans men. 67% of trans women reported harassment compared to 57% of trans men. 24% of trans women had experienced verbal abuse compared to 20% of trans men;
- iv. Italian respondents reported the highest percentage of comments (51%); Greek, German and British/UK respondents reported the highest levels of verbal abuse (25%); Greek respondents reported the highest levels of threatening behaviour (22%); English respondents reported the highest levels of physical abuse (7%) and French respondents, the highest level of sexual abuse (3%).

<sup>29</sup> Kristen Schilt & Matthew Wiswall (2008), *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, *The B.E. Journal of Economic Analysis & Policy*: Vol. 8: Iss. 1 (Contributions), Article 39.

<sup>30</sup> Commissioner for Human Rights (2009), at 5. See also Amy Roch, Graham Ritchie & James Morton (2010), *Out of sight, out of mind? Transgender People’s Experiences of Domestic Abuse*, Scotland: LGBT Youth Scotland & Equality Network.

<sup>31</sup> *Ibid.*, at 45.

<sup>32</sup> Louis Turner, Stephen Whittle & Ryan Combs (2009), *Transphobic Hate Crimes in the European Union*, London: Press for Change.

Similar outcomes were also recorded by the London Metropolitan Police Service<sup>33</sup> in its 2008 survey among lesbians and trans women which found that:

- i. 65% of the lesbian and trans women surveyed have already experienced incident(s) that they feel were homophobic or transphobic in nature; 94% of these women had experienced verbal abuse or harassment; 46% has experienced threats, intimidation or bullying; and up to 30% had experienced physical violence or assault;
- ii. 37% of the women surveyed had experienced such an incident in the last 12 months;
- iii. Nearly two thirds (64%) of the women having experienced such incidents said they had a short-term or long-term impact on them;
- iv. In 62% of the incidents mentioned during the survey, there were at least two perpetrators. In 26% of the incidents mentioned, the perpetrator was known to the victim, and in some cases they were members of the victim's family;
- v. 83% of the incidents mentioned by the women surveyed went unreported to the police. 41% of the women who reported incidents to the police felt that police officers did not make it comfortable. In 42% of the cases no action was taken by the police.

In addition to the high percentages of trans people who fall victim to harassment and violence, the *Transrespect versus Transphobia Worldwide* research project reported that 22 trans people were murdered within the EU during the three-year period 2008-10.<sup>34</sup> Presumably many of them were killed as a result of transphobia or the vulnerability of trans people caused by social marginalisation.

No information is available about the situation of intersex people with regard to harassment, violence and bias crime.

<sup>33</sup> Susan Paterson, Vicky Kielinger & Hazel Fletcher (2008), *Women's Experience of Homophobia and Transphobia: Survey Report*, London: Metropolitan Police Service.

<sup>34</sup> Trans respect v. Transphobia project, map issued in February 2011, available online at <http://www.transrespect-transphobia.org/uploads/images/maps/TvT-TMM-Map2008-10-en.png>.



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## Part II

# Gender identity and gender expression under international human rights law

Express coverage of gender identity (or sexual orientation) in international human rights treaties is very uncommon, and references are without exception very recent.<sup>35</sup> Aware of the gap in human rights law, experts from around the world met in Yogyakarta in 2006 to formulate and adopt a set of human rights principles, known as The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (Yogyakarta Principles, for short). These principles constitute a primary source for the elaboration of the human rights of LGBT people and have been extensively referred to by various governments, including by several EU Members States and European Economic Area (EEA) countries.<sup>36</sup>

## 1. International human rights law governed by the United Nations (UN)

### 1.1 The Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights is an international treaty adopted by the United Nations General Assembly in 1948. It contains 30 articles which have been elaborated in subsequent international treaties, regional human rights instruments, and national laws. The UDHR affirms that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms that the Declaration sets forth, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. While the UDHR does not expressly mention gender identity, the UN can still be instrumental in extending human rights to trans people.

On 17 June 2011, the United Nations Human Rights Council (HRC) adopted a resolution on *Human rights, sexual orientation and gender identity*.<sup>37</sup> The Resolution is the first of its kind and expresses grave concern about acts of violence and discrimination against individuals because of their sexual orientation and gender identity. It calls on the UN High Commissioner for Human Rights to commission a global study to document discrimination and violence on the grounds of sexual orientation and gender identity. A panel discussion informed by this study is also expected to take place at the nineteenth session of the HRC in 2012.

### 1.2 The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly in 1979. It defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. Additionally, the Convention requires States Parties to undertake various positive measures aimed at realising equality between women and men in political and public life, education, health and employment.

On 22 October 2010, the CEDAW Committee adopted two General Recommendations, one on older women and the protection of their human rights<sup>38</sup> and the other on the core obligations of States Parties under Art. 2

<sup>35</sup> To date, not one reference to gender expression exists in international law.

<sup>36</sup> Paula Ettelbrick & Alia Trabucco Zerán (2010), *The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007 – June 2010 (Final Report)*.

<sup>37</sup> A/HRC/17/L.9/Rev.1.

<sup>38</sup> General recommendation No. 27 on older women and protection of their human rights, CEDAW/C/2010/47/GC.1.

(discrimination).<sup>39</sup> Both recommendations affirmed that discrimination of women based on gender and sex is linked with other factors, including gender identity. Para. 18 of the latter recommendation states:

“Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as [...] gender identity.”

As a result of these resolutions, national reports submitted to the Treaty bodies need to specifically address the situation of trans women and specify which measures are being undertaken to tackle discrimination against them.

## 2. Regional human rights law governed by the Council of Europe (CoE)

### 2.1 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The European Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty to protect human rights and fundamental freedoms in Council of Europe Member States. It was drafted in 1950 and entered into force on 3 September 1953. The Convention established the European Court of Human Rights (ECtHR), which is the only court of an international human rights treaty that provides individuals with the right to directly file complaints against a State party. Judgements of the ECtHR are binding. Moreover, the Convention is a ‘living instrument’ and hence the Court is able to interpret the Convention in light of current knowledge and changing attitudes.

Art. 14 ECHR prohibits discrimination on an open-ended list of grounds, namely “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” The article has also been interpreted to cover other grounds not specifically listed within the text of the Convention such as sexual orientation (in *L. and V. v. Austria* [2003] and subsequent cases),<sup>40</sup> and more recently transsexuality (*P.V. v. Spain* [2010]).<sup>41</sup> The protection provided by Art. 14 ECHR is limited to the rights that are enshrined within the Convention. A “general prohibition of discrimination” is only provided under Protocol 12 to the ECHR which extends the prohibition of discrimination to cover any legal right, even when such a right is not protected under the Convention.<sup>42</sup>

In an effort to integrate the two European regional court systems, Art. 17 of Protocol 14 to the ECHR establishes that the European Union may accede to the Convention. Correspondingly, Art. 6(2) of the Treaty of the European Union (TEU) establishes that the European Union “shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”. A formal integration of the two systems is still to take place. However,

<sup>39</sup> General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/2010/47/GC.2.

<sup>40</sup> On 9 January 2003, in the cases of *L. and V. v. Austria* (ECtHR, Application nos. 39392/98 and 39829/9), the ECtHR held that sexual orientation is a concept covered by Art. 14 ECHR. The Court maintained the same view in subsequent decisions.

<sup>41</sup> On 30 November 2010, in the admissibility decision on the case of *P.V. v. Spain* (ECtHR, Application no. 35159/09), the ECtHR recognised transsexuality as a protected stand-alone ground under Art. 14 ECHR.

<sup>42</sup> Protocol No 12 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 1 April 2005, CETS 177. Protocols to the ECHR are optional and many EU Member States have not yet signed or ratified Protocol 12.

there are already cases of alignment of the jurisprudence of the ECtHR and the Court of Justice of the European Union (CJEU).<sup>43</sup>

## 2.2 ECtHR case-law on the human rights of trans people

The first case submitted by a trans person to reach the ECtHR was *Van Oosterwijck v Belgium*<sup>44</sup> in 1976 but it was unsuccessful. The first positive decision taken by the court had to wait until *B v. France* in 1992. The milestone decisions of Court with regard to trans people's rights concern the legal recognition of change of name and legal gender, the right to marry and coverage of costs of gender reassignment treatment. To date all the cases brought in front of the Court were by transsexuals and the Court has thus not yet pronounced on the rights of other trans people.

### 2.2.1 Gender recognition of post-operative transsexuals

In *B v. France*<sup>45</sup> (decided in 1992) the ECtHR established that the French government's refusal to rectify the birth certificate and the name of a post-operative transsexual constituted a violation of Art. 8 ECHR (right to respect for private and family life).

The applicant had undergone gender reassignment surgery in 1972, and subsequently sought a judgment to amend the sex recorded on her birth certificate and other civil status documents, but was denied such changes. Indeed, French law forbade the bearing of a name and surname other than those recorded on the birth certificate. The applicant was thus facing recurrent humiliation as she could only produce documents showing the name and gender that corresponded to her sex before the transition. In this case, the Court noted the particularly difficult situation for transsexual persons in France and held that, "even having regard to the State's margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual has not been attained" (para. 63 of the judgement).

Consequently, France had to provide for recognition of change of gender on personal identity cards and official documents. While this case did not lead to similar changes in other countries, it established an important precedent in establishing that the right to privacy is crucial to the daily life of many trans people.

### 2.2.2 Right to marry in accordance with the acquired gender

In the ground-breaking decision in the cases of *Goodwin and I. v. UK*<sup>46</sup> (decided by the Grand Chamber in 2002) the ECtHR established that the UK's denial to recognise the post-operative gender and the right to marry in accordance with the acquired gender constituted a violation of Art. 8 and Art. 12 ECHR (right to marry) respectively.

Both applicants complained about the lack of legal recognition of their post-operative gender and about the legal status of transsexuals in the United Kingdom. Amongst other things, the applicants argued that they were not able to marry as a result of the state's refusal to amend their birth register. In its reasoning the Court noted that on the one hand there was a major social change in the institution of marriage, and on the other that there were great

<sup>43</sup> See the *K.B.* case, discussed in III.2.1.1.

<sup>44</sup> ECtHR, *Van Oosterwijck v Belgium* (Application no. 7654/76), judgment of 6 November 1980.

<sup>45</sup> ECtHR, *B. v. France* (Application no.13343/87), judgment of 25 March 1992.

<sup>46</sup> ECtHR, *Goodwin and I. v. UK* (Application no. 28957/95) and (Application no. 25680/94), respectively, judgment of 11 July 2002.

changes brought about by developments in medicine and science in the field of transsexuality. The Court was therefore not persuaded that the gendered references to “men and women” in Art. 12 ECHR had to be restricted to purely biological criteria, and therefore found no justification for barring transsexuals from enjoying the right to marry under any circumstances.

In this case, the Court also narrowed the previous wide margin of appreciation that applied to States vis-à-vis transsexual people, by attaching “less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals” (para. 85 of the judgement).

### 2.2.3 Right to fair and proportionate requirement related to gender reassignment

In *Van Kück v. Germany*<sup>47</sup> (decided in 2003) the ECtHR established that the burden that was placed on the applicant to prove the “medical necessity” of her gender reassignment and the genuineness of her transsexualism was unreasonable, and found a violation of Art. 6(1) ECHR (right to a fair hearing) and Art. 8 ECHR.

The applicant had taken an action in front of the Berlin court against a German health insurance company claiming that the company was liable to reimburse fifty per cent of the expenses related to gender reassignment and hormone treatment (as applicable to employees of the Berlin Land). The German courts dismissed her reimbursement claim for medical treatment related to her transsexuality arguing that she had deliberately caused her condition.

The ECtHR found that the domestic proceedings were unfair and in breach of the right to a fair trial, and that the requirement to prove medical necessity of her treatment was disproportionate and unreasonable because “gender identity is one of the most intimate areas of a person’s private life” (para. 56 of the judgment). A similar case reached the Court in *Schlumpf v Switzerland*<sup>48</sup> (decided in 2009) and the Court affirmed its own reasoning in *Van Kück*.

### 2.2.4 Right to a pension in accordance with the acquired gender

In *Grant v. United Kingdom*<sup>49</sup> (decided in 2006) the ECtHR found a contravention of Art. 8 ECHR with regards to the British government’s refusal to pay a post-operative transsexual woman a pension at the female retirement age.

The applicant was registered as a woman on her National Insurance Card and paid her contributions at the female rate. In spite of this when she applied for her retirement pension she was informed that she was entitled to a state pension at the age applicable to men (5 years later). The judgement of the ECtHR in this case supported a slightly earlier judgement of the CJEU in *Richards*.<sup>50</sup>

<sup>47</sup> ECtHR, *Van Kück v. Germany* (Application no. 35968/97), judgment of 12 June 2003.

<sup>48</sup> ECtHR, *Schlumpf v. Switzerland* (Application no. 29002/06), judgment of 8 January 2009.

<sup>49</sup> ECtHR, *Grant v. United Kingdom* (Application no. 32570/03), judgment of 23 May 2006.

<sup>50</sup> See III.2.1.1.

## 2.2.5 Trans people’s right to clear gender reassignment procedures

In *L. v. Lithuania*<sup>51</sup> (decided in 2007) the ECtHR established that the lack of clarity of Lithuanian law with regard to gender reassignment, resulting in the applicant’s inability to complete his gender reassignment process and obtain legal recognition in his new gender, constituted a violation of Art. 8 ECHR.

While Lithuania did not ban gender reassignment surgery, and the Civil Code (adopted in 2000) granted the right to undergo gender reassignment surgery, the law that was expected to regulate gender reassignment had never been passed. As a result L was left in “the intermediate position of a pre-operative transsexual, having undergone partial surgery”<sup>52</sup> and made to face various humiliations because he still had his old name and gender marker on civil status documentation. The Court ordered Lithuania to adopt the appropriate legislation within the three-month period following the judgement or otherwise pay the applicant €40,000 in pecuniary damages related to the cost of undergoing gender reassignment. The Court also awarded the applicant €5,000 in non-pecuniary damages. Lithuania has not yet fully implemented this judgement.

## 2.3 Council of Europe recommendations on the rights of LGBT people

In March 2010, the Council of Europe Committee of Ministers adopted a resolution setting out clear measures to combat discrimination on the grounds of sexual orientation and gender identity.<sup>53</sup> This resolution is the first comprehensive intergovernmental agreement on the rights of LGBT people, and addresses: (i) the right to life, security and protection from violence – covering (a) “hate crimes” and other hate-motivated incidents and (b) “hate speech”; (ii) freedom of association; (iii) freedom of expression and peaceful assembly; (iv) the right to respect for private and family life; (v) employment; (vi) education; (vii) health; (viii) housing; (ix) sports; (x) the right to seek asylum; (xi) national human rights structures; and (xii) discrimination on multiple grounds. While these recommendations are not directly enforceable, they are considered to be soft law and include an implementation review process (to be held in 2013).

One month later, the Council of Europe Parliamentary Assembly (PACE) adopted a resolution<sup>54</sup> and a set of recommendations<sup>55</sup> on the grounds of sexual orientation and gender identity. PACE commended the Resolution of the Committee of Ministers and called on the Committee to advance various measures promoting LGBT equality.

## 2.4 Convention on preventing and combating violence against women and domestic violence

The recently adopted *Convention on preventing and combating violence against women and domestic violence*<sup>56</sup> contains a reference to gender identity in Art. 4(3) “Fundamental rights, equality and non-discrimination”, making

<sup>51</sup> ECtHR, *L. v. Lithuania* (Application no. 27527/03), judgment of 11 September 2007.

<sup>52</sup> *Ibid.* B. The Court’s assessment (within the judgment).

<sup>53</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers’ Deputies).

<sup>54</sup> Resolution 1728 (2010) Discrimination on the basis of sexual orientation and gender identity; Assembly debate on 29 April 2010 (17th Sitting).

<sup>55</sup> Recommendation 1915 (2010) Discrimination on the basis of sexual orientation and gender identity (Text adopted by the Assembly on 29 April 2010 [17th Sitting]).

<sup>56</sup> Adopted in Istanbul by the Committee of Ministers and opened for signatures on 11 May 2011.

it the first convention to provide express protection against discrimination on the grounds of gender identity. The article states:

“The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, [...] gender identity, [...] or other status.”

The explanatory report<sup>57</sup> elaborates the ground of gender identity as follows (para. 53):

“Certain groups of individuals may also experience discrimination on the basis of their gender identity, which in simple terms means that the gender they identify with is not in conformity with the sex assigned to them at birth. This includes categories of individuals such as transgender or transsexual persons, cross-dressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to “male” or “female” categories.”

In adopting such a wide definition that goes well beyond the case-law discussed above, the Council of Europe is giving a signal that all trans people should be protected irrespective of whether or not they have undergone gender reassignment surgery.

<sup>57</sup> COM(2011)49 final, adopted on 7 April 2011.

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# Part III

## Gender identity and gender expression discrimination under present EU law

## 1. No explicit legislation on gender identity and gender expression discrimination

EU non-discrimination law at present does not contain an explicit prohibition of discrimination on the grounds of a person's gender identity and gender expression. Art. 18(1) TFEU, which is the most general non-discrimination provision in the Treaties, prohibits discrimination on grounds of nationality only. Similarly, Art. 157 TFEU concerns discrimination on grounds of sex specifically in matters of employment and occupation. For other areas of law, as well as for other types of discrimination that are linked to human beings, Art. 19 TFEU entitles the EU to take action to combat "discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" only, without mentioning trans issues. According to Art. 10 TFEU, the EU shall, in defining and implementing its policies and activities, aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (mainstreaming).

Neither can an explicit prohibition on gender identity and gender expression discrimination be found in the EU Charter of Fundamental Rights, where Art. 21 refers to nationality (section 2) as well as to "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation" (section 1). Additionally, neither gender identity nor gender expression appears in the EU's internal labour law, the Staff Regulations,<sup>58</sup> which in Art. 1d outlaws the same types of discrimination as Art. 21(1) of the Charter of Fundamental Rights. However, it should be noted that in both of these cases the catalogues of discrimination grounds are openly worded ("any discrimination based on any ground such as ..."), which in principle allows for the conclusion of other grounds than those expressly mentioned. At the same time and as far as the Charter of Fundamental Rights is concerned, the Charter binds the Member States "only when they are implementing Union law" (Art. 51(1)), and it further specifies expressly that it does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties (Art. 51(2)). Unless one adheres to an extremely wide definition of the meaning of the expression of "when they are implementing Union law", it would seem impossible to include discrimination on grounds of gender identity and gender expression merely on the basis of the Charter. For this to be possible there must be a competence of the Union in relation to such issues. As has already been stated, that is not the case at the moment.

In theory, the only possibility for the EU to nevertheless legislate would be to treat discrimination on the grounds of gender identity and gender expression as an economic issue related to the internal market, and to base secondary legislation on a general legal basis provision (Arts. 114, 115 and 352 TFEU), as was done in the field of sex equality before specific legal basis provisions were included in the then EC Treaty (post-Lisbon: the TFEU).<sup>59</sup> Obviously, such action requires political will on the side of the institutions. So far, no such action has been undertaken.

Therefore, it must be stated that under present EU law gender identity and gender expression do not appear anywhere in EU primary or secondary law. However, this does not mean that at present there is no applicable EU law in this context. According to the case-law of the European Court of Justice (CJEU), under certain circumstances discrimination against trans people may amount to discrimination on the grounds of sex.

<sup>58</sup> Regulation 259/68/EEC laying down the Staff Regulations of Officials of the European Communities, OJ 1968 L 56, 4.3.1968 – English Special Edition 1968, 1 December 1972, as amended on numerous occasions; consolidated version available at [http://ec.europa.eu/civil\\_service/docs/toc100\\_en.pdf](http://ec.europa.eu/civil_service/docs/toc100_en.pdf).

<sup>59</sup> See Christa Tobler (2000), Sex Equality Law under the Treaty of Amsterdam, *European Journal of Law Reform* 2000, 135-153.

## 2. CJEU case-law on gender reassignment discrimination

### 2.1 Gender reassignment discrimination as sex discrimination

The Court so far held in three cases, namely *P. v S.*<sup>60</sup> (decided in 1996), *K.B.*<sup>61</sup> (decided in 2004) and *Richards*<sup>62</sup> (decided in 2006), that discrimination against people who intend to undergo, are undergoing and have undergone gender reassignment may amount to sex discrimination.

In *P. v S.*, the Court of Justice found that dismissal of a transsexual person because of gender reassignment constitutes discrimination on grounds of sex as prohibited by Art. 5(1) of what was then Directive 76/207.<sup>63</sup> The case involved the male-to-female transsexual P., a person born in terms of chromosomes and physical characteristics a man, but with a psychological feeling of being a woman. In the interest of identity cohesion, P. underwent gender reassignment surgery, changing physical characteristics as far as possible in order to make P. a woman. P. was employed as a manager in an educational establishment and was dismissed during the course of the gender reassignment process (P. was given notice of the dismissal before the final surgical operation was performed, but the dismissal took effect only after that operation). In court, P. complained of sex discrimination. The British court seized of the matter found that the true reason for the dismissal was P.'s proposal to undergo gender reassignment. In a request for a preliminary ruling, it asked the Court of Justice whether or not such a case is covered by what was then EC (post-Lisbon: EU) sex equality law, notably Directive 76/207. Art. 5(1) of this Directive required that, as regards dismissal, "men and women shall be guaranteed the same conditions without discrimination on grounds of sex". The Court held that,

"the scope of the directive cannot be confined to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned. Such discrimination is based, essentially, if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard. Dismissal of such a person must therefore be regarded as contrary to Article 5(1) of the directive, unless the dismissal could be justified under Article 2(2). There is, however, no material before the Court to suggest that this was so here. It follows from the foregoing that the reply to the questions referred by the Industrial Tribunal must be that, in view of the objective pursued by the directive, Article 5(1) of the directive precludes dismissal of a transsexual for a reason related to a gender reassignment." (*P. v S.*, para. 19-24).

<sup>60</sup> CJEU, Case C-13/94 *P. v S. and Cornwall County Council* [1996] ECR I-2143.

<sup>61</sup> CJEU, Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541.

<sup>62</sup> CJEU, Case C-423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585.

<sup>63</sup> Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39/40, subsequently revised by Directive 2002/73/EC amending Council Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002 L 269/15. The Directive has since been replaced by the so-called Recast Directive, Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23.

In the later judgment *Grant* (para. 41 and 42),<sup>64</sup> the Court summarised its findings in *P. v S.* in the following way:

“[T]he Court stated that the provisions of the directive prohibiting discrimination between men and women were simply the expression, in their limited field of application, of the principle of equality, which is one of the fundamental principles of Community law. It considered that that circumstance argues against a restrictive interpretation of the scope of those provisions and in favour of applying them to discrimination based on the worker’s gender reassignment. The Court considered that such discrimination was in fact based, essentially if not exclusively, on the sex of the person concerned. [...] such discrimination is to be prohibited just as is discrimination based on the fact that a person belongs to a particular sex [...]”

As for the *K.B.* case, both the facts and the Court’s approach were different from those in *P. v S.* The *K.B.* case concerned a female employee of the National Health Service (NHS) in the UK whose partner in life was a female-to-male transsexual. Because this partner was not allowed, under the national law, to be registered as a man in the Register of Births, the couple was unable to marry. The NHS informed its employee that in the event that the partner would survive the employee, he would be unable to claim a survivor’s occupational pension, as only surviving partners of a marriage were entitled to such a pension. Asked whether this amounted to sex discrimination prohibited under what was then EC law, the Court of Justice began by stating that the decision to restrict certain benefits to married couples while excluding all persons who live together without being married cannot be regarded *per se* as discriminatory on grounds of sex. However, the Court added that in a situation such as that before the national court, there is inequality of treatment which, although it does not directly undermine enjoyment of a right protected by what was then Community law, affects one of the conditions for the granting of that right, namely, the capacity to marry. The CJEU then pointed to the case-law of the European Court of Human Rights which recognised the right of transsexuals to marry. Against this background, the Court held that “legislation such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as the claimants from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other, must be regarded as being, in principle, incompatible with the requirements of Article 141 EC” (*K.B.*, para. 34; post-Lisbon, Art. 141 EC is Art. 157 TFEU). However, the Court added that it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person.

The *Richards* case concerned the refusal to award a statutory retirement pension at the age of 60 to a male-to-female transsexual because the retirement age for men born before 6 April 1950 was 65. The Court stated that the scope of the relevant sex equality directive “cannot thus be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of that directive is also such as to apply to discrimination arising from the gender reassignment of the person concerned” (*Richards*, para. 24). The Court explained that the unequal treatment at issue was based on Ms Richards’ inability to have the new gender which she acquired following surgery recognised with a view to application of the UK pension legislation and then stated (*Richards*, para. 29 and 30): “Unlike women whose gender is not the result of gender reassignment surgery and who may receive a retirement pension at the age of 60, Ms Richards is not able to fulfil one of the conditions of eligibility for that pension, in this case that relating to retirement age. As it arises from her gender reassignment, the unequal treatment to which Ms Richards was subject must be regarded as discrimination which is precluded by Article 4(1) of Directive 79/7.” The Court concluded by finding that Art. 4(1) of Directive 79/7<sup>65</sup> “must be interpreted as precluding legislation which denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law” (*Richards*, para. 38).

<sup>64</sup> CJEU, Case C-249/96 *Grant v South-West Trains Ltd* [1998] ECR I-621.

<sup>65</sup> Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24.

The fact that discrimination against people who intend to undergo, are undergoing and have undergone gender reassignment may amount to sex discrimination means the prohibition against this discrimination can be relied on within the field of application of the relevant EU law, which includes notably issues related to employment and occupation,<sup>66</sup> statutory and occupational social security,<sup>67</sup> self-employment<sup>68</sup> and access to, and supply of, goods and services available to the public.<sup>69</sup>

## 2.2 The Court's conceptual approach

If compared to more traditional sex discrimination cases, the conceptual approach underlying the Court's judgments in the above-mentioned gender reassignment cases is rather challenging. In the present context, it is worth discussing this aspect as well as the choice of the right comparator (see 2.3 below) in some detail, as these aspects will play a role in the overall assessment of the present EU law on gender identity and gender expression discrimination as well as in the suggestions to be made for future EU law.

Very few commentators found the *P. v S.* judgment unsurprising. Pallaro<sup>70</sup> is an example. While lauding the Court for being aware of a pressing human need and for recognising the rights of persons who "wish to be, rather than merely to appear" (*voler «essere», al di là del mero apparire*), he found the Court's approach to be "legally strict" (*giuridicamente rigorosa*; similarly More:<sup>71</sup> "a straightforward application of sex discrimination law").<sup>72</sup> In contrast, according to most commentators the *P. v S.* judgment was based on a fundamentally novel approach to sex discrimination (which, according to some, raised high hopes for other types of discrimination, in particular discrimination on grounds of sexual orientation; e.g. Barnard,<sup>73</sup> McInnes,<sup>74</sup> Campbell/Lardy<sup>75</sup> - however, the Court's judgment in the later *Grant* case made it clear that such hopes had been too high, at least at that time).<sup>76</sup>

<sup>66</sup> Art. 157 TFEU as well as Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23.

<sup>67</sup> Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24. This directive concerns statutory social security, as opposed to occupational social security, and the Recast Directive (see previous footnote) for occupational pensions.

<sup>68</sup> Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ 1986 L 359/56. With effect from 5 August 2012, this Directive will be replaced by Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ 2010 L 180/1.

<sup>69</sup> Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

<sup>70</sup> Paolo Pallaro (1998), *Il divieto di discriminazione fondate sul sesso, fra transsessualismo e libertà di orientamento sessuale*, *Diritto Comunitario e degli scambi internazionali* 1998, 609-619, at 615/616.

<sup>71</sup> Gillian More (1999), *The Principle of Equal Treatment: From Market Unifier to Fundamental Right?*, in: Paul Craig & Gráinne de Búrca, *The Evolution of EU Law*, Oxford: Oxford 1999, 517-553, at 545.

<sup>72</sup> Referring to C. Stychin (1997), *Troubling Genders: A Comment on P v S and Cornwall County Council*, *International Journal of Discrimination and the Law* 1997, 217-230.

<sup>73</sup> Catharine Barnard (1997), *Kite Flying or a New Constitutional Approach?*, in: Alan Dashwood & Síofra O'Leary (eds), *The Principle of Equal Treatment in EC Law*, London/Dublin/Hong Kong: Sweet & Maxwell 1997, 59-79, at 59 and 72 et seq.

<sup>74</sup> John McInnes (1999), (Case note on *Grant*), *Common Market Law Review* 1999, 1043-1058, at 1052.

<sup>75</sup> Angus Campbell & Heather Lardy (1996), *Discrimination against Transsexuals in Employment*, *European Law Review* 1996, 412-418, at 417.

<sup>76</sup> See e.g. Catherine Barnard (1999), *Some are more equal than others: the decision of the Court of Justice in Grant v. South-West Trains*, in: Alan Dashwood/Angela Ward (eds), *The Cambridge Yearbook of European Legal Studies*, Volume 1, 1998, Oxford: Hart Publishing 1999, 147-173.

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Particularly interesting for the purposes of this report is the view that *P. v S.* reflects a true gender approach on the side of the Court, in particular a recognition that sex is not just a biological phenomenon, but is also determined by traditional sex roles. For example, Campbell and Lardy<sup>77</sup> thought that the judgment could mean that individuals should be protected against disadvantageous treatment because they do not share society's current perception of the different roles and conduct appropriate to men and women (see also Skidmore,<sup>78</sup> McInnes).<sup>79</sup> However, others explained the outcome of *P. v S.* precisely with the fact that, given that it is their wish to comply fully with one of these roles, transsexuals undergoing gender reassignment do not call into question the social roles and expectations imposed on men and women as such (Flynn,<sup>80</sup> Denys<sup>81</sup>). In the present writers' view,<sup>82</sup> the judgment in the *P. v S.* case did not so much recognise the basic problem inherent in the traditional sex roles but rather the fact that sex is not necessarily a fixed and unchangeable personal feature. If so, this would mean that the Court acknowledged the special situation of transsexual persons who intend to undergo, are undergoing and have undergone gender reassignment, and thereby the two possibilities of *being* of a given sex (which is the case of the majority of people) and of *developing* from one sex in the direction of the other (which is the case of transsexuals undergoing gender reassignment). Though less encompassing than a true gender approach, that in itself is remarkable.<sup>83</sup>

Whilst *P. v S.* appeared to be the first and foundational case on discrimination against transsexuals under what was then EC law, it is noteworthy that there is no reference to this judgment in the later decision in the *K.B.* case. In fact, the Court's reasoning in this second case is quite different, in that it appears to be based essentially on the right to marry under the ECHR. According to Foubert,<sup>84</sup> the Court's decision confirmed that ultimately the relevant differentiation criterion in the trans cases that had arrived before it so far had been that of the gender reassignment, a criterion which was assimilated by the Court to sex. Apart from that, the novelties perceived by commentators concern aspects such as the Court's focus on a precondition to pay (i.e. a prerequisite to earn money), which is different from other equal pay cases (Canor),<sup>85</sup> the fact that the discrimination in question concerned the worker's partner, rather than the worker herself (Battaglia),<sup>86</sup> as well as the further fact that the discriminatory act affected the enjoyment of the right granted under the directive (namely the right to equal pay) only indirectly (namely through the marriage rules that were applicable; Violini).<sup>87</sup>

This element is absent in the *Richards* case, which – like *P. v S.* – concerned discrimination on grounds of gender reassignment in relation to an individual worker. The Court's judgment confirms that the relevant discrimination criterion is, indeed, that of the gender reassignment which is equated by the Court to the criterion of sex (Longo).<sup>88</sup>

<sup>77</sup> Campbell & Lardy (1996), at 416 et seq.

<sup>78</sup> Paul Skidmore (1997), *Sex, Gender and Comparators in Employment Discrimination*, *Industrial Law Journal* 1997, 51-61, at 60.

<sup>79</sup> McInnes (1999), at 1050/1051.

<sup>80</sup> Leo Flynn (1997), (Case note on *Grant*), *Common Market Law Review* 1997, 367-387, at 381.

<sup>81</sup> Christine Denys (1999), *Homosexuality: a non-issue in Community law?*, *European Law Review* 1999, 419-425, at 424.

<sup>82</sup> See already Christa Tobler (2001), *Same-Sex Couples under EU Law*, *Aktuelle Juristische Praxis* 2001, 269-286.

<sup>83</sup> Though it should be noted that it does not remove the possibility that in the case of *P.* the dismissal was caused by a combination of the two elements: the employer may have objected to the gender reassignment as such (the process) and at the same time to getting a female employee instead of a male one (the outcome).

<sup>84</sup> Petra Foubert (2004), (Case note on *K.B.*), *Sociaal-economische Wetgeving* 2004, 441-444, at 442/443.

<sup>85</sup> Iris Canor (2004), (Case note on *K.B.*), *Common Market Law Review* 41 (2004), 1113-1125, at 1118.

<sup>86</sup> Elisa Battaglia (2004), *"Sesso" e "orientamento sessuale" nell'interpretazione dell'art. 141 CE alla luce della sentenza K.B. c. Regno Unito*, *Il Diritto dell'Unione Europea* 2004, 599-618, at 612; see further below IV.1.1.3.

<sup>87</sup> Lorenza Violini (2004), *Il diritto dei transessuali a contrarre matrimonio di fronte alla Corte di giustizia*, *Quaderni costituzionali* 2004, 414-416, at 415.

<sup>88</sup> Erik Longo (2006), *La Corte di Giustizia, i diritti dei transessuali e la riduzione delle competenze statali*, *Quaderni costituzionali* 2006, 581-584, at 583.

## 2.3 Choosing the right comparator

The most hotly debated issue concerning the case-law mentioned relates to the comparison underlying the Court's finding of sex discrimination. The historical starting point of EU sex equality law is the aim of equal treatment of men and women. Unequal treatment in principle constitutes discrimination. Consequently, discrimination must be identified through a comparison of the complainant(s) in a given case with the treatment that persons of the opposite sex received or would have received. Further, unequal treatment constitutes discrimination only where the situations of the two groups that are compared are comparable. Obviously, much depends on the way this comparison is made.

### 2.3.1 The comparison made in *P. v S.* – a highly disputed issue

In *P. v S.*, the Court appeared to compare the post gender-reassignment transsexual person who complained about discrimination with a person of the opposite sex who had not undergone gender reassignment (in fact, it would appear that the concrete comparator was the complainant herself, before gender reassignment).<sup>89</sup> However, later the Court moved in a direction that makes it rather difficult to understand why discrimination on grounds of gender reassignment should be embodied through law on sex discrimination.

The Court's approach in *P. v S.* was much debated in academic writing where some commentators struggled to understand it. In fact, some thought that it was not comparison-based at all. For example, Advocate-General Elmer in his opinion on the *Grant* case interpreted *P. v S.* as "a decisive step away from an interpretation of the principle of equal treatment based on the traditional comparison between a female and a male employee", concluding that there is no requirement of a comparison at all. Instead, the notion of discrimination on grounds of sex should be understood as "prohibiting discrimination against employees not solely on the basis of the employee's own gender but also on the basis of the gender of the employee's child, parent or other dependent" (*Grant*, para. 15 and 16 of the AG's opinion; see also Berthou & Masselot).<sup>90</sup> Similarly, Flynn<sup>91</sup> thought that "the Court may be moving away from an Aristotelian approach to equality and the requirement that a comparator of the opposite sex be used, and towards an analysis based on disadvantage and detriment". However, at the same time, he acknowledged that this was unlikely in view of later case-law concerning more traditional sex equality cases. According to Wintemute,<sup>92</sup> para. 20 of the judgment seemed to indicate a willingness on the side of the Court to abandon a comparison-based test, similar to *Dekker*<sup>93</sup> (which concerned discrimination on grounds of pregnancy). However, he too realised that the Court did in fact engage in a comparison. Indeed, given the wording of para. 21 ("he or she is treated unfavourably *by comparison* with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment"; italics added), such a conclusion is inevitable.

<sup>89</sup> Barnard (1998, at 157) now seemed to read *P. v S.* as being based on what she calls the "sex-based approach". Her distinction between the (more traditional) discrimination-based approach and the (novel) sex-based approach concerns the identification of discrimination on grounds of sex. According to Barnard, only the sex-based approach "unpacks the two elements" of the latter notion, starting with the question of whether sex-based criteria have been used and, if so, only then turning to the question of whether there has been less favourable treatment. In this view, the Court in *P. v S.* "recognised that the dismissal of a transsexual was based essentially, if not exclusively, on the grounds of sex (question 1). It then said that P had been treated less favourably than a person of the sex to which P had once belonged (question 2)."

<sup>90</sup> Katell Berthou & Annick Masselot (1998), *La CJCE et les couples homosexuels*, *Droit social* 1998, 1034-1039, at 1035.

<sup>91</sup> Flynn (1997), at 377/378.

<sup>92</sup> Robert Wintemute (1997), *Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, *Modern Law Review* 1997, 334-359, at 340/341.

<sup>93</sup> CJEU, Case C-177/88 *Dekker v Stichting Vormingscentrum Jong Volwassenen* [1990] ECR I-3941.

But if so, who then was compared to whom? More specifically, was the comparison made by the Court “*inter-person*” (comparison between different people) or “*intra-person*” (comparison “within” one single person)?<sup>94</sup> It seems that P. herself had suggested an intra-person comparison before the national court, namely between the employer’s treatment of her when she was perceived as a (non-transsexual) man and the employer’s treatment of her once she was known to be a male-to-female transsexual who would undergo gender reassignment.<sup>95</sup> A number of commentators considered that this was indeed the comparison relied on by the Court (e.g. Carolan:<sup>96</sup> “the claimant was allowed to act as her own comparator”). Others implicitly assumed that there was some sort of inter-person comparison, though they disagreed as to between whom the comparison was made (e.g. Denys,<sup>97</sup> Wintemute).<sup>98</sup> In contrast, Campbell/Lardy<sup>99</sup> noted that a comparison was made between the treatment given to the transsexual P. (a woman), and the treatment “which men generally could expect to receive in similar circumstances”, concluding from this that there is no need to identify an individual comparator. The present writers agree, notably in view of the plural form used by the Court in para. 21 of *P. v S.* (“by comparison with *persons*”; italics added): the treatment Ms. P. received was compared not only to the treatment of her former self (Mr. P.), but also to that of other men. However, as will see below, this changed with the *Richards* case.

A further question, linked to the issue just mentioned, is whether the comparison engaged in by the Court was *male/male* (“intra-sex”) or *female/male* (“inter-sex”). Flynn<sup>100</sup> relied on the fact that under British law at the time P., even post-surgery, was still a man, and concluded that the “comparison” (which in his view was not really a comparison) in fact was between two men (see also Burrows).<sup>101</sup> Similarly, Wintemute<sup>102</sup> took as a starting point P.’s chromosomal sex.<sup>103</sup> However, most authors agreed that the comparison made by the Court was *male/female* (“inter-sex”; e.g. Bell,<sup>104</sup> Campbell/Lardy,<sup>105</sup> Carolan,<sup>106</sup> Denys,<sup>107</sup> McInnes<sup>108</sup>). Indeed, the wording of para. 21 of the judgment shows that the Court clearly meant to engage in an inter-sex comparison. Again, it will be seen that this changed later with the *Richards* case.

One additional point should be noted, namely that the Court’s judgment in the *P. v S.* case does not treat post-surgery transsexual persons as belonging to a category in between men and women. Rather, the Court wisely refused to engage in the highly sensitive debate whether or not transsexuals, especially after gender reassignment,

<sup>94</sup> Terminology according to Wintemute (1997), at 341/342.

<sup>95</sup> Ibid.

<sup>96</sup> Bruce Carolan (1999), Hope fades for EU recognition of same-sex partnerships, *Gazette of the Incorporated Law Society of Ireland* 1999, 44-47, at 45.

<sup>97</sup> Denys (1999), at 422.

<sup>98</sup> Wintemute (1997), at 341.

<sup>99</sup> Campbell & Lardy (1996), at 415.

<sup>100</sup> Flynn (1997), at 377 et seq.

<sup>101</sup> Norreen Burrows (1998), Sex and Sexuality in the European Court, *The International Journal of Comparative Labour Law and Industrial Relations* 1998, 153-158, at 154.

<sup>102</sup> Wintemute (1997), at 341.

<sup>103</sup> In Wintemute’s terminology, “chromosomal sex” is an aspect of biological sex. It refers to “whether a person is chromosomally male (XY) or female (XX), or belongs to another chromosomal category”. “Physical sex” (physical sex characteristics) appears to be another aspect of biological sex. Wintemute distinguishes biological sex from “psychological sex”, the latter referring to whether persons, regardless of their chromosomal and physical sex characteristics, consider themselves to be male, female or members of another category; Wintemute (1997), at 334.

<sup>104</sup> Mark Bell (1999), Shifting Conceptions of Sexual Discrimination at the Court of Justice: from *P v S* to *Grant v SWT*, *European Law Journal* 1999, 63-81, at 66.

<sup>105</sup> Campbell & Lardy (1996), at 414/415.

<sup>106</sup> Carolan (1999), at 45.

<sup>107</sup> Denys (1999), at 422.

<sup>108</sup> McInnes (1999), at 1051/1052.

form a “third sex” (Campbell/Lardy).<sup>109</sup> Though Brems<sup>110</sup> correctly notes that the Court carefully avoided the use of any gender-specific indicators when referring to P, the comparison made in para. 21 implies that the Court respected P’s wish to be considered a woman.<sup>111</sup> The present writers agree with McInnes’s<sup>112</sup> view that the significance of the Court’s approach in *P. v S.* lies in the fact that it focused on the transsexual’s asserted gender identity, not on his/her biological or legal sex (see also Skidmore).<sup>113</sup> Indeed, the debate about the sex of post-surgery transsexual persons is possible only against the background of an assumed dichotomy between two clearly defined and unchangeable sexes. Advocate-General Tesauro refuted the argument that, in the case of a person undergoing gender reassignment, there is no discrimination “between the two sexes”, by stating that “to maintain that the unfavourable treatment suffered by P. was not on grounds of sex because it was due to her change of sex or else because in such a case it is not possible to speak of discrimination between the two sexes would be a quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value which is equality” (*P. v S.*, para. 20 of the AG’s opinion). More explicitly, Hauser<sup>114</sup> considered it paradoxical to refuse protection through the non-discrimination principle to a transsexual person undergoing gender reassignment, under the pretext that he or she does not belong to either sex and therefore is *a priori* not “discriminable” («*sous prétexte qu’il n’était ni d’un sexe ni de l’autre donc a priori «non discriminable»*).

Finally, many commentators applauded the Court for not relying on what is called a symmetrical comparison, that is, a comparison between the treatment of the male-to-female transsexual P. and the treatment that a female-to-male transsexual would have received. Such writers pointed out that in this case there is no different treatment because of the so-called equal misery situation: female-to-male transsexuals would also have been dismissed in the event of a gender reassignment (e.g. Barnard,<sup>115</sup> Carolan,<sup>116</sup> Helfer,<sup>117</sup> Skidmore,<sup>118</sup> Wintemute).<sup>119</sup> In *P. v S.*, the Court did not address this at all and it is therefore open to speculation what the judgment means in this regard. Did the Court include female-to-male transsexuals in the general category of “persons of the sex to which the transsexual was deemed to belong before undergoing gender reassignment” (para. 21)? And if so, why is it that the equal misery argument did not prevent the Court from finding discrimination? The easiest answer to these questions – and, it is submitted, not an unlikely one – is simply that the Court, in view of the sheer obviousness of the sex discrimination in a case like P’s, did not care. Advocate-General Tesauro, after having questioned the general accurateness of the symmetrical assumption, continued: “One fact, however, is not just possible, but certain: P. would not have been dismissed if she had remained a man. So how can it be claimed that discrimination on grounds of sex was not involved? How can it be denied that the cause of discrimination was precisely, and solely, sex?” (para. 18 of the AG’s opinion). In other words: whatever the merits of the symmetrical argument, it does not matter in such a case because, due the specific factual situation, it is obvious that the reason for the disadvantageous treatment is the

<sup>109</sup> Campbell & Lardy (1996), at 416.

<sup>110</sup> Eva Brems (1998), (Case note on *P. v S.*), *Columbia Journal of European Law* 1998, 339-345, at 339, footnote 1.

<sup>111</sup> Compare, however, Flynn (1997) at 379, who asserts that “at no point does the Court indicate that P. is female as a matter of Community law”. See also Campbell & Lardy (1996), at 414, according to whom the Court’s analysis “did not take as its starting point the classification of P. as a man or a woman” and the ultimate decision in P’s favour was not based on an endorsement of P’s preferred sexual status. For examples of British cases where the Court looked for what it conceived as the “true sex” of a person, see Skidmore (1997), at 53.

<sup>112</sup> McInnes (1999), at 1052.

<sup>113</sup> Skidmore (1997), at 59.

<sup>114</sup> Jean Hauser (1996), (Case note on *P. v S.*), *Revue trimestrielle de droit civil* 1996, 579, at 579.

<sup>115</sup> Catherine Barnard (1998), *The Principle of Equality in the Community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows?*, *Cambridge Law Journal* 1998, 352-377, at 365.

<sup>116</sup> Carolan (1999), at 45.

<sup>117</sup> Larry Helfer (1999), (Case note on *Grant*), *American Journal of International Law* 1999, 200-205, at 202.

<sup>118</sup> Skidmore (1997), at 60.

<sup>119</sup> Wintemute (1997), at 351.

worker's sex. It may well be that the Court agreed with the Advocate-General and accordingly wished to recognise the obvious fact of that discrimination.

This could indicate that the Court was willing to concentrate on the heart of the discrimination matter, namely discrimination as a real social phenomenon, rather than submitting to the widespread obsession with formulas of an almost mathematical quality on legal equality and non-discrimination. Certainly, the wish for clear and easily applicable formulas is understandable from the point of view of legal certainty. On the other hand, some cases do not easily fit into such formulas and are nevertheless clear discrimination cases. Insisting that a given formula needs to be applied in precisely the same way in all circumstances can jeopardise the very aim of non-discrimination law. Such an approach is therefore not always appropriate. *P. v S.* is a good example (and so is the case of disadvantageous treatment because of pregnancy). It is that issue of obviousness that *P. v S.* shares with *Dekker*<sup>120</sup> (Tobler).<sup>121</sup> The consequences, however, are different in the two cases. According to *Dekker*, discrimination on grounds of pregnancy can be found without engaging in a comparison at all. By contrast, the finding of *P. v S.* is indeed based on a comparison. It should be emphasised that the obvious nature of the discrimination in this case is due to the very specific features inherent in the situation of a transsexual who undergoes gender reassignment. Only in this case can it be said that "she would not have been dismissed had she remained a man".

### 2.3.2 The comparisons made in *K.B.* and in *Richards* and the test to be applied since then

Compared to *P. v S.*, the comparison made by the Court in the *K.B.* and *Richards* cases led to considerably less discussion, though here, too, there are interesting elements to be noted.

Noteworthy in *K.B.* is the fact that the Court did not compare the treatment of workers as individuals, but rather the treatment of couples of whom one partner is a worker (Battaglia,<sup>122</sup> Violoni,<sup>123</sup> Valvo,<sup>124</sup> also Tomasi<sup>125</sup>). More specifically, the Court's comparison was between heterosexual couples where neither partner's identity is the result of gender reassignment surgery and the treatment of couples where the identity of one partner has led to gender reassignment being intended, being already underway or having been undergone.<sup>126</sup> This couple-based approach is specific to *K.B.* and is not reflected in the other decisions by the Court on gender reassignment (though it is in cases concerning couples and discrimination on grounds of sexual orientation; *Maruko*,<sup>127</sup> *Römer*<sup>128</sup>). As noted by

<sup>120</sup> In *Dekker* (para. 25 of the AG's opinion), AG Darmon wrote: "At the expense of stating the obvious, motherhood can only ever affect women; taking account of it in order to justify a refusal of employment is therefore ipso facto direct discrimination on grounds of sex."

<sup>121</sup> Christa Tobler (2005), *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerp/Oxford: Intersentia, at 46 et seq.

<sup>122</sup> Battaglia (2004), at 602.

<sup>123</sup> Violini (2004), at 416.

<sup>124</sup> Anna Lucia Valvo (2004), (Case note on *K.B.*), *Rivista della cooperazione giuridica internazionale* 2004, 173-175, 175.

<sup>125</sup> Laura Tomasi (2004), 'Le coppie non tradizionali (nuovamente) alla prova del diritto comunitario', *Rivista di diritto internazionale privato e processuale* 2004, 977-998.

<sup>126</sup> This approach promptly led some commentators to criticise the Court for acting in a field of law (i.e. marriage law) that as such is not part of EU law, and thereby acting outside its competences; María Elósegui Itxaso (2004), *El TJCE y el matrimonio de transsexuales. Una interpretación "ultra vires"*. *Comentario a la sentencia del Tribunal de Justicia de las Comunidades Europeas*, 7 de enero de 2004, *K.B. y National Health Service Pensions Agency, Secretary of State for Health, Asunto C-117/01*, Unión Europea 2004, 13-24. However, the fact that the EU does not enjoy a competence in the field of marriage law does not prevent marriage from being relevant under EU law; see Christa Tobler (2001), 'Der Begriff der Ehe im EG-Recht', *Die Praxis des Familienrechts* 2001, 479-499.

<sup>127</sup> CJEU, Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757.

<sup>128</sup> CJEU, Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg*, judgment of 10 May 2011, not yet reported.

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Lynskey,<sup>129</sup> the Court in *K.B.* moves away from a direct comparison between men and women. According to this commentator, the decisive element in the Court’s approach lies in the recognition of Ms K.B.’s partner’s post-gender reassignment sex, as otherwise the couple in question would have been a same-sex couple (see also Battaglia).<sup>130</sup>

Taking into account the post-gender reassignment sex of the complainant is a common element in all three decisions by the Court of Justice. It later returned in *Richards* which, however, is again based on a comparison between people as individuals rather than as couples. In *Richards*, the Court stated that cases involving discrimination against transsexual persons on grounds of the gender reassignment that they have undergone must be analysed based on a comparison not between men and women, but rather between the post-operative transsexual and a person of the same sex whose gender is not the result of gender reassignment surgery.

What seems clear after *Richards* is that the comparison to be made has changed since *P. v S.* (Lynskey).<sup>131</sup> Starting from the fact – mentioned earlier – that the Court wishes to respect the post-gender reassignment transsexual’s wish to belong to the relevant sex, the comparison is, technically speaking, no longer between the sexes but rather between persons of the same sex. From a traditional perspective of sex equality law, this makes it rather difficult to see why such cases should be seen as concerning sex equality. To some extent, the case-law discussed seems to recognise the need stated by Advocate-General Tesouro to recognise the fact that, in addition to the man/woman dichotomy, there is a range of characteristics, behaviour and roles shared by men and women, so that sex itself ought rather to be thought of as a continuum (*P. v S.*, para. 17 of the AG’s opinion).

### 3. Possible future developments of CJEU case-law: transposition to other aspects of gender identity and gender expression?

In the cases discussed, it is not discrimination on grounds of transsexuality in general (and much less of gender identity and gender expression) that was held to fall under the prohibition of sex discrimination, but only the specific case of discrimination for a reason related to gender reassignment as apparent in the three cases.<sup>132</sup> Obviously, this is only one particular aspect of the broad spectrum of discrimination on grounds of gender identity and gender expression. The question therefore arises of whether other aspects concerning such discrimination would also be covered by the prohibition of sex discrimination as interpreted by the Court in its transgender case-law. This could include, for example, discrimination against transgender and other trans people who do not wish to undergo gender reassignment, but also discrimination related to persons who present themselves differently to the expectations of the gender role assigned to them at birth, as well as discrimination against intersex people.

As for the narrow case of gender reassignment, even here confusion may arise around what precisely constitutes gender reassignment, i.e. what can be brought within the scope of this category of cases. In this context, it should be noted that none of the cases discussed refers to any surgical status of the applicants or in the case of *K.B.*, the partner of the applicant. Accordingly, there may be some room for interpretation.

Regarding other aspects, it seems clear that they are not at the moment expressly covered by any case-law of the Court of Justice. Also, it might be difficult to find a way of reasoning that would easily include them, so that it could be said that they constitute sex discrimination. Including them would require a broader interpretation of the term “on grounds of sex” than has been used by the Court so far, along the lines suggested by Advocate-General Tesouro in *P. v S.* (para. 17 of the AG’s opinion): “[...] it is necessary to go beyond the traditional classification and recognize

<sup>129</sup> O. Lynskey (2006), (Case note on *Richards*), *Revue du Droit de L’Union Européenne* 2006, 462-466, at 465.

<sup>130</sup> Battaglia (2004), at 602.

<sup>131</sup> *Ibid.*

<sup>132</sup> G.J.J. Heerma van Voss (1997), (Case note on *P. v S.*), *Nederlands tijdschrift voor de mensenrechten/NJCM Bulletin* 1997, 284-286, at 286.

that, in addition to the man/woman dichotomy, there is a range of characteristics, behaviour and roles shared by men and women, so that sex itself ought rather to be thought of as a continuum. From that point of view, it is clear that it would not be right to continue to treat as unlawful solely acts of discrimination on grounds of sex which are referable to men and women in the traditional sense of those terms, while refusing to protect those who are also treated unfavourably precisely because of their sex and/or sexual identity.” In other words, such an interpretation would rely on a modern conception of gender, rather than of biological sex only.

## 4. Application of existing CJEU case-law in the EU Member States

Following the extensive overview of CJEU case-law, we now turn our attention to EU gender equality legislation and its coverage of gender reassignment discrimination. Subsequently we review the quality of its transposition in domestic legislation.

### 4.1 Coverage of gender reassignment in EU gender equality directives

The Goods and Services Directive (Directive 2004/113) was adopted in 2004. It prohibits sex discrimination in access to and supply of goods and services, which are available to the public by both the public and private sectors, and by public bodies. The Directive, however, does not apply to the content of media and advertising or to education.

During the negotiation of the Goods and Services Directive, the Council of the European Union and the European Commission took note of the gender reassignment related case-law of the CJEU. Indeed, while the Goods and Services Directive does not contain an express reference to gender reassignment within its text, the Council and the Commission clearly indicated that trans people are protected under the scope of the Directive, as stated in the minutes of their joint 2606<sup>th</sup> meeting:

“Concerning Article 3 and its application to transsexuals, the Council and Commission recall the jurisprudence of the Court of Justice in case C-13/94 P v S and Cornwall County Council, where the Court held that the right not to be discriminated against on grounds of sex cannot be confined simply to discrimination based on the fact that a person is of one or other sex, and may include discrimination arising from the gender reassignment of a person.”<sup>133</sup>

Two years later, the Recast Directive (Directive 2006/54) was adopted by the European Parliament and the Council with the aim of bringing under one Directive all EU legislation implementing the principle of equal treatment in access to employment, including promotion, and access to vocational training; working conditions, including pay; and occupational social security schemes. This time (and for the first time in EU law), an express mention of gender reassignment was included within the Preamble of the Directive. Recital 3 reads:

“The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.”

The inclusion of this reference within the Preamble indicates that the European Union wanted to give visibility to and ensure the implementation of CJEU gender reassignment case-law within Member States’ domestic legislation.

<sup>133</sup> 2606<sup>th</sup> meeting of the Council of the European Union (Employment, Social Policy, Health and Consumers Affairs) held in Luxembourg on 4 October 2004, Draft minutes, Doc. No. 13369/04 of 27 October 2004, at 7.

However, the reference did not go as far as to require an express mention of gender reassignment in domestic law, the reason being that recitals in preambles of EU directives do not require a direct transposition because their role is to establish the purpose and to set the parameters of the main text of the Directive. Member States were therefore only expected to interpret the meaning of sex in domestic law to cover gender reassignment.

## 4.2 Coverage of gender reassignment in domestic equality legislation

Mapping the exact application of CJEU case-law and transposition of the two Directives with regard to gender reassignment is rather complicated. In 2009 an assessment study<sup>134</sup> of implementation of the Recast Directive among the EU-27 and EEA countries was conducted by the European Network of Legal Experts in the Field of Gender Equality. The study asked whether the novelties and/or clarifications that were introduced into the Directive as a result of the recasting process were implemented in national law, also asking a specific question about gender reassignment. It found out that since the main exercise of the Recast Directive was to consolidate existing European Union gender equality law in the field of employment and occupation, many Member States did not undergo a thorough implementation process (if they undertook one at all), basing their lack of transposition on the premise that all of the provisions were already included in national law.<sup>135</sup>

Further studies about the coverage and meaning of gender reassignment in domestic legislation were conducted by both the FRA (latest in 2010)<sup>136</sup> and EQUINET (2010).<sup>137</sup> Both of these studies shed some light on the differences in understanding of gender reassignment across the European Union, and the diversity between the extensive coverage provided in a handful of countries, the lack of clarity on the extent of coverage in some others and even a complete absence of coverage in a third group of countries.

Further to the above mentioned studies, in preparation of this report a questionnaire was circulated to all National Equality Bodies (NEBs) in May 2011 asking them whether: (i) there is express or implicit protection against gender identity and gender expression discrimination in national legislation, (ii) the NEB is provided with the remit to investigate cases of discrimination on the grounds of gender identity and gender expression, (iii) trans and/or intersex people have submitted cases of discrimination to the NEB, and (iv) the NEB has taken any measures to promote equality for trans and intersex people.<sup>138</sup>

<sup>134</sup> European Network of Legal Experts in the Field of Gender Equality (2009), *The Transposition of Recast Directive 2006/54/EC*, Brussels: European Commission.

<sup>135</sup> *Ibid.*, at 1-7.

<sup>136</sup> European Union Agency for Fundamental Rights (2010).

<sup>137</sup> European Network of Equality Bodies (2009), *Dynamic Interpretation: European Anti-Discrimination Law in Practice V.*, Brussels: EQUINET.

<sup>138</sup> All respective National Equality Bodies answered the questionnaire other than the one from Malta.

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The situation in the Member States and EEA countries vis-à-vis the coverage of gender identity and gender expression is as follows (until end May 2011):

**Table 2**

Country	Implicitly covered under the ground of sex	Autonomous ground	NEB mandated to tackle gender re-assignment discrimination	Trans people that are covered by NEB <sup>139</sup>	Cases that have reached the NEB	NEB's specific measures promoting trans equality
<b>Austria</b>	Yes	No	Yes	All trans may be covered	3 cases concluded	Organised a conference on trans issues (2009)
<b>Belgium<sup>140</sup></b>	Yes	No	Yes	All trans: transsexuals expressly; other trans ad hoc	81 cases (since 2006); 1 legal action ongoing	Specific research; partnership with trans organisations
<b>Bulgaria</b>	No	No, open ended list	Not statutory	All trans may be covered	3 cases; 1 case ongoing	None
<b>Cyprus</b>	Unclear	No	No (only ad hoc)	All trans may be covered	3 cases; 2 cases ongoing	None
<b>Czech Republic</b>	Yes, sexual identification	No	Yes	All trans may be covered	None	None
<b>Denmark</b>	Yes	No	Yes <sup>141</sup>	All trans may be covered	n/a	Trans organisation in NEB committee
<b>Estonia</b>	Yes	No	Yes (NEB interpretation)	All trans may be covered	1 case (since 2005)	None
<b>Finland<sup>142</sup></b>	Yes	No	Yes	All trans and intersex (NEB interpretation)	5-10 cases per annum	Advice to government; focus on trans issues during 2011; dialogue with trans & LGBTI organisations
<b>France</b>	Yes	No	Yes	Transsexuals only, other trans no	4 cases	Dialogue with trans organisations
<b>Germany</b>	Yes	Yes, sexual Identity	Unclear	All trans and intersex (NEB interpretation)	114 enquiries: 98 trans, 16 intersex. No decisions yet	Research
<b>Greece</b>	Yes	No	Yes	All trans may be covered	2 cases (since 2010)	None

Country	Implicitly covered under the ground of sex	Autonomous ground	NEB mandated to tackle gender re-assignment discrimination	Trans people that are covered by NEB <sup>139</sup>	Cases that have reached the NEB	NEB's specific measures promoting trans equality
<b>Hungary</b>	No	Yes, sexual identity	Yes, expressly	All trans may be covered	2 cases (since 2005)	None
<b>Iceland</b>	Unclear	No	Yes	All trans may be covered	1 case (since 2009)	None
<b>Ireland</b>	Yes	No	Yes	All trans may be covered	1 case (decided 2011) <sup>143</sup>	Advice to government
<b>Italy</b>	No	No	No	None	n/a	Dialogue with trans organisations
<b>Latvia</b>	Unclear	No	Yes (NEB interpretation)	All trans may be covered	3 cases (since 2006)	None
<b>Liechtenstein</b>	No	No	No	None	n/a	None
<b>Lithuania</b>	No	No	No	None	n/a	None
<b>Luxembourg</b>	Unclear	No	Yes (Board decision)	All trans may be covered	6 cases (since 2008)	Dialogue with trans organisation
<b>Malta</b>	No	No	No	None	n/a	None
<b>Netherlands</b>	Yes	No	Yes	All trans (NEB interpretation)	22 decisions (since 1998): 19 transsexual, 1 transgender, 1 transvestite.	Dialogue with trans organisation
<b>Norway</b>	Yes	No	Yes	Transsexuals only, other trans no	4 cases, 11 requests for information	Advice to government
<b>Poland</b>	No	No	Not expressly	Unclear	1 case (since 2010)	None
<b>Portugal</b>	No	No	No (only ad hoc)	Unclear	n/a	None
<b>Romania</b>	No	No, open ended list	Not statutory	All trans may be covered	n/a	None
<b>Slovakia</b>	Yes, sex or gender identification	No	Yes, expressly	All trans may be covered	1 case (received 2011), 2 requests for information	None
<b>Slovenia</b>	Yes	No, open ended list	Not expressly	All trans may be covered	2 cases (ground of sexual identity established)	Advice to government

Country		Implicitly covered under the ground of sex	Autonomous ground	NEB mandated to tackle gender re-assignment discrimination	Trans people that are covered by NEB <sup>139</sup>	Cases that have reached the NEB	NEB's specific measures promoting trans equality
Spain <sup>6</sup>		Yes	Yes, sexual identity	Yes, expressly	All trans, expressly covered	n/a	n/a
Sweden		Yes	Yes, transgender identity and expression	Yes, statutory	All trans, expressly covered	25 complaints received on specific ground. A few other cases under sex	Working group on trans issues, action plan (since 2009; advice to government)
UK	GB	No	Yes, gender reassignment	Yes, statutory	Transsexuals expressly covered, other trans no	9 strategic cases; 200 queries (since 2009). 6 additional cases (Scotland).	Capacity building and funding for trans organisations; policy and law review; various specific publications
	NI	Yes	No	Yes	Transsexuals only, other trans no	1 out of court settlement; various enquiries	Advice to government

The table above shows that there are great variations across the European Union and EEA countries when it comes to coverage of trans people under domestic law. It also shows that even though some progress has been registered since 2009,<sup>145</sup> several states do not meet the standards that were set by CJEU case-law. Indeed, based on the information that was collected, it appears that Bulgaria, Italy, Liechtenstein, Lithuania, Malta, Poland, Portugal and Romania fall short of meeting the established principle of including gender reassignment within the meaning of sex. The situation in Cyprus, Iceland, Latvia, and Luxembourg is unclear and coverage is entirely dependent on the respective NEB's willingness. Austria, Belgium, Denmark, Estonia, Finland, France, Greece, Ireland, the Netherlands, Northern Ireland, Norway and Slovenia seem to meet the requirement even though they do not include an express reference in the law. In the Czech Republic and Slovakia the ground of sex is expressly extended to cover sexual

<sup>139</sup> In many cases, no non-transsexual trans cases have reached domestic courts or National Equality Bodies yet. The coverage of all trans people is therefore only a presumption, and future decisions may narrow the interpretation than is provided in this document.

<sup>140</sup> A review of current equality legislation is underway, and express inclusion of the ground of gender identity and expression is being considered.

<sup>141</sup> Danish Institute for Human Rights since March 2011. There is no information about the previous structure.

<sup>142</sup> A new anti-discrimination act is in preparation and is expected to include clear reference to sexual and gender minorities.

<sup>143</sup> Equality Tribunal, Louise Hannon v First Direct Logistics Ltd., Decision No. DEC-E2011-066, 29.03.2011.

<sup>144</sup> Following the new Ley Integral para la Igualdad de Trato y la no Discriminación adopted at the end of May 2011. A new equality body structure will be created.

<sup>145</sup> See 2009 overview and map in Fabeni & Agius, at 21-23.



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identification (and gender identification in the latter) while Germany, Great Britain, Hungary, Spain, and Sweden have an autonomous ground that is equivalent to gender reassignment or gender identity and gender expression. Belgium and Finland are both undergoing a review of existing legislation and are expected to introduce an autonomous ground of gender identity and gender expression in domestic law, thus joining the growing number of countries that are opting for a separate ground of anti-discrimination.

While the above assessment may seem to indicate that there is a five-tier distinction,<sup>146</sup> a more nuanced review is necessary. EQUINET acknowledges this in its publication by stating that, “[t]here is some variation in the scope of protection afforded to transsexual people depending on which Member State they happen to live in: for example, in Austria, discrimination arising from gender reassignment covers discrimination on grounds of gender reassignment and gender identity; in Cyprus discrimination on grounds of ‘sexual identification’ is deemed to fall within sex discrimination.”<sup>147</sup> Indeed, gender reassignment is not in itself a ground of anti-discrimination but a process that many trans people undergo. In some countries, the term is restrictively reserved for transsexuals, while in others it is applied more broadly to cover all trans people irrespective of whether or not they intend to undergo any form of physiological gender reassignment. A precise assessment of the scope that the term encompasses in domestic settings remains difficult. This is due to the fact that in several states few cases have been considered by courts and equality bodies and hence to date a legal interpretation of the term is still academic. Additionally, beyond the phrasing of the law, it is important to review trans people’s (i) access to justice through the domestic NEB structure and the judicial system, as well as (ii) whether any initiatives promoting equality for trans people and existing remedies have been undertaken.

## 5. Possible future development of CJEU case-law: extension to discrimination against transsexuals more generally or to other trans people?

No cases regarding non-transsexual trans persons have reached the CJEU, since all three cases that have reached the CJEU involved post-op transsexual women or, in the case of *K.B.*, her partner. The CJEU has thus not yet addressed discrimination against the broader spectrum of trans people who have not undergone and/or do not intend to undergo gender reassignment. Additionally, to date the CJEU has restricted itself to interpreting discrimination on the basis of gender reassignment as a form of sex discrimination without emancipating discrimination on the ground of gender identity and gender expression as a distinct form of discrimination. In 2010, the ECtHR moved away from this approach and recognised transsexuality as a protected stand-alone ground under Art. 14 ECHR in the case of *P.V. v. Spain*.<sup>148</sup> This development is in line with the growing recognition that gender identity and gender expression do indeed constitute a separate ground of discrimination in human rights law (see Chapter II for a thorough overview). Furthermore, the Council of Europe’s *Convention on Preventing and Combating Violence Against Women and Domestic Violence* adopted on 7 April 2011 was the first international convention to include an express ground of gender identity in Art. 4 (3).

The Council of Europe Commissioner for Human Rights called on Member States of the Council of Europe to:

“1. Implement international human rights standards without discrimination, and prohibit explicitly discrimination on the ground of gender identity in national non-discrimination legislation. The Yogyakarta

<sup>146</sup> (i) No coverage, (ii) unclear, (iii) according to CJEU case-law, (iv) according to CJEU case-law with an express clarification of sex including trans people, (v) autonomous ground.

<sup>147</sup> European Network of Equality Bodies (2010), *Dynamic Interpretation: European Anti-Discrimination Law in Practice V*. Brussels: EQUINET, at 30.

<sup>148</sup> ECtHR, *P.V. v. Spain* (Application no. 35159/09), judgment of 30 November 2010.

Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity should be used to provide guidance for national implementation in this field [...]."<sup>149</sup>

Similarly, the FRA is of this conviction that:

"[T]ransgenderism may not have to be reduced to [a] narrow understanding, linking it to 'gender reassignment' defined as 'a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process'. Whereas transgender people in this narrow understanding do find themselves in a specific situation due to the operation of gender reassignment [...] there is no reason not to extend the protection from discrimination beyond these persons, to cover 'cross dressers, and transvestites, people who live permanently in the gender 'opposite' to that on their birth certificate without any medical intervention and all those people who simply wish to present their gender differently'. It has been recommended that protection from discrimination on grounds of 'gender identity', more generally, should encompass not only transsexuals (undergoing, intending to undergo, or having undergone a medical operation resulting in gender reassignment), but also those other categories."<sup>150</sup>

Additionally, a growing number of states have introduced an autonomous ground equivalent to gender identity and gender expression in national law (five so far), or at least an express clarification that the ground of sex includes sexual [and/or gender] identity (two so far). Interestingly, whilst not having an autonomous ground referring to gender identity and gender expression in national law, the NEBs of Belgium,<sup>151</sup> Finland<sup>152</sup> and the Netherlands<sup>153</sup> have extended the current grounds of sex (or gender) included in domestic legislation to cover all trans people. The latter group of countries has also successfully concluded cases brought forward by non-transsexual trans persons thus confirming that current formulations, albeit not ideal, can already be effectively used to cover all trans persons.

Returning to the Court of Justice, it remains to be seen whether the ECtHR inclusion of transsexuality as a stand-alone ground under Art. 14 ECHR will have a bearing on future CJEU case-law. In *K.B.*, the CJEU took the position that Art. 141 EC (post-Lisbon Art. 157 TFEU) in principle precludes discriminatory legislation that is in breach of the ECHR. However, this does not mean that the CJEU can easily follow the same approach. The reason for this is that, unlike Art. 14 ECHR which is openly formulated, EU law is based on a closed list of discrimination grounds which cannot be enlarged by the Court. However, what the Court can and should do is to interpret the existing discrimination grounds in a purposive manner, giving them the broadest possible meaning in order to live up to the Union's commitment to respect for human dignity and human rights, including the rights of persons belonging to minorities (Art. 2 TEU).

The above exposé shows that there is room for a broader interpretation of existing EU equality law in light of current high standards in human rights regarding trans people. Such future developments may require that the Court moves away from a binary sex model and indeed reflect on and update the observations made by Advocate-General Tesouro in his opinion with regard to the *P. v S.* case, where he argued that (para. 17 of the AG's opinion):

"17. [...] it is necessary to go beyond the traditional classification and recognise that, in addition to the man/woman dichotomy, there is a range of characteristics, behaviour and roles shared by men and women, so that sex itself ought rather to be thought of as a continuum. From that point of view, it is clear that it would not

<sup>149</sup> Commissioner for Human Rights (2009), at 45 Rec.1.

<sup>150</sup> European Union Agency for Fundamental Rights (2008), at 131.

<sup>151</sup> The Institute for the Equality of Women and Men has developed an *ad hoc* practice that consists of receiving all transgender people (in a broad sense).

<sup>152</sup> The Ombudsman for Equality has decided that the Equality Act applies widely to trans people (among others transgender and transvestite individuals) and intersex people.

<sup>153</sup> See *Commissie Gelijke Behandeling* [Equal Treatment Commission], Oordeel 2007-201 (travestie), 15.11.2007.

be right to continue to treat as unlawful solely acts of discrimination on grounds of sex which are referable to men and women in the traditional sense of those terms, while refusing to protect those who are also treated unfavourably precisely because of their sex and/or sexual identity.

The argument just put forward, attractive as it is, requires a redefinition of sex which merits deeper consideration in more appropriate circles; consequently, this is not the path that I propose that the Court should follow. I fully realise that from time immemorial a person's sex has merely been ascertained, without need of the law to define it. The law dislikes ambiguities and it is certainly simpler to think in terms of Adam and Eve.

Having said that, I regard as obsolete the idea that the law should take into consideration, and protect, a woman who has suffered discrimination in comparison with a man, or vice versa, but denies that protection to those who are also discriminated against, again by reason of sex, merely because they fall outside the traditional man/woman classification."



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## Part IV

# Legal analysis of gender identity and gender expression discrimination from a systematic point of view

The following part of the report turns to gender identity and gender expression discrimination in a broader sense, i.e. going beyond the specific case of gender reassignment discrimination. It discusses, from a systematic point of view, a number of challenges to the legal analysis of discrimination cases, the burden of proof and remedies and sanctions in cases where discrimination has been found. Given that so far the Court's case-law on trans issues is based on the prohibition of sex discrimination, the legislation referred to in the following will mostly be from that particular field.

## 1. Discrimination

### 1.1 Discrimination grounds and general principles of equal treatment and non-discrimination

Whether or not a legal argument of discrimination will be successful in a specific case depends in the first place on the existence of an applicable legal rule that prohibits the discrimination in question. In the EU law system, such rules may be found on different levels, including the general principle of equal treatment or non-discrimination, the general principles of equal treatment or non-discrimination in relation to specific grounds and explicit equality or non-discrimination provisions.

In practice, the search will always begin at the most concrete level, i.e. that of explicit legal provisions. Both the TFEU and secondary law contain explicit equality or non-discrimination provisions. However, on this level EU law is characterised by a limited list of discrimination criteria, which in addition apply in a limited factual context (i.e. they have a limited field of application). As was stated earlier,<sup>154</sup> neither gender identity nor gender expression feature among these grounds, though discrimination related to gender reassignment is seen as sex discrimination. This means that this type of discrimination is banned in the fields of employment and occupation, including occupational social security (Art. 157 TFEU and the Recast Directive 2006/54), statutory social security (Directive 79/7) and goods and services (Directive 2004/113).

Next, it should be noted that within this field not only the specific legislative measures just mentioned may play a role, but also certain general principles. As the Court of Justice has explained on various occasions, explicit equality or non-discrimination provisions are specific expressions of general principles of equal treatment or non-discrimination, e.g. in relation to sex (*Defrenne III*),<sup>155</sup> age (*Mangold*,<sup>156</sup> *Kücükdeveci*)<sup>157</sup> and sexual orientation (*Römer*). Together with the provisions of the Charter of Fundamental Rights, the general principles of equality and non-discrimination form part of EU primary law that may, in certain circumstances, be invoked by individuals as a matter of the primacy of EU law over national law (e.g. *Mangold*, *Kücükdeveci*). The general principles of equal treatment and non-discrimination in relation to specific grounds are relevant wherever there is no more specific rule of EU law that could apply and where, in addition, the situation at issue falls within the scope of EU law (*Römer*, para. 60). Practical examples of a lack of more specific EU law are situations where there is no horizontal direct effect of a specific non-discrimination provision (*Kücükdeveci*) or where the period for implementation of a directive has not yet expired (*Mangold*). So far, the Court's case-law in this context is limited to age discrimination and discrimination on grounds of sexual orientation (*Römer*, where the Court, however, found that the case at issue did not fall within the scope of EU law). However, there is no reason to assume that it must be limited to the types of discrimination

<sup>154</sup> See above III.1.

<sup>155</sup> CJEU, Case 149/77 *Gabrielle Defrenne v SABENA* [1978] ECR 1365.

<sup>156</sup> CJEU, Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

<sup>157</sup> CJEU, Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG*, judgment of 19 January 2010, not yet reported.

covered by Directive 2000/78.<sup>158</sup> Thus the general principle of equal treatment on grounds of sex may also be relevant in the context of sex discrimination in the context of gender reassignment.

Regarding other aspects of disadvantage caused in the context of gender identity and gender expression which are outside the reach of sex discrimination, the only possibility would be to argue that they are contrary to the general principle of equal treatment or non-discrimination in its most general form, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (e.g. *Sturgeon*,<sup>159</sup> para. 48). This principle is relevant where there is no more specific principle or rule on equality or discrimination that could apply to the case in question. It should be noted that in this form the general principle of equality or non-discrimination does not focus on any particular discrimination criterion but is independent of it. This makes it open for use in very diverse contexts, including gender identity or gender expression. However, in practice the challenge of applying the principle in concrete situations lies in the issue of comparability, which has proven open to all sorts of interpretation. Accordingly, there is a danger that national courts might find people suffering from gender identity or gender expression discrimination to be differently situated than other people, thereby preventing a finding of discrimination. At the same time, there is case-law from other contexts where the Court of Justice has taken a generous approach to the issue of comparability (e.g. *Sturgeon*, regarding air passenger rights). Accordingly, reasoning on the basis of the general principle of equal treatment should not be excluded from the outset as a potentially helpful strategy for trans people.

## 1.2 Determination of the relevant discrimination criterion

Examining an allegation of discrimination in any concrete case requires a careful analysis of the facts of the case, including in particular the ground on which the alleged discrimination is based. In practice, this may pose certain challenges.<sup>160</sup> *K.B.*, discussed earlier, may serve as an example.

As was noted by Advocate-General Ruiz Jarabo Colomer in his opinion on this case, different “interpretative approaches to the problem” at issue in the *K.B.* were possible (*K.B.*, para. 63 et seq. in the AG’s opinion). The applicant, Ms K.B., argued that the decision denying her the right to nominate her partner, Mr R., as the beneficiary of the widower’s pension was made solely for a reason related to R’s gender reassignment and that for that reason it amounted to sex discrimination (*K.B.*, para. 17 and 18). However, according to Battaglia<sup>161</sup> it would also have been possible for Ms K.B. to use the argument of discrimination on grounds of sexual orientation, based on the fact that in the UK at that time a post-gender reassignment transsexual person legally retained his or her original legal sex. As R. was legally born a female, she and her partner formed, from a legal point of view, a same-sex couple which, as such, was barred from marrying. According to Battaglia, such an approach might have led to a very different (i.e. less successful) outcome for the applicant (however, as Lhernould<sup>162</sup> rightly points out, this has changed with the adoption of Directive 2000/78). Yet another approach was suggested by AG Ruiz Jarabo Colomer but then discarded in favour of “a less audacious solution”, namely to focus on the different treatment of formally married couples and non-married couples. According to the AG, in a mature society where substance prevails over form consideration should be given to the suitability of a purely formal contract to symbolise a community based on solidarity and to

<sup>158</sup> Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

<sup>159</sup> CJEU, Joined cases C-402/07 and C-432/07 *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH (C-402/07) and Stefan Böck and Cornelia Lepuschitz v Air France SA (C-432/07)* [2009] ECR I-10923.

<sup>160</sup> See Tobler (2005, Indirect Discrimination), at 334.

<sup>161</sup> Battaglia (2004), at 602.

<sup>162</sup> J.-Ph. Lhernould (2004), ‘Transsexualisme, concubinage homosexuel et hétérosexuel et prestations sociales’, *Revue de jurisprudence sociale* 2004, 263-265, at 265.

the possibility that relations of another kind merit equal protection. Accordingly, it would be appropriate to equate cases of genuine cohabitation having no official recognition to marriage.

This illustrates that a given case may present different possibilities of discrimination arguments, from which the complainant (and ultimately also the courts) must choose. According to Battaglia,<sup>163</sup> the approach reflected in the Court's answer in *K.B.* was ultimately due to the fact that for Ms K.B. it was "absolutely crucial that the UK authorities should recognise that R. was a man". That determined the form that her argument took and that in turn shaped the preliminary questions asked by the national court to the Court of Justice.

### 1.3 Discrimination by association

More recently, the Court's decision in the case of *Coleman*<sup>164</sup> has added a new element in EU non-discrimination law that might also play a role in the context of gender identity and gender expression. The Court held in *Coleman* that the concept of discrimination on grounds of disability covers not only cases where the victim of unfavourable treatment is disabled, but also cases where the disability concerns another person but reflects back on the person in question. In *Coleman*, a female employee suffered unfavourable treatment because of the severe disability of her child. In other words, she suffered discrimination because of her association with a disabled person.

The Court explains its finding in *Coleman* with the purpose of Directive 2000/78, which is to combat all forms of discrimination on grounds of disability in the context of employment and occupation. The Court in this context states that "[t]he principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1. That interpretation is supported by the wording of Article 13 EC, which constitutes the legal basis of Directive 2000/78, and which confers on the Community the competence to take appropriate action to combat discrimination based, inter alia, on disability." (*Coleman*, para. 38). Given this reasoning, it is to be assumed that the concept of discrimination by association is not limited to the specific case of discrimination on grounds of disability, but could also play a role in other contexts, among which e.g. discrimination on grounds of gender reassignment.

In particular, it could be argued that cases involving couples as in *K.B.* could also be seen in this context. More specifically, it could be argued that the discrimination at issue in a case like *K.B.* was due to Ms K.B.'s association with a post-gender reassignment transsexual person. However, it should be noted that the situation in cases concerning couples such as *K.B.* (as well as other cases in other legal contexts, such as *Grant*, *Maruko* and, most recently, *Römer*, all concerning same-sex couples) is different from that in *Coleman*. Whilst the latter concerned the treatment of one person only, namely the employed mother of the disabled child, the couples' cases concerned the rights of two persons, namely the worker (e.g. Ms K.B. who is barred from nominating her female-to-male transsexual partner as the beneficiary of a widower's pension) and the worker's partner (e.g. Ms K.B.'s partner who is denied rights that he otherwise would derive from his partner). However, the present writers believe that this difference should not be decisive. Accordingly, the concept of discrimination by association should be seen as an additional tool that may strengthen the position of claimants in trans discrimination cases.

### 1.4 Direct and indirect discrimination

Once the relevant discrimination ground has been identified, the next question is that of the form of discrimination that might be at issue in the case at hand. The most recent generation of EU social non-discrimination law

<sup>163</sup> *Idem*, at 610.

<sup>164</sup> CJEU, Case C-303/06 *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.

distinguishes between different forms of discrimination (i.e. direct discrimination, indirect discrimination, harassment and instruction to discriminate). The oldest distinction, originally developed by the Court of Justice, is that between direct and indirect discrimination.<sup>165</sup> It concerns the direct or indirect reliance on the discrimination criterion in a given case. It should be noted that this is a matter different from the direct or indirect link of the treatment in question with the factual situation covered by the law (e.g. the unfavourable treatment of post-gender reassignment persons under the law in relation to the right to marry, which indirectly affected the entitlement to a pension in *K.B.*, because this entitlement was limited to married persons).<sup>166</sup>

Put simply, the legal concept of direct discrimination concerns obvious forms of discrimination, whilst the concept of indirect discrimination relates to more hidden forms of discrimination. According to Art. 2(1)(a) of Directive 2006/54 (Recast Directive, which is used here as an example because of its relevance in the context of discrimination on grounds of gender-reassignment), direct discrimination exists:

“where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation; [...]”.

In contrast, under Art. 2(1)(b) of Directive 2006/54 there is indirect discrimination:

“where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary; [...]”.

The same definitions can also be found in the Goods and Services Directive (Art. 2 of Directive 2004/113). Given that they essentially reflect the Court’s earlier case-law, it is to be assumed that these definitions also apply in areas where EU legislation does not yet contain express legal definitions (e.g. Directive 79/7 on statutory social security).

In practice, the delimitation between direct and indirect discrimination is less straightforward than it might appear based on the above definitions. Case-law such as *Nikoloudi*<sup>167</sup> and *Maruko* (already mentioned) shows that there may be direct discrimination even where unfavourable treatment is based on an apparently neutral differentiation criterion, namely where reliance on such a criterion means that all persons of one particular group (i.e. women in the case of *Nikoloudi*, and gay men, lesbians and bisexuals in the case of *Maruko*) are disadvantaged. In such a case, the fact that the criterion relied on does not formally correspond to the prohibited criterion does not prevent a finding of direct discrimination.<sup>168</sup>

From a practical perspective, the qualification as direct, rather than as indirect, discrimination may be important in two contexts. The first concerns the possibilities of justification for the discrimination in question. As a rule, the justification possibilities for direct discrimination are much more limited than in the case of indirect discrimination, which by way of definition includes a broad possibility of objective justification. Conversely, for direct discrimination EU law normally states a limited number of justification grounds (the most notable exception being age discrimination under Art. 6 of Directive 2000/78, but also sex discrimination under Directive 2004/113).<sup>169</sup>

The Court’s case-law on sex discrimination in the context of gender-reassignment has led to some academic discussion as to the form of discrimination at issue. In fact, the Court itself does not explicitly qualify the discrimination

<sup>165</sup> See generally Tobler (2005, Indirect Discrimination), also Tobler (2008).

<sup>166</sup> See Violini (2004), at 415; also Tobler (2005, Indirect Discrimination), at 215/216.

<sup>167</sup> CJEU, Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE* [2005] ECR I-1789.

<sup>168</sup> See Christa Tobler & Kees Waaldijk (2009), (Case note on *Maruko*), *Common Market Law Review* 2009, 723-746.

<sup>169</sup> See also further below IV.2.



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as either direct or indirect (Foubert).<sup>170</sup> However, it seems clear that these cases concern direct rather than indirect sex discrimination (Anselmo,<sup>171</sup> also Trucco<sup>172</sup>). Rather than using language that points to indirect discrimination, the Court simply equates gender reassignment discrimination to sex discrimination, in the same way as it did with pregnancy in the earlier case of *Dekker*.

Whether the concept of (direct) sex discrimination is also capable of covering other aspects of gender identity or gender expression than gender reassignment remains to be seen. There is no case-law on such issues yet. In the present writers' opinion, there is room for further development. For example, Wintemute<sup>173</sup> argued already in 1997 that the concept of direct sex discrimination should be understood as also covering other situations, including notably sexual orientation and sex-distinct dress codes. The author based his argument on a creative approach linked, among other things, to traditional sex roles. Whilst the Court did not follow him in relation to sexual orientation (*Grant*), there is no case-law yet in relation to other issues such as dress codes. In principle, the possibility that at a later point in time the Court might include other issues is not excluded.

Neither is there any case-law from the Court of Justice on indirect sex discrimination in the context of gender reassignment. Given the definition of indirect discrimination, such cases would have to involve a criterion different from gender reassignment which, however, would put persons undergoing a gender reassignment at a particular disadvantage compared with persons who are not in this situation. A practical example would be a refusal to hire a male-to-female trans person with the argument that the employer's clients would be confused by the candidate's deep voice. A further example would be the inability to take leave flexibly and restrictions on sick leave which create an extra hurdle for people who intend to undergo gender reassignment and for that reason need chunks of time away from work.

## 1.5 (Sexual) Harassment and instruction to discriminate

Two further forms of discrimination in the most recent generation of non-discrimination legislation concern harassment and instruction to discriminate. Again, the Recast Directive (Directive 2006/54) shall serve as an example; similar definitions can be found in the Goods and Service Directive (2004/113).

According to Art. 2(1)(c) of Directive 2006/54, there is harassment:

“where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment; [...]”

In addition, Art. 2(1)(d) contains a definition of sexual harassment which exists:

“where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment; [...]”

<sup>170</sup> Foubert (2004), at 442/443.

<sup>171</sup> Alice Anselmo (2004), I transessuali hanno diritto di sposarsi ... e di ottenere la pensione di reversibilità, *Diritto comunitario e degli scambi internazionale* 2004, 719-737, at 735/736.

<sup>172</sup> Lara Trucco (2004), *Transessuali e Regno Unito: anche la Corte di giustizia censura i britannici*, *Diritto pubblico comparato ed europeo* 2004, 825-831, at 830.

<sup>173</sup> Wintemute (1997).

Further, according to Art. 2(b) of Directive 2006/54, the concept of discrimination on grounds of sex also covers “instruction to discriminate against persons on grounds of sex”.

Even though there is no case-law from the Court of Justice yet on these issues in relation to gender-reassignment, it is clear that these forms of discrimination are also relevant in this particular context. A practical example of harassment might be denigrating remarks at work about female employees with “male voices”.

## 2. Justification

Under EU law, discrimination is usually not prohibited in an absolute manner. Rather, the law provides for possibilities for justification or derogation. As a general rule, direct discrimination can be justified only based on a limited list of derogation grounds that are explicitly listed in the law (statutory derogation grounds). In contrast, in the context of indirect discrimination there is always the possibility of objective justification – an open concept that is not based on a limited list of grounds – which may prevent a finding of discrimination.

If compared to most other non-discrimination directives, the Goods and Services Directive is special in that it contains a general possibility of justification even for direct discrimination. According to Art. 4(5), the Directive “shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.<sup>174</sup>

Other legislation on sex discrimination provides for a number of statutory derogation grounds. The statutory derogation grounds available in a specific factual context depend on the applicable legislation. For example, Art. 14(2) of the Recast Directive, which relates to employment and occupation, provides for justification based on genuine occupational requirements: “Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.” Further, Art. 28(1) generally provides that the Recast Directive is without prejudice to provisions under national law concerning the protection of women, particularly as regards pregnancy and maternity.

Given that under EU law discrimination on grounds of gender reassignment is sex discrimination, these derogation grounds are also relevant in this particular context. However, there is no case-law from the Court of Justice on such issues yet. In particular, none of the trans cases decided by the Court touches upon justification.

## 3. Positive action

The same is true for positive action: there is no case-law on this issue in relation to gender reassignment yet. However, given the vulnerable position of trans people, it is clear that positive action measures could serve as a valuable instrument to better their situation.

<sup>174</sup> The Goods and Services Directive also contains a special derogation rule in relation to insurance and actuarial factors (Art. 5(2) of Directive 2004/113/EC). However, this provision was declared invalid by the Court of Justice with effect from 21 December 2012 (CJEU, Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres*, judgment of 1 March 2011, Grand Chamber, not yet reported.). It is therefore not discussed further in this report.

Positive action is based on the recognition that equal treatment (i.e. applying the same rule for all) may lead to an unequal outcome, and that therefore preferential treatment is needed. Under EU law, provisions on positive action can be found in different places. In the Treaty on the Functioning of the European Union, Art. 157(4) provides:

“With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

Art. 3 of the Recast Directive contains a reference to this provision. In the Goods and Services Directive, Art. 4(5) provides that the directive “shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

## 4. Proof

### 4.1 Burden of proof

EU law is based on the principle that where there is right, there must be a remedy.<sup>175</sup> Accordingly, victims of alleged discrimination must be able use judicial procedures in order to complain about the discrimination (e.g. Art. 17 of the Recast Directive, Directive 2006/54/EC). Again as a result of the Court of Justice’s case-law, the most recent generation of secondary EU law on discrimination contains explicit rules on the burden of proof, which also apply in the context of discrimination in relation to gender reassignment. For example, Art. 19(1) to (3) of the Recast Directive provide:

- “1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.”

Following these rules, a victim of alleged discrimination must establish a so-called *prima facie* case of discrimination (“establish facts from which it may be presumed that there has been direct or indirect discrimination”). Following this, the burden of proof shifts to the alleged discriminator who then has to show that there has been no discrimination (notably due to the existence of justification).

<sup>175</sup> For this and the following, see already Christa Tobler (2005), Remedies and Sanctions in EC non-discrimination law (for the European Commission), Luxembourg: Office for Official Publications of the European Communities 2005.

## 4.2 Statistical evidence

How difficult it may be in practical terms to prove (*prima facie* discrimination) depends largely on the required level of proof. This may pose challenges especially in the context of indirect discrimination. Helpfully, modern EU legislation allows for a generous approach in this context, since it is sufficient that the measure in question ‘would’ put certain persons at a particular disadvantage, i.e. if it is liable to have the required disparate effect. Depending on the circumstances, this may be easier than a test based on statistics, since the courts will be able to rely on common knowledge (e.g. *Kachelmann*),<sup>176</sup> on obvious facts (e.g. *Schnorbus*)<sup>177</sup> or on their conviction (e.g. *O’Flynn*,<sup>178</sup> concerning discrimination on grounds of nationality).

With regard to statistical proof, to obtain it may pose a number of challenges, including in particular the definition of the right comparators, the appropriate moment or time period for the comparison, the finding of statistical material concerning the relevant groups, and the relevance or significance of the statistical material relied on. Finally, once relevant statistical material is available, it must be determined precisely which figures have to be taken into account in order to establish the required disparity of effect.

The cases relating to gender reassignment discrimination that so far have come to the Court of Justice do not touch upon these issues. This is perhaps not surprising considering the fact that they concern direct sex discrimination in relation to concrete individuals where the difference in treatment was evident as such. In a broader context, statistics may be helpful to show the extent of disadvantage suffered by trans people. For example, research has shown that unemployment figures among trans people are much higher than among the non-trans population (Commissioner for Human Rights).<sup>179</sup> Such information may be helpful when arguing that the refusal to hire a trans person is linked to his or her being trans.

## 5. Remedies and sanctions

Once discrimination has been found, the victim is entitled to a substantive remedy. Again, modern EU law on this issue is the result of the case-law of the Court of Justice. Art. 18 of the Recast Directive provides:

“Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.”

Art. 18 has to read together with Art. 25 of the same Directive:

“Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate

<sup>176</sup> CJEU, Case C-322/98 *Bärbel Kachelmann v Bankhaus Hermann Lampe KG* [2000] ECR I-7505.

<sup>177</sup> CJEU, Case C-79/99 *Julia Schnorbus v Land Hessen* [2000] ECR I-10997.

<sup>178</sup> CJEU, Case C-237/94 *John O’Flynn v Adjudication Officer* [1996] ECR I-2617.

<sup>179</sup> Commissioner for Human Rights (2009), at 30.

and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.”

In recent years, the Court emphasised the practical meaning of enforcement of non-discrimination law in its judgment in the case *Jonkman*.<sup>180</sup> Not only does the victim of discrimination have a right to be treated in the same way as the comparator person or group, where national law is at issue the Member State concerned must adapt it in such a way that all further discrimination is avoided.

## 6. Multiple discrimination

Finally, practical difficulties may arise because a given case may involve several discrimination grounds at once. For example, cases involving sex discrimination in the context of gender-reassignment may at the same time be linked to other discrimination grounds, e.g. religion or age. Under EU law, the possibility of multiple discrimination<sup>181</sup> is explicitly recognised in Directive 2000/43 and Directive 2000/78, where reference is made to the fact that women are often the victims of multiple discrimination (recitals 14 and 3 of the preambles of the two Directives, respectively).

On the practical level, multiple discrimination often poses challenges in view of the differences in scope of the relevant laws and in the derogations that they permit.<sup>182</sup> On the level of scope, it is possible that a given case is covered by EU law (or by national law implementing it) only in relation to one discrimination ground but not in relation to another, for example when the alleged discrimination concerns access to services (e.g. a visit to a restaurant) and is based on combination of discrimination on grounds of sex and religion: the Goods and Services Directive (which concerns sex discrimination) covers access to services, but Directive 2000/78 (which concerns, among others, discrimination on grounds of religion) does not. On the level of justification, different forms of justification may apply in relation to the different types of discrimination at issue in a case of multiple discrimination. For example, in a case combining direct discrimination on grounds of religion and indirect discrimination on grounds of sex, the broad possibility of objective justification is available in the context of the latter, but not in the context of the former. It is suggested that in cases where both types of discrimination are indissociably linked, national courts should focus on the higher level of protection from discrimination.

One possible solution for such issues is that the national law of the Member States provides for a broader scope and more discrimination grounds than are required by EU law. Overall, wherever possible in the applicable legal framework the national courts should appreciate the complexity of multiple discrimination cases. In particular, they should take into account the aggravating nature of multiple discrimination when they determine the sanctions for such discrimination.<sup>183</sup>

Finally, a note on terminology: in a strict sense, the term “multiple discrimination” refers only to situations where the different grounds operate separately. The strict terminology distinguishes multiple discrimination from compound discrimination (which occurs where a person suffers discrimination on the basis of two or more grounds at the same time and where one ground adds to discrimination on another ground) and from intersectional discrimination (which occurs where several grounds operate and interact with each other at the same time in such a way that they are inseparable).

<sup>180</sup> CJEU, Joined cases C-231/06 to C-233/06 *Office national des pensions v Emilienne Jonkman and Hélène Vercheval; Noëlle Permesaen v Office national des pensions* [2007] ECR I-5149.

<sup>181</sup> On multiple discrimination, see e.g. Dagmar Schiek & Victoria Chege (2009), *European Union Non-Discrimination Law. Comparative perspectives on multidimensional equality law*, London/New York: Routledge-Cavendish 2009.

<sup>182</sup> On this and the following, see already Tobler (2008), at 44/45.

<sup>183</sup> As is provided for under Romanian law; European Commission (2007), *Tackling Multiple Discrimination. Practices, Policies and Laws*, Luxembourg: Office for Official Publications of the European Communities, at 20.

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# Part V

## Case studies of national legislation and case-law on gender identity and gender expression discrimination

Part 1 has provided an overview of the various problems that trans people face as a result of gender stereotypes, problems with gender recognition laws and structural discrimination in various fields of life. In this part we refer back to some of the problems raised in this document and provide good practice examples from national legislation, case-law and practice against trans discrimination, with a particular focus on anti-discrimination law and mechanisms, gender recognition and protection from bias-motivated crime. It should be noted that while good practices can be found in some European countries, the legal and social situation for most trans people living in Europe remains very difficult.<sup>184</sup>

## 1. Best practice in equality legislation and case-law

### 1.1 Legal coverage of gender identity and gender expression

Equality legislation in **Sweden** was recast in 2008, and brought all previous equality legislation into one Act of laws. In a parallel process the previous four single strand Equality Ombudsmen were also brought together into one consolidated Equality Ombudsman. In fact, the adoption of the *Discrimination Act* (SFS 2008:567) and the *Act Concerning the Equality Ombudsman* (SFS 2008:568) consolidated existing equality legislation by extending the highest standard of protection to all equality grounds without hierarchy or distinction.<sup>185</sup> The scope of the legislation was also broadened well beyond minimum EU equality standards, covering working life; the education system; labour market policy activities and employment services not under public contract; starting or running a business and professional recognition; membership in trade unions and employers' associations; goods, services and housing; public assemblies; health and medical care; social services; the social insurance system; unemployment insurance; state financial assistance for studies; national military service and civilian service; and public employment.

Importantly, in this recasting process the ground of *transgender identity or expression* was introduced as a new ground of anti-discrimination along with the existing six grounds of Art. 19 TFEU and EU equality directives. Ch.1 Sec.1 of the *Discrimination Act* states:

“The purpose of this Act is to combat discrimination and in other ways promote equal rights and opportunities regardless of *sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.*” (*emphasis added*)

The reformulation of this law is particularly interesting. While coverage of discrimination against transsexuals remained under the ground of sex as per CJEU case-law, all other trans people were provided with new legal certainty and covered under the inclusive ground of transgender identity or expression. A clarification about this is provided in Ch.1 Sec. 5 which defines the two grounds as follows:

- “1. Sex: that someone is a woman or a man.
2. Transgender identity or expression: that someone does not identify herself or himself as a woman or a man or expresses by their manner of dressing or in some other way that they belong to another sex.”

The Equality Ombudsman has since its inception advocated for the ground of discrimination to be changed from transgender identity or expression to *gender identity and gender expression*. This amendment would make it clear that the ground applies to everyone without distinction, and remove any possible stigma that trans people may be

<sup>184</sup> See Commissioner for Human Rights (2009).

<sup>185</sup> Both laws entered into force on 1 January 2009.

subjected to as a result of the direct legal reference. The Ombudsman’s proposed definition of gender identity and gender expression is:

“Gender identity or expression: a person’s identity or expression in terms of clothing, mannerisms and behavior with regards to gender.”

## 1.2 National Equality Body covering gender identity and gender expression

In **Sweden**, the *Discrimination Act* and the *Act Concerning the Equality Ombudsman* contain cross references to each other and provide the Equality Ombudsman with the statutory opportunity to carry out legal proceedings in cases of discrimination (including on the grounds of sex, transgender identity or expression). In fact, *The Act Concerning the Equality Ombudsman* provides the Equality Ombudsman with a wide remit to ensure that discrimination “does not occur in any areas of the life of society”, “promote equal rights and opportunities” (section 1) and “provide advice and other support so as to help enable anyone who has been subjected to discrimination to claim their rights.” (section 2). Additionally Section 3 empowers the Ombudsman to:

- inform, educate, discuss and have other contacts with government agencies, enterprises, individuals and organisations,
- follow international developments and have contacts with international organisations,
- follow research and development work,
- propose legislative amendments or other anti-discrimination measures to the Government, and
- initiate other appropriate measures.”

The Equality Ombudsman can initiate investigations based on complaints that are lodged to the Ombudsman’s office. If the investigations demonstrate that discrimination or unfair treatment can be understood to have occurred, the Ombudsman first tries to negotiate a settlement (voluntary agreement) between the complainant and the organisation, employer or body responsible for the discrimination. If no settlement is reached the Equality Ombudsman may proceed to take the case to court. Court cases concerning employment and occupation are brought to the Labour Court whilst cases concerning all other areas covered by the *Discrimination Act* are taken to the general courts.

The Equality Ombudsman uses its wide remit to proactively advocate for equality on all grounds, and addresses structural obstacles and discrimination in all spheres of life. For example, because the ground was still largely unknown in Sweden, during 2009 the Equality Ombudsman set up an internal working group tasked with presenting strategies and an action plan for the Ombudsman’s work on gender identity or expression. Additionally, the Ombudsman can propose amendments to governmental policies and legislation (e.g. gender recognition) in accordance with current highest standards and human rights principles.

The NEBs of **Belgium**, **Finland** and **Great Britain** have produced an interesting body of work that deserves due credit. In **Belgium** the Institute for the Equality of Women and Men has taken a proactive role, and during 2008-2009 commissioned a thorough study on the social and legal situation of transgender people in Belgium<sup>186</sup> with the aim of mapping the discrimination and inequalities in practice, policy and legislation faced by transgender people. Following this study the Institute is working with two trans organisations to discuss joint actions and projects. A study is currently underway to assess how best to provide trans people with legal certainty in equality legislation and other proposals towards legal amendments. Similarly, in **Finland** the Ombudsman for Equality has published

<sup>186</sup> Joz Motmans (2010), *Being Transgender in Belgium: Mapping the Social and Legal Situation of Transgender People*, Brussels: Institute for the Equality of Men and Women.

guidelines<sup>187</sup> that clarify how the Act on Equality of Men and Women is applicable to trans and intersex people, and recommend that employers include trans and intersex people in their gender equality plans and introduce measures to prevent discrimination and enhance equality. Additionally, the Ombudsman is giving particular attention to discrimination against gender minorities during 2011. Following an exploratory seminar the Ombudsman will be conducting a study on structural discrimination and difficulties that trans people meet when dealing with various authorities. In **Great Britain**, the Equality and Human Rights Commission has conducted extensive work. It engages with representatives from transgender and associated organisations to discuss systemic discrimination experienced by the trans community and funds projects that promote trans equality. The Commission has also reviewed access to gender reassignment services, collected information on gender identity and produced a range of guidance aimed at tackling trans discrimination and promoting trans equality. All the guidance and other information is available on the trans specific page of the EHRC website.<sup>188</sup>

### 1.3 Specific protection against discrimination during gender reassignment

**Great Britain's Equality Act 2010** provides protection against discrimination arising on the basis of dual characteristics (including on the basis of gender reassignment), disability, absence from work related to gender reassignment, pregnancy and maternity. With regard to gender reassignment, Part 2 Ch.2 Sec.16 of the Act states:

*“Gender reassignment discrimination: cases of absence from work*

- (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of gender reassignment.
- (2) A person (A) discriminates against a transsexual person (B) if, in relation to an absence of B's that is because of gender reassignment, A treats B less favourably than A would treat B if—
  - (a) B's absence was because of sickness or injury, or
  - (b) B's absence was for some other reason and it is not reasonable for B to be treated less favourably.
- (3) A person's absence is because of gender reassignment if it is because the person is proposing to undergo, is undergoing or has undergone the process (or part of the process) mentioned in section 7(1).”

### 1.4 Case-law and decisions in countries where national law does not directly refer to gender identity and/or gender expression

In March 2011, The Equality Tribunal in Ireland ruled on the employment discrimination case of *Louise Hannon*,<sup>189</sup> who was dismissed following her revelation of her true gender identity to her employer and the subsequent process that she undertook towards living in accordance with it fulltime (including presenting herself as a woman at work). While the employer had originally agreed to the transition, he eventually told her that she had to revert back to her former male identity and wear male clothes when seeing clients. Moreover the Operations Manager continued to refer to her by her former male name, and *Hannon* was told that she could not use the female toilets (even though male staff occasionally used them as well). Following further similar incidents, she was told that her productivity had reduced dramatically. The Equality Tribunal ruled that *Hannon* was a victim of constructive dismissal and awarded her more than €35,000 in compensation for the discrimination that she suffered. In this case the Tribunal could not rely on the ground of gender identity and/or gender expression as they are not covered by Irish law, and instead relied the grounds of gender and disability (taken to include Gender Identity Disorder) as argued by the complainant.

<sup>187</sup> See [http://www.tasa-arvo.fi/en/discrimination/gender\\_variation](http://www.tasa-arvo.fi/en/discrimination/gender_variation).

<sup>188</sup> See <http://www.equalityhumanrights.com/advice-and-guidance/your-rights/transgender/>.

<sup>189</sup> The Equality Tribunal, *Louise Hannon v First Direct Logistics Limited*, Decision DEC-E2011-066, 29.03.2011.

The compensation provided by the Tribunal proved to be a dissuasive measure and arguably makes this case the most high profile national decision on employment discrimination against trans people to date. However, the fact that the complainant built the case on the ground of gender in conjunction with disability is problematic as it shows that her lawyer was not confident that the ground of gender (or sex) was going to be interpreted in the full meaning established by the CJEU in *P. v S.*

In **the Netherlands**, the Equal Treatment Commission covers discrimination against all trans people without distinction under the ground of sex. In a case<sup>190</sup> that was referred to it by an anti-discrimination agency (ADB), the Commission was asked for its opinion as to whether a hotel's cancellation of a room booking on the basis that "Providing a cross-dressing party is not in keeping with the character of [the] hotel" since it caters for "a family atmosphere" constituted sex discrimination.

In this case, the complainant argued that while there are differences between transsexuality and transvestitism, the foundation of the discrimination had the same root and was based on sex norms. The complainant followed that hence the Commission should consider the extension of the protection afforded to transsexuals to transvestites as well. However, the Commission did not take this approach. Instead, it referred back to its decision on the freedom of employees to choose the appropriate dress code and hence considered dress as a form of sex freedom. The Commission decided that the cancellation of the hotel room booking constituted direct discrimination on the ground of sex in the acquisition of goods and services which is prohibited under Article 7, paragraph a, of the Dutch Equal Treatment Act.

## 2. Name change and legal gender recognition

### 2.1 Case-law on name change and legal gender recognition without the requirement to undergo gender reassignment

On 28 January 2011, the Germany Federal Constitutional Court<sup>191</sup> declared unconstitutional the prerequisites for the statutory recognition of transsexuals,<sup>192</sup> which included permanent infertility (sterilisation), and the undergoing of surgery to change external sexual characteristics in order that the person's appearance approach that of the other gender.<sup>193</sup> In this case, a 62 year old trans woman successfully argued that although she had legally changed her name to a female one, she was still not allowed to enter into a registered partnership with her female partner. She demonstrated that on the one hand, marrying her partner was not an option that she could consider as the requirement to marry her as a man while holding a female name would have exposed her to constant outing. On the other hand, due to her age, undergoing gender reassignment surgery in order to meet the requirements of German legal gender recognition thus allowing her to register her relationship would involve incalculable health risks. The Court therefore struck down the requirements related to genital surgery basing its judgement on the fact that they went against the Constitutional right to physical integrity and self-determination, and the right to marry or enter into a registered partnership.

<sup>190</sup> *Commissie Gelijke Behandeling* [Equal Treatment Commission], *Oordeel 2007-201 (travestie)*, 15.11.2007.

<sup>191</sup> *Bundesverfassungsgericht* [Federal Constitutional Court], BVerfG, 1 BvR 3295/07, 11.01.2011.

<sup>192</sup> According to Article 8.1 nos. 3 and 4 of the Transsexuals Act (*Transsexuellengesetz – TSG*).

<sup>193</sup> Federal Constitutional Court, Press release no. 7/2011 of 28 January 2011.

## 2.2 Legislation on name change and legal gender recognition that meets human rights principles

On 15 March 2011, the first European law on name change and legal gender recognition that meets the Yogyakarta Principles<sup>194</sup> and the Recommendations of the Commissioner for Human Rights of the Council of Europe<sup>195</sup> entered into force in **Portugal**.<sup>196</sup> Unlike similar laws in other European Union countries, the law does not require that the person be single (whereby those who are already married have to divorce their spouse); be sterile; and/or has undergone other requirements of physical change such as hormone treatment, gender reassignment surgery and other bodily modification.<sup>197</sup> The law does however require that prior to a change of name and legal gender on civil status documents, applicants must: (i) have achieved legal maturity (18 years of age); (ii) be Portuguese nationals; and (iii) have a diagnosis of gender identity disorder issued and signed by a multidisciplinary team consisting of at least one psychologist and one physician (sexologist).

After meeting these requirements, an application for change of name and legal gender needs to be submitted to a registrar including (i) the previous name and civil identification number as printed on the identification card, (ii) the name by which the applicant would like to be identified, and (iii) the gender identity disorder diagnosis. The registrar is subsequently requested by law to process the application within 8 days and provide the applicant with a response. This can be: (a) positive, whereby the person's name is changed on official civil status documents and new birth certificate and identification documents are issued; (b) a request for improvements to the application; or (c) a rejection. Privacy is guaranteed by law.

## 3. Protection from bias violence

To date, **Scotland** is the only territory in Europe that has enacted legislation protecting trans and intersex people against bias-motivated violence in its *Offences (Aggravation by Prejudice) (Scotland) Act 2009*, whereby Art.2 states:

### "2 Prejudice relating to [...] transgender identity

(1) This subsection applies where it is —

- (a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to [...] transgender identity, and

<sup>194</sup> The Yogyakarta Principles (2006), at 11-12:

"Principle 3: The Right to Recognition Before the Law

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity."

<sup>195</sup> Commissioner for Human Rights (2009), at 45:

"3. Develop expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, identity cards, passports, educational certificates and other similar documents;

4. Abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in laws regulating the process for name and sex change; [...]."

<sup>196</sup> *Lei n.º 7/2011 de 15 de Março Cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração ao Código do Registo Civil.*

<sup>197</sup> Hungary does not have such requirements in its procedures regulating change of name and legal gender, however, this is clearly stated in the law and therefore the level of legal certainty of trans people is significantly lower. Likewise, the judgment by the Constitutional Court of Germany has not yet been translated into an amendment of the *Transsexuellengesetz* – TSG.

- (b) proved that the offence is so aggravated.
- (2) An offence is aggravated by prejudice relating to [...] transgender identity if —
  - (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to — [...]
    - (ii) the transgender identity (or presumed transgender identity) of the victim, or
  - (b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have — [...]
    - (ii) a transgender identity or a particular transgender identity.
- (3) It is immaterial whether or not the offender’s malice and ill-will is also based (to any extent) on any other factor.
- (4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to [...] transgender identity.
- (5) Where subsection (1) applies, the court must —
  - (a) state on conviction that the offence is aggravated by prejudice relating to [...] transgender identity,
  - (b) record the conviction in a way that shows that the offence is so aggravated,
  - (c) take the aggravation into account in determining the appropriate sentence, and
  - (d) state —
    - (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
    - (ii) otherwise, the reasons for there being no such difference.
- (6) In subsection (2)(a), “presumed” means presumed by the offender. [...]
- (8) In this section, reference to transgender identity is reference to —
  - (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender, or
  - (b) any other gender identity that is not standard male or female gender identity.”

#### 4. Removal of trans identities from domestic classification of diseases

Sweden’s National Board of Health and Welfare decided to remove various diagnostic codes related to trans identities from the Swedish issue of ICD-10 (ICD-10SE) in January 2009. These were F64.1 Dual-role transvestism; F64.2 Gender identity disorder of childhood; F65.0 Fetishism and F65.1 Fetishistic transvestism. Norway followed suit in January 2010. Its Helsedirektoratet, removed F64.1 Dual-role transvestism; F65.0 Fetishism and F65.1 Fetishistic transvestism from the Norwegian version of the ICD. In May 2011 Finland’s *Terveystieteiden tutkimuskeskus* [National Institute for Health and Welfare] decided to remove F64.1 Dual-role transvestism; F65.1. Fetishism and F65.1 Fetishistic transvestism from the Finnish version of the ICD.

The motivations behind the Nordic countries’ growing consensus towards the removal of trans identities from domestic ICDs is that the medical evidence behind the diagnoses is unclear, and while their removal does little harm to the statistical system, the diagnoses cause significant difficulties to trans people.

This said, none of the countries has yet fully depathologised all trans identities. In Sweden, for example, the National Board of Health and Welfare has so far left the inclusion of F64.0 Transsexualism and F64.9 Gender Identity Disorder NOS in ICD-10SE untouched. On 30 June 2010 the Board did, however, present its report on transsexuals and other persons with gender identity disorders containing a discussion on the removal of F64.0 and F64.9 from section F (psychiatry) and replacing the diagnostic codes requiring treatment under an non-pathologising heading. In the proposal that the Board submitted to the Swedish Government in May 2011, the Board committed itself to work for this change at the international level.

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# Part VI

## Gender identity and gender expression discrimination in future EU law

The above analysis has found that so far EU non-discrimination law only very selectively covers issues of gender identity and gender expression, namely cases where disadvantageous treatment relates to a person's gender reassignment and falls within the field of application of EU sex discrimination law. It was seen that whilst from a conceptual point of view this approach is not very satisfactory, it can be explained by the EU's closed list of discrimination grounds which precludes the Court of Justice from "finding" new and additional discrimination grounds. The only possible approach for the Court is to interpret the existing grounds in a broad manner. This it has done in the cases *P. v S.*, *K.B.* and *Richards*.

The question that remains is how the present situation could be improved. In the following, three possible approaches are discussed, namely (1) a formal revision of EU law in order to include discrimination on grounds of gender identity and gender expression as a ground of its own, (2) making good use of the flexibility provided by the existing EU law on the level of the national law, and (3) a broader interpretation of the already existing EU law.

## 1. A formal Treaty revision in order to include a new discrimination ground

In the context of the discussion of international human rights law it was seen that there is a trend to recognise discrimination on grounds of gender identity and gender expression as a form of discrimination in its own right, rather than linking it to another, more traditional, discrimination ground such as sex. Indeed, from a conceptual point of view this appears to be the best approach as it would also provide the ground for avoiding awkward comparisons of the kind that is now reflected in the Court's case-law.

However, in order for EU law to reach this point a Treaty revision would have to be effected. Following the Lisbon revision, the Treaty on European Union provides for two types of revision procedure: the ordinary revision procedure and the simplified revision procedure (Art. 48(1) TEU). The simplified procedure is described in Art. 48(6) and (7) TEU. Recently, a simplified procedure was used for the first time in order to insert Art. 136(3) TFEU into the Treaty concerning the European Stability Mechanism. However, the simplified procedures cannot be used when the change to be effected relates to an increase or reduction in competences conferred upon the Union. This (here: an increase) would be the case if gender identity and gender expression were to be added to Art. 19(1) TFEU as discrimination grounds in relation to which the EU is given the competence to adopt secondary legislation. In such a case, only the ordinary revision procedure would be available.

The ordinary revision procedure is a fully-fledged revision procedure based on a number of steps as described in Art. 48(2)-(5) TEU. It begins with a proposal from a government of a Member State, the European Parliament or the Commission to the Council of Ministers. The Council then notifies the national Parliaments and submits the proposal to the European Council. In the next step, the European Council consults the European Parliament and the Commission. Following a decision in favour of the proposed amendments, the European Council in principle convenes a Convention which examines the proposals for amendments and adopts by consensus a recommendation to a conference of representatives of the governments of the Member States. This Intergovernmental Conference decides unanimously on the amendments. The revision process is completed once all Member States have ratified the revised Treaty according to the requirements of their national laws.

As a result of the recent difficult experiences both with the Constitutional Treaty (which was signed but did not enter into force) and with the Lisbon Treaty (which suffered a prolonged ratification process burdened with uncertainties), it is likely that the EU Member States are not keen on another such revision in the near future, even just for procedural reasons. If such a revision is undertaken, then most likely it will only be to deal with a number of issues that are considered vital for the European Union, but hardly "merely" to insert one single new competence in a field that by many is not considered of central importance.

In addition, the creation of a new and explicit competence of the EU to adopt legislation in order to combat discrimination on grounds of gender identity and gender expression would require agreement of all Member States on this point. Given the very different state of the Member States' national laws on this issue, it is by no means certain that such an agreement could be found. However, the lack of agreement of even one of the 27 Member States would be sufficient to block the Treaty amendment.

For all these reasons, it would appear that working towards the inclusion of a specific competence of the EU to combat discrimination on grounds of gender identity and gender expression can be no more than a long-term strategy. In the near future, it does not appear to be a feasible option.

## 2. A broader interpretation of the already existing law

Short of a Treaty revision, better protection against discrimination on grounds of gender identity and gender expression could be achieved by an even broader interpretation of the term "discrimination on grounds of sex" than is reflected in the CJEU case-law that was discussed in this report. As this issue has already been touched upon twice,<sup>198</sup> it shall be recapitulated only briefly at this point in the present report.

It was seen that since *P. v S.* the Court of Justice has used an approach to sex discrimination that is not based on a simplistic binary comparison between traditionally defined men and women. At least to some extent, this approach could be further broadened to also include cases other than gender reassignment. The way to do this would be to understand the relevant terms under EU law (discrimination on grounds of sex, and equal treatment of men and women) as being defined at least in part also by traditional sex roles.

From a practical point of view, it is in particular for the parties in national proceedings that lead to preliminary ruling procedures before the Court of Justice to bring forward innovative arguments in this direction, thereby hopefully prompting the Court to broaden its approach.

In addition to the Court of Justice, the European Commission also has a role to play in extending the meaning of sex in EU legislation to include gender identity and gender expression expressly. The European Commission is well aware of this, and in the *Strategy for equality between women and men 2010-2015* it stated that it "is also studying the specific issues pertaining to sex discrimination in relation to gender identity." In the Annex<sup>199</sup> accompanying the strategy, a clear reference to gender identity is made with regard to the monitoring of the correct implementation of EU equal treatment laws with a particular focus on Directives 2004/113 and 2006/54.<sup>200</sup>

The above is corroborated by interesting developments in the recasting process of EU asylum legislation, particularly regarding the so called Qualification Directive (Directive 2004/83)<sup>201</sup> and the Procedure Directive (Directive 2005/85)<sup>202</sup> in which gender identity has been included as a recognised reason for persecution on the

<sup>198</sup> See above III.5. and IV.3.

<sup>199</sup> Commission Staff Working Document: Actions to implement the Strategy for Equality between Women and Men 2010-2015 (Accompanying the Communication From the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions - Strategy for Equality between Women and Men 2010-2015), SEC(2010) 1079/2.

<sup>200</sup> *Ibid.*, at 18.

<sup>201</sup> Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004 L 304/2.

<sup>202</sup> Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005 L 326/13.

one hand (Qualification Directive), and the introduction of more sensitivity towards gender identity related asylum cases, thanks to a new definition of “asylum seekers with special needs” on the other hand (Procedure Directive). In both cases, while the initial proposals of the Commission (October 2009) included no new provisions regarding gender identity, the European Parliament used its co-decision powers procedure introduced by the Lisbon Treaty and called for these amendments. In the case of the Qualification Directive, this vote was an orientation vote which defined the Parliament’s position in its negotiations with the Council (which are currently underway). In the case of the Procedure Directive, a whole legislative process was re-launched following objections from Member States. The new proposal presented by the European Commission on 1 June 2011 expressly refers to gender and gender identity in the appropriate articles.<sup>203</sup>

Similarly, in May 2011, the Commission published a Victims’ Rights Package<sup>204</sup> that included a proposal for a new directive<sup>205</sup> establishing minimum standards on the rights, support and protection of victims of crime. This directive would modify the existing Framework Decision 2001/220<sup>206</sup> and address the situation of all victims of offences in Europe, without approximating the national definitions of the offences in criminal law. The need to consider the situation of victims of transphobic crimes as well as other bias-motivated crimes could thus be addressed only by clarifying the concept of “vulnerable victims”, which was used in EU law but without being defined. The proposed directive, following exchanges with the Commission (both the relevant DG and the competent cabinet), defines a procedure to assess the potential vulnerability of all victims of crime. This assessment would include the possible bias motivation of the crime, as well as the victim’s personal fundamental characteristics such as gender identity.

No similar opportunity exists for express inclusion of gender identity and gender expression with respect to legislation based on Arts. 19 and 157 TFEU. However, there is no impediment to considering gender identity and gender expression as constituting a similar area of focus under the ground of sex as are pregnancy, maternity and paternity, and family responsibilities. Indeed, neither one of these effective sub-grounds of sex are included in the Treaty, but specific provisions and legislation have been adopted to address the specific vulnerabilities and sex discrimination that may apply, e.g. the so called Pregnant Workers Directive (Directive 92/85)<sup>207</sup> and Parental Leave (Directive 2010/18).<sup>208</sup> Taking this route would be particularly useful, as the EU would not be exclusively relying on extending existing sex equality legislation to the grounds of gender identity and gender expression, but it would be able to address specific vulnerabilities and sex discrimination faced by trans and intersex people falling within EU competences.

### 3. On the level of national law: making good use of the flexibility provided by EU law

Finally, it should be recalled that the existing EU non-discrimination law, however broadly or narrowly it may be interpreted by the Court of Justice, contains minimum rules only. Importantly, the existing law does not prevent the

<sup>203</sup> Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), COM(2011) 319 final.

<sup>204</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Regions, Strengthening victims’ rights in the EU, COM(2011) 274 final.

<sup>205</sup> Proposal for a Directive of the European Parliament and the Council establishing minimum standards on the rights, support and protection of victims of crime, COM(2011) 275 final.

<sup>206</sup> Framework Decision on the standing of victims in criminal proceedings, OJ 2001 L 82/1.

<sup>207</sup> Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ 1992 L 348/1.

<sup>208</sup> Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ 2010 L 68/13.

Member States from providing a higher level of protection against discrimination, in particular through a broader interpretation of the terms in the secondary EU law in favour of victims of discrimination, a broader material scope of the national legislation and indeed the inclusion of additional discrimination grounds. In fact, from the point of view of the victims of discrimination on grounds of gender identity and gender expression, good regulations at national level are probably the most beneficial approach.

Given this situation, the Member States must be encouraged to make the most of the flexibility inherent in EU non-discrimination law and to go well beyond the minimum established at the common EU level in their national laws.

Michael | 1987

# Part VII

## Discrimination against intersex people

Discrimination against intersex people is a particularly complex form of sex discrimination. Unfortunately, little work has been undertaken to explore the human rights issues and attempt to address them. This can be seen through the fact that while the Yogyakarta Principles elaborately explain how international human rights principles apply on the ground of sexual orientation and gender identity, they only contain one mention of intersex people in a general phrase. Moreover, even when intersex people are referred to, this is often done incorrectly either under the trans umbrella or on the ground of gender identity and gender expression.

## 1. Legal coverage of intersex people under anti-discrimination legislation

It remains unclear whether intersex people are implicitly covered by the existing EU anti-discrimination legal framework. This is mainly because EU gender equality legislation is silent on the issue and the definition of the ground of sex is still based on the male/female binary sex model. Additionally, no case of discrimination against intersex people has yet reached the CJEU to challenge the current understanding of the ground of sex. Schiek, Waddington and Bell shed some light in this respect and argue that there is “a close relation between intersexualism and gender or sex, for which reason it would not be illogical to classify distinctions based on intersexualism or hermaphroditism as being gender based.”<sup>209</sup> They find support for their argument in the CJEU decision in *P. v. S.*, in which the Court stated that the scope of the directive at issue went beyond “the fact that a person is of one or other sex” (*P. v. S.*, para. 20), as well as in the German Constitutional Court decision concerning transsexuality,<sup>210</sup> in which the court acknowledged that not all trans people strive to undergo a full gender reassignment.

It would thus seem logical to presume that any move by lawmakers to provide legal protection against discrimination against transgender people (who do not intend to fully align their body with the other gender), would consequently also extend similar protections to intersex people. However, a key distinction needs to be made: discrimination against intersex people is more directly linked to sex discrimination (as it is a form of discrimination against all those who have particular biological makeups that are neither exclusively male nor exclusively female) than discrimination on the grounds of gender identity and gender expression (which refer to the internal and individual experience of gender and its manifestation). The debate on the extension of sex equality legislation to cover intersex people should thus not be intertwined with that of trans people, since intersex people form a distinct category which is not a subcategory of the trans umbrella term.

### 1.1 Coverage of intersex people in domestic anti-discrimination legislation

Two EU Member States seem to have followed the above reasoning and included discrimination against intersex people within the interpretation of domestic gender equality legislation. In **Germany**, the ground of sexual identity is interpreted broadly covering the whole LGBTI spectrum, which is usually covered under the grounds of *sexual orientation* for heterosexual, gay, lesbian and bisexual people; *gender identity and gender expression* for cisgender and trans people; and *sex* for intersex people (along with men and women).

In **Finland**, the coverage of intersex people under domestic gender equality legislation follows the approval of a report on gender equality by the Finnish Parliament in 2011 that called for the mandate of the Equality Act to be extended to cover gender minorities. The Ombudsman for Equality has already called for implementing the existing Equality Act widely, to cover all trans and intersex people in 2011. Furthermore, the Ombudsman has

<sup>209</sup> Dagmar Schiek, Lisa Waddington & Mark Bell (2007), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law: Ius Commune Casebooks for the Common Law of Europe*, Oxford: Hart Publishing, at 79.

<sup>210</sup> *Bundesverfassungsgericht* [Federal Constitutional Court], BVerfG, 1 BvL 3/03, 06.12.2005.

insisted that the Equality Act needs to be amended to include provisions on the protection of gender minorities against discrimination and the promotion of their equality in society.

## 1.2 Express reference to intersex people in domestic legislation

To date, the only known explicit reference to intersex people in domestic legislation is found in **Scotland's Offences (Aggravation by Prejudice) (Scotland) Act 2009**,<sup>211</sup> whereby Art. 2(8) includes "intersexuality" within the meaning of "transgender identity".

While the provision of protection against bias crime is a milestone, the inclusion of intersex under trans identity shows that the legislator was not fully aware of the fact that intersex people constitute a separate category to trans people. Indeed the invisibility of intersex people in European and national legislation speaks volumes about the lack of knowledge about intersex people and their invisibility in society as well as their lack of protection against human rights violations.

## 2. Case-law on legal recognition of intersex people and their right to bodily integrity

Intersex court cases are extremely rare. It appears that so far only two cases have been considered by courts in Europe, both in Germany. In the first case, the complainant sought the introduction of an intersex classification in civil status documents alternative to the male/female binary sex model, while in the second the complainant took a case against the surgeon that had removed female primary sexual characteristics without her consent and sought €100,000 in compensation.

### 2.1 Alternative sex classification on civil status documents

While alternative sex entries (other than male and female) on civil status documents are recognised in some societies,<sup>212</sup> not one EU Member State has a system in place that would allow citizens to change the sex indicated on their civil status documents to an alternative classification outside the male/female binary sex model.

A case challenging this binary sex model was decided by the Regional Court of Munich in 2003.<sup>213</sup> The complainant was an intersex person who had asked the Public Register of Civil Status to change the entry under sex to "Zwitter" (old German term meaning two-sexed) or *hermaphrodite/intersex(ual)* but was refused such a change by the public registrar. In its judgement, the court recognised that "hermaphrodites" do occur in nature, but went on to argue that the complainant was not a "hermaphrodite" according to the (narrow) definition that it referred to,<sup>214</sup> and thus the

<sup>211</sup> Referred to in V.3.

<sup>212</sup> In **India** the Passport Application Form allows three gender categories: "Male", "Female" and "Others". In April 2007 almost 400 "X" passports had been issued in **New Zealand** according to the Department of Internal Affairs, and clear guidelines on access to "X" passports are available on the Department's website. Similar passport options also exist in **Australia, Malaysia, Nepal** and **South Africa**. The prospect of a third gender is not necessarily supported by intersex people themselves. For example, OII calls for the removal of the gender marker on identification documents and advocates that, where this is not possible, persons should be able to have their gender unspecified.

<sup>213</sup> *Landgericht München I 16. Zivilkammer* [Regional Court of Munich, Civil Division], 16 T 19449/02, 30.06.2003; in Schiek, Waddington & Bell (2007), at 78/79.

<sup>214</sup> "A person is described as 'hermaphrodite' if both testicles and ovaries are present. Only in this case – which occurs with extreme rarity – can one speak of 'genuine hermaphroditism'."

court discounted the need for it to “have to decide whether, in the case of genuine hermaphroditism, the sexual designation ‘hermaphrodite’ could be entered into the Register of Births, Deaths and Marriages.”

The court also argued that “[t]he entry of ‘intersexual’ or ‘intrasexual’ as a gender identification in the Register of Births, Deaths and Marriages cannot be considered as an option [...]” since according to it “the terms do not indicate any specific gender [...]” and “[b]iology and medicine make the assumption that human beings belong to one of two sexes, and consider the various forms of doubtful gender as exceptions to the rule [...]”, while it dismissed research to the contrary, presented by the complainant, as a “minority opinion.”

Finally, the court argued that a call for the inclusion of a third sex classification could not be claimed under fundamental human rights or the German Constitution, and that its inclusion “would lead to considerable difficulties in the defining of terms and to uncertainties in the law.”

## 2.2 Right to bodily integrity

As discussed in Part I, one of the primary human rights breaches against intersex people is the denial of their existence outside of the male/female binary sex model. As a matter of fact, surgical operations on intersex babies and infants in many European countries take place without adequate informed consent by the intersex persons in question.

In 2008, the Cologne District Court decided on one such case that was taken to court by Christiane Völling against her surgeon who had removed her uterus, tube and ovaries without her consent 30 years before.<sup>215</sup> Ms Völling was born with indeterminate external genitalia and was raised as a boy, however, as a child she identified as a girl. During an appendectomy at age 17, her uterus and womb were discovered, which led to her fully-intact female internal organs being removed the next year, without her being properly informed or consulted. As a result of this operation the complainant was made to live in the “wrong sex” and suffered a urethral reconstruction with a chronic, antibiotic-resistant urinary tract infection, as well as chronic renal disease, and a spasmodic bladder dysfunction with urinary retention. Furthermore her body was masculinised through the administration of testosterone. Ms Völling discovered what had happened to her following an unrelated incident when a questionnaire on intersex issues was passed on to her. In this case, the court found that the doctor had “culpably violated her health and self-determination.”

In 2009, the District Court Cologne in a final judgement ordered the surgeon to pay €100,000 in damages to Ms Völling together with five per cent interest since the decision of 28 August 2007 and to bear the cost of litigation.

## 3. Addressing discrimination against intersex people in future law

Following the two cases discussed above and the awareness that they raised, it is by no coincidence that **Germany** is now leading the way on intersex issues. In 2010, the German government commissioned an expert position by the German Ethics Council on the living situations and challenges faced by intersex people. The position is being developed on input that is being received following: (i) public hearings with experts and concerned persons (June 2010 and June 2011); (ii) an online questionnaire on the situation of intersex people (June 2011); and (iii) an online consultation (June-July 2011).

<sup>215</sup> *Kölner Landgericht* [Cologne District Court], 25 O 179/07, 06.02.2008.

The preliminary findings by the Ethics Council after the hearing and the basis for online consultation<sup>216</sup> show that amongst others: (i) there is agreement on the physical integrity of intersex people and that “irreversible” invasive medical treatment should be postponed as long as possible; (ii) the parental right to decide in the best interest of the child is limited when it comes to medical gender assignment as this touches the core of the person’s right to gender identity and sexual sensitivity; and (iii) that *“those persons could not, based on the prohibition of discrimination and the right to self-determination, be forced to assign themselves for one of the binary categories of male or female”* (emphasis added). The final findings are expected to be published by the end of 2011. Additionally, a motion introduced in the German Bundestag in April 2011 asks the Bundestag to call on the Federal Government to advance recognition and respect to intersex people’s realities in various spheres including civil status and statistics, end surgery on intersex children, provide advice and include intersex issues in school curricula amongst others.<sup>217</sup>

Hopefully, the outcomes of this German consultation and Bundestag debate will be followed closely by European institutions and other national governments.

<sup>216</sup> Available online at <http://diskurs.ethikrat.org/2011/06/eine-erste-einschätzung/>.

<sup>217</sup> Safeguarding the rights of intersex people (17/5528), 13.04.2011.



Sarah | 1979

# Conclusion

Sadly, discrimination against trans and intersex people remains wide spread and takes many forms. At the same time, the legal means to combat it are limited and that legal reasoning in the context of such discrimination may be complex, at least within the existing legal frameworks. However, the degree of difficulty may depend on the specific legal order concerned.

It was seen in the present report that there are hopeful signs in the field of international human rights law of growing recognition that gender identity and gender expression constitute a separate ground of discrimination. It is therefore to be welcomed that the ECtHR has recognised transsexuality as a protected stand-alone ground under Art. 14 ECHR.

The same approach does not, however, apply in the framework of EU law. Based on a limited list of grounds, EU non-discrimination law does not allow for the extension of the grounds through case-law. The only possible approach, and indeed the one taken by the CJEU, is that of interpreting an already existing ground (in this case: sex) widely so as to include at least certain forms of discrimination on grounds of gender identity and gender expression, namely discrimination cases linked to gender reassignment. However, this approach remains very limited as it covers only a small group of people who suffer from discrimination on grounds of gender identity and gender expression. Also, it does not include discrimination against intersex people specifically even though the ground on which intersex people suffer discrimination is the ground of sex itself, primarily because EU law is based on the male/female binary sex model.

In a situation where an extension of the EU's competences through a formal Treaty revision is unlikely, the only pragmatic approach at the level of EU law itself is to argue that the term "discrimination on grounds of sex" should be interpreted even wider, so as to include more forms of discrimination on grounds of gender identity as well as discrimination on grounds of gender expression and discrimination against intersex people. Germany's wide scope of the ground of sexual identity may serve as a good model in this regard.

Beyond this, it is important to realise that EU non-discrimination law is but a minimum regime which does not prevent the Member States from providing for protection against discrimination on additional grounds and more generally for better protection of victims of discrimination. As the discussion of best practices in this report has shown, there are promising approaches in the laws of some Member States which can and should serve as a model for others to follow.

## Glossary of key terms

The terminology referring to trans and intersex people has evolved significantly over recent years, and steadily shifted away from medical language towards the terms and definitions proposed by scholars, and human rights advocates. However, the debate around terminology and definitions is still not entirely resolved and as a result this glossary may require further updating in the future.

**Binary gender model** refers to the norms derived from the simplistic idea of a dichotomy of two mutually exclusive and biologically defined sexes to whom different roles and behaviour are traditionally ascribed.

**Cisgender** is a term referring to those people whose gender identity and gender expression match the sex they were assigned at birth and the social expectations related to their gender.

**Cisnormativity** refers to the practices and institutions that legitimise and privilege those who are comfortable in the gender belonging to the sex assigned to them at birth. On the other hand, this norm systematically disadvantages and marginalises all persons whose gender identity and expression do not meet social expectations.

**Disorders of Sex Development (DSD)** is a medical term that has recently replaced the term intersex within medical spheres, and refers to congenital conditions in which development of chromosomal, gonadal, or anatomical sex are considered atypical.

**Gender** refers to people's internal perception and experience of maleness and femaleness, and the social construction that allocates certain behaviours into male and female roles which vary across history, societies, cultures and classes. Gender is hence strongly linked to society's expectations and is not exclusively a biological matter.

**Gender expression** refers to people's manifestation of their gender identity, and the one that is perceived by others. Typically, people seek to make their gender expression or presentation match their gender identity/identities, irrespective of the sex that they were assigned at birth.

**Gender identity** refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modifications of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism.<sup>218</sup>

**Gender Identity Disorder (GID)** is listed in both the *International Statistical Classification of Diseases and Related Health Problems (Section F Mental Disorder)* of WHO; and the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association (APA). It is a classified mental disorder diagnosis applied by psychiatrists and psychologists to classify severe discomfort and rejection that people may feel towards their sex embodiment and their internally felt gender identity.

**Gender marker** is a gendered designator on official documents. The most obvious gender markers are designations such as male/female or Mr/Mrs/Ms/Miss. They are often embedded in ID cards, driver's licences, birth certificates, diplomas, civil status documents and tax forms. Less obvious gender markers can be coded numbers such as social security numbers and tax numbers.

<sup>218</sup> As defined in the Yogyakarta Principles.

**Gender reassignment** refers to the process through which people re-define the gender in which they live in order to better express their gender identity. It is often referred to as a process that may involve medical assistance including hormone therapies and surgical procedures that trans people undergo to align their body with their gender. This process, however, also includes some or all of the following social and legal adjustments: coming out to family, friends and colleagues; dressing and acting according to one's gender; changing one's name and/or sex on legal documents; and meeting other legal or judicial procedures depending on national law. In *P. v S.*, the CJEU affirmed that gender reassignment is included within the scope of the ground of «sex» in EU law.

**Gender variant** refers to anyone whose gender varies from normative gender identity and roles of the gender assigned at birth.

**Interphobia** refers to negative cultural and personal beliefs, opinions, attitudes and behaviours based on prejudice, disgust, fear and/or hatred of intersex people or against variations of physical sex. Institutional transphobia manifests itself through the binary gender model and the pathologisation and medicalisation of intersex bodies. Social interphobia manifests itself in the forms of marginalisation, social exclusion and exoticisation.

**Intersex (or inter\*)** refers to those people who have genetic, hormonal and physical features that are neither exclusively male nor exclusively female, but are typical of both at once or not clearly defined as either. These features can manifest themselves within secondary sexual characteristics such as muscle mass, hair distribution, breasts and stature; primary sexual characteristics such as reproductive organs and genitalia; and/or in chromosomal structures and hormones. This term has replaced the term 'hermaphrodite' which was used extensively by medical practitioners during the eighteenth and nineteenth centuries.

**Sex** refers to biological makeup such as primary and secondary sexual characteristics, genes, and hormones. The legal sex is usually assigned at birth and has traditionally been understood as consisting of two mutually exclusive groups, namely men and women. However, "[t]he Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person."<sup>219</sup> In addition to the above, the legal definition of sex should also include intersex people.

**Trans (or trans\*)** is an inclusive umbrella term referring to those people whose gender identity and/or gender expression differs from the sex they were assigned at birth. It includes, but is not limited to: men and women with transsexual pasts, and people who identify as transsexual, transgender, transvestite/cross-dressing, androgyne, polygender, genderqueer, agender, gender variant or with any other gender identity and/or expression which is not standard male or female and who express their gender through their choice of clothes, presentation or body modifications, including the undergoing multiple surgical procedures.

**Transphobia** refers to negative cultural and personal beliefs, opinions, attitudes and behaviors based on prejudice, disgust, fear and/or hatred of trans people or against variations of gender identity and gender expression. Institutional transphobia manifests itself through legal sanctions, pathologisation and inexistent/inadequate mechanisms to counter violence and discrimination. Social transphobia manifests itself in the forms of physical and other forms of violence, hate speech, discrimination, threats, marginalisation, social exclusion exoticisation, ridicule and insults.

**Transgender** refers to those trans people who live permanently in their preferred gender, without necessarily needing to undergo any medical intervention/s. Until recently, this term was also the primary umbrella term

<sup>219</sup> Recast Directive (Directive 2006/54/EC), Recital 3.

referring to all trans people, but this use is now losing favour to the term “trans” which is perceived to be more inclusive of all trans communities.

**Transsexual** refers to people who identify with the gender role opposite to the sex assigned to at birth and seeks to live permanently in the preferred gender role. This is often accompanied by with strong rejection of their physical primary and secondary sex characteristics and a wish to align their body with their preferred gender. Transsexual people might intend to undergo, be undergoing or have undergone gender reassignment treatment (which may or may not involve hormone therapy or surgery).

**Transvestite/Cross dresser** refers to people who enjoy wearing the clothing of another gender for certain periods of time. Their sense of identification with another gender can range from being very strong and indeed it being their primary gender, to being a less critical part of their identity. Some transvestite or cross-dressing people may seek medical assistance to transition and live permanently in their preferred gender at some point in their lives. Others are happy to continue cross-dressing part-time for the rest of their lives.

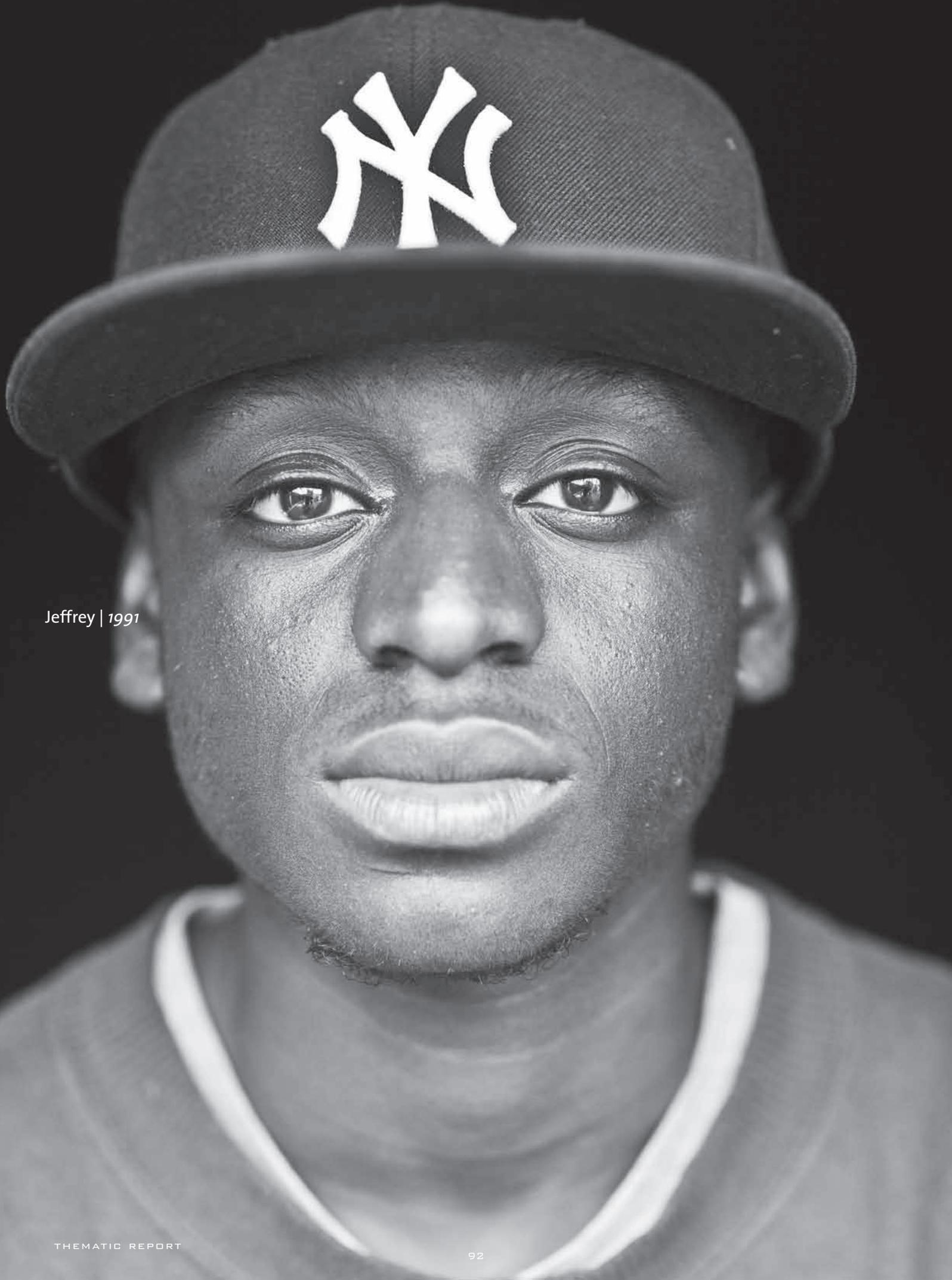
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Jeffrey | 1991

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# Acronyms & Abbreviations

AG	Advocate-General
APA	American Psychological Association
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CoE	Council of Europe
DG	Directorate-General
DSD	Disorders of Sex Development
DSM	Diagnostic and Statistical Manual of Mental Disorders
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EIGE	European Institute for Gender Equality
EQUINET	European Network of Equality Bodies
ETUC	European Trade Union Confederation
EU	European Union
FRA	European Union Agency for Fundamental Rights
GB	Great Britain
GID	Gender Identity Disorder
HRC	United Nations Human Rights Council
LGBT	Lesbian, gay, bisexual, trans
LGBTI	Lesbian, gay, bisexual, trans and intersex
ICD	International Classification of Diseases
ILGA-Europe	European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association
NEB	National Equality Body
NI	Northern Ireland
n.y.r.	not yet reported
OII	Organisation Intersex International
OJ	Official Journal
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TGEU	Transgender Europe
TSG	<i>Transsexuellengesetz</i>
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
WHO	World Health Organization
WPATH	World Professional Association for Transgender Health

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doi: 10.2838/56269

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